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Making Comparative Criminal Law Possible

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EINFÜHRUNG IN DAS US-AMERIKANISCHE STRAFRECHT. By Markus Dirk Dubber. *Munich: C.H. Beck*, 2005. Pp. xvii, 216. €19.80.

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Today there can be little doubt that criminal law has internationally more in common than one might expect at first sight.[1] That is why—despite a hesitant development in the last century—international studies, even in the field of criminal law, become more and more common. And this is the right way to go, considering that each and every national criminal law system has to deal with similar legal aspects and problems. So why not direct one's view abroad to see how certain aspects are handled there?

German criminal law science, long the dominant body of criminal law scholarship in the civil law world,[2] is already following such an approach. Comparative studies are conducted with a number of other European, Scandinavian, South American, and Asian nations.[3] By contrast, a

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1. *Cf.* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW (1998).

2. *E.g.*, Markus D. Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 6 GERMAN L.J. 1049 (2005), http://www.germanlawjournal.com/article.php?id=613.

3. *See, e.g.*, WINFRIED HASSEMER & FRANCISCO MUNOZ CONDE, INTRODUCCIÓN A LA CRIMINOLOGÍA Y AL DERECHO PENAL (1989). This book is an attempt by a German and a Spanish author to transfer a German approach into the system of Spanish criminal law. Recently, the German criminal law scholar Claus Roxin emphasized in the preface of the newest edition of his famous textbook 1 STRAFRECHT ALLGEMEINER TEIL (4th ed. 2006) that he felt compelled by the growing international cooperation in the field of criminal law to include and cite international literature (for the first time). It is also worth mentioning that several German criminal law textbooks have been translated into different

scientific exchange with the United States and its criminal law system barely exists. Most Europeans think of American criminal law only in its extremes, such as the death penalty, habitual offender laws (notably the infamous three strikes laws),[4] and the practice of plea bargaining, which seems to conflict with very basic rules of criminal procedure.[5] Alas, this perception focuses on a few highly

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languages. *See, e.g.*, HANS WELZEL, DAS DEUTSCHES STRAFRECHT (11th ed. 1969) (translated into Spanish, Italian, Korean, Japanese and Greek); JOHANNES WESSELS & WERNER BEULKE, STRAFRECHT, ALLGEMEINER TEIL (35th ed. 2005) (translated into Portuguese, Spanish and Korean). However, it seems that foreign countries are more interested in the German criminal law system than German scholars are in other nations' criminal law, since there are hardly any translations available of foreign criminal law textbooks. Note also that South American Courts occasionally cite German literature in criminal cases. A striking example is a recent opinion by Colombia's Corte Constitucional, which cites a host of German criminal law scholars, including Hassemer, Roxin, Jakobs, Welzel, Binding, Maurach, Zipf, and Otto. *See* Sentencia C-333/01 (Mar. 29, 2001), *available at* http://www.secretariasenado.gov.co/leyes/SC333_01.htm. (I am indebted to Carmen Ruiz for this reference). The German Constitutional Court (*Bundesverfassungsgericht*), by contrast, tends to stick to German literature in criminal cases.

An important center of comparative criminal law research in Germany is the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg. *See* Max-Planck-Institut, http://www.iuscrim.mpg.de/iuscrim.html (last visited Feb. 24, 2005).

4. *Cf.* Lutz Eidam, *Mentally Retarded Offenders and the Death Penalty: The Latest Supreme Court Ruling and Possible European Influences*, 4 GERMAN L.J. 493 (2003), http://www.germanlawjournal.com/article.php?id=272; Ulrike Grasberger, *Three Strikes and You Are Out*, 110 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 796 (1998) (F.R.G.); Wanja A. Welke, *Mandatory Sentencing*, 2002 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 207 (F.R.G.); Brunhild Wiek, *Wider aller Vernunft: Die Todesstrafe in den Vereinigten Staaten*, 1990 MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 113 (F.R.G.). Another issue Germans and Europeans in general tend to emphasize with regard to American criminal law is the prison population explosion. *Cf.* Katja Gelinsky, *Keine Strafe ohne Geld: Amerika kann sich seine Gefängnisse nicht mehr leisten*, FRANKFURTER ALLGEMEINE ZEITUNG (F.R.G.), Feb. 9, 2004, at 31. On harsh sentencing in the United States, see Uwe Buse, *Lebenslang, immer wieder: Warum in den USA ein Dieb härter als viele Mörder bestraft wurde*, 25 DER SPIEGEL 60 (2005) (F.R.G.).

5. *E.g.*, Toni M Massaro, *Das amerikanische Plea-Bargaining System: Staatsanwaltschaftliches Ermessen bei der Strafverfolgung*, 1989 STRAFVERTEIDIGER [StV] 454 (F.R.G.); Thomas Weigend, *Strafzumessung durch die Parteien: Das Verfahren des plea bargaining im amerikanischen Recht*, 94 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 200 (1982) (F.R.G.). Also, *Bernd Schünemann, Absprachen im Strafverfahren? Grundlagen, Gegenstände und Grenzen*, 58 DEUTSCHER JURISTENTAG 104 (1990) (F.R.G.) calls the American system a "guilty plea enforcement machine." For a comparative

selective issues in American criminal law while leaving its doctrinal system totally unattended.

In his *Einführung in das US-amerikanische Strafrecht* ("Introduction to U.S.-American Criminal Law"), Markus Dubber tries to replace this narrow and piece-meal European view of American criminal law with a comprehensive approach. It is the first book on the general principles of American criminal law written in German, and as a result, is poised to shape German thinking on American criminal law for some time to come.

A first look at the table of contents of the book reveals that the book's structure resembles that of textbooks on general German criminal law, thus making it readily accessible to German scholars and students while, at the same time, highlighting some basic structural similarities between American and German criminal law. Dubber's book follows the three-step analysis scheme for criminal liability, which includes chapters on the prerequisites of criminality (*Handlung* and *Tatbestandsmäßigkeit*), as well as issues concerning justification (*Rechtfertigung*) and excuse (*Entschuldigung*).[6] Such an approach to criminal liability is—even today—not universally followed in the United States considering the traditional English common law used a two-step analysis, which roughly distinguished between offenses (themselves constituted of actus reus and mens rea) and defenses.[7] As Dubber demonstrates, however, the influential Model Penal Code (MPC) recognizes three levels of criminal liability that parallel those familiar with German criminal law.

The book's emphasis on the MPC (published by the American Law Institute in 1962) initially comes as a surprise to a German reader eager to learn something about contemporary American criminal law, considering

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perspective, see Markus D. Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547 (1997).

6. For an English-language overview of the German system for analyzing criminal liability, see Wolfgang Naucke, *An Insider's Perspective on the Significance of the German Criminal Law Theory's General System for Analyzing Criminal Acts*, 1984 BYU L. REV. 305. *See also* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 575-78 (1978).

7. On the differentiation between justification and excuse, see the comparative work of Winfried Hassemer, *Justification and Excuse in Criminal Law: Theses and Comments*, 1986 BYU L. REV. 573.

that the MPC is merely a model piece of legislation that never came into force in toto. But after Dubber's first chapter, the reason he focused on the MPC becomes quite clear. Since the criminal law of the fifty-two jurisdictions in the United States (including the District of Columbia as well as federal criminal law, found in the Federal Criminal Code—Title 18 of the U.S. Code—and other federal statutes) had become increasingly complex and confusing, particularly in the first half of the twentieth century, the code attempted to systematize and thus simplify American criminal law. Moreover, at least forty of the fifty states took the MPC as a model to reform their criminal codes, and courts all over the United States (including the U.S. Supreme Court) consult the MPC to address difficult doctrinal problems.[8]

The decision to focus on the MPC analysis also makes the book accessible to readers from the civil law tradition in general and German readers in particular. As already mentioned, the MPC's overall structure generally resembles the three-part analysis of criminal liability familiar to criminal lawyers outside the common law tradition. Moreover, the very fact that the Code is a code, and therefore represents a comprehensive statement of the basic principles of criminal law, facilitates comparative analysis by readers who have long grown accustomed to conceiving of criminal law both as a statutory subject, rather than one that evolves over time through judicial opinions, and as a conceptually sophisticated and highly developed area of law.

Besides setting out the basic ideas underlying the MPC, the first chapter also introduces the reader to important notions of American criminal law. Among them, for instance, is the American understanding of "legality" (which differs substantially from the German *Legalitätsprinzip*, or principle of compulsory prosecution[9]), the rise and fall of

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8. MARKUS DIRK DUBBER, EINFÜHRUNG IN DAS US-AMERIKANISCHE STRAFRECHT 16 (2005).

9. For an English language discussion of the German *Legalitätsprinzip* compare NIGEL FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS 341-42 (3d ed. 2003) and THOMAS WEIGEND, CRIMINAL PROCEDURE: A WORLDWIDE STUDY 187, 210 (Craig M. Bradley ed., 1999). For an introduction to the understanding of "legality" in different criminal law systems in general, compare FLETCHER,

judge-defined "common law crimes" in the United States, the prevalent theories of punishment in American criminal law, and the American understanding of criminal harm and of the legal goods or interests that are meant to be protected by the criminal law. Before chapter one, Dubber helpfully summarizes the American method of legal citation, which will be appreciated by foreign readers who wish to follow up the numerous references to primary and secondary sources in the book.

Next, Dubber delves into the depths of the doctrinal rules of modern American criminal law, as illustrated by the MPC's general part. Following the three-step analysis of criminal liability, chapter two deals with all the issues a German lawyer would assemble under the legal term *Tatbestandsmäßigkeit* (prerequisites of the criminal offense). The chapter deals with the different forms of actus reus (commission, omission, possession) and related issues (complicity, causation, inchoate offenses). Also, it discusses in considerable detail problems associated with the concept of mens rea, including the MPC's differentiated and highly influential scheme of modes of culpability (purpose, knowledge, recklessness, negligence), strict liability, and intoxication and mistake as relevant to the negation of mens rea. Particularly, the treatment of mens rea makes the potential for comparative analysis explicit, as Dubber draws out parallels between the American and the German approach to the crucial question of intent, comparing and contrasting the MPC scheme with the traditional civil law distinction between various types of *dolus* and *culpa*.

At first sight, a German reader must be amazed by the complexity of the MPC's mens rea provision. As opposed to Germany, where all mens rea issues are in the hands of the judiciary,[10] everything is codified in considerable detail.[11] This seems odd from a German perspective, since it is the German criminal law system that is strictly code-based, as

supra note 1, at 206-11 (distinguishing between "positive" and "negative" legality).

10. Section fifteen of the German Penal Code only provides that intent (*Vorsatz*) is a necessary prerequisite for criminal liability. *See* Strafgesetzbuch [StGB] [Penal Code] § 15.

11. *See* MODEL PENAL CODE § 2.02 (1962).

opposed to Anglo-American criminal law that still retains some common law elements.[12]

However, one soon finds out that the American mens rea scheme contains broad similarities with—and some specific differences from—the different forms of *Vorsatz* (intent) in German criminal law. It would be safe to assume that the MPC's definition of "purpose" is broadly consistent with the German concept of *Absicht* (*dolus directus* one). Also, the code's definition of "knowledge" broadly resembles the German legal concept of *dolus directus* two.[13] On the other hand, the American concept of recklessness based on section 2.02(2)(c) of the MPC seems to vary from its German pendent *dolus eventualis* (conditional intent) more than one might expect at first sight. Dubber cites an interesting example: an injury case where the actor was aware that something might happen to the victim but was not certain that it would happen might lead to different results under German and American mens rea schemes if the actor hoped that he would not hit another person.[14] Under the German system, *Vorsatz* (in the form of *dolus eventualis*, or conditional intent) clearly would be absent. Under the MPC, however, the outcome of the case could be different, depending on the understanding of the code's requirement of "conscious disregard," a risk in its definition of recklessness. So it seems from a German perspective that the concept of recklessness is to be seen somewhere in between the German concepts of *dolus eventualis* and conscious negligence (*bewusste Fahrlässigkeit*).[15]

The German scholar Thomas Weigend[16] already claimed that the German criminal law system might learn how to ease the still ongoing and complicated debate of how to differentiate between intent (*Vorsatz*) and negligence

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12. Note, however, that the United States appears to be well on its way to a code-based criminal law system as well. *Cf.* Markus D. Dubber, *Reforming American Penal Law*, 90 J. CRIM. L. & CRIMINOLOGY 49, 50 (1999) ("The age of the common penal law is over.").

13. Thomas Weigend, *Zwischen Vorsatz und Fahrlässigkeit*, 93 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 657 (674) (1981) (F.R.G.).

14. DUBBER, *supra* note 8, at 71.

15. *See* Weigend, *supra* note 13, at 674-677.

16. *See id.* at 687-700.

(*Fahrlässigkeit*)[17] by acknowledging a category like the American standard of recklessness. In Germany, intent in its form of *dolus eventualis* requires a court to find out what the defendant knew (first element of intent) and what he wanted (second element of intent) when he committed the crime.[18] Here, Weigend is absolutely right when he states that it is a considerable challenge to determine what a defendant actually wanted somewhere in the past.[19] The American notion of recklessness would have the advantage of more closely approaching the psychic reality of the defendant in the past, since it just asks whether the defendant disregarded a substantial risk.[20] On the other hand, one should not disregard the fact that adopting a concept of recklessness in Germany would extend intent liability far into today's area of negligence and thus lead to harsher sentencing in certain areas.[21] So all these points considered, Weigend's suggestion has several advantages and disadvantages.

Apart from that, perhaps German criminal law could at least learn from the MPC's attempt to codify mens rea issues systematically and in a meaningful way. Yet, the MPC's very detailed mens rea scheme, which suggests different forms of mens rea for different offense elements, might turn out to be a little bit too detailed after all. Generally speaking, as already stated, it is difficult to ascertain a perpetrator's thoughts about something he or she did in the past. Nobody has access to the thoughts of

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17. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Nov 4, 1988, 36 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 1 (9) (F.R.G.) (so-called Aids Case), as well as WESSELS & BEULKE, *supra* note 3, ¶ 216-229 (35th ed. 2005).

18. *See* 36 BGHSt 1, *supra* note 17.

19. *See* Weigend, *supra* note 13, at 689.

20. *See id.*

21. It seems that the expansion of recklessness into what Germans would call "conscious negligence" (*bewusste Fahrlässigkeit*) helped the American scholar Jerome Hall justify his critical suggestion that no punishment of negligent behavior is needed beyond the punishment of reckless behaviour. *Cf.* Jerome Hall, *Negligent Behaviour Should be Excluded from Penal Liability*, 63 COL. L. REV. 632 (1963). Hall suggests drawing the line of punishment between voluntary harm (punishable) and inadvertence (unpunishable), showing at the same time that behavior involving "gross deviation" or merely thinking of a risk that finally comes true, may be enough to assume recklessness under the MPC. *See id.* at 633, 641.

other human beings (luckily!). As a result, findings about intent are always insecure and require a certain amount of conjecture on the part of the fact finder—a criminal judge (in Germany) or a jury[22] (in the United States). Thus, an overly differentiated system that puts too much emphasis on finely grained distinctions among types of mens rea might further complicate an inquiry that is already complicated enough.

Similar concerns arise throughout American criminal law. As described in Dubber's book, American criminal law generally tends to place great emphasis on subjective offense elements (mens rea) as opposed to objective elements (actus reus). Consider, for instance, the MPC's taxonomy of homicide offenses, which rests largely on distinctions among types of mens rea,[23] whereas German criminal law does not specifically focus on the exact form of mens rea in a given case.[24] Under the murder statute of section 211 of the German Penal Code, the lowest form of intent (*dolus eventualis*) would be sufficient for criminal liability. Here, the aggravated punishment for murder may only arise out of special characteristics (*Mordmerkmale*) of either the objective act or out of subjective motives of the actor.[25] Similarly, the MPC's theory of justification holds that it is—contrary to German law[26]—sufficient for claims of justification that the actor merely "believes" he is entitled to the defense.

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22. *Cf.* FLETCHER, *supra* note 1, at 123 ("It is not the kind of question that a jury can readily answer."). Also admitting to such difficulties is Thomas Weigend, *supra* note 13, at 695.

23. *See* MODEL PENAL CODE art. 210 (1962).

24. But note, however, that several offenses in the special part of the German Penal Code require more than *dolus eventualis* for criminal liability. *See, e.g.*, Strafgesetzbuch [StGB] [Penal Code] § 258 (requiring *dolus directus* one or two).

25. On the *Mordmerkmale* of section 211 German Penal Code see, for example, Friedrich C. Schroeder, *Grundgedanken der Mordmerkmale*, 1984 Juristische Schulung [JuS] 275 (F.R.G.), as well as the new annotations of Ulfrid Neumann on § 211 of the German Penal Code in NOMOS KOMMENTAR ZUM STAFGESETZBUCH (Ulfrid Neumann et al. eds., 2d ed. 2005).

26. Under German Criminal Law, the rules of mistake (the so-called *Erlaubnistatbestandsirrtum*) would apply if the actor merely thinks that he is entitled to act in self-defense although there is no objective self-defense situation. *See* HANS H. JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS-ALLGEMEINER TEIL 350 (5th ed. 1996).

The question of justification is addressed in chapter three, where Dubber proceeds to the second step in the three-step analysis, which inquires into the lawfulness of facially criminal behavior, including necessity (balance of evils), self-defense, and consent. It turns out that, particularly with respect to the doctrines of necessity and self-defense, American and German criminal law display some noteworthy differences.

Under the MPC's doctrinal system of justification, necessity is the mother of all justifications, introducing the doctrinal mechanism of balancing evils, which can be found in each and every claim of justification under the MPC. Thus, self-defense, consent, et cetera can be considered as particular instances of balancing evils. Under German criminal law, by contrast, self-defense[27] is said to be the strongest claim of justification, which should always be considered first in a case before moving on to other possibilities of justification. It is also established doctrine that self-defense does not involve any balancing of evils.[28] Under the self-defense statute of section thirty-two of the German Penal Code, it is sufficient for somebody to face an imminent and unlawful attack. This alone is the basis for a claim of self-defense. A balancing process between the legal goods of the attacker and the defender is not involved here. The only "proportionality" that is needed for a claim of self-defense under section thirty-two of the German Penal Code is proportionality between the intensity of the attack and the intensity of the defense.[29] On the other hand, German criminal law does recognize a necessity defense that turns on the balancing of evils;[30] however, that defense is not considered fundamental. It merely constitutes one way to justify criminal behavior among others and thus reflects the

27. *See* Strafgesetzbuch [StGB] [Penal Code] § 32.

28. *See, e.g.*, 72 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 58 (1938) (F.R.G.); Bundesgerichtshof [BGH] [Federal Court of Justice] July 9, 2004, 2 Neue Zeitschrift für Strafrecht [NStZ] 85 (2004) (F.R.G.); Bundesgerichtshof [BGH] [Federal Court of Justice] Feb 12, 2003, 8 Neue Zeitschrift für Strafrecht [NStZ] 425 (2003) (F.R.G.); Bundesgerichtshof [BGH] [Federal Court of Justice] 1982 Strafverteidiger [StV] 219 (F.R.G.).

29. See the detailed and up-to-date explanations of Felix Herzog, in NOMOS KOMMENTAR ZUM STAFGESETZBUCH, *supra* note 25, at § 32 ¶ 63.

30. *See* Strafgesetzbuch [StGB] [Penal Code] § 34; *see also* Bürgerliches Gesetzbuch [BGB] [Civil Code] §§ 228, 904.

fact that balancing evils is not the only underlying theoretical explanation for the doctrinal rules of justification. In German criminal law, each justification will derive from its own underlying theoretical explanation, such as the enforcement and protection of the legal system and its legal rules, the guaranty of liberty, and so on.[31]

Another important difference between the American and the German laws of justification concerns one of the classic problems in the doctrinal rules of justification: weighing the value of lives. Under German criminal law—although not explicitly stated in section thirty-four of the German Penal Code—balancing one human life against another or others is not permitted.[32] This is one of the most important rules to keep in mind with regard to the German necessity defense. Under the MPC's necessity provision the value of lives are weighed against each other, as the MPC Commentaries make clear. Dubber uses the famous nineteenth century sea cannibalism case of *Regina v. Dudley & Stephens*[33] to illustrate this point.[34] Here, the MPC would not categorically reject the argument that the necessity defense might justify killing a boy to save two sailors from the imminent death of starvation.[35] German literature, on the other hand, claims that the necessity defense should never be available to justify a killing of a human being.[36]

A comparative perspective might highlight compelling reasons to reject claims of weighing lives on the ground that the MPC approach implicates very sensitive matters of

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31. *See* JESCHECK & WEIGEND, *supra* note 26.

32. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Sept 15, 1989, 35 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 347 (350) (F.R.G.); NOMOS KOMMENTAR ZUM STAFGESETZBUCH, *supra* note 25, at § 34 ¶ 74; 1 ROXIN, *supra* note 3, § 16 ¶ 33-41.

33. The Queen v. Dudley and Stephens (1884) 14 Q.B 273 (Germans often refer to this case as the Mignonette Case).

34. DUBBER, *supra* note 8, at 148.

35. As Dubber points out, however, the MPC Commentaries argue that the MPC version of the necessity defense would not apply in this particular case, though for a different reason, namely that the defendants did not establish the *necessity* of their facially criminal act, since their death was not sufficiently likely when they killed the boy.

36. *See, e.g.*, ADOLF SCHÖNKE ET AL., STRAFGESETZBUCH § 34 ¶ 23 (26th ed. 2001).

human existence and bears the risk of abuse.[37] Still, the American approach seems more honest than the German approach. American criminal law openly recognizes the possibility of balancing the value of human lives. German criminal law doctrine, on the other hand, insists on the basic principle that weighing the value of lives is beyond the pale, while at the same time, violating this principle in different areas, proving that a legal system might not be able to resist such a balancing process.[38] The most prominent current example in Germany is the so-called "Air Security Act," which came into force after the terrorist attacks of September 11, 2001.[39] Here (in section fourteen subsection three), the German legislature explicitly entitles fighter pilots to shoot and destroy passenger jets full of innocent people when they are under the control of hijackers! The planes then constitute an imminent danger for people on the ground, which could not otherwise be stopped. The justification of this new piece of legislation is exactly what is rejected under the law of balancing evils pursuant to section thirty-four of the German Penal Code: weighing the value of lives as a matter of necessity. The German Supreme Court (*Bundesverfassungsgericht*) has agreed to consider the constitutionality of the Act.[40] In the

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37. Arguments of weighing human lives were often used in Nazi Germany to justify the killings of people. Therefore, the category of *lebensunwertes Leben* (unworthy lives) was established. *See* 1 ROXIN, *supra* note 3, at § 16 ¶ 33.

38. *See* NOMOS KOMMENTAR ZUM STAFGESETZBUCH, *supra* note 25, at § 34 ¶ 77. Also, a few German scholars argue for certain exceptions to the basic rule against balancing lives. See 1 ROXIN, *supra* note 3, at § 16 ¶ 35 for a summary of the discussion.

39. *Cf.* Wolfram Höfling & Steffen Augsberg, *Luftsicherheit, Grundrechtsregime und Ausnahmezustand*, 22 JURISTEN ZEITUNG [JZ] 1080 (2005) (F.R.G.); Wolfgang Mitch, *Luftsicherheitsgesetz-Die Antwort des Rechts auf den 11. September 2001*, 7 JURISTISCHE RUNDSCHAU [JR] 274 (2005) (F.R.G.); Michael Pawlik, *§ 14 Abs. 3 des Luftsicherheitsgesetzes-ein Tabubruch?*, 21 JURISTEN ZEITUNG [JZ] 1045 (2004) (F.R.G.); Arndt Sinn, *Tötung Unschuldiger auf Grund § 14 III Luftsicherheitsgesetz-rechtmäßig?*, 11 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 585 (2004) (F.R.G.); Klaus Lüderssen, *Krieg gegen den Terror-Die Logik des Luftsicherheitsgesetzes*, FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 18, 2005, at 37.

40. *See* 1 BvR 357/05 (2006), *available at* http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html. The constitutional challenge here is Article One, as well as Article Two of the German Constitution (Basic Law). Certain plaintiffs claim that their constitutional right to be treated with dignity as human beings (Article One) and their constitutional right to life

end, the issue before the court will turn on the very same basic questions of necessity as a justification that troubled the English court in *Dudley & Stephens* over a century ago.[41]

The third, and final, step in the analysis of criminal liability—responsibility—is discussed in chapter four. Here, Dubber discusses excuses such as insanity, infancy, duress, entrapment, and ignorance of law. At this point, too, general areas of similarity appear alongside points of difference between American and German criminal law. German criminal law regards issues of insanity and infancy as excuses as well.[42] Also, a mistake of law (ignorance of law) might be treated as an excuse according to section seventeen of the German Penal Code.[43]

Interesting, however, is a very basic difference with respect to the MPC's approach to entrapment. While the MPC can be seen as treating entrapment as an excuse, German criminal law might classify subjective entrapment as a mistake that might qualify as an excuse but would not treat objective entrapment under matters regarding culpability. In German criminal procedure, the discussion around the so-called *agent provocateur* addresses the same basic problem. Here, the judiciary has held that if governmental entrapment causes one to commit a crime, it is considered in the sentencing process (*Strafzumessungslösung*).[44] This is to say that entrapment in Germany might (only) lead to

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(Article Two) are unconstitutionally endangered by this piece of legislation when entering an airplane. See Das Bundesverfassungsgericht (Federal Constitutional Court), http://www.bundesverfassungsgericht.de (last visited Mar. 10, 2006) for details. On these constitutional issues, see the detailed analysis of Höfling & Augsberg, *supra* note 39, at 1081-83.

41. During the process of publication of this article the federal constitutional court reached a final decision holding section fourteen, subsection three of the Air Security Act unconstitutional. For details, see Das Bundesverfassungsgericht (Federal Constitutional Court), http://www. bundesverfassungsgericht.de.

42. *See* Strafgesetzbuch [StGB] [Penal Code] §§ 19, 20. See also 1 ROXIN, *supra* note 3, at § 20 for details.

43. *See id.* at § 21. See also NOMOS KOMMENTAR ZUM STAFGESETZBUCH, *supra* note 25, at § 17 for details.

44. For the judiciary's point of view see Bundesgerichtshof [BGH] [Federal Court of Justice] Nov 18, 1999, 45 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 321 (F.R.G.). For a good overview of the legal discussion in general, see KARLSRUHER KOMMENTAR ZUR STRAFPROZESSORDNUNG UND ZUM GERICHTSVERFASSUNGSGESETZ § 48 ¶ 78-79 (Gerd Pfeiffer ed., 5th ed. 2003).

mitigation of punishment. Some criminal law scholars argue, however, that entrapment should function as a complete defense because the government forfeits its right to punish a citizen when it encourages people to commit a crime.[45] At least in the case of objective entrapment, however, which would apply even if the defendant was predisposed to commit the offense in question, the German approach might be preferable. It seems that Dubber is not too far away from such a conclusion when he states that objective entrapment under the MPC is hardly seen as an excuse, although codified as one.[46]

The book concludes with a useful overview that summarizes its contents in a flowchart for the analysis of criminal liability. Relevant sections of the MPC are cited throughout, once again highlighting the connection between the doctrinal rules of American criminal law, the MPC, and German criminal law.

Not only does the structure of Dubber's book resemble that found in traditional textbooks on German criminal law, but Dubber's frequent references and comparisons to German criminal law turn the book into a fruitful resource for comparative work in the field of criminal law. It will prove particularly useful to those scholars and students within the civil law tradition who wish to satisfy their curiosity—and perhaps even to correct their prejudices—regarding the current state of American criminal law. For Anglo-American scholars, with even a rudimentary understanding of German, it may also serve as an introduction to some basic German criminal law concepts that parallel familiar doctrines and encourage further study in German criminal law.

Future editions of Dubber's book may be enhanced if the detailed description of American criminal law from the perspective of the MPC were enriched with additional normative or even critical remarks presenting the author's opinion on certain issues. A German audience in particular might expect such commentary since German textbooks on general criminal law are usually full of critical remarks or

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45. See, for example, the articles of Hans O. Bruns (228-237), Hans-Jürgen Bruns (259-284), Kurt Seelmann (285-298), and Jürgen Taschke (305-314) *in* V-LEUTE, DIE FALLE IM RECHTSSTAAT (Klaus Lüderssen ed., 1985).

46. DUBBER, *supra* note 8, at 188.

suggestions for how to proceed in certain cases. So it would be interesting, from a German perspective, to learn more about Dubber's position on critical issues such as strict liability (unknown to German criminal law in this form) and the widespread use of possession offenses in American criminal law.[47] Also, Dubber might address such problems as those already discussed with regard to mens rea. When the reader learns that an injury case might lead to different results under the mens rea schemes in German and American criminal law,[48] it would be interesting to have Dubber evaluate the respective outcomes.

Moreover, certain concepts of substantive criminal law are difficult to appreciate without a basic knowledge of criminal procedure. This may pose a problem for a German reader since the German "inquisitorial" system differs significantly from the American "adversarial" system. A discussion of American criminal procedure probably would exceed the scope of Dubber's book, which already covers considerable ground in the area of substantive criminal law. Still, a familiarity with American criminal procedure will be necessary for anyone who should wish to pursue the issues raised in Dubber's book in greater detail. Clearly, further comparative criminal law research would benefit from a German-language introduction to American criminal procedure. But this needs to be done in another book.

Comparative criminal law is not a new way of thinking. Even at the beginning of the twentieth century, German scholars undertook comparative studies of criminal law.[49] But such comparative work needs to be intensified,

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47. But note that Dubber has already discussed the above-mentioned problems in other publications, though in English. *See* Markus D. Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2002), as well as Markus D. Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509 (2004).

48. DUBBER, *supra* note 8, at 71.

49. *Cf.* Lutz Eidam, *Facilitating a Comparative Analysis of Criminal Law: Volker Krey's Bilingual Textbook on German Criminal Law*, 5 GERMAN L.J. 1171, 1171-72 (2004), http://www.germanlawjournal.com/article.php?id=500. Robert von Hippel's influential criminal law textbook, first published in 1925, already contained a chapter on comparative criminal law. In the late nineteenth century, the leading representative of the progressive school of German criminal jurisprudence, Franz von Liszt, conducted comparative studies beginning and, in 1889, founded the "International Criminalist Association" (*Internationale Kriminalistische Vereinigung*).

especially in the long unattended field of criminal law. Dubber's book makes an important contribution to this field; hopefully, others will follow its lead.