

## CHAPTER 40

---

# COMPARATIVE CRIMINAL LAW

---

MARKUS DUBBER

*SUNY-Buffalo\**

---

<b>I. Criminal Law's Parochialism</b>	<b>1288</b>
<b>II. Histories and Functions of Comparative Criminal Law</b>	<b>1291</b>
1. P. J. A. Feuerbach: A Good Place to Start	1292
2. Two Modes of Comparative Criminal Law	1296
(a) The View from Above	1296
(b) Muddling Through	1299
3. Domesticating Comparative Criminal Law	1301
4. Foreign Law as Comparative Criminal Law	1302
5. Toward a General Theory of Criminal Law	1305
6. International Criminal Law	1307
<b>III. Selected Topics in Comparative Criminal Law</b>	<b>1308</b>
1. General Part	1309
(a) Punishment Theory	1309
(b) Victims	1310
(c) Jurisdiction	1311
(d) Principle of Legality ( <i>nulla poena sine lege</i> )	1313
(e) Analysis of Criminal Liability	1318
(f) General Principles of Criminal Liability	1320

\* Thanks to Jennifer Behrens, Nina Cascio, Carlos Gómez-Jara Díez, Marcelo Ferrante, Tobias Liebau, Lyonette Louis-Jacques, John Mondo, Mathias Reimann, and Leonardo Zaibert for many helpful comments and suggestions, to the Alexander von Humboldt Foundation and Dean Nils Olsen for financial support, and to Bernd Schünemann for exemplary hospitality at the University of Munich.

2. Special Part	1322
IV. Comparative Criminal Law in Context	1324

## I. CRIMINAL LAW'S PAROCHIALISM

CRIMINAL law occupies an odd position in the field of comparative jurisprudence. Historically speaking, one can occasionally read that comparative law as a serious academic discipline began as comparative criminal law, either in Germany or in France, or both. And yet, no introduction to comparative criminal law fails to point out that comparative law means, and has meant for quite some time, comparative civil law first and foremost. Textbooks on comparative law feel no need to address, or even acknowledge the existence of, comparative studies in criminal law. The massive *International Encyclopedia of Comparative Law* does not cover criminal law, devoting itself instead to virtually every aspect and variety of 'civil, commercial and economic law'.<sup>1</sup>

It's easy to dismiss academics' complaints about the relative, and undeserved, neglect of their subject—a condition they then set out to rectify—as an all-too-familiar scholarly gripe. And yet there is something to the fact that comparative criminal law has attracted little attention, at least as compared to other types of law. The persistent peculiar parochialism of criminal law is deeply bound up with the history of criminal law itself. It is worth exploring not only for its own sake, but also in the hope of framing the challenges the criminal comparatist faces even today.

Of all branches of law, criminal law historically has been the one most closely associated with sovereignty.<sup>2</sup> It's useful to think of criminal law as having emerged from the householder's virtually unlimited discretion to discipline members of his household. The Athenian *oikonomos* or the Roman *paterfamilias* enjoyed the unquestioned power to employ, against insiders and outsiders alike, whatever disciplinary sanctions were necessary to discharge his obligation to look after the welfare of his household (*oikos* or *familia*). The medieval householder wielded the same disciplinary authority, to correct and to punish, over his household—including his wife, offspring, servants, and animals—for the sake of maintaining

<sup>1</sup> Adolf Sprudz, 'The International Encyclopedia of Comparative Law: A Bibliographical Status Report', (1980) *AJCL* 93 ff, 94.

<sup>2</sup> See generally Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

the peace (*mund*) of his household.<sup>3</sup> The consolidation and centralization of power, and the eventual creation of a state, consisted of the expansion of this model of household governance from the family to the realm. Criminal law served the function of protecting the ‘king’s peace’—and still does in English law—by preventing and punishing ‘breaches’ of that peace, which were considered offences against the (macro) householder, the king, himself. Eventually, in the United States, the concept of the king’s peace was replaced by that of the ‘public peace’, as sovereignty was transferred from the king to ‘the people’. In the United States, the intimate connection between criminal law and sovereignty none the less remained in place, even after the fiction of the self-governing and sovereign people had replaced the person, and fiction, of the king as sovereign.

This essentially patriarchal model of criminal law as household discipline was not challenged until the Enlightenment, when the idea of personal autonomy emerged and cast doubt on any account of state power that distinguished radically between governor and governed and denied the latter a say in (their) government altogether. As persons endowed with the capacity to govern themselves, royal subjects were transformed, at least in theory, into citizens, leading eventually to the establishment of democracies as the form of government most consistent with the idea of personal autonomy.

The critique of traditional criminal law formed an important part of the critical project of Enlightenment political theory. Central Enlightenment figures like Voltaire (in France), Kant and P. J. A. Feuerbach (in Germany), Bentham (in England), and—most influentially—Beccaria (in Italy) recognized that the threat and infliction of punitive pain on the newly discovered autonomous citizen posed the most difficult, and the most important, challenge to Enlightenment political theory.<sup>4</sup>

It makes sense, then, that the Enlightenment would trigger a systematic interest in the comparative analysis of criminal law and, in fact, an interest in comparative criminal law first and foremost, before an interest in other forms of comparative analysis. All comparative law bears critical, even subversive, potential by exposing the relativity of apparently ironclad rules.<sup>5</sup> The mere existence of alternative rules suggests that alternatives are possible; and if alternatives are possible, it is only a small step to the suggestion that they might be preferable. If comparative analysis is

<sup>3</sup> cf the German offence of *Hausfriedensbruch* (breach of the house peace) even today. StGB § 123.

<sup>4</sup> As a matter of comparative criminal law history, no similar urgency to radically rethink state punishment was felt in the United States. See Markus Dirk Dubber, ‘“An Extraordinarily Beautiful Document”: Jefferson’s Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment’, in Markus Dirk Dubber and Lindsay Farmer (eds), *Modern Histories of Crime and Punishment* (forthcoming 2007).

<sup>5</sup> See eg Horatia Muir Watt, ‘La fonction subversive du droit comparé’, (2000) 52 *Revue internationale de droit* 503 ff; George P. Fletcher, ‘Comparative Law as a Subversive Discipline’, (1998) 46 *AJCL* 683 ff. This critical attitude, however, is not always applied to the study of comparative criminal law itself; closer attention to the history of the subject might prove useful in this regard.

used in conjunction with, or—in Feuerbach’s case—as the positive foundation of, natural law arguments, the results of comparative research naturally lead to strong normative claims that the existing arrangements be rendered consistent with the demands of natural justice.

In a pre-Enlightenment system of criminal law, the very idea of comparative law is preposterous. A wise and curious sovereign might wish to consult the experiences of other sovereigns as they exercise quasi-patriarchal power over their households, but accounts of other practices elsewhere would have no critical bite whatsoever—the exercise of disciplinary power over the state household was beyond critique. Criminal law—or rather penal discipline, in so far as, after the Enlightenment, the very concept of law implies the notion of an autonomous legal subject—is the least constrained power of the sovereign since it is the power closest to the very essence of sovereignty. A sovereign who cannot punish as he sees fit is no sovereign.

The significance of Enlightenment critique for the appearance of comparative criminal law as a discipline also helps to account for the fact that comparative criminal law not only began but also has struck considerably deeper roots in continental Europe than in Anglo-American jurisprudence. In the United States in particular, criminal law continues to rest on a quasi-patriarchal foundation. Doctrinally speaking, the criminal law is the most intrusive manifestation of the state’s ‘police power’, which, since Blackstone, has been defined as the power of ‘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 conform their general behaviour to the rules of propriety, good neighbourhood, and good manners’.<sup>6</sup>

In the United States, criminal law to this day is conceived of as protecting the state’s sovereignty against ‘offences’.<sup>7</sup> The power of the state to reassert its sovereignty against an offence is virtually unlimited within its geographical limits. Territoriality remains the dominant principle of criminal jurisdiction in the United States; any state is free to mete out penal discipline as it sees fit provided it does not interfere with another state’s discretion to do likewise within its territory. By contrast, continental criminal law has long recognized active and passive personality, based on the offender’s and the victim’s citizenship, respectively, as important bases for criminal jurisdiction, along with—more controversially—universal jurisdiction over certain international crimes (eg genocide) regardless of who committed them where against whom.<sup>8</sup> Again unlike in continental criminal law,<sup>9</sup> choice of law

<sup>6</sup> William Blackstone, *Commentaries on the Laws of England* (vol 4, 1769), at 162; see generally Dubber, (n 2).

<sup>7</sup> See Markus Dirk Dubber, ‘Toward a Constitutional Law of Crime and Punishment’, (2005) 55 *Hastings LJ* 509 ff.

<sup>8</sup> See eg StGB §§ 3–7; see Markus D. Dubber and Mark G. Kelman, *American Criminal Law: Cases, Statutes, and Comments* (2005), ch 2.F.

<sup>9</sup> See Albin Eser, ‘The Importance of Comparative Legal Research for the Development of Criminal Sciences’, in Roger Blanpain (ed), *Law in Motion* (1997), 492 ff, 499 (passive personality jurisdiction).

questions cannot arise in American criminal cases, since no sovereign could assert another's authority; the very act of indirect reassertion would merely reaffirm the other state's lack of authority. Similarly, double jeopardy protections do not apply: a single act that violates two states' criminal norms gives offence to two sovereigns and, in that sense, constitutes not one offence but two, so that the constitutional prohibition of twice putting a defendant in jeopardy of life or limb for 'the same offence' does not come into play.<sup>10</sup> In the pre-Enlightened American view, sovereignty requires nothing less than leaving it to the discretion of each sovereign to decide whether, and how, to respond punitively to offences against its authority.

Even in countries where the Enlightenment's fundamental assault of the traditional quasi-patriarchal regime of state punishment was felt more strongly than in the United States, comparative criminal law emerged only sporadically and without ever achieving anything close to the breadth and depth of work in private law. We now turn to an account of that slow and timid emergence, noting along the way the various functions comparative criminal law was meant to fulfil according to its proponents and practitioners over the past two centuries.

## II. HISTORIES AND FUNCTIONS OF COMPARATIVE CRIMINAL LAW

---

The story of comparative criminal law is one of great promise followed by disappointing practice, even drudgery. Following a theoretically ambitious start at the turn of the nineteenth century, when its aims were laid out with great verve and high hopes, comparative criminal law flattened out quickly. By the second generation, it had been turned over to professional comparatists who lacked the broad vision that animated its creation and were largely content to accumulate foreign law materials, often in the service of some reform project or other.

At the outset of our historical inquiry, it must be noted that the study of comparative criminal law can be oddly ahistorical. Quite often criminal comparatists are content to note the similarities and differences between doctrinal rules in two legal systems, without spending much time on their respective historical roots.<sup>11</sup> This is not only regrettable, but also surprising since comparative law and legal history are so obviously related. History, after all, can be seen as one form of

<sup>10</sup> See Dubber (n 7), 509 ff.

<sup>11</sup> There are notable exceptions, of course. See eg George P. Fletcher, *Rethinking Criminal Law* (1978), ch 2.

comparison, across time. As the contemporary criminal comparatist might try to detail—and, if she feels ambitious, perhaps even to explain<sup>12</sup>—the differences in the criminal laws of various states, countries, regions, cities, and so on across space, so the historian would set out to capture, and hopefully to account for, the intertemporal differences in various legal rules, institutions, or practices. (Of course the practitioner of comparative legal history faces the formidable task of comparing across two dimensions.<sup>13</sup>) It is often said that comparative law highlights the relativity of legal rules; but intertemporal comparison illustrates the relativity of current law no less clearly than does interspatial comparison.

And yet, even exhortations to expand the scope of comparative criminal law beyond abstract legal doctrine emphasize the need to consider criminal law in its ‘sociocultural’ and ‘socioeconomic context’, as well as its ‘political setting’, rarely mention the importance of historical context.<sup>14</sup> Clearly, however, comparative research in criminal law without history makes no more sense than comparative criminal law without sociology, and notably criminology, economics, politics, or culture.

This unfortunate lack of historical curiosity also extends to the discipline of comparative criminal law itself. The historiography of comparative criminal law, if it can be called that, can be found in canned histories in the introductory sections of the very few textbooks on comparative criminal law that exist in any language and occasional contributions to essay collections. It is hoped that future scholarship will move beyond the oddly parochial passing remarks on the history of comparative criminal law we currently have; the following preliminary remarks are offered in this spirit.

## 1. P. J. A. Feuerbach: A Good Place to Start

As far as they go, comments on the history of comparative criminal law tend to locate its origins in Germany in the early nineteenth century—though some authors, particularly French comparatists, also point to roughly contemporaneous developments in France.<sup>15</sup> More specifically, P. J. A. Feuerbach, the influential

<sup>12</sup> See James Q. Whitman, ‘The Comparative Study of Criminal Punishment’, (2005) 1 *Annual Review of Law & Social Science* 17 ff, 20.

<sup>13</sup> For a recent example in the field of comparative criminal legal history, see James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (2003).

<sup>14</sup> See eg Marc Ancel, ‘Some Reflections on the Value and Scope of Studies in Comparative Criminal Law’, in Edward M. Wise and Gerhard O. W. Mueller (eds), *Studies in Comparative Criminal Law* (1975), 3 ff, 10.

<sup>15</sup> See eg Marc Ancel, *Introduction comparative aux codes pénaux Européens* (1956), 5 (discussing Joseph-Louis-Elzéar Ortolan, *Cours de législation pénale comparée* (2 vols, 1839–41); also Jean Pradel, *Droit pénal comparé* (2nd edn, 2002), 18–19 (discussing comparative aspects of Pellegrino Rossi’s *Traité de droit pénal* (1829) ).

German jurist, codifier, author, and judge, is often identified as the father of modern comparative criminal law and, in fact, of modern comparative law in general.<sup>16</sup> Feuerbach's 1800 essay on Islamic criminal law<sup>17</sup> in particular tends to be mentioned as a formative document.<sup>18</sup> This early attempt at legal anthropology—written at a time of frequent anthropologizing and intense interest in the exotic world of Muslim culture—today is remembered not for its forgettable observations about the 'criminal jurisprudence of the Koran', but for programmatic pronouncements such as the following:

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.<sup>19</sup>

Feuerbach's insistence on the comparative method in criminal law thus must be seen as part of his general rejection of traditional natural law, which attempted to deduce substantive principles of right, or justice, from reason alone. Feuerbach instead developed a formal theory of natural law, insisting that universal principles of law be derived from a thorough appreciation of the legal norms of particular societies, which was impossible without the required careful study of each society's 'constitution'. Note that Feuerbach's conception of comparative law incorporates the study of legal history, among other things.

Still, Feuerbach's critique of natural law should not be misunderstood as a rejection of natural law, which at the time was thought to be synonymous with legal theory.<sup>20</sup> Feuerbach did not doubt the possibility of deriving universal principles of law; he simply thought traditional natural law had been going about that derivation in the wrong, purely rationalistic, and insufficiently positivistic, way.

For decades Feuerbach laboured on a large comparative project, which he alternately described as a 'world history of legislation', a 'universal legal history', or simply a 'universal jurisprudence'. To that end, he collected materials not only from Europe, but also from East Asia, Southeast Asia, the Middle East, and the United States.

Feuerbach never managed to complete his grand comparative opus. Still, he better captured the theoretical ambitions of comparative law than anyone since, and placed them within the context of a larger human and scientific endeavour, the discovery of universals:

<sup>16</sup> See eg Walther Hug, 'The History of Comparative Law', (1932) 45 *Harv LR* 1027 ff, 1054 (Feuerbach 'the first to conceive the science of comparative law').

<sup>17</sup> Paul Johann Anselm Feuerbach, 'Versuch einer Criminaljurisprudenz des Koran', (1804) 2 *Bibliothek für die peinliche Rechtswissenschaft und Gesetzkunde* 163 ff.

<sup>18</sup> On Feuerbach as comparatist, see Gustav Radbruch, *Paul Johann Anselm Feuerbach: Ein Juristenleben* (3rd edn, 1969), 190 ff.

<sup>19</sup> Feuerbach (n 17), 163 ff, 164.

<sup>20</sup> See the subtitle of Hegel's *Philosophy of Right* of 1821: *Natural Law and State Science in Outline (Naturrecht und Staatswissenschaft im Grundrisse)*.

Why does the legal scholar not yet have a comparative jurisprudence? . . . 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.<sup>21</sup>

Here Feuerbach makes explicit the connection between comparative jurisprudence and another, far better known, comparative enterprise: comparative linguistics associated with Jacob Grimm and Wilhelm von Humboldt and, more generally, comparative language studies, which also included comparative dictionary projects as well as attempts to work out a ‘philosophical universal linguistics’.<sup>22</sup> Humboldt went on to posit that a universal linguistic competence, or ‘sense of language’ (or grammar), could be distilled from comparative linguistic studies—an idea later revived by Noam Chomsky.<sup>23</sup> Although Feuerbach is credited with introducing the concept of a ‘sense of law’ (or justice), this juristic competence turned out to be distinctly non-universal. Feuerbach invoked the sense of justice to make a very parochial point: he argued against importing the French jury, which he praised as a theoretical matter, into German criminal procedure on the ground that early nineteenth-century Germans lacked the sense of justice required for the jury to protect, rather than to threaten, individual rights.<sup>24</sup>

If Feuerbach’s project sounds very much like Montesquieu’s *Spirit of Laws* (1748), not only in the reference to climate, that’s no accident. Feuerbach was a great admirer of Montesquieu’s; he occasionally referred to his overarching comparative project as his ‘German esprit des lois’. Unlike Feuerbach, however, Montesquieu showed virtually no interest in comparative criminal law, or in other matters of criminal law generally—beyond his general but influential call for punishment ‘in the spirit of’ the crime.<sup>25</sup>

A little later, Cesare Beccaria, whose essay *Of Crimes and Punishments* (1764) kicked off the Enlightenment attack on established penal practices—and notably of the use, or at least overuse, of capital punishment—in earnest, likewise took an

<sup>21</sup> Paul Johann Anselm Feuerbach, *Anselm Feuerbachs kleine Schriften vermischten Inhalts* (1833), 163.

<sup>22</sup> See Barbara Kaltz, ‘Christian Jacob Kraus’ Review of “Linguarum totius orbis vocabularia comparativa” (ed. Peter Simon Pallas, St. Petersburg, 1786): Introduction, Translation and Notes’, (1985) 12 *Historiographia Linguistica* 229 ff.

<sup>23</sup> See generally Markus Dirk Dubber, *The Sense of Justice: Empathy in Law and Punishment* (forthcoming 2006).

<sup>24</sup> See Markus Dirk Dubber, ‘The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology’, (1995) 43 *AJCL* 227 ff. The jury, and lay participation generally, has remained one of the key topics in comparative criminal procedure to this day. See eg Markus Dirk Dubber, ‘American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure’, (1997) 49 *Stanford LR* 547 ff.

<sup>25</sup> On Montesquieu’s two ‘very simple and almost simplistic’ comments on comparative criminal law in *Spirit of Laws*, see Jean Pradel, (n 15), 15; see also David Carrithers, ‘Montesquieu’s Philosophy of Punishment’, (1998) 19 *History of Political Thought* 213 ff.



acomparative approach to the subject of criminal law, or rather of state punishment. 'Follow[ing] the steps' of the 'immortal Montesquieu' who 'has but slightly touched on this subject', Beccaria's famous essay analyses human society in general and critiques laws throughout Europe and throughout history, rather than drawing detailed contrasts and comparisons among individual systems of criminal law. Beccaria here 'pleads the cause of humanity', applying 'philosophical truths' that are 'eternally the same' to state punishment, chief among them of course the universal principle that a good law is one that pursues 'the greatest happiness of the greatest number'.

Bentham took from Beccaria not only his greatest happiness principle, but also his ahistorical and acomparative approach. There is no trace of comparative sensibility in Bentham's systematic, and often tedious, application of Beccaria's principle to every corner of law, including all aspects of penal law, from substance, to procedure, to modes of punishment execution. Bentham was indiscriminately abstract: he attacked Blackstone's common law and the American Revolution's natural law from the same high perch of rigorous utilitarianism. Bentham's inability, or unwillingness, to consider comparative nuance or context was particularly ironic, and ultimately self-defeating, in light of his repeated offers to draft criminal codes for governments throughout the world, including the federal and state governments in the United States, all of which were rejected. Bentham's interest in what he termed 'international law' is not to the contrary; in his view, international law concerned itself not with a community of nations marked by apparently irreconcilable historical, cultural, and economic—yes, even climatic—differences, but with the drafting of a 'universal international code'.

None the less, it would be a mistake to think of Bentham's project as an attempt to export a superior legal system to other less fortunate, or less enlightened, countries, a common occurrence in the history of comparative law, and comparative criminal law in particular. Bentham thought the English common law required radical utilitarian reform just as much as, if not more so than, the legal systems of other countries. His project was universalistic, not chauvinistic, though acomparative all the same.

In an important sense, in fact, the common law—the frequent object of Bentham's withering ridicule—can be viewed as an essentially, and increasingly, comparative project. In Bentham's (and Blackstone's) day, the only comparative dimension of the common law was intertemporal. In Blackstone's *Commentaries on the Laws of England* (1764–9), which Bentham so gleefully criticized, non-English criminal law appears nowhere—nor does Blackstone, it must be said, even follow his common-law predecessors, most importantly Coke, in carefully tracing the development of criminal law doctrine over time. References to foreign law of any kind in Blackstone's discussion of criminal law are limited to vague references to exotic, and essentially non-English and therefore presumptively threatening,

customs, such as polygamy. The foreigners themselves occasionally pop up in the form of ‘outlandish persons calling themselves Egyptians, or gypsies’, association with whom is punished by death or of ‘Jews and other infidels and heretics’ not entitled to benefit of clergy.

At the same time, it’s worth noting that, as a matter of procedure, English law specifically provided for the disposition of foreign criminal (and civil) defendants. From 1190 until 1870, foreigners—notably Jews and foreign merchants—were tried before a mixed jury (*de medietate linguae*). This procedural device, however, hardly turned trials of foreigners into an opportunity for the exploration of comparative criminal law. The mixed jury applied the same substantive common law (or law merchant, as the case may have been) as the unmixed jury deciding the faith of a native Englishman. Still, even if the mixed jury did not introduce choice of law questions into English criminal trials, it at least recognized the existence, and interests, of non-English defendants, who for ‘oeconomic’ reasons of household governance—as opposed to considerations of their individual rights—were put under the king’s protection.<sup>26</sup>

## 2. Two Modes of Comparative Criminal Law

Common criminal law analysis became more explicitly comparative when it left the English motherland and entered the colonies. Here, two types of interaction between English and colonial (or Commonwealth) law might be distinguished: (1) the consideration of foreign law by English courts, notably the Privy Council, and (2) the consideration of English law by colonial (or postcolonial) courts. In both cases, courts have turned to comparative analysis, be it between various non-English legal systems or between non-English and English law.

### (a) *The View from Above*

The first—*hierarchical* or *unidirectional*—mode of comparative analysis operates within an imperialist framework that guides English courts’ application of English law to resolve disputes and to help develop other, lesser, systems of law. This framework should not be obscured by frequent references to the application and development of a uniform common law within the British Empire or the Commonwealth, which by definition recognizes no distinction between English and ‘foreign’ law.<sup>27</sup>

In this, imperialist, mode of comparative criminal law, the comparison proceeds from the assumption that the domestic system is superior to the foreign one.

<sup>26</sup> On the traditional concept of ‘oeconomy’ and its connection to ‘police’, see Dubber (n 2).

<sup>27</sup> See, in this regard, Esin Örüçü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition* (1999).

Arguably, imperialist comparative law does not qualify as comparative law in the first place, at least in so far as, in the formulation of Hans-Heinrich Jescheck, ‘the basic intellectual approach toward all comparative work consists of the willingness to learn’.<sup>28</sup> Imperialist comparative law seeks, at best, to teach and, at worst, to oppress, but never to learn.

The most obvious instance of imperialist comparative law in the area of criminal law is the exportation of criminal codes to colonies, a common practice among colonial powers in the nineteenth century.<sup>29</sup> The most prominent example is Macaulay’s Indian Penal Code (1837). Macaulay looked to Indian customs—which, as is standard colonial practice, were denied the status of laws, thus making comparative law impossible by definition—only in so far as they indicated the need for extraordinary legal measures—as, for instance, to combat Indians’ presumed predilection for perjury—or might help render the code more effective by placing its commands within a familiar local context—as evidenced by his innovative use of illustrations of code sections.<sup>30</sup>

There is a contemporary—non-colonial—version of this imperialist approach to comparative criminal law. It also operates from a position of superiority, but without the aid of open political might and, ordinarily, with greater subtlety. The sense of superiority of non-colonial exporter nations in comparative criminal law comes in different forms. German scholars of comparative criminal law, for instance, may be convinced of the superior, and even unmatched, complexity of their domestic law’s doctrine of substantive criminal law, which is taken as an indication of the superiority of German substantive criminal law as a matter of scientific progress.<sup>31</sup> Note, for instance, that Jescheck, in the same programmatic essay cited above, remarks that German substantive criminal law has little use for comparative research as a source of alternative approaches because it ‘has largely exhausted the field of doctrinal possibilities’.<sup>32</sup> In fact, in his popular criminal law textbook, Jescheck argued for the need to develop a complex doctrinal system of substantive criminal law in part by attributing what he considered the wrong result in a landmark nineteenth-century English criminal case to what he perceived as

<sup>28</sup> Hans-Heinrich Jescheck, *Entwicklung, Aufgaben und Methoden der Strafrechtsvergleichung* (1955), 38.

<sup>29</sup> On the (much neglected) history of German colonial criminal law, see Wolfgang Naucke, ‘Deutsches Kolonialstrafrecht 1886–1918’, (1988) 7 *Rechtshistorisches Journal* 297 ff.

<sup>30</sup> On the exportation of Macaulay’s code to Asia and Africa, and James Fitzjames Stephen’s Code of Criminal Law and Procedure (1878–80) to Canada, New Zealand, and Australia, see Sir Rupert Cross, ‘The Making of English Criminal Law: (5) Macaulay’, (1978) *Crim LR* 519 ff; Sir Rupert Cross, ‘The Making of English Criminal Law: (6) Sir James Fitzjames Stephen’, (1978) *Crim LR* 652 ff. For an altogether different model of European influence on criminal law reform in a developing but independent nation, see Steven Lowenstein, *Materials on Comparative Criminal Law as Based Upon the Penal Codes of Ethiopia and Switzerland* (1965).

<sup>31</sup> On the scientific ambitions of German criminal law, see Markus Dirk Dubber, ‘The Promise of German Criminal Law: A Science of Crime and Punishment’, (2005) 6 *German LJ* 1049 ff.

<sup>32</sup> Jescheck (n 28), 28.

English criminal law's lack of doctrinal sophistication.<sup>33</sup> Here comparative criminal law is used not as an opportunity for critical reflection, but as an opportunity for self-affirmation.

Germany has been a major exporter of criminal law doctrine and theory over the past century: the sun never sets on German criminal law theory. Leading textbooks on German criminal law—including Jescheck's—have been translated into several languages, including Spanish, Portuguese, Chinese, Japanese, and Korean. Scores of budding scholars have studied with German criminal law professors, often with generous German foundation support, returning to their home countries to spread German criminal law doctrine.<sup>34</sup> German criminal law theory has been particularly influential in Spain, Latin America, Japan, South Korea, and Taiwan, as well as in several Eastern and Southern European countries (eg Greece, Poland, Turkey).

In criminal procedure, Germany has been less influential, though Turkey adopted the German criminal procedure code as an effort at Westernization, along with the Italian criminal code of 1899. In the area of comparative criminal procedure, the United States is far more likely to suffer from a superiority complex.<sup>35</sup> US criminal procedure, of course, was entirely forgettable both domestically and internationally until the so-called Warren Court Revolution in Criminal Procedure, which turned the subject into a subdiscipline of constitutional law. Claims to the superiority of US criminal procedure law do not invoke scientific progress, but assert a political, even moral, superiority, and perhaps for that reason are advanced most vigorously not by scholars, but by government and foundation representatives who are dispatched to criminal law reform projects throughout the world to do battle with champions of the inquisitorial model.<sup>36</sup>

Scientific or moral chauvinism has been less common in the comparative law of punishment execution and sanctions. There a less ideologically charged exchange of ideas and practices has occurred since the late eighteenth century, when European reformers first took an interest in American penitentiaries; Beaumont and Tocqueville were only the most famous among many foreign visitors and

<sup>33</sup> Hans-Heinrich Jescheck and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* (5th edn, 1996), 195 (discussing the famous cannibalism on the high seas case of *Regina v Dudley and Stephens*, [1884] 14 QBD 273).

<sup>34</sup> See eg Hans Joachim Hirsch (ed), *Krise des Strafrechts und der Kriminalwissenschaften?* (2001) (proceedings of a conference of foreign criminal law scholars who have received funding from the Alexander von Humboldt Foundation). Between 1953 and 2000, the Humboldt Foundation alone sponsored almost 200 foreign scholars doing research on criminal law in Germany.

<sup>35</sup> Domestically, however, the American criminal process has come under attack from comparatists who claim a European, and notably a German, advantage in criminal procedure. Compare John H. Langbein, 'Land without Plea Bargaining: How the Germans Do It', (1979) 78 *Mich LR* 204 ff with Dubber, 'American Plea Bargains', (n 24), 547 ff; see also Symposium, 'The European Advantage in Criminal Procedure', (2001) 100 *West Virginia LR* 765 ff.

<sup>36</sup> See Eser, (n 9), 492 ff, 516 ('common-law missionaries' in 'the successor states to the ex-Soviet Union').

inquirers at the time.<sup>37</sup> Today, the two illustrious Frenchmen would have no reason to study American penal institutions, which have long since abandoned the correctional project, unless they were charged with learning about private or maximum security prisons.

It is no accident that, when Jescheck set out to illustrate the successes of comparative criminal law as an engine of domestic criminal law reform in German, every example was drawn from the law of punishment execution and sanctions: (1) ‘uniform type of imprisonment’ (citing Italian and Austrian practice in support of abandoning the traditional distinction among *Zuchthaus* (penal servitude), *Gefängnis* (imprisonment), and *Haft* (detention) in German criminal law), (2) ‘the day-fine system’ (drawing on a Scandinavian model that tailors the amount of the daily fine to the economic resources of the defendant and the number of daily fines to the seriousness of her offence), and (3) ‘warning combined with suspended fine’ (looking to English, French, Italian, and East German law—but apparently not to US law—to develop a new type of alternative sanction).<sup>38</sup>

### (b) *Muddling Through*

A second—*egalitarian* or *multidirectional*—mode of comparative criminal law in the common law world emerged in the United States after the American Revolution. Every federal system composed of independent bodies of state law offers opportunities for comparative analysis of law.<sup>39</sup> American criminal law, for the first hundred years or so of its existence, relied almost exclusively on English precedent. Eventually, however, as each state—and more recently federal law as well—developed its own jurisprudence on a wide range of issues in criminal law, an American court could consider a wide palette of approaches to a given issue before it. Decisions from other states, and to a lesser extent from federal courts, could then be considered alongside English decisions. English law thus became integrated into a comparative analysis, rather than functioning as the model against which lesser colonial efforts must be measured.

This comparative criminal lawmaking was still thought of as a form of common lawmaking, with the various, and increasingly differing, rules fitting together into an increasingly incoherent whole. As time went on, and differences continued to emerge, it became increasingly difficult, however, to maintain the fiction of a

<sup>37</sup> Gustave de Beaumont and Alexis de Tocqueville, *Du système pénitentiaire aux États-Unis, et de son application en France; suivi d'un appendice sur les colonies pénales et de notes statistiques* (1833); on the influence of the American penitentiary movement on German criminal law, see Markus Dirk Dubber, ‘The Right to be Punished: Autonomy and its Demise in Modern Penal Thought’, (1998) 16 *Law & History Rev* 113 ff.

<sup>38</sup> Hans-Heinrich Jescheck, ‘The Significance of Comparative Law for Criminal Law Reform’, (1981) 5 *Hastings Int'l & Comp LR* 1 ff, 20 ff.

<sup>39</sup> cf already Karl Stooß, *Die Schweizerischen Strafgesetzbücher zur Vergleichung zusammengestellt* (1890), *Die Grundsätze des Schweizerischen Strafrechts vergleichend dargestellt* (1892–3).

common law of crimes. The Model Penal Code of the American Law Institute, completed in 1962, attempted to systematize the internally inconsistent body of American criminal law that had accumulated over the years.<sup>40</sup> ‘The common law’ is ordinarily thought of as the Model Penal Code’s raw material, and as its doctrinal alternative in jurisdictions that did not follow the Code. The Code drafters, however, in fact engaged in a comprehensive comparative analysis of the general principles of criminal law in the various American state and federal jurisdictions, drawing on statutes as well as on case law. Based on this systematic exercise in comparative criminal law, the drafters proposed rules that retained certain features of the criminal laws in American jurisdictions while rejecting others, in an effort to render American criminal law as a whole more consistent both internally and in light of what they regarded as the basic functions of a modern system of criminal law (legality, deterrence, treatmentism).

In the wake of the widespread reform and codification of criminal law in jurisdictions throughout the United States—with notable exceptions, such as California and federal criminal law—American criminal law today is essentially a creature of domestic comparative criminal law.<sup>41</sup> There is no American ‘common law’ of crime; there are only separately codified independent systems of criminal law that are developed in occasional reference to other American systems of criminal law.<sup>42</sup> The myth of a uniform common law of crimes—which is often, in a particularly anachronistic twist, treated as though it included even English criminal law—continues to shape American thinking about, and teaching of, criminal law. It is hoped that the internally comparative dimension of American criminal law will be recognized more fully so that the study of American criminal law, as well as the jurisprudence itself, can become conscious of, and eventually refine, its method. Even without a full-blown comparative investigation, the comparatist’s sceptical eye for apparent similarities and apparent differences in doctrinal questions and answers, her sensitivity to procedural, institutional, theoretical, and even historical context, would serve American criminal law well, as its practitioners and theoreticians draw on statutes and court opinions from throughout the land to resolve a given issue.<sup>43</sup>

<sup>40</sup> On the Model Penal Code project, see Markus Dirk Dubber, ‘Penal Panopticon: The Idea of a Modern Model Penal Code’, (2000) 4 *Buffalo Crim LR* 53 ff; Markus Dirk Dubber, *Criminal Law: Model Penal Code* (2002).

<sup>41</sup> Consider in this regard the Model Penal Code for Latin America, a self-consciously (transnational) comparative project inspired by the ALI’s Model Penal Code and Uniform Commercial Code. Juan Bustos Ramirez and Manuel Valenzuela Bejas, *Le système pénal des pays de L’Amérique Latine* (trans Jacqueline Bernat de Celis, 1983), 7; see also Jescheck, (n 38), 1 ff, 18 (Model Penal Code as example of ‘regional’ comparative criminal law reform project).

<sup>42</sup> On American criminal law as domestic comparative law, see Markus Dirk Dubber, ‘Reforming American Penal Law’, (1999) 90 *J Crim L & Criminology* 49 ff.

<sup>43</sup> For a casebook based on this approach, see Dubber and Kelman, (n 8).

### 3. Domesticating Comparative Criminal Law

The idea of internal comparative criminal law might be further developed to extend beyond the boundaries of criminal law itself. As a matter of theory, as well as of doctrine, the study of criminal law requires a comparative dimension that places its subject within the broader context of law, and, ultimately, of state action generally speaking. The discipline of criminal law rumbles along in almost complete ignorance of other areas of law. American criminal law has yet to develop a satisfactory account of its relation to the law of torts, contracts, or property, or for that matter, to the law of taxation or bankruptcy. As a result, American criminal law has the least to say about the very issues that matter the most in criminal law-making—namely the proper role of criminal law in public policy, and the proper scope and definition of offences within that role.

As a species of law, criminal law must be distinguished from other modes of state governance, most importantly administrative regulation.<sup>44</sup> In addition, criminal law must be differentiated from other legal modes of governance, including both so-called public and private law. This differentiation requires a comparative analysis of the various doctrinal points of contact between criminal law and other areas of law, including—if we use tort law as an example—act, commission through omission, harm, voluntariness, intention, recklessness, negligence, strict liability, causation, mistake, reasonableness, justification, public and private necessity, self-defence, use of force in law enforcement, consent, excuse, insanity, infancy, attempt, as well as—in the special part—protected interests and the host of torts paralleling criminal offences, such as assault, battery, false imprisonment, trespass on land, and trespass to chattels.

The Model Penal Code drafters did not engage in this sort of interdisciplinary domestic comparative law analysis. As a result, some critical features of the Model Code remain troublingly indeterminate. The drafters failed to account for their adoption of differing definitions of similar, if not identical, concepts—for example, rejecting an affirmative definition of the fundamental concept of an act along the lines of the American Law Institute's own Restatement of Torts. What's more, the relationship between criminal law and other areas of law remains unarticulated even where the Model Code makes specific reference to non-criminal law—for example, in justification defences that turn on the general, criminal and civil, 'lawfulness' of the conduct in question.

The drafters of the Model Penal Code were not particularly interested in transnational, as opposed to intranational, comparative criminal law. Eager to devise a piece of model legislation with a chance of adoption in American jurisdictions throughout the land, they instead focused on American law. The only foreign

<sup>44</sup> See Markus Dirk Dubber, 'Policing Possession: The War on Crime and the End of Criminal Law', (2002) 91 *J Crim L & Criminology* 829 ff.

criminal law system that received some attention was English law. Even English law, however, appeared not so much in the form of primary materials, that is, cases and to a lesser extent statutes, but through the work of a contemporary commentator, Glanville Williams, who is widely regarded as the father of modern English criminal law scholarship. It is no accident that the publication of Williams's groundbreaking work, *Criminal Law: The General Part*, coincided with the drafting of the Model Code between 1952 and 1962. The Code drafters cited German criminal law only very rarely, even though the Code's basic analytic framework bears a certain resemblance to that developed by German criminal law scholars at the beginning of the twentieth century (see Section III.1.(e) below).<sup>45</sup>

It is worth noting at this point that the Model Penal Code, in its primarily internal comparative approach, resembled Feuerbach's criminal law textbook, *Textbook of the Common Criminal Law in Force in Germany*, which dominated German criminal law teaching during the first half of the nineteenth century. As the textbook's title makes clear, Feuerbach faced a challenge not unlike that encountered by the Model Code drafters. What's more, he viewed his task in similar terms—as revision, reform, and rationalization of an existing, often hopelessly self-contradictory and arbitrary, 'common' criminal law that had evolved over centuries. Like the Model Code drafters, Feuerbach also realized that this formidable critical project presupposed a different, but no less daunting, analytical one: a careful comparative study of the rules of law as they existed at the time. Note that, in Feuerbach's telling, the sources of criminal law included 'the philosophy of criminal law, insofar as it has not been limited in its application through positive statutory provisions'.

Feuerbach was criticized—not without justification—for paying too much attention to the philosophy of criminal law, and too little to positive law, common and otherwise. Recall, however, that under his view, philosophical principles themselves should derive from a careful study of positive law. The Model Penal Code drafters, by contrast, studiously avoided extended discussions of criminal theory, preferring instead to cast their Code as animated by a spirit of 'principled pragmatism'.

#### 4. Foreign Law as Comparative Criminal Law

The more telling contrast, however, pits Feuerbach and the Model Penal Code, on the one hand, against what has come to be regarded as traditional comparative law, on the other. Feuerbach—both in his textbook and his path-breaking Bavarian

<sup>45</sup> For rare citations to the German criminal code in the official Commentaries to the Model Code, see eg *Model Penal Code Commentaries* (1985), § 3.02, at 11, § 210.3, at 65. On the similarity between the structure of the Model Code and German criminal law, see Dubber and Kelman (n 8), 182–9.



Criminal Code of 1813, which was based closely on the views laid out in the textbook and other, more theoretical, writings—and the Model Penal Code exemplify the use of internal comparative analysis of legal rules in the service of criminal law reform. Comparative analysis was of integral, and in fact foundational, importance to the law reform projects undertaken by Feuerbach and the Model Penal Code drafters. The materials subjected to comparative analysis were the very subject-matter of the reform effort itself.

Contrast this integral and internal form of comparative analysis with the use of comparative law in other criminal law reform efforts, which self-consciously turn to studies of foreign law to aid domestic projects. The prime example of this style of reform-oriented comparative criminal law is the publication of a sixteen-volume ‘comparative depiction of German and foreign criminal law’, published under the auspices of the German Justice Ministry between 1905–9 in connection with proposals for reform of the German criminal code.<sup>46</sup> This collection is a treasure trove of information about non-German criminal systems as of the early twentieth century. It is, however, at bottom a work of reportage, a series of essays on how the French do it, how the English do it, and so on. It is fascinating as a study of ‘foreign’ criminal law, from a German perspective. It tells us a great deal about non-German systems of criminal law and, at least as interesting, about German criminal law thought at a time of great scholarly creativity, when the basic building blocks of German criminal law theory were being assembled.

It is not, however, a work of comparative law. These very building blocks, for instance, were developed without any reference to the extensive study of foreign criminal law.<sup>47</sup> There is also no indication that this enormous project had any influence on the effort to reform the German criminal code, which failed at any rate. The code was not fundamentally revised until the 1960s. At that time, another foreign criminal law study was commissioned by the German Justice Ministry, with far less impressive results, however, which likewise had no noticeable effect on the reform of the code.

The accumulation of materials on, references to, and brief—or not so brief—summaries of foreign criminal law has a long tradition in comparative criminal law. Already Feuerbach’s textbook bears its early traces, in the run-on notes of its later editions. These editions were the work of Carl Joseph Anton Mittermaier, who spent his early years collecting and translating foreign criminal codes for Feuerbach. Mittermaier went on to great fame, becoming the internationally best-known German jurist of his time.<sup>48</sup> If Feuerbach established the modern discipline of comparative criminal law, Mittermaier was the first professional

<sup>46</sup> *Vergleichende Darstellung des deutschen und ausländischen Strafrechts: Vorarbeiten zur deutschen Strafrechtsreform* (16 vols, 1905–9).

<sup>47</sup> Instead, they were largely derived from a phenomenology of crime curiously above all comparative nuance. See generally Dubber (n 31), 1049 ff.

<sup>48</sup> Gerd Kleinheyer and Jan Schröder, *Deutsche Juristen aus fünf Jahrhunderten* (3rd edn, 1989), 182.

criminal law comparatist. Unlike Feuerbach, Mittermaier had no theoretical ambitions for his work in general, or for comparative criminal law in particular. He spent his long career amassing accounts of foreign criminal law, ultimately with an eye toward criminal law reform, notably the reform of the German criminal process in light of the English and French systems and the abolition, or at least limitation, of capital punishment.

Mittermaier's main contribution to Feuerbach's textbook, apart from critiquing Feuerbach's preoccupation with matters philosophical and adding countless footnotes, consisted of inserting long lists of snapshots of foreign criminal law. In Mittermaier's hands, then, Feuerbach's textbook came to contain a miniature version of the still more ambitious foreign criminal law project of 1905–9. The reader could find out quickly—though not necessarily reliably—how the French, the English, and so on dealt with a particular question, without any attempt, however, to integrate these descriptions into the textbook's doctrinal analysis of German criminal law.

One finds the same use of foreign criminal law in Jescheck's textbook on German criminal law more than a century later. Here, too, discussions of German criminal law are often followed—in smaller print, indicating their relative insignificance—by capsules of foreign criminal law. These one-sentence summaries, which generally consist of citations to criminal code sections from one country after another, are as a rule not incorporated into the discussion of German criminal law, nor are they interconnected across topics, preventing the reader from gleaning a parallel view of non-German systems of criminal law across the book. They serve no analytic purpose, though they may help to satisfy the curiosity of anyone looking for a thumbnail sketch of where some non-German criminal law systems address a given issue in their criminal code, assuming they have a code. In the end, they are impressive displays of cosmopolitan erudition.

Not surprisingly, integrating a comparative approach into one's exploration of issues in criminal law becomes more difficult when the points of comparison are drawn from a foreign legal system, rather than from another constituent jurisdiction of the same legal system. Making US criminal law relevant to a treatment of German criminal law is more challenging than bringing California criminal law to bear on New York criminal law with an eye toward rationalizing American criminal law. Getting foreign criminal law right is just as difficult as any other inquiry into foreign law. Different systems draw on different sources of criminal law, ranked in different orders of significance, and functioning in different ways.

The comparatist interested in US criminal law, for instance, would do well to consult not only the Model Penal Code, but also the relevant jurisdictions' criminal codes (should they exist), non-criminal codes (if any), unconsolidated criminal and non-criminal statutes, sentencing guidelines, code commentaries (which may not exist and, if they do, may differ dramatically in form, content, and ambition), secondary literature, treatises, and—of course—the jurisprudence of the relevant

courts, in addition to that of the US Supreme Court. One must learn not only how to find the relevant sources, but also how to read them. And once the comparatist has assembled an image of a foreign legal rule, she must be prepared to adjust that image in light of current developments. It is no accident that examples of external comparative criminal law that attempt to engage a foreign system of criminal law, rather than merely citing a necessarily oversimplified nutshell to add foreign flavour to one's doctrinal explorations, are quite rare. One such example from the German literature is Thomas Weigend's nuanced and careful consideration of the Model Penal Code's *mens rea* scheme, as adopted and interpreted in New York criminal law, in the context of a searching exploration of the doctrine of intention in German criminal law.<sup>49</sup>

Retaining for the moment our focus on the comparative analysis on German and US criminal law, it should be noted that neither shows much interest in the other. German criminal law finds it difficult to take US substantive criminal law seriously and, for that reason, sees no particular need to go beyond capsule summaries of US doctrine. At the same time, US criminal law pays just as little attention to German criminal law—or for that matter to the criminal law of any other nation—though not out of a sense of superiority but for simple lack of interest, aside from the obvious language barriers that plague all comparative law work. Interest in German criminal law in the United States, however, has grown over the past fifty years in the wake of the work of Jerome Hall, G. O. W. Mueller, and—most importantly—George Fletcher.

## 5. Toward a General Theory of Criminal Law

Fletcher's work distinguishes itself not only from other comparative, and non-comparative, criminal law scholarship in the United States, but also from much comparative criminal law scholarship in other countries through its intellectual ambition and instrumental approach to comparative research. Fletcher's mode of comparative scholarship recalls Feuerbach more than it does Mittermaier. In fact, Fletcher even uses a contemporary version of Feuerbach's linguistic analogy; he compares his project to Chomsky's search for a universal grammar.<sup>50</sup> Fletcher pursues an essentially theoretical project, unattached to any particular legal system; aspects of various criminal law systems throughout the world—notably German criminal law and Anglo-American criminal law, and, to a lesser extent, French, Italian, Israeli, and Russian criminal law—are pressed into service in the pursuit of a universal criminal theory. Unlike Weigend, for instance, Fletcher does not turn to

<sup>49</sup> Thomas Weigend, 'Zwischen Vorsatz und Fahrlässigkeit', (1981) 93 *Zeitschrift für die gesamte Strafrechtswissenschaft* 657 ff.

<sup>50</sup> George P. Fletcher, *Basic Concepts of Criminal Law* (1998), 5.

comparative analysis to address problems in domestic criminal law; foreign criminal law materials thus aren't integrated into an underlying domestic framework. There is no domestic law, no foreign law; there is only one criminal law, and all criminal law is comparative. In Fletcher's work, the point of comparative criminal law is not reform, nor ornamentation; comparative criminal law serves the establishment of a 'universal jurisprudence', in Feuerbach's term.

Fletcher's work on substantive criminal law theory fits into the comprehensive programme for a 'general theory of criminal law' encompassing all branches of criminal law—including substantive criminal law, procedural criminal law, and the law of punishment execution and sanctions—that was eloquently sketched by Jescheck in 1955, with obvious Feuerbachian roots:

As there is a general theory of the state and a general theory of macroeconomics, a *general theory of criminal law* also must be possible, namely one that derives not only from general-philosophical preconditions, but also proceeds from empirical-comparative foundations. For as much as the conditions of criminality might differ from country to country, the same variables are always at issue: human conduct, the violation of legal norms and legal interests, guilt and atonement, protection and rehabilitation, juveniles, adolescents, and adults, first-time offenders and recidivists, and the great problem of the selection and design of sanctions.<sup>51</sup>

This ambitious, and exciting, project still awaits serious scholarly attention; instead, since Mittermaier, comparative criminal law scholars—including Jescheck himself—have devoted themselves largely to the collection of foreign legal materials. The greatest achievement of comparative criminal law in Germany, France, Italy, and the United States remains the publication of foreign criminal codes in translation, with no evident effort to incorporate these primary materials into the analysis of domestic criminal law or, for that matter, a 'general theory of criminal law'.

The danger of an abstract approach to comparative criminal law is, of course, that it neglects the very detail and context—the local nuances—that distinguish comparative criminal law from pure criminal philosophy—or 'natural law', in the old terminology. Comparative criminal law thus might be reduced to serve as a ready-made grab bag of possible solutions to problems that the theoretician did not, or could not, generate using her powers of thought and imagination. At the same time, there is always the danger of confusing the established doctrines of one's domestic criminal law system with the dictates of reason, thus reducing comparative criminal law to a unilateral campaign of civilization and enlightenment—or, if you prefer, a type of criminal law missionary work. There is also the less dramatic concern that the resulting theory is beside the point, or entirely self-referential. Comparative criminal law theorizing that claims independence from any domestic system of law may, in the end, say a great deal about nothing in

<sup>51</sup> Jescheck (n 28), 27 (emphasis in original).

particular as it becomes too disconnected from any single body of law to affect actual doctrine anywhere in the world.

These concerns about theoretical comparative criminal law are at least as old as Feuerbach. Feuerbach cleverly, and unusually, evaded the charge of insufficient attention to positive criminal law by creating his very own positive criminal law—the Bavarian criminal code of 1813. Not every comparatist has that luxury, if only because criminal codes are no longer drafted on royal order.

## 6. International Criminal Law

Today's theoretical comparatist, however, can point to a body of positive law that simply did not exist in Feuerbach's time, or for that matter, in Jescheck's time: international criminal law. It is only fitting, then, that Fletcher recently has turned his attention to international criminal law, which he contrasts with 'parochial' criminal law.<sup>52</sup> Criminal comparatists are hard at work assembling a 'general part' of international law, which attempts to draw on various legal systems and whatever little precedent there is in the field of international criminal law to create a system of general principles of criminal responsibility, in analogy to the general part of domestic criminal law and of domestic criminal codes.<sup>53</sup>

The notoriously vague and often outright puzzling provisions of the Rome Statute of the International Criminal Court are best read as reflecting negotiated diplomatic compromises rather than some carefully constructed comprehensive view of criminal responsibility. At any rate, they have been taken by criminal comparatists as open invitations to explore how different domestic doctrines of criminal law handle central questions of criminal liability such as intent and other forms of *mens rea*, accomplice and group liability, inchoate criminality (conspiracy, attempt, solicitation), and the availability of defences (eg self-defence, necessity, duress, superior orders, and ignorance of law).

The internationalization—and regionalization<sup>54</sup>—of criminal law is also creating new opportunities for comparative work in procedural criminal law. Left without specific procedural guidelines, international criminal tribunals have been forced to generate procedural rules on the fly, based on general overviews of procedural norms, institutions, and practices in various legal systems across the world prepared by the court's staff. These norms, as well as their application in particular cases, must then be subjected to review under applicable international

<sup>52</sup> George P. Fletcher, 'Parochial versus Universal Criminal Law', (2005) 3 *J Int'l Crim Justice* 20 ff.

<sup>53</sup> See eg Antonio Cassese, *International Criminal Law* (2003); Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2004); Gerhard Werle, *Principles of International Criminal Law* (2005); see also Philippe Sands (ed), *From Nuremberg to the Hague: The Future of International Criminal Justice* (2003).

<sup>54</sup> See eg the emergence of European criminal law as a subject. Cf Helmut Satzger, *Internationales und Europäisches Strafrecht* (2005).

human rights norms, which in turn cannot be interpreted except in light of the various procedural traditions represented by the tribunal's judges.<sup>55</sup>

### III. SELECTED TOPICS IN COMPARATIVE CRIMINAL LAW

---

In this, the final, section we will explore a few issues that have attracted, or might attract, the attention of comparatists in the area of criminal law. Under a familiar analytic scheme, the field of penal law is divided into three aspects. *Substantive criminal law* or criminal law proper concerns itself with the general principles of criminal liability, in its general part, and specific offence definitions, in its special part. *Criminal procedure* deals with the imposition of the general and specific norms of substantive criminal law in particular cases. The law of *punishment execution and sanctions* covers the quantity and quality of sanctions for violation of criminal norms as well as the conditions of their actual infliction on convicted offenders.

The following selection of topics is subjective, and so is the selection of comparative materials. Topics have been drawn from substantive criminal law; no attempt has been made to provide a comprehensive overview of comparative penal law as a whole, or even of comparative substantive criminal law in particular. For simplicity's sake, familiar comparative labels such as 'Anglo-American' and 'continental', 'civil' and 'common' will appear from time to time. Their use does not imply a commitment to the position that any of them capture some distinctive essence; they are used for convenience, and no other purpose. In the end, comparative work always requires careful attention to the law of specific jurisdictions, which may or may not permit generalization to a more abstract—collective or systematic—level of comparison. Comparison that begins with generic contrasts between artificial blocs all too easily descends into the fruitless reaffirmation of unexamined prejudices, particularly if the blocs were assembled for the very purpose of tendentious comparison. This has been a danger particularly in comparative criminal procedure, where 'adversarial' and 'inquisitorial' systems have long, and with increasing futility, locked horns.

Throughout, an effort has been made to highlight issues for comparative

<sup>55</sup> See eg the different views of the requirement of 'equality of arms' in the criminal process explored in *Prosecutor v Aleksovski*, Case No. IT-95-14/1-AR73, PP 23–25 (Appeals Chamber, International Criminal Tribunal for Yugoslavia, 16 February 1999).

analysis, rather than to provide a panoramic view of criminal law throughout the world.<sup>56</sup> US law figures prominently in the discussion, reflecting both the author's personal perspective and the increasing significance of US law as a point of reference in comparative analyses of criminal law, particularly for purposes of law reform, where it is often compared and contrasted with German criminal law.

Substantive criminal law, or criminal law proper, traditionally has attracted less comparative interest than its sister disciplines criminal procedure and—at least historically—punishment execution.<sup>57</sup> Even Feuerbach, whose main interest lay in substantive criminal law, showed a programmatic enthusiasm for comparative substantive criminal law, but in fact produced more significant comparative work on criminal procedure (notably on the hotly contested question of lay participation in general, and of the jury in particular).

The relative paucity of comparative work on criminal law is surprising given that theoretical interest in substantive criminal law traditionally has far outpaced theoretical interest in procedural criminal law and, by an even wider margin, in execution law. In fact, within a given criminal subdiscipline, the interest in comparative work appears to be roughly inversely proportional to the interest in theoretical work in that subdiscipline. Unencumbered by theoretical ambitions or broader systematic concerns, criminal procedure and punishment execution have been more likely to scan the world of criminal law for 'better' (generally in the sense of more efficient, if not necessarily more just) processes of case disposition and offender control.

## 1. General Part

### (a) *Punishment Theory*

Common law and civil law systems generally operate with the same palette of rationales for punishment: retribution, general and specific deterrence, incapacitation, rehabilitation. German criminal law in 1933 adopted a two-track system that distinguishes between punishments and measures; only the latter may rely exclusively on considerations of incapacitation and rehabilitation, while 'true' punishments must reflect the defendant's culpability. This distinction may retain

<sup>56</sup> For just such a panoramic view of the law of criminal procedure, see the excellent collection of essays in Craig Bradley, *Criminal Procedure: A Worldwide Study* (1999).

<sup>57</sup> Some of the chestnuts of comparative criminal procedure, touched upon in this essay, include the control, desirability, and inevitability of prosecutorial and police discretion, the roles of judges, prosecutors, and defence attorneys in the criminal process, the place of lay participation in the criminal trial, the control and legitimacy of plea bargaining, and—more recently—the procedural role of victims. Representative general comparative works on all three aspects of penal law appear in the bibliography.

the principled purity of punishments properly speaking, but becomes difficult to maintain once it becomes clear that measures may include indeterminate incarceration for life.<sup>58</sup>

Rehabilitation has fallen into disfavour in the United States, where the dominant rationale for punishment of the War on Crime has been incapacitation, resulting in record incarceration rates and a renaissance of capital punishment. While rehabilitation continues to enjoy greater support in continental systems, a new rationale for punishment has been championed in continental criminal law. 'Positive general prevention' attempts to justify the threat, imposition, and infliction of punishment not in terms of its effect on potential law-breakers but as a means to reinforce the commitment to law among the law-abiding. Positive general prevention is said to avoid both retribution's barbaric pointlessness and deterrence's immoral use of threats to cow citizens into compliance. In the end, however, it is unclear whether it does more than attach a more palatable label to familiar, and familiarly troubled, rationales, not unlike rehabilitation's failed attempt to evade the problem of legitimation altogether by redefining punishment as treatment.<sup>59</sup>

#### (b) *Victims*

The victim has undergone a 'rediscovery' in both Anglo-American and continental criminal law in recent decades. In German criminal proceedings, the victim can appear as a parallel prosecutor (*Nebenkläger*), for instance, in sexual assault cases. In cases of petty crime, the victim may even assume the role of private prosecutor (*Privatkläger*), such as in shoplifting prosecutions.<sup>60</sup> In the United States, victims also have been granted various procedural rights, including—most notably—the right to contribute victim impact statements to be considered at sentencing, along with the right to be consulted regarding plea agreements, the right to be accompanied to trial by a 'victim's advocate', and so on.<sup>61</sup>

Upon closer inspection, however, it turns out that the victim's renaissance in US criminal law has very little to do with developments in civil law countries and, for that matter, in other common law countries, including the United Kingdom.<sup>62</sup> In the United States, the rise of the 'victims' rights movement' coincided with the War on Crime and the triumph of incapacitation over other rationales for punishment, and rehabilitation in particular. The pursuit of victims' rights was thought to be inconsistent with the protection of the rights of those suspected of, charged with,

<sup>58</sup> See Dubber (n 36), 113 ff, 131.

<sup>59</sup> *ibid.*

<sup>60</sup> See William T. Pizzi and Walter Perron, 'Crime Victims in German Courtrooms: A Comparative Perspective on American Problems', (1996) 32 *Stanford J Int'l L* 37 ff.

<sup>61</sup> See generally Markus Dirk Dubber, 'The Victim in American Penal Law: A Systematic Overview', (1999) 3 *Buffalo Crim LR* 3 ff.

<sup>62</sup> See generally Symposium, 'Victims and the Criminal Law: American and German Perspectives', (1999) 3 *Buffalo Crim LR* 1 ff.



and convicted of crime. The fight for victims' rights, in fact, was first and foremost a fight against defendants' rights. So from the very beginning an important component of the victims' rights agenda in the United States included calls for the reform of the law of criminal evidence to require the introduction of all relevant evidence of guilt even where its relevance was outweighed by its potential for confusing or inflaming the jury, the long-term incapacitation of repeat offenders, the reintroduction and expansion of capital punishment, the harshening of prison conditions, and every other item on an ever-growing wish list of tough-on-crime measures.<sup>63</sup>

The rediscovery of the victim elsewhere was considerably less punitive in nature. For instance, one of the central victim-based reforms in German criminal law was the introduction of a provision that permitted the resolution of certain criminal cases through victim-offender mediation, rather than through a traditional criminal trial (StGB § 46 a). By contrast, the mainstream US victims' rights movement showed remarkably little interest in restorative justice programmes or other forms of less punitive responses to crime such as victim compensation laws, which had first appeared in the 1960s.

### (c) *Jurisdiction*

Among the formal prerequisites for the imposition of criminal liability, jurisdiction recommends itself for comparative analysis not only because different legal systems have taken different approaches to the issue but also because they have given it different levels of attention. Anglo-American criminal law traditionally has largely ignored the question of criminal jurisdiction (in sharp contrast to the question of civil jurisdiction). Criminal jurisdiction was territorial jurisdiction; it was simply taken for granted that the place of the crime determined jurisdiction. The question attracted no theoretical interest, and doctrinal questions were by and large limited to the issue whether a particular offence was committed in one place or another, or perhaps both, in which case two sovereigns were found to have territorial jurisdiction.

Even today, criminal jurisdiction in Anglo-American law is not covered in criminal law courses and continues to be treated as virtually synonymous with territoriality.<sup>64</sup> This is puzzling since other bases of jurisdiction have begun to enter positive law—largely undetected by the literature—with federal criminal law leading the way in the United States. The non-territorial bases of federal criminal jurisdiction are difficult to detect because the federal criminal law contains no comprehensive provision on jurisdiction. Specific federal statutes, however, have extraterritorial reach, generally on the basis of the passive personality principle,

<sup>63</sup> See generally Markus Dirk Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (2002).

<sup>64</sup> But see Dubber and Kelman (n 8), ch 2.

which attaches criminal jurisdiction on the basis of the victim's citizenship.<sup>65</sup> Active personality, which turns on the offender's status rather than the victim's, has long since been recognized as not merely one, but the only, basis of military criminal jurisdiction in US law.<sup>66</sup> It also plays an important role in Native American criminal law, which depends crucially on the offender's status (Indian versus non-Indian, Indian tribe member versus Indian non-tribe member)<sup>67</sup> and continues to stump courts accustomed to associating criminal jurisdiction with territoriality.<sup>68</sup>

By contrast, other legal systems recognize the fundamental importance of the question of criminal jurisdiction, conceptualized as part of the more general issue of applicability, which also includes the question of retroactivity, or temporal applicability. Even there, however, the doctrine remains undertheorized as policy considerations, the interpretation of international treaties, and technical questions of extradition have attracted the lion's share of attention in the literature and in the doctrine.<sup>69</sup> Still, the failure to even recognize the need to develop a grounded and comprehensive account of the basis of criminal jurisdiction is symptomatic of a general assumption in Anglo-American criminal law that the power to punish is essentially discretionary and thus beyond the scope of critical inquiry. Once the sovereign has taken offence at the violation of one of its criminal norms, it is free to respond in any way it chooses.

Even the introduction of non-territorial criminal jurisdiction is best seen not as the result of a deep reconsideration of the bases of the state's punitive power, but rather as the reaffirmation of the sovereign's power to reassert its authority even beyond the polity's geographical boundaries. One might argue, for instance, that the active personality principle is more easily justified than, say, territoriality because the offender's citizenship is a better proxy for consent to criminal jurisdiction than the location of the offence. It is no accident that the question of extraterritorial jurisdiction has attracted attention in the United States only when the sovereign itself took offence at the possibility that it, in the person of its official representatives, might be subject to another polity's criminal jurisdiction. The suggestion that a Belgian court might have universal jurisdiction over a former President of the United States and the current Secretary of State (George H. W. Bush and Colin Powell for the bombing of a civilian shelter during the 1991 Gulf War) was rebuffed as a matter of international politics, not on principled grounds of criminal law doctrine. After all, it could hardly be said to violate some as yet undeveloped basic tenets of criminal jurisdiction in US law. US resistance to the international criminal jurisdiction asserted by the international criminal court has followed suit, with the exception that it has proved

<sup>65</sup> See eg 18 USC § 2332 (homicide and serious bodily injury).

<sup>66</sup> See Uniform Code of Military Justice art 2.

<sup>67</sup> Poarch Band of Creek Indians Code § 4-1-2.

<sup>68</sup> See, most recently, *United States v Lara*, 541 US 193 (2004).

<sup>69</sup> StGB § 3, 5, 6, 7.

more difficult to exert political pressure on dozens of signatory nations than on a single country.<sup>70</sup>

(d) *Principle of Legality (nulla poena sine lege)*

The principle of legality may be widely recognized for its importance. But it means radically different things to different legal systems. In US law, for instance, the legality principle tends to be vaguely associated with two constitutional principles—the prohibition of *ex post facto* and vague criminal laws. The former appears in the federal constitution; the latter has been derived from the general due process guarantee in the federal bill of rights. Both have developed haphazardly and still await integration into a systematic view of criminal law.

For instance, the constitutional *ex post facto* prohibition applies to all laws, including non-criminal ones. Its limitation to criminal laws, which has long been taken for granted, was read into the provision—in dictum, and with very little analysis—by a late eighteenth-century US Supreme Court decision in a civil matter that remains the leading case on retroactivity in American criminal law, and to this day is not merely cited, but extensively quoted, in virtually every judicial, and for that matter scholarly, discussion of retroactivity.<sup>71</sup>

*Specificity.* Vagueness doctrine has suffered from a similar lack of attention. While it is ordinarily treated as a (Fifth Amendment) due process requirement that presumably would apply to all criminal laws, US courts often struggle to distinguish it from specificity requirements based on (First Amendment) concerns about state interference with protected speech that would apply only to criminal statutes that prohibit speech. Even when the due process foundation of the vagueness prohibition is clear enough, courts often misunderstand it. A ‘vagueness’ case, for instance, may well strike down a criminal law statute not because it fails to provide potential offenders (or even law enforcement officers) with sufficient notice of what it does and does not criminalize, but because it reaches conduct that lies beyond the state’s power to punish, however defined.<sup>72</sup> Moreover, US courts have been decidedly uneven in applying the constitutional prohibition of vagueness. For instance, it appears that courts will uphold patently vague criminal statutes (such as Racketeer Influenced and Corrupt Organizations Act and federal honest services fraud) as long as the legislature specifically designed the statute to be vague—because vague criminal statutes simplify and expedite the state’s war on crime.<sup>73</sup>

<sup>70</sup> The Belgian parliament revised the universal jurisdiction law in response to US pressure.

<sup>71</sup> *Calder v Bull*, 3 US 386 (1798); cf *Rogers v Tennessee*, 532 US 451 (2001).

<sup>72</sup> *Papachristou v City of Jacksonville*, 405 US 156 (1972) (vagraney); see Dubber and Kelman (n 8), 143–4.

<sup>73</sup> See eg the federal Racketeer Influenced and Corrupt Organizations Act of 1970, better known as ~~Racketeer Influenced and Corrupt Organizations Act~~, 18 USC §§ 1961 ff. On ~~Racketeer Influenced and Corrupt Organizations Act~~’s vagueness, see *People v Capaldo*, 151 Misc 2d 114, 572 NYS 2d 989 (1991); see generally Dubber and Kelman (n 8), 740–77.

Vagueness doctrine thus may appear as little more than a guideline for statutory interpretation, as opposed to a constitutional norm. The rule of lenity, which instructs courts to interpret ambiguous criminal statutes in favour of the accused, is often associated with the vagueness prohibition. A court unwilling to strike down a statute on vagueness grounds might interpret it narrowly instead, thus curing it of its vagueness. The rule of lenity is applied even less consistently; courts invoke it in some cases, but ignore it in others. (In fact, modern criminal codes often explicitly abandon lenity as an interpretative guideline in the hope of limiting courts' interpretative discretion to the code's comprehensive conceptual framework.<sup>74</sup>) Like the vagueness prohibition, the rule of lenity is often mistakenly—or at least unnecessarily—invoked, as courts can reach the same result based on an inquiry into legislative intent. Finally, the constitutional foundation of the rule of lenity is at least questionable, despite occasional remarks suggesting a basis in due process.

*Legalitätsprinzip.* Continental criminal law, by contrast, has developed a more systematic approach to the question of the constraints of legality on criminal law. Driven by the Enlightenment critique of state power in all forms, and in the guise of criminal law in particular, the principle of *nulla poena sine lege* attempted to place principled constraints on official discretion—notably in its judicial and executive manifestations (with legislative constraints lagging behind). In the executive realm, the principle of legality (*Legalitätsprinzip*) was thought to require eliminating official discretion altogether. Prosecutors (who now performed functions traditionally performed by judges, in an attempt to limit judicial discretion) and police were obligated—under threat of criminal punishment—to pursue all reasonably suspected violations of a criminal statute.

Judges in turn were forbidden from interpreting criminal law statutes by analogy, as they had done in the past; criminal statutes were instead to be interpreted strictly and *in dubio pro reo*. In fact, judges who intentionally misinterpreted the statute were themselves subject to criminal liability.<sup>75</sup> As a result, legislatures indirectly were required to draft comprehensive criminal codes rather than passing occasional and broad laws that judges could apply as they saw fit. Legality concerns, however, have remained clearly focused on the judiciary (and the executive), rather than on the legislature. And by all accounts, judges have remained remarkably faithful to the prohibition of interpretation by analogy. Oddly, the one example of a violation of the prohibition which is cited *ad nauseam* is not a judicial decision at all, but a statute: the 1935 amendment to section 2 of the German Criminal Code authorizing punishment of 'an act which the law declares to be punishable *or which deserves punishment according to the fundamental principle of a penal statute and the healthy sentiment of the people*' (emphasis added).

<sup>74</sup> See eg Model Penal Code § 1.02(3).

<sup>75</sup> StGB § 339 (*Rechtsbeugung*).

**Legislativity.** It is one thing for a judge to interpret a criminal statute by analogy. It is quite another for a judge to create the criminal offence in the first place. Under the continental understanding of the legality principle, the former was unacceptable; the latter would have been unthinkable. Yet this is precisely what common law courts, first in England and then in the United States, did for centuries.<sup>76</sup> In the United States, the principle of legality was never invoked to question the court's power to make criminal law. Modern US criminal codes did shift criminal lawmaking power from the judiciary to the legislature, but not on the ground that judicial criminal lawmaking violated constitutional prohibitions of retroactivity, vagueness, or some more fundamental requirement of fair notice. Judicial criminal lawmaking in the United States was not abolished; it slowly faded away, after having survived well into the twentieth century, when US courts finally stopped recognizing new 'common law misdemeanours' that constituted offences against 'the public police and oeconomy'.<sup>77</sup>

Today, executive criminal lawmaking by regulatory agencies and quasi-agencies like sentencing commissions poses a far more significant threat to the principle of legality in US criminal law. The US Supreme Court's recent downgrading of the federal sentencing guidelines from what *de facto*, if not *de jure*, amounted to a comprehensive regulatory code of sentencing law to a discretionary set of guidelines does not reflect a commitment to the principle of legality. That decision instead was motivated by a new-found desire to protect the jury's role in the criminal process.<sup>78</sup>

**Prospectivity.** Retroactivity is condemned in continental law as it is in US criminal law, though without necessarily having recourse to constitutional rights.<sup>79</sup> Retroactivity in fact was hotly debated in German criminal law long before the appearance of a jurisprudence of constitutional rights in Germany. Karl Binding famously argued that retroactive application of criminal statutes is not necessarily illegitimate because criminal statutes represented only one possible manifestation of a prohibitory norm that might also find recognition in civil statutes or other state action (such as the publication of the norm itself—do not do X). In Binding's view, only the prohibitory norm could not be retroactively applied. As long as the offender had notice of the background norm, the particular, prospective or retrospective, way in which the state chose to respond to its violation was entirely up to the state.

<sup>76</sup> See Stanislaw Pomorski, *American Common Law and the Principle Nullum Crimen Sine Lege* (2nd edn, 1975).

<sup>77</sup> See eg *Commonwealth v Keller*, 35 Pa D & C 2d 615 (1964) (creating common law offence as 'indecent disposition of a dead body').

<sup>78</sup> See Dubber and Kelman (n 8), 119–23.

<sup>79</sup> That's not to say that there aren't constitutional prohibitions of retroactivity. See eg GG art 103(2).

*Constitutional Law.* Outside US law, the problem of vague criminal statutes is not necessarily framed as a constitutional issue. Rather than striking down the statute on vagueness grounds, courts are more likely to interpret it narrowly. Also, continental criminal law tends to be more generous in its interpretation of mistake of law defences based on claims of a good-faith misinterpretation of an unclear statute, as a matter of criminal rather than constitutional law.<sup>80</sup> (US criminal law instead traditionally has taken a very dim view of ignorance of law claims, at least in so far as they are not based on an official misinterpretation of applicable law.)

Only recently have non-US courts begun to explore the connection between the principle of legality (along with other basic principles of criminal law) with the norms of domestic constitutional law and international human rights law. Unlike their counterparts elsewhere, US courts cannot fall back on a well-developed jurisprudence of criminal law; instead they are more likely to draw on a long-standing US constitutional jurisprudence. Viewing an issue in constitutional terms does give courts the power to strike down legislation, thus subjecting the legislature to scrutiny not found elsewhere. By contrast, the finding by a non-US court that a given statute violates this criminal law principle or that does not imply the statute's invalidity. At the same time, however, US courts tend to disregard the criminal nature of an issue. Notably in the special part of criminal law, US courts investigate the state's authority to regulate certain conduct in general, rather than its power to punish that conduct by means of the criminal law.

The legality principle in the United States, then, is considerably narrower than in other countries. Violations of those (few) aspects of the legality principle that are recognized in the United States, however, face a stiffer sanction than mere judicial disapproval: they result in the invalidation of the offending statute. Also note that the (non-constitutional) norms that add up to a broad legality principle in non-US countries are not always as categorical as they might at first appear. The well-known (non-constitutional) principle of compulsory prosecution (*Legalitätsprinzip*) in the German Code of Criminal Procedure, for instance, has for some time been subject to an exception that has begun to threaten the rule—the (non-constitutional) *Opportunitätsprinzip*, or principle of appropriateness. The latter principle releases prosecutors (but, at least in theory, not police officers, who are thought not to deserve the same level of trust) from the former in cases where the public interest does not require prosecution. As one might suspect, the principle of appropriateness played a central role in the spread of plea bargaining in Germany over the past few decades, after—and even while—this practice was universally disavowed and, in fact, derided as a typical example of the pervasive lawlessness of

<sup>80</sup> But see Wolfgang Naucke, 'Staatstheorie und Verbotsirrtum', in Bernd Schünemann, Hans Achenbach, Wilfried ~~Battifol~~, Bernhard Haffke, and Hans-Joachim Rudolph (eds), *Festschrift für Claus Roxin* (2001), 503 ff.

the US criminal process and the principled superiority of German criminal procedure law.<sup>81</sup>

**Codification.** A commitment to a broad principle of legality in civil law countries also has not interfered with an approach to codification that leaves considerable room for interpretation and to developments in what is framed as a science of criminal law. The German Criminal Code, for instance, does not define the various mental states required for criminal liability (*Vorsatz, Fahrlässigkeit*). By contrast, the centrepiece of the Model Penal Code project in the United States was a comprehensive and systematic definition of the subjective element of crime, resulting in a taxonomy of mental states including purpose, knowledge, recklessness, and negligence.<sup>82</sup> The German Criminal Code also does not define the basic objective element of criminal liability, conduct. Here too, the Model Penal Code includes a lengthy, if not particularly systematic, provision—which, in the end, evades the thorny question of what constitutes voluntary conduct simply by listing conduct that would not qualify as voluntary.<sup>83</sup> Finally, the German Criminal Code provides no definition of possession, a crucial concept in modern criminal law where possession (of drugs, weapons, instruments of crime, stolen goods, and so on) is increasingly criminalized as a form of early preventive detention that attaches even before the point of preparation—never mind an attempt—to commit an offence.<sup>84</sup> In the case of possession, a definition is particularly important since, without more, criminal liability for possession (a relationship between a person and an object) cannot be squared with the general principle that criminal conduct be limited to conduct. (The Model Penal Code at least attempts a definition, even if it proves unsatisfactory in the end.<sup>85</sup>)

German criminal law, of course, has developed a highly sophisticated account of the objective and subjective elements of criminal liability. In fact, one entire school of German criminal law theory, *Finalismus*, which dominated criminal law thought in Germany and German-influenced countries for the better part of the twentieth century, derived an entire system of criminal liability from the ontology of actness, which purportedly implied an essentially human intentionality. Likewise, the discussion of the distinctions among the various types of *Vorsatz* and *Fahrlässigkeit*, or *dolus* and *culpa*, fills volumes. The point here is simply that none of these distinctions is based on the criminal code (except in the loose, and ultimately

<sup>81</sup> See Dubber, 'American Plea Bargains', (n 24), 547 ff.

<sup>82</sup> Model Penal Code § 2.02; see Markus D. Dubber, *Criminal Law* (n 40), § 4.2.

<sup>83</sup> Model Penal Code § 2.01; see Dubber, *Criminal Law* (n 40), § 4.1.

<sup>84</sup> On German criminal law, see Cornelius Nestler, 'Rechtsgüterschutz und Strafbarkeit des Besitzes von Schusswaffen und Betäubungsmitteln', in *Vom unmöglichen Zustand des Strafrechts* (1995), 65; Eberhard Struensee, 'Besitzdelikte', in Erich Samson, Friedrich Dencker, and Peter Frisch (eds), *Festschrift für Gerald Grünwald* (1999), 713; Ken Eckstein, *Besitz als Straftat* (2001); on US criminal law, see Dubber (n 44), 829 ff.

<sup>85</sup> Model Penal Code § 2.01(4); see Dubber, *Criminal Law* (n 40), § 4.1(d).

circular, sense that the code reflects a certain conceptual structure, which is itself external to it).

The vast bulk of German criminal law (and therefore of much of criminal law in civil law countries) stems not from codes, nor from courts interpreting these codes, but from the academic literature. Traditionally, the main manufacturers of German criminal law doctrine have been German criminal law professors who regard themselves as engaged in the continuing enterprise of criminal law science, a branch of legal science. (In fact, the definitions of mental states were omitted from the German Criminal Code specifically to allow for continued scientific debate on this issue.<sup>86</sup>) This is not the place to scrutinize the considerable and highly influential achievements of German criminal law science over the past centuries. Suffice it to highlight the tension between the principle of legality and a system of criminal law that relies crucially on the jurisgenerative authority of unelected experts engaged in a highly exclusive and increasingly impenetrable scientific project.<sup>87</sup>

#### (e) *Analysis of Criminal Liability*

It is generally assumed that the analysis of criminal liability differs widely in common law and civil law, with one system requiring *actus reus* and *mens rea*, and the other *Tatbestandsmäßigkeit* (*tipicidad, tipicità*), *Rechtswidrigkeit* (*antijuricidad, antiigiuridicità*), and *Schuld* (*culpabilidad, colpevolezza*). The significance of these structural matters tends to be exaggerated; none the less, they are worth one's attention if only because supposed structural incompatibility is an unnecessary impediment to comparative analysis.

Modern US criminal law uses an analytic structure that is easily compatible with the German scheme.<sup>88</sup> The Model Penal Code defines a crime as 'conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests'.<sup>89</sup> Criminal liability thus has three basic components: (1) conduct, (2) without justification, and (3) without excuse. To count as a crime, 'conduct' must, however, meet several additional criteria, namely it must: (a) inflict or threaten (b) substantial harm to individual or public interests. If we put the two together, we get the Model Penal Code's complete scheme of criminal liability. A person is criminally liable if he engages in (1) conduct that (a) inflicts or threatens (b) substantial harm to individual or public interests (2) without justification and (3) without excuse.

This scheme is easily mapped onto the traditional common law scheme. It is

<sup>86</sup> For a recent suggestion that German criminal law professors be recognized as a 'fourth branch of government', see Bernd Schünemann, 'Strafrechtsdogmatik als Wissenschaft', in Schünemann *et al.* (n 80), 1, 8.

<sup>87</sup> Dubber (n 31), 1049 ff. <sup>88</sup> See Dubber and Kelman (n 8), ch 3.

<sup>89</sup> Model Penal Code § 1.02; see Dubber, *Criminal Law* (n 40), § 3.



impossible to crystallize a single coherent liability analysis from hundreds of years of Anglo-American common law. Let's assume, for present purposes, that a crime in the common-law sense consists of two 'offence' elements, (1) *actus reus* (the guilty act) and (2) *mens rea* (the guilty mind). *Actus reus* and *mens rea* are necessary, but not sufficient, prerequisites of criminal liability under the common law; criminal liability requires both a criminal 'offence' (consisting of *actus reus* and *mens rea*) and the absence of 'defences'. Particularly in the law of homicide, which has always managed to attract the lion's share of doctrinal attention, courts generally divided these defences into two types, justifications and excuses. Criminal liability thus attached to an offence committed (2) without justification and (3) without excuse. The analytic schemes of the Model Penal Code and the common law therefore are more or less interchangeable depending on how one views the connection between conduct and *mens rea*. The Model Code defines conduct as encompassing both: conduct is 'an action or omission and its accompanying state of mind'. Replacing '*actus reus* and *mens rea*' with 'conduct', the common-law scheme of criminal liability therefore looks like this: (1) conduct, (2) without justification, and (3) without excuse.

The similarity to the German tripartite scheme now is clear. (1) The inquiry into *Tatbestandsmäßigkeit* asks whether the accused's conduct matches the definition of a criminal offence, and is thus criminal in the formal sense. (2) The second level probes the formally criminal conduct's *Rechtswidrigkeit*, or unlawfulness, which is easily reframed as an inquiry into the presence or absence of a justification. (3) Assuming *Tatbestandsmäßigkeit* and *Rechtswidrigkeit*, the third and final prerequisite for criminal liability is *Schuld*, which might be rendered as guilt, responsibility, or perhaps blameworthiness, or—to put it differently once again—the absence of an excuse.

Despite this basic structural compatibility, which should suffice for meaningful comparative analysis, some general differences remain (besides the inevitable distinctions in specific rules). For one, US criminal law attaches far less significance to the definitions of, and distinctions among, the various levels of inquiry. Even the Model Penal Code considered them as no more than occasionally convenient analytic devices. Unlike in other traditions (notably in German criminal law), they are not generally thought to reflect the ontology, or the phenomenology, of criminal liability.<sup>90</sup> Moreover, even modern Anglo-American criminal law has retained the basic distinction between offence and defence, classifying justifications and excuses (themselves defensive concepts) as types of defence, rather than as preconditions for the attachment of criminal liability. This distinction, which is largely ignored in continental criminal law, reflects the continued dominance of procedure over substance in Anglo-American criminal law. The distinction, however arbitrary, also carries considerable doctrinal significance as it separates issues that must be proved

<sup>90</sup> See generally Dubber (n 31), 1049 ff.

by the state, beyond a reasonable doubt, from those that the defendant may be required to prove.<sup>91</sup>

(f) *General Principles of Criminal Liability*

Criminal liability requires conduct; mere thoughts or beliefs may not be criminalized. That much is clear, at least as a matter of principle (notwithstanding the criminalization of attempt and conspiracy, for instance). Unlike other systems, US criminal law has constitutionalized the so-called act requirement, though it is unclear whether the constitutional norm limits criminal liability to acts or, more narrowly, to voluntary acts.<sup>92</sup> Also unusually, US criminal law distinguishes between acts (as mere bodily movements) and voluntary acts. The constitutional norm does not reach the widespread criminalization of possession, which is widely recognized as a non-act; it bars the criminalization of the status of being a drug addict, but not the criminalization of drug possession by that same addict.<sup>93</sup>

Generally speaking, US criminal law in particular, and Anglo-American criminal law in general, is thought to be less inclined to criminalize another non-act: omission, or the failure to act by one who is obligated to act. The general German omission statute is regularly held up as a model for more callously individualistic criminal law systems to follow. It's worth noting that this provision originally was added to the German Criminal Code in 1935. It proscribed violations of one's 'duty according to sound popular sentiment', a central concept of National Socialist law, which regarded all serious crime as an act of treason, that is, as the violation of one's loyalty to the *Volk* community or its personal manifestation, the *Führer*.

The connection between the *mens rea* schemes in modern Anglo-American criminal law (which has been heavily influenced by the US Model Penal Code) and in continental (German-influenced) criminal law still awaits detailed exploration. The great comparatist Jimenez de Asúa surely oversimplified matters when he claimed that the Model Penal Code drafters merely rediscovered (and relabelled) the traditional civil law mental states of *dolus* (purpose), *dolus eventualis* (knowledge), conscious *culpa* (recklessness), and unconscious *culpa* (negligence).<sup>94</sup> For one, the Model Code concept of recklessness lacks the subjective element of conditional acceptance that is generally thought to be required for conscious *culpa* (though an argument can be made that the Model Code's concept of recklessness makes room for an element of acceptance by requiring 'conscious disregard' of a risk, rather than mere awareness of it).<sup>95</sup>

<sup>91</sup> Dubber and Kelman (n 8), 203–5.      <sup>92</sup> *ibid*, ch 4.B.

<sup>93</sup> See *People v Davis*, 33 NY 2d 221 (1973).

<sup>94</sup> Luis Jimenez de Asúa, *Tratado de Derecho Penal* (vol 1, 1964), 669. See generally L. A. Zaibert, 'Philosophical Analysis and the Criminal Law,' (2001) 4 *Buffalo Crim LR* 100 ff. For a careful comparative reading of the Model Code scheme, see Weigend (n 49), 657 ff.

<sup>95</sup> Dubber, *Criminal Law* (n 40), 73–6.

After traditionally opposing corporate criminal liability, civil law countries have gradually moved closer to the contrary Anglo-American position. Even Germany, which in principle continues to maintain that corporate entities are capable neither of engaging in criminal conduct (see finalism's rich concept of conduct, mentioned above) nor of forming culpable mental states, has quietly recognized corporate 'order offences' (*Ordnungswidrigkeiten*), to be distinguished from corporate 'crimes' (*Straftaten*). These 'order offences' are subject to 'monetary fines' (*Geldbußen*), to be distinguished from 'monetary penalties' (*Geldstrafen*).<sup>96</sup>

In general, the modern US law of complicity—which is related to corporate liability in so far as it involves imputing one (natural) person's conduct to another (juristic) person—today resembles continental law less than it did before the Model Penal Code. The distinctions in traditional Anglo-American criminal law among principals in the first and in the second degree and accessories before, at, and after the fact rivalled the continental taxonomy of *Täter*, *mittelbarer Täter*, *Mittäter*, ~~*Nebentäter*~~, and *Teilnehmer* in complexity, if not in systematic rigour. The Model Penal Code flattened the law of complicity, retaining only a distinction between principal and accomplice and expanding criminal liability to attempted complicity.<sup>97</sup> While the requirement of purpose was retained for accomplice liability, some US jurisdictions now criminalize non-purposive facilitation as a separate offence.

In the law of defences, some historical differences have been eroding. German criminal law continues to reject a formal proportionality requirement in the law of self-defence. None the less, it has begun to recognize limits on the right to stand one's ground that in the final analysis approximate the long-standing Anglo-American requirement that even those who are in the right must retreat if they can do so in complete safety. In the law of necessity, Anglo-American criminal law continues to have some difficulty with a defence of circumstantial (as opposed to personal) duress, which has long been recognized in German criminal law. At the same time, German criminal law continues to insist that necessity cannot provide a defence in homicide cases because it is improper, or impossible, to measure the value of human life. This position also retains strength in Anglo-American criminal law, despite the countervailing influence of the Model Penal Code which rejected the taboo in favour of a general lesser-evil rule.<sup>98</sup>

The traditional Anglo-American position on insanity, which recognized only a

<sup>96</sup> Dubber (n 31), 1049 ff, 1068; see generally Albin Eser, Günter Heine, and Barbara Huber (eds), *Criminal Responsibility of Legal and Collective Entities* (1998).

<sup>97</sup> Markus D. Dubber, 'Criminalizing Complicity: A Comparative Analysis', *Journal of International Criminal Justice* (forthcoming 2006); cf Carl Erik Herlitz, *Parties to a Crime and the Notion of a Complicity Object: A Comparative Study of the Alternatives Provided by the Model Penal Code, Swedish Law and Claus Roxin* (1992).

<sup>98</sup> The taboo may be weakening even in Germany. See eg Michael Pawlik, '§ 14 Abs. 3 des Luftsicherheitsgesetzes: Ein Tabubruch?', (2004) *Juristenzeitung* 1045 ff (legitimacy of statute authorizing the use of arms to intercept aircraft that threaten human lives).

limited defence in case of incapacity to know the difference between right and wrong, has shown remarkable resilience (and, in fact, many US jurisdictions abandoned, or at least significantly limited, the insanity defence in the wake of John Hinckley's 1982 insanity acquittal for his botched assassination attempt of Ronald Reagan<sup>99</sup>). The Model Penal Code position, which was adopted in several US jurisdictions, more closely resembles the continental position in also recognizing insanity based on the volitional incapacity to control one's behaviour.<sup>100</sup> Anglo-American criminal law remains hostile to intoxication as a defence, either precluding it altogether or, more commonly, limiting it to certain offences (eg those requiring intent or knowledge, rather than recklessness).<sup>101</sup> German criminal law places no such limitations on the use of intoxication as a defence, but then criminalizes the intoxication itself (StGB § 323a).<sup>102</sup>

## 2. Special Part

Any attempt to provide even a preliminary overview of the enormous number and variety of criminal offences that constitute the special parts of various jurisdictions found in various criminal law systems would far exceed the scope of this essay. (Given the continuous expansion of modern criminal law in criminal and non-criminal, consolidated and unconsolidated, statutes and administrative rules and regulations, capturing the breadth of the special part of any single jurisdiction would be difficult enough.) For that reason we will focus on some of the broader characteristics of special parts in common and civil law systems, rather than on specific offences.

The concept of *Rechtsgut* (*bien jurídico*, *bene giuridico*) plays a central role in the structure of the special part of continental criminal law, as well as in its theory of criminal law in general.<sup>103</sup> A crime is defined as a violation of a *Rechtsgut*, and the special part consists of offences designed to protect various *Rechtsgüter*. There is no similar concept in Anglo-American criminal law, which instead vacillates between ill-defined concepts such as 'individual or public interests' and 'harm or evil'. At the same time, it is worth noting that the all-important question of what qualifies as a *Rechtsgut* remains unsettled. While it is easy enough to define a *Rechtsgut* as

<sup>99</sup> See ~~eg *State v Clark*, Nos. 1 CA-CR 03-0851, 1 CA-CR 03-0985 (Ariz Ct App filed 25 January 2005), cert granted, 126 S Ct 797 (5 December 2005); *Finger v State*, 27 P 3d 66 (Nev 2001).~~

<sup>100</sup> Compare StGB §§ 20 & 21 with Model Penal Code §§ 4.01 & 4.02; see generally Dubber and Kelman (n 8), ch 7.H.

<sup>101</sup> See generally Dubber and Kelman (n 8), ch 5.G.

<sup>102</sup> cf Brian Foley, 'Same Problem, Same Solution? The Treatment of the Voluntarily Intoxicated Offender in England and Germany', (2001) *Trinity College LR* 119 ff.

<sup>103</sup> See Markus Dirk Dubber, 'Theories of Crime and Punishment in German Criminal Law', (2006) 53 *AJCL* 679 ff.

any interest that a criminal provision is designed to protect, a circular definition of this sort has no critical bite. Even if one could identify a criminal statute that does not protect an interest that could be classified as a *Rechtsgut*, it is unclear what such a finding would imply. Given that the *Rechtsgut* is grounded in preconstitutional criminal law theory rather than in a constitutional guarantee, it is generally understood that an offence without a *Rechtsgut* is not, for that reason alone, unconstitutional or invalid. Even without critical force, however, the *Rechtsgut* may provide a useful analytic device for statutory interpretation that could take the place of a hodgepodge of concepts used by Anglo-American courts for that purpose.

Without a concept of *Rechtsgut*, US courts have turned to constitutional law, rather than criminal law, in cases that raise the question of the permissible scope of the special part. For instance, the US Supreme Court considered whether homosexual sex may be criminalized in keeping with the constitutional right to privacy of consenting adults,<sup>104</sup> whether the private consumption of pornography may be punished in keeping with the right to freedom of thought,<sup>105</sup> whether criminalizing assisted suicide violates a constitutionally recognized right to die,<sup>106</sup> and so on.

Both common law and civil law extend the protection of the relevant interests or rights to acts that fall short of actual interference. Apart from the law of inchoate offences such as attempt, a criminal offence may be consummated by posing a threat or even engaging in conduct that ordinarily poses a threat of harm even if it may not have posed a threat in the particular case. Anglo-American criminal law boasts a wide and ever-expanding variety of implicit and explicit endangerment offences, even if the taxonomy of criminal offences has not been mapped out as systematically as in continental criminal law.<sup>107</sup>

Traditionally, the Anglo-American law of inchoate (incomplete, preparatory, anticipatory) offences has differed rather dramatically from continental criminal law. Notably the offence of conspiracy, which historically could attach not only to any criminal offence but even to non-criminal yet otherwise objectionable ('corrupt, dishonest, fraudulent, or immoral') behaviour, has no direct analogue in continental criminal law, as the Allies noticed as they prepared for the Nuremberg Trials:

During much of the discussion, the Russians and French seemed unable to grasp all the implications of the concept; when they finally did grasp it, they were genuinely shocked. The French viewed it entirely as a barbarous legal mechanism unworthy of modern law, while the Soviets seemed to have shaken their head in wonderment—a reaction, some cynics may believe, prompted by envy. But the main point of the Soviet attack on

<sup>104</sup> *Lawrence v Texas*, 539 US 558 (2003) (no); but see *Bowers v Hardwick*, 478 US 186 (1986) (yes).

<sup>105</sup> *Stanley v Georgia*, 394 US 557 (1969) (yes).

<sup>106</sup> *Washington v Glucksberg*, 521 US 702 (1997) (no).

<sup>107</sup> For a recent analytic effort in this regard, see Markus Dirk Dubber, 'The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process', in R. A. Duff and Stuart Green (eds), *Defining Crimes: Essays on the Criminal Law's Special Part* (2005), 91 ff.

conspiracy was that it was too vague and so unfamiliar to the French and themselves, as well as to the Germans, that it would lead to endless confusion.<sup>108</sup>

The Model Penal Code retained the offence of conspiracy, though limiting it to criminal objectives. It may well be that modern continental criminal law can achieve much of the same result through a broad use of doctrines of complicity and attempt.<sup>109</sup> Still, it should be kept in mind that even the modern US view of conspiracy remains extremely broad: The Model Penal Code expanded conspiracy to cover so-called ‘unilateral’ conspiracies that require merely the belief that one has entered into an agreement with another and generally punished conspiracies (and all other inchoate offences) as harshly as consummated offences. Federal criminal law, in fact, provides for harsher punishments of conspiracies to commit an offence than for the commission of the offence itself, permits punishment for both the conspiracy to commit an offence and its commission, and generally treats proof of conspiracy as sufficient for liability for complicity in the object offence. The Model Penal Code in turn significantly broadened the scope of attempt liability to include any act that amounts to a substantial step toward the commission of the object offence, provided that act is indicative of the defendant’s criminal purpose.<sup>110</sup> Note also that in US law—unlike in German law, for instance—attempt, conspiracy, and solicitation are general inchoate offences that attach to any criminal offence, including misdemeanours.

#### IV. COMPARATIVE CRIMINAL LAW IN CONTEXT

Comparative criminal law is best seen as one way to gain critical distance from a given system of criminal law by placing it within a larger context. Criminal law history is another. So is other transdisciplinary research, drawing on the tools and insights of the social sciences and humanities. Within comparative criminal law, transnational analysis is only one possible approach among many. Others include intranational comparison among various types of law (torts, contracts, property,

<sup>108</sup> Stanislaw Pomorski, ‘Conspiracy and Criminal Organizations’, in *The Nuremberg Trial and International Law* (1990), 213, 218–19 (quoting Bradley F. Smith, *Reaching Judgment at Nuremberg* (1977), 51).

<sup>109</sup> See generally Dubber n 97.

<sup>110</sup> cf George Fletcher, ‘Is Conspiracy Unique to the Common Law?’, (1995) 43 *AJCL* 171 ff (reviewing Elisabetta Grande, *Accordo criminoso e conspiracy: Tipicità e stretta legalità nell’analisi comparata* (1993) ).

taxation, victim compensation) and regulation within a given jurisdiction and among criminal law systems across domestic jurisdictions.

It is important, in other words, to place comparative criminal law itself within a larger context. Detached from a broader vision of thinking about, teaching, and critiquing law, comparative criminal law all too easily slips into essayistic travel reportage or the collection of criminal exotica, if not the considerably less harmless confirmation of preconceived notions about the superiority—or inferiority—of one's domestic criminal law system. Comparative criminal law has the potential to make an important contribution to criminal law, a subject that is both more parochial *and* more in need of critical analysis than any other form of state action through law. That potential remains as yet unrealized.

## BIBLIOGRAPHY

- Luis Jiménez de Asúa, *Tratado de derecho penal* (4th edn, 1964)
- Juan Bustos Ramírez and Manuel Valenzuela Bejas, *Derecho penal latinoamericano comparado* (1981)
- Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986)
- Markus D. Dubber and James Q. Whitman, *Comparative Perspectives on Criminal Law* (forthcoming 2007)
- Markus D. Dubber and Kevin J. Heller (eds), *Handbook of Comparative Criminal Law* (forthcoming 2007)
- Albin Eser, George P. Fletcher, and Karin Cornils (eds), *Justification and Excuse: Comparative Perspectives* (1987)
- George P. Fletcher, *Basic Concepts of Criminal Law* (1998)
- Craig Bradley, *Criminal Procedure: A Worldwide Study* (1999)
- Mireille Delmas-Marty and J. R. Spencer (eds), *European Criminal Procedures* (2002)
- Jean Pradel, *Droit pénal comparé* (2nd edn, 2002)
- Stephen C. Thaman, *Comparative Criminal Procedure: A Casebook Approach* (2002)
- James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (2003)
- Alberto Cadoppi, *Introduzione allo studio del diritto penale comparato* (2nd edn, 2004)
- Liora Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England* (2004)
- Richard Vogler, *A World View of Criminal Justice* (2005)

