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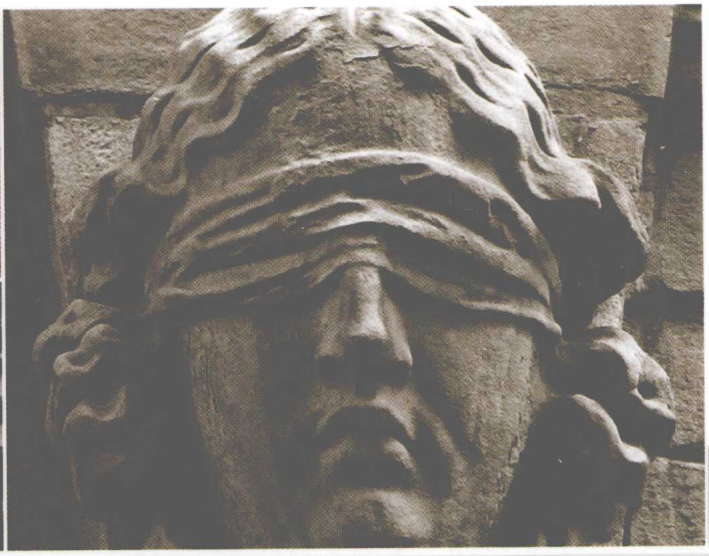


COMPARATIVE CRIMINAL LAW

Edited by

KEVIN JON HELLER AND MARKUS D. DUBBER

THE HANDBOOK OF COMPARATIVE CRIMINAL LAW

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CONTENTS

INTRODUCTION: COMPARATIVE CRIMINAL LAW

Kevin Jon Heller and Markus D. Dubber

The comparative analysis of criminal law can do many things for many people. For the legislator, it can be a source of possible approaches to a specific issue or even to the enterprise of criminal law reform and criminal lawmaking in general. For the judge, it can suggest different solutions to tricky problems of interpretation or common-law adjudication. The theorist can mine the vast stock of principles and rules, of structures and categories, and of questions and answers that can be found in the world's criminal law systems. And the teacher, too, can draw on the positive manifestation of different, or not-so-different, approaches to particular or general questions of criminal law to challenge students' ability to comprehend, to formulate, and eventually to critically analyze black-letter rules that are all too often presented by judicial—or, occasionally, professorial—oracles of law as the manifestations of inexorable logic or, at least, of *stare decisis*.[1]

Oddly, it is precisely this critical potential that may well account for the fact that the comparative study of criminal law traditionally has been neglected. In fact, if not in theory, Anglo-American criminal law continues to be regarded as an exercise of the police power of the state, where the power to police is thought to be closely related, even essential, to the very idea of sovereignty. More particularly, the police power is the modern manifestation at the state level of the deeply rooted power of the householder (*oikonomos*, *paterfamilias*) over his household (*oikos*, *familia*).[2] In Blackstone's memorable phrase, "public police or oeconomy" is "the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to

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conform their general behavior to the rules of propriety, good neighborhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations."[3]

As essentially discretionary, and defined by its very indefinability, the police power is incompatible with principled critique. And insofar as a penal police regime is not subject to critical analysis, it has no use for regarding criminal law comparatively.

Comparative analysis fits more comfortably with a conception of criminal law as law, which recognizes and attempts to meet the challenge of a system of state punishment consistent with the state's function of safeguarding and manifesting the autonomy of its constituents under the rule of law (i.e., in a *Rechtsstaat*). It is therefore no surprise that the project of comparative criminal law begins in the wake of the Enlightenment's fundamental critique of state power in general, and of state penal power in particular. P. J. A. Feuerbach, one of the leading figures of Enlightenment criminal law and the generally acknowledged "father" of modern German criminal law, thought the comparative method essential to the project of constructing a critical theory of criminal law. Comparative analysis, in Feuerbach's view, was essential not only to the project of critical criminal law but also to the project of legal theory in general: "Just as the comparison of various tongues produces the philosophy of language, or linguistic science proper, so does a comparison of laws and legal customs of the most varied nations, both those most nearly related to us and those farther removed, create universal legal science, i.e., legal science without qualification, which alone can infuse real and vigorous life into the specific legal science of any particular country."[4]

One need not share Feuerbach's enthusiasm for a universal legal science, or pursue the analogy between language and law that was commonly drawn at the time, to appreciate his insight into the critical potential of comparative analysis. That critical potential can be put to use in various contexts, some more ambitious than others. The least self-conscious and ambitious form of comparative analysis is exemplified by modern American criminal law. At least since the completion of the Model Penal Code in 1962 and the widespread reform of American criminal codes in its wake, American criminal law can no longer be regarded as a common-law subject. Instead, it is a collection of self-standing code-based jurisdictions, dominated by the criminal law systems of the fifty states and the District of Columbia, superimposed on which is the ever-growing body of federal criminal law. In teaching and in scholarship—though decreasingly in judicial opinions, which by necessity concern themselves with the criminal law of the jurisdiction in question—the subject of "American criminal law" survives as a form of domestic or internal comparative criminal law, where norms from various American jurisdictions are compared, contrasted, and (with difficulty) synthesized into a more or less coherent whole. American criminal law teaching and scholarship would benefit from the conscious adoption of a comparative approach that includes both domestic and foreign materials, rather than maintaining the anachronistic image of a unified body of "American criminal law" that contributes to the evolution of a yet larger body of "common law."[5]

An explicit form of international and external comparative analysis is exemplified by the ambitious research project prompted by an early twentieth-century effort to revise the German Penal Code. Although the effort proved unsuccessful—the Code was not signifi-

cantly reformed until the late 1960s—it generated a sixteen-volume overview of criminal law systems throughout the world.[6]

The frequent reference to foreign criminal law in the jurisprudence of the Canadian Supreme Court falls somewhere in between the two forms of comparative criminal law exemplified by this systematic inquiry into foreign criminal law and the implicit comparativism of contemporary American criminal law. In general, these references are restricted to "common-law" countries, notably England and to a far lesser extent Australia, New Zealand, and the United States,[7] although certain basic concepts of German criminal law have had some influence, indirectly, as disseminated in English-language criminal law scholarship, notably George Fletcher's *Rethinking Criminal Law*.[8] The limitation to Commonwealth countries and the continued special place accorded English criminal law, however, indicates that Canadian criminal law also continues to regard itself as part of the general "common-law" enterprise; in this sense, references to foreign law are less an exercise in comparative criminal law than they are the canvassing of persuasive, though no longer controlling, precedent familiar from centuries of common-law judging.[9]

The emerging enterprise of international criminal law is inherently and explicitly comparative. The broad provisions of the Rome Statute of the International Criminal Court (ICC) leave considerable room for comparative inquiries into the treatment of central questions of criminal liability, including intent and other forms of *mens rea*, accomplice and group liability, inchoate criminality (conspiracy, attempt, solicitation), and the availability of defenses (e.g., self-defense, necessity, duress, superior orders, and ignorance of law). Article 21 of the Rome Statute expressly instructs ICC judges to consult "general principles of law derived by the Court from national laws of legal systems of the world." Because of the often-nebulous quality of international criminal law, judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have frequently decided cases through such comparative surveys: in *Delalic* (1998),[10] where ICTY judges had to interpret the *mens rea* requirement for murder when charged as a grave breach of the Geneva Conventions; and in *Akayesu* (1998),[11] where ICTR judges examined national criminal law systems to decide what kinds of acts qualify as rape when charged as a crime against humanity.[12]

The rise of international criminal law and the creation of institutions of international criminal law have attracted the attention of criminal law theorists who, like Feuerbach, see an opportunity for the development of a universal, or at least supranational, theory of criminal law.[13] But even without this doctrinal ambition, which reflects an elevated sense of the significance of theorizing (and of the theorizer) in the construction and maintenance of a system of criminal law, criminal law theory can be enriched by taking a comparative perspective. The mere recognition of the existence of well-developed and well-considered alternatives makes room for the consideration not only of new answers to familiar questions, but of new questions as well. Comparative analysis, of course, can also be rewarding as a scholarly end in itself, although the meaningful comparison of even a single doctrinal rule requires careful consideration of the rule's place in the doctrinal system as a whole, along with an inquiry into historical and sociolegal context, notably its interpretation and implementation. To quote Feuerbach once more: "Without knowledge

of the real and the existing, without comparison of different legislations, without knowledge of their relation to the various conditions of peoples according to time, climate, and constitution, a priori nonsense is inevitable."[14]

This *Handbook* contains seventeen chapters, sixteen that are country specific—a sample that includes countries in six different continents and covers all of the world's major legal systems—and one that discusses the criminal law applied by the International Criminal Court from a comparative perspective.

Argentina's criminal code, the Código Penal (CP), was adopted in 1921. The CP has been influenced by both the German and the Italian criminal law traditions: the first draft of the CP, the Tejedor Code, was heavily influenced by Feuerbach's Bavarian Criminal Code of 1813, and the 1891 draft code that ultimately led to the current CP was primarily influenced by Giuseppe Zanardelli's Italian Criminal Code of 1889. The current CP was intended "to capture in a simple and pragmatically oriented text the basics of the Tejedor Code and the 1891 draft," and to a significant extent it succeeded: the CP established a simple regime of sanctions, abolished the death penalty, and endorsed straightforward rules of responsibility and definitions of offenses. However, as Marcelo Ferrante notes, the numerous minor reforms and amendments adopted since 1921 have—as is often the case with codes that are updated in piecemeal fashion—"introduced complexity into an otherwise relatively simple text, often affecting the code's systematicity." Ferrante offers a particularly striking example of this in the area of punishment: possessing explosives in Argentina is now subject to longer imprisonment (5 to 15 years) than detonating the explosives and destroying goods or endangering human life (3 to 10 years).

"The history of Australia's criminal law," according to Simon Bronitt, "is bound up in its foundation as a penal colony." Because it was a settled colony, as opposed to a conquered or ceded one, English criminal law applied in Australia. Nevertheless, English criminal law's "tangled mass" of common-law and statutory offenses ultimately made Australia "fertile ground for codification." Today, most states and territories in Australia, which are bound together by Australia's federal system of government, have codified systems of criminal law (the "code jurisdictions"), and even those that do not (the "common-law jurisdictions") have adopted extensive criminal consolidation statutes. The many important substantive differences between the various jurisdictions led Australia—like the United States—to develop a Model Criminal Code. The Code has been received with markedly different degrees of enthusiasm across Australia, however, so fundamental differences remain. For example, although the Code provides that murder requires a perpetrator to act with at least English criminal law's oblique intention, five of Australia's eight jurisdictions continue to criminalize reckless murder.

Like the United States and Australia, Canada has a federal system. Unlike those countries, however, all criminal law in Canada is federal—a direct response, in fact, to the perceived weaknesses of the U.S. system. The federal criminal power in Canada is quite broad, extending to a number of areas that are not traditionally regulated by criminal law, such as tobacco advertising and pollution. But there are important limits, the most important of which is the Canadian Charter of Rights and Freedoms, adopted in 1982. According to Kent Roach, the Charter "has . . . emerged as a significant restraint on the

criminal law in Canada, with some basic criminal law principles being constitutionalized." Roach provides a number of illuminating examples of how courts have used the Charter to restrain the more punitive tendencies of Canadian criminal law: striking down constructive murder offenses on the ground that the stigma and penalties associated with a murder conviction require proof that the perpetrator subjectively foresaw the likelihood that his or her act would lead to death; holding that criminal negligence requires a much greater departure from the standard of care than ordinary civil negligence; and refusing to apply a statutory definition of duress that is far more restrictive than its common-law counterpart.

China's current criminal code was adopted in 1979, after a thirty-year period in which the Chinese Communist Party ruled the country without a criminal code or comprehensive set of criminal laws. As Wei Luo notes, many of the basic principles of the current code—for example, mental states, foreseeability, and causation—differ from their common-law and civilian counterparts. The code abandons several features of traditional Chinese criminal law, such as its lack of separation between administrative and judicial powers (which permitted a person to be convicted of a crime without a formal judicial proceeding), its willingness to extend the definition of crimes by analogy (which served as a useful tool for political repression), and its reliance on severe penalties for even minor crimes (which was useful to deter crime during times of social instability), but retains the death penalty for nearly seventy offenses, including bribery and embezzlement.

Modern Egyptian criminal law began in 1883 with the creation of national courts and a number of new legal codes. The Penal Code itself, which was modeled along the lines of the Napoleonic Code, was adopted in 1937. Perhaps the most striking aspect of Sadiq Reza's account of Egyptian criminal law is the progressive role that the Supreme Constitutional Court has played in its development: striking down both irrebuttable and rebuttable presumptions of knowledge on the ground that they violated the presumption of innocence; affirming the constitutional status of the voluntary-act requirement by disapproving a status law criminalizing vagabondage; declaring the Penal Code's conspiracy provision unconstitutional as inconsistent with the principle of legality; creating a "fair-notice" mistake-of-law defense; and so on. Unfortunately, as is the case in many criminal law systems, the Egyptian judiciary has proved considerably more deferential when it comes to terrorism offenses, where the president's decisions have largely gone unchallenged.

France finally adopted a new criminal code in 1992, after nearly two centuries of unsuccessful efforts to reform the Napoleonic Code of 1810. Like many criminal law systems, French criminal law normally distinguishes between crimes that require some form of intention and those that do not. Interestingly, though, *le dol éventuel*—where a perpetrator foresees the possibility of a particular result but does not want it to occur—does not satisfy the *mens rea* requirement of a crime that requires a special intent to cause a result forbidden by law. As Catherine Elliott discusses, before the adoption of the new Criminal Code *dol éventuel* was simply treated and punished as a form of negligence. Now, however, that mental state is a *mens rea* in its own right: "deliberately putting someone in danger." A perpetrator who deliberately puts someone in danger—a *mens rea* that lies somewhere between intention and negligence—is either convicted of a separate substantive

offense (where there was an immediate risk of death or serious injury) or is sentenced as if he or she committed an aggravated offense of negligence (for crimes such as involuntary homicide and nonfatal offenses against the person).

The German Penal Code has been amended regularly since it was adopted in 1871, but its main structure has remained intact. German criminal law is remarkably systematic, particularly in terms of protecting fundamental interests. The centrality of the right to life in the German legal and philosophic tradition, for example, means that necessity can never justify killing an innocent person—not even in order to save the lives of several innocent people. However, Thomas Weigend makes clear that even German criminal law is willing to deviate from its own principles when the situation demands it. The strict prohibition against applying criminal laws retroactively is a striking example. After the reunification of Germany, East German soldiers who were charged with manslaughter for shooting people who tried to escape from the German Democratic Republic (GDR) often invoked a GDR statute that, under certain circumstances, justified such killings. The Federal Constitutional Court recognized that prohibiting the soldiers from relying on the statute was inconsistent with the principle of nonretroactivity, but prohibited the defense anyway.

Macaulay's Indian Penal Code, which dates from 1860, was inspired by English criminal law, the French Penal Code, and Edward Livingston's Benthamite draft of a Louisiana Penal Code.[15] Particularly noteworthy, as Stanley Yeo points out, is Indian criminal law's comprehensive taxonomy of homicides, which are divided into two categories—culpable homicide amounting to murder and culpable homicide not amounting to murder—and are arranged in descending order of culpability according to the perpetrator's intent to harm or his or her knowledge of the likelihood of death. Culpable homicides amounting to murder include killings in which the perpetrator intended to cause death, intended to cause injury the perpetrator knew would "likely" cause death, intended to cause injury that a reasonable person would have known "most probably" would cause death, or did not intend to cause death but knew that death would be a "virtual certainty." Culpable homicides not amounting to murder include killings in which the perpetrator intended to cause injury that a reasonable person would have known was "likely" to cause death or did not intend to cause death but knew that death was "likely." Finally, killings in which the perpetrator did not intend to cause death and only knew that death would "possibly" result are excluded from the category of culpable homicide entirely and constitute the much less serious crime of "causing death by a rash act." A number of partial defenses are also available under Indian criminal law to reduce culpable homicide amounting to murder to culpable homicide not amounting to murder, such as provocation, excessive self-defense, and consent. Interestingly, and reflective of India's unique caste system, although the existence of adequate provocation is assessed objectively, the standard is "a reasonable man, belonging to the same class of society to which the defendant belongs."

The Islamic Revolution in 1979 led Iran to replace its General Criminal Code of 1926, which had been strongly influenced by the Napoleonic Code, with a new criminal code based exclusively on classical Islamic criminal law. The Iranian Penal Code contains a general part, but—unusually—the principles contained therein do not apply to all the

substantive crimes in the special part. Indeed, Silvia Tellenbach shows how the same principle can have a different meaning depending on the offense at issue. *Dolus eventualis* is a striking example: a death that results from an inherently deadly act (such as using a weapon) committed with *dolus eventualis* is regarded as intentional, while an arson that leads to death committed with the same *dolus* is regarded as nonintentional. This is an important difference, because the former crime will be punished by retaliation, while the latter will be punished only by blood money. However, whether to prosecute the perpetrator for homicide at all will be decided solely by the victims of the crime: "The role of the state is limited to conducting proceedings on the demand of the blood avengers."

The general part of Israel's Penal Law, which dated back to the criminal code enacted by the British mandatory legislature, was completely revamped by the Knesset in 1994. A number of features of Amendment no. 39, the vehicle for reform, have proven controversial and have led to judicial resistance. An example Itzhak Kugler discusses is section 20(b), the so-called foresight rule, which provides that the *mens rea* of all intention crimes is satisfied if the person knew that a particular result was almost certain to occur—equivalent to "oblique intention" in English criminal law. Before Amendment no. 39 was adopted, Israeli courts had held that the foresight rule did not apply to the crime of murder, because only persons who intended to cause death deserved the stigma (and accompanying life sentence) of a murder conviction. Amendment no. 39 would seem to eliminate that exception, but a number of courts have held that because murder requires "premeditation" and section 20(b) speaks only of "intention," the traditional exception to the foresight rule continues to apply.

Japan's criminal code, Keihō, celebrated its one hundredth birthday in 2007. Two aspects of Japanese criminal law, clearly interrelated, are worth noting. On the one hand, negligence crimes play an unusually large role in Japanese criminal law, which criminalizes a wide range of conduct, such as negligent driving, that would attract only civil liability in most countries. On the other hand, Japanese criminal law is remarkably lenient: as John O. Haley points out, "[o]nly rarely . . . do convicted offenders receive any significant formal punishment." In part, that is due to Japan's very low crime rate and the fact that more than two-thirds of code violations consist of negligence offenses, which are normally punished with fines instead of incarceration, but it also reflects the significant discretion possessed by police, prosecutors, and judges: the police fail to report 33 percent of all crimes; prosecutors refuse to prosecute 33 percent of their cases; and judges suspend nearly 60 percent of all sentences. It is little wonder, then, that Japan has the lowest per capita incarceration rate of any industrial democracy, including the Nordic countries.

Russia's criminal code, the Ugolovnyy kodeks Rossiyskoy Federatsii (UK), is relatively new, having been adopted in 1996 and amended frequently since, including a comprehensive reform in 2003. One of the more unusual aspects of the UK, in Stephen Thaman's view, is its "socially dangerous act" requirement, according to which an act that does not pose a danger to society is not criminal even if it satisfies all the formal requirements of a particular offense. Although the "socially dangerous act" requirement is a vestige of Soviet criminal law, it now serves to limit the ambit of criminal responsibility instead of, as in the Soviet era, to expand it. And limit it does: Russian criminal law's emphasis on social

protection leads to expansive defenses of necessity (permitting an actor to take a "justified risk toward the achievement of socially useful goals") and self-defense (permitting the use of force to defend "social or state interests protected by the law"), among others.

South African criminal law is a true hybrid system that blends, in Jonathan Burchell's words, "Roman-Dutch, English, German, and uniquely South African elements." There is much that is unusual about this system, particularly its insistence that a person does not act with the "guilty mind" that criminal responsibility requires unless he or she subjectively appreciates the unlawfulness of his or her conduct. True mistakes of law are thus always exculpatory in South Africa, even if they are unreasonable or unavoidable. Equally unusual—and equally subjectivizing—is South African criminal law's concept of "non-pathological incapacity," according to which mental disturbance that falls short of insanity can negate not only the *mens rea* of a criminal offense but also criminal capacity itself. A number of courts have relied on "non-pathological incapacity" to acquit defendants who committed serious crimes because of intoxication, provocation, or emotional stress.

Although modern Spanish criminal law dates back to the reform movement of the late eighteenth century—and is thus deeply influenced by Cesare Beccaria's seminal work *Of Crimes and Punishments* (1764)—the current penal code was enacted only in 1995. There are a number of interesting features of Spanish criminal law, such as its categorical rejection of strict liability and its willingness to acquit individuals who use disproportionate force in self-defense. The most interesting aspect, however, has to be the right of victims to pursue civil claims against a defendant within a criminal proceeding. As Carlos Gómez-Jara Díez and Luis E. Chiesa explain, "As private prosecutors, the victims not only charge the defendant with the commission of an offense but also seek monetary relief through restitution, compensation, or indemnification." Indeed, Spanish criminal law provides victims with an incentive to litigate civil and criminal claims simultaneously, because civil courts cannot award damages to victims until a criminal court has determined that a crime was committed.

The criminal law of the United Kingdom is perhaps the most common-law of all the common-law systems: although efforts to codify English criminal law have led to the adoption of a number of important statutory reforms, such as the Theft Act 1968 and the Sexual Offences Act 2003, "the vast majority of rules relating to the general part of the criminal law remain governed by the common law and therefore by judicial decisions." The lack of a comprehensive criminal code explains, at least in part, what Andrew Ashworth describes as English criminal law's "shadowy engagement" with the principle of legality; indeed, as late as 1962 the House of Lords was willing to convict a defendant of "conspiracy to corrupt public morals" even though he could not have known at the time that such a crime existed. More recently, however, that shadowy engagement has begun to blossom into open marriage—the result of Parliament's decision to enact the Human Rights Act 1998, which incorporated the European Convention on Human Rights (ECHR) into English law. The principle of legality enshrined in article 7 of the ECHR has transformed English courts' approach to determining the ambit of common-law offenses, and the ECHR has had a significant impact on English criminal law in general, such as leading courts to "read down" reverse burdens of proof for many defenses into more easily discharged evidentiary bur-

dens. However, on more than one occasion English courts have resisted giving the ECHR domestic effect—upholding, for example, the conviction of a fifteen-year-old boy of raping a child, the most serious child sex offense in English criminal law, despite the fact that such a conviction would almost certainly be impermissible under the ECHR.

The defining feature of criminal law in the United States, in Paul Robinson's account, is that there is no such thing as American criminal law: "there are fifty-two American criminal justice systems"—the fifty states, the federal system, and the District of Columbia—"and each is different from the others in some way." The fragmentation of criminal law in the United States has been minimized somewhat by the promulgation of the 1962 Model Penal Code: a number of states have adopted the Code wholesale, with only minor revisions, while other states have used it to provide the style and form for their statutory (re) codifications. Other states, however, have yet to adopt a modern criminal code, and all efforts to reform the federal code over the last four decades have failed miserably, meaning that the federal code "is not significantly different in form from the alphabetical listing of offenses that was typical of the original American codes in the 1800s." However, modern state criminal codes are remarkably comprehensive, with detailed general and special parts that are "designed to include a comprehensive and self-contained statement of all the rules required to adjudicate all criminal cases."

The Rome Statute of the International Criminal Court was adopted in 1998 and entered into force in 2002. The Rome Statute has been described as a "major step forward for substantive international criminal law," and with good reason: unlike the minimalist statutes of earlier international courts, such as the Nuremberg Tribunal, the ICTR, and the ICTY, the Rome Statute provides detailed definitions of the core international crimes, the possible modes of participation in those crimes, and the permissible grounds for excluding criminal responsibility. The Statute thus represents the international community's most ambitious attempt to create a special and general part of international criminal law. How successful that attempt has been remains to be seen: as Kevin Jon Heller explains, the Rome Statute is based on a complicated and often-unstable hybridization of common law and civil law that leaves open as many questions —including fundamental ones, such as the meaning of "intent"—as it answers.

Rather than present an album of postcards from faraway, and not-so-faraway, criminal law places, never mind an encyclopedic overview of World Criminal Law, this *Handbook* aims to provide a diverse selection of criminal law systems designed to stimulate comparative analysis. The authors of each chapter were asked to address a common set of topics to ensure reasonable comprehensiveness and facilitate comparison among chapters (and systems). At the same time, the list and order of topics were designed to allow for maximum flexibility. Conceptual rigidity is not only inconsistent with the very idea of comparative analysis, but also may result in formulaic summaries that are neither accurate nor particularly interesting. Instead, contributors were encouraged to write the sort of essay they would like to read about an unfamiliar criminal law system. The contributors are not necessarily comparativists by trade; they are leading criminal law scholars who portray a given ("their") criminal law system with a comparative sensibility (i.e., with an eye to facilitating comparative criminal law research).

General principles of criminal liability (the general part of criminal law) receive greater attention than detailed definitions of specific offenses (the special part), which differ considerably, but not necessarily interestingly, from jurisdiction to jurisdiction. In the special part, coverage is largely limited to key offenses like homicide, theft, rape, and victimless crimes.

Although specific topics for fruitful comparison will emerge from perusing the rich and varied contributions to this *Handbook*, some promising issues may include the rationales for punishment (and other sanctions, or "measures"), the scope and shape of the legality principle (*nulla poena sine lege*), the role and design (and existence) of criminal codes, the general structure of the analysis of criminal liability (and the related question of the distinction between justifications and excuses), accounts of *mens rea* (including the distinctions between *dolus* and *culpa*, and between intent and recklessness or negligence), and—in the special part—the scope of criminal law and the sorts of interests and rights the criminal law is designed to protect (*Rechtsgüter*), as well as the continued relevance, if any, of the distinction between "common law" and "civil law" systems or, relatedly, the influence of so-called Anglo-American criminal law, on one hand, and of German criminal law, on the other. Different readers, and different readings, will reveal different points of similarity and contrast, producing an image of convergence or divergence depending on one's point of view and point of focus.

NOTES

1. The pedagogic potential of comparative criminal law is explored in Richard S. Frase, "Main-streaming Comparative Criminal Justice: How to Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses," 100 *West Virginia Law Review* 773 (1998); Markus D. Dubber, "Criminal Law in Comparative Context," 56 *Journal of Legal Education* 433 (2007).

2. See Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005).

3. 4 William Blackstone, *Commentaries on the Laws of England* 162 (Chicago: University of Chicago Press, 1979) (1769); see also Jean-Jacques Rousseau, "Discourse on Political Economy," in *On the Social Contract with Geneva Manuscript and Political Economy* 209, 209 (Roger D. Masters ed. & Judith R. Masters trans.) (Boston: Bedford Books, 1978) (1755) ("political economy" derived from "*oikos*, house, and *nomos*, law," extending "the wise and legitimate government of the household for the common good of the whole family" to "the government of the large family which is the State").

4. P. J. A. Feuerbach, *Anselm Feuerbachs kleine Schriften vermischten Inhalts* 163 (1833).

5. For an attempt to implement this approach, see Markus D. Dubber and Mark Kelman, *American Criminal Law: Cases, Statutes, and Comments*, 2d ed. (Foundation Press Thomson/West, 2009).

6. *Vergleichende Darstellung des deutschen und ausländischen Strafrechts: Vorarbeiten zur deutschen Strafrechtsreform*, 16 vols. (1905–1909).

7. See, e.g., R. v. Martineau, [1990] 2 S.C.R. 633 (England, New Zealand, Australia, United States).

8. George P. Fletcher, *Rethinking Criminal Law* (Little, Brown, 1978); see, e.g., R. v. Perka, [1984] 2 S.C.R. 232.

9. For a broader comparative analysis, see BVerfG, 2 BvR 392/07 (26 Feb. 2008) (German Constitutional Court judgment relying on study of criminal incest laws in "twenty Anglo-American, European, and other non-European jurisdictions," prepared by the Max-Planck-Institute for Foreign and International Criminal Law, Freiburg, Germany). The U.S. Supreme Court, to put it mildly, has less enthusiastically embraced comparative analysis in its constitutional criminal law jurisprudence, although this has begun to change. See, e.g., Lawrence v. Texas, 539 U.S. 558, 573, 576 (2003) (discussing European Court of Human Rights [ECtHR] jurisprudence); Atkins v. Virginia, 536 U.S. 304, 317 n. 21 (2002) (considering attitude of "world community" toward execution of mentally retarded offenders).

10. Prosecutor v. Delacic et al., Case No. IT-96-21-A, Judgment (16 Nov. 1998).

11. Prosecutor v. Akayesu , Case No. ICTR-96-4-T, Judgment (2 Sept. 1998).

12. See also ECtHR, M.C. v. Bulgaria, Appl. Nr. 39272/98, paras. 88–100 (4 Dec. 2003) (comparative analysis of European rape law).

13. See, e.g., George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International*, vol. 1: *Foundations* (Oxford University Press, 2007).

14. P. J. A. Feuerbach, "Versuch einer Criminaljurisprudenz des Koran," 2 *Bibliothek für die peinliche Rechtswissenschaft und Gesetzkunde* 163, 164 (1800).

15. See generally Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles," in *A Model Indian Penal Code* (forthcoming 2011); see also Sanford Kadish, "Codifiers of the Criminal Law: Wechsler's Predecessors," 78 *Columbia Law Review* 1098, 1106–1121 (1978).

ARGENTINA

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