

Criminal Law

A Comparative Approach

MARKUS D. DUBBER
TATJANA HÖRNLE

OXFORD

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OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
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First published 2014

First published in paperback 2016

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Cataloging in Publication Data

Data available

ISBN 978-0-19-958960-9 (Hbk.)

ISBN 978-0-19-879422-6 (Pbk.)

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PREFACE

Criminal Law: A Comparative Approach is a criminal law text written from a comparative perspective, featuring cases and materials on the central issues in criminal law from two representative common law and civil law jurisdictions, the United States and Germany.

The idea for this book emerged from several years of searching for a format that allows teachers and scholars to unlock the potential of comparative analysis. *Criminal Law: A Comparative Approach* does not attempt to present an encyclopedic overview of the world's criminal law systems.¹ It is both narrower and deeper in conception; it presents a systematic and comprehensive comparative analysis of the substantive criminal law of two jurisdictions, covering both the fundamental principles of the so-called general part and a selection of offenses drawn from the so-called special part of criminal law.²

The present book, then, is about criminal law first, and about comparative law second. Its primary audience is criminal law scholars and teachers interested in a deeper understanding of their own field, not card carrying comparativists. It presupposes no familiarity with either U.S. or German criminal law—or with any other criminal law system, for that matter.³ All foreign-language sources have been translated into English.⁴ Cases and materials are accompanied by heavily cross-referenced introductions and notes that place them within the framework of each country's criminal law system and highlight issues ripe for comparative analysis. Throughout, readers are exposed to alternative approaches to familiar problems in criminal law, and as a result will have a chance to see “their” country's criminal law doctrine, on specific issues and in general, from the critical distance of comparative analysis.

The bulk of the materials is drawn from U.S. and German criminal law; materials from other jurisdictions, common and civil, have been included where appropriate—notably from Canadian criminal law, which has come to occupy an intermediate position between common law and civil law approaches in general, and between U.S. and German criminal law in particular. Of course each reader is free—and, in fact, encouraged—to adapt the text to her needs, by highlighting and exploring contrasts and comparisons with her domestic criminal law system.

¹ For a fuller picture of approaches to substantive criminal law around the world, based on the same conceptual structure that shapes the present book, see Kevin J. Heller and Markus D. Dubber (eds.), *Handbook of Comparative Criminal Law* (2010); see also Markus D. Dubber and Tatjana Hörnle (eds.), *Oxford Handbook of Criminal Law* (forthcoming 2014).

² The book is yet narrower, in another sense: Rather than trying to capture “American criminal law” in its entirety (consisting of over fifty jurisdictions), we focus on the Model Penal Code. The Model Penal Code was drafted by the American Law Institute, an influential law reform organization, between 1952 and 1962, under the direction of Professor Herbert Wechsler, with the assistance of a cast of collaborators, which included law professors, lawyers, and judges, as well as psychiatrists, a criminologist, and a professor of English. The Model Penal Code triggered widespread reform in American criminal law, remains the most systematic statement of American criminal law, has been called “the principal text in criminal law teaching,” and—as a code—is particularly well suited for comparative analysis with civil law systems. See generally Markus D. Dubber, *Criminal Law: Model Penal Code* (2002).

³ Those seeking more detailed, independent, accounts of American criminal law or German criminal law (in English), may wish to consult the following texts. Wayne R. LaFare, *Criminal Law* (5th edn. 2010); Joshua Dressler, *Understanding Criminal Law* (6th edn. 2012); Volker Krey, *Deutsches Strafrecht: Allgemeiner Teil / German Criminal Law: General Part pts. I & II* (2002/2003) (bilingual textbook); Michael Bohlander, *Principles of German Criminal Law* (2008).

⁴ In fact, the primary texts by themselves add up to the most comprehensive English-language collection of criminal law materials from a non-Anglophone legal system. For a collection of essays reflecting on formative texts in criminal law scholarship, see Markus D. Dubber (ed.), *Foundational Texts in Modern Criminal Law* (forthcoming 2014).

The comparative study of criminal law thus can lay the foundations for critical analysis not only of another system or systems, but also of one's own. Taking a comparative perspective facilitates a more nuanced analysis of the criminal law system familiar to a given reader, both at the specific level of individual criminal law doctrines and at the general level of the two representative systems as a whole. This enhanced understanding of one's "home" system may lead to a more critical engagement with, and appreciation of, specific features of that system along with its conceptual and historical foundations.

Beyond the realm of domestic criminal law systems, a comparative view of criminal law is conducive to the study of international criminal law. This rapidly emerging field, still in the early stages of its development, has relied heavily on a comparative analysis of domestic systems of criminal law, both in the scholarly literature and in the growing jurisprudence of international criminal courts.

To unlock its considerable potential, domestic and international, comparative criminal law must take a comprehensive and contextual approach that enables rich comparative analysis, rather than collect point-by-point contrasts or make grand but vague statements about essential systemic distinctions and similarities. Ideally, in criminal law scholarship, doctrinal comparison will be placed within a broad historical and extra-legal context, and will reflect the necessary sensitivity to the difference between "law in the books" and "law in action." In criminal law teaching, we ordinarily do not have the luxury to fill in quite as much of the conceptual and empirical framework as we might in scholarship, except perhaps in upper-level seminars of sufficiently narrow topical focus. The present book nonetheless draws on what we hope is a suitably rich body of primary and secondary materials on two major criminal law systems that makes meaningful and rewarding comparative analysis possible, adjusting the resolution of our comparative lens as appropriate to find a happy medium between generality and specificity, the forest and the trees. Similarities at the level of general doctrine will go hand in hand with differences in detail, while differences in general approach may, upon closer inspection, make less of a difference on the ground than might first appear.

It is tempting, in this preface, to attempt to trace grand themes that run through this book, and to try in broad strokes to set out a general comparative analysis of common law and civil law systems of criminal law, or at any rate of U.S. and German criminal law, but it is a temptation we will resist. Developing and discarding, then reviving and constantly revising hypotheses on the subject of systemic comparison will be among the chief pleasures of reading and working through the book, or so we hope.

Markus D. Dubber
Tatjana Hörnle

ACKNOWLEDGMENTS

We are happy to acknowledge the assistance of colleagues, friends, and institutions in the completion of this project. First and foremost, our thanks go to Raymond Youngs who did a wonderful job translating dozens of German judgments. Others who helped in various ways and at different times include Alan Brudner, Andreas Dürr, Lindsay Farmer, Simon Stern, and Leo Zaibert. Among our students and assistants we would like to thank John Koziar, James Marton, Sarah Rankin, Brittany Shames, and Cate Simpson (in Toronto) and Beatrice Brunhöber (in Berlin), along with the participants in our Toronto seminar on *Comparative Criminal Law*, where we test drove an early draft of these materials. Work on this project was supported by generous grants from the Social Sciences and Humanities Research Council of Canada (SSHRC) and the Deutsche Forschungsgemeinschaft (DFG).

Finally, we are grateful for permission to reprint excerpts from the following publications:

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