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Commonwealth v. Keller:
The Irrelevance of the Legality Principle in American Criminal Law

Markus D. Dubber

Commonwealth v. Keller\(^1\) is not a leading case, but it should be. It raises important questions about the foundation of the state’s power to punish through criminal law. These questions generally do not receive much attention in American criminal law teaching, nor have they received much attention in American legal and political discourse in general.

More specifically, Keller’s irrelevance is symptomatic of the irrelevance of the principle of legality in American criminal law. Rather than being regarded, and employed, as a fundamental principle of legitimacy of state penal power, the principle of legality is poorly understood as a disconnected aggregate of maxims, rules, and guidelines—preferably cited in lawyers’ Latin phrases of uncertain formulation and meaning (“nullum crimen sine lege” and “nullum crimen, nulla poena sine lege” being two popular variations) that join other groundless, anachronistic, and ill-examined bedrocks of American criminal law passed down from a mystical and timeless time before time in the history of the English Common Law, most notably actus reus and mens rea, or their combination as “actus non facit reum nisi mens sit rea.”\(^2\)

That Commonwealth v. Keller, a short-yet-rambling 1964 opinion by a Pennsylvania trial judge, who affirms, and then exercises, judges’ power to recognize new common law crimes (here “indecent disposition of a dead body”), should provide the most searching analysis, however brief, of the state’s—and not merely the judiciary’s—power to punish through criminal law is both ironic and significant. It is significant because it indicates the lack of interest this fundamental question has attracted in American legal and political discourse. The state’s power to punish was taken for granted by the Founding Generation. While considerable effort was expended on the question of who should exercise this awesome power, both among different branches of a single government (legislature vs. judiciary and, more recently, the executive) and among different governments (states vs. federal), no one bothered to address the primary, substantive and non-institutional, question of what could possibly justify the state’s, any state’s, use of penal violence against its own citizens, of whom, by whom, and for whom it was constituted.

\(^{*}\) University of Toronto, Faculty of Law. This paper was written for the collection Criminal Law Stories (Weisberg & Coker eds.), forthcoming from Foundation Press.


\(^{2}\) Ironically, the common Latinness of the two (or three) maxims masks different origins. The nullum crimen maxim (along with several other variations) is generally attributed to P.J.A. Feuerbach, an early nineteenth-century Bavarian criminal law scholar, judge, and codifier. Markus Dubber & Mark Kelman, American Criminal Law: Cases, Statutes, and Comments 106-07 (2d. ed. 2009). The origin of the actus reus maxim is less certain, but also more ancient, and may trace itself back to St. Augustine. Thomas A. Gowan, Toward an Experimental Definition of Criminal Mind, in Philosophical Essays in Honor of Edgar Arthur Singer, Jr, 163 (Francis Palmer Clarke, ed. 1942).
Though ostensibly concerned only with the question of who gets to punish through criminal law—judges or (only) legislators—Keller also offers a glimpse of the preliminary, and both unasked and unanswered, question of why any state actor—judge, legislator, administrator—gets to punish through criminal law in a modern democratic state grounded in the (literally) revolutionary ideal of the self-governing person who, in the political realm, appears as the citizen.

The remarkable passage in Keller that addresses the foundation of the state’s power to punish through criminal law is short and easy to miss. (In fact, it tends to be omitted from casebook excerpts of the case.) It consists almost entirely of a quotation from an 1881 Pennsylvania case, often cited as a key case on the doctrine of (judge-made) common law misdemeanors, which in turn consists almost entirely of a quotation from the fourth volume of Blackstone’s Commentaries (first published in 1769):

The landmark case in this Commonwealth which enounces the principle of preserving common law offenses is Commonwealth v. McHale, 97 Pa. 397. After analyzing and determining that common law crimes are preserved, Mr. Justice Paxton, at page 408, asks the question, “What is a common-law offense?”

“The highest authority upon this point is Blackstone. In chap. 13, of vol. 4, of Sharswood’s edition, it is thus defined: ‘The last species of offenses which especially affect the Commonwealth are those against the public police or economy. By the public police and economy I mean 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 behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations. This head of offenses must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the four preceding series. These amount some of them to felony, and other to misdemeanors only.”

The bulk of this paper will be devoted to unpacking this short, but rich, passage, which grounds a twentieth-century American state trial judge’s power to create new criminal offenses in a passage from a nineteenth-century American state supreme court’s judgment quoting a passage from a distinctly pre-revolutionary eighteenth-century English treatise on “The Laws of England” that affirms the English king’s power to maintain the “public police or economy” of “the kingdom,” composed of individuals conceptualized as “members of a well-governed family,” a passage

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moreover, that concerns itself with state (i.e., royal) power in general, rather than addressing judicial power in particular.

This passage from Keller in all its haphazard brevity and lack of depth or serious engagement points to, and illustrates, a conception of the state’s power to punish through criminal law that has driven, without serious reflection or critique, American legal and political discourse since the Founding Era. That conception is the police power model, which regards the state’s power to punish as an obvious incident of the state’s power to police, which in turn is regarded as firmly rooted in the very notion of state sovereignty itself, and therefore ultimately beyond question and scrutiny.

The police power model, however, is best understood in contract to a radically different conception of the state’s power to punish, the law power model, which regards the object of punishment as a person capable of self-government, or autonomy, rather than as a member of a well-governed, or not-so well-governed, family, or household, in need of management and, occasionally, penal discipline. This model, unlike the police power model, attempts to legitimate state punishment in light of the principles of a modern liberal democracy (and of the historical ideals of the American Revolution).5

The “principle of legality,” properly understood as addressing the question of why (or whether) to punish—and not merely that of who (or how)—is a principle of law, or lawfulness. As such it plays a central role in the law power model of state punishment, but has no place in the police power model of state punishment, the dominant model of American penalty since the Founding Generation, which simply adopted—and in fact interpreted expansively, as we will see—the patriarchal English conception of state punishment as managing and disciplining “the kingdom” (now relabeled “the people”) as a householder would govern his household, or a father his family.

The Keller Opinion

The facts in Keller are simple and quickly recalled. Mrs. Keller, whose husband was in the military, had an affair with another man, whom she bore two children, alone in her bathroom. She hid the babies’ dead bodies in boxes. The cause of death could not be established, thus barring a conviction of homicide.

A jury convicted Mrs. Keller of adultery (about which more later on) and the common law misdemeanor of “indecent disposition of a dead body.” The trial court’s opinion addresses the question whether indecent disposition of a dead body “is a crime cognizable under the laws of the Commonwealth of Pennsylvania.” The court concludes that it is and denies the defendant’s motions in arrest of judgment and for a new trial.

In his decision, the trial judge searches in vain for a statutory offense of indecent disposition of a dead body. Attempts to find cases defining such an offense, either in Pennsylvania or in any other American jurisdiction, are also unsuccessful. The judge does hit upon two cases, one from Maine, the other from Arkansas, that he finds relevant. The indictment in the Maine case (from 1939), Bradbury, alleged that the defendant “with force and arms, unlawfully and indecently take the human body of one Harriet P. Bradbury, and then and there indecently and unlawfully put and place said body in a certain furnace, and then and there did dispose of and destroy the said body of the said Harriet P. Bradbury by burning the same in said furnace, to the great indecency of Christian burial, in evil example to all others in like case offending, against the peace of said State and contrary to the laws of the same.”

The defendant in the Arkansas case (1949) was charged, more succinctly, with “treating a dead body indecently.” Mrs. Baker had propped up the disguised corpse of a dead tenant, displaying it in various poses to passers-by long enough to cash his monthly welfare check.

For good measure, the trial judge proceeds to list “evidence that there existed a standard of decency and respect for the dead and their resting places” from since the beginning of time, including the Bible, “the renowned pyramids of Egypt,” “American Indian lore,” the “Code of Justinian,” and “the tomb of William Shakespeare.”

Much could be said about the judge’s discussion of the Maine and Arkansas cases, none of which—as he acknowledges—is on all fours with the case before him. Even more could be said about his romp through human history. In particular, as we will see shortly, his invocation of cultural norms as the foundation for penal sanctions, both in form and in substance, goes to the legitimacy of morals offenses in general, and not merely that of criminal lawmaking from the bench. What interests me here, though, is not the application of the definition of common law misdemeanor, but the definition itself—along with the fact that the judge in Keller thought such a definition necessary, apart from the obvious fact that the Pennsylvania Supreme Court had supplied one a century before, in McHale.

Keller differs from other twentieth-century common law crime cases in not merely asserting the courts’ longstanding authority, or even obligation, to define common law crimes as necessary. Baker, the 1949 Arkansas case, skirts the issue by simply asserting that “treating a dead body indecently” is a common law crime, after all, so that no invention, but merely discovery, was necessary. Bradbury, ten years older, contents itself with marveling at the ever evolving nature of the common law, whose flexibility is uniquely suited to adjust to new situations (or, in the case at hand, not-so-new situations having to do with the disposal of corpses), always a step ahead of (or just a short step behind) the devious inventions of the likewise ever evolving criminal mind (even if, again, in Bradbury itself, the criminal—and possibly not quite sound—mind was that of an old man who, when asked about his sister’s

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7 For a detailed discussion of Baker, see Paul H. Robinson, Criminal Law Case Studies (3d ed. 2006).
whereabouts “took down the crank used for shaking down the furnace, turned over the grates, shovelled out the ashes and said: ‘If you want to see her, there she is.’”). These musings are then amplified with a gratuitous—and unexplored though well-known—quotation from Holmes’s *Common Law*, to the effect that law ought to “correspond with the actual feelings and demands of the community, whether right or wrong.”

The notorious English common law crime case, *Shaw v. DPP*,\(^9\) decided shortly before, but not mentioned in, *Keller*, does not go beyond insisting that (English) judges have a “duty as servants and guardians of the common law” and that: “Whatever is contrary, bonos mores et decorum, the principles of our law prohibit, and the King’s court, as the general censor and guardian of the public manners, is bound to restrain and punish.” At best, the House of Lords here can be taken to rely implicitly on the theory of common law misdemeanors set out in *Keller*, insofar as English common law judges’ power to recognize new crimes stems from their nature as royal courts, which presumably derive their authority from the king’s now familiar power to discipline his subjects in the name of maintaining the “public police.” *Keller*, in this reading, identifies the state (royal) power the exercise of which by (royal) judges *Shaw* merely asserts—the power to police.

The Police Power and Common Law Misdemeanors

To appreciate the significance of the passage from Blackstone’s *Commentaries* quoted in *Keller* (and *McHale*), it is important to recognize three things. First, the power to police was traditionally regarded in American legal and political discourse as the broadest, most flexible, and least limitable powers of government. Second, the power to police has repeatedly been cited as the basis of the state’s power to punish through criminal law.\(^10\) And third, the Blackstone passage frequently was quoted, by American courts and commentators, as a definition of the power to police.\(^11\)

*Keller*, then, in what appears to be an unremarkable reference to a nineteenth-century Pennsylvania case on the doctrine of common law misdemeanors in fact put its finger on the widely acknowledged source of American criminal law, if not on the essence of American state power in general. For its immediate objective, namely to answer the seemingly simple question “What is a common law crime?,” this passage proves too much, to put it mildly. Rather than highlighting the nature of judicial criminal lawmakering, it identifies the source of criminal lawmakering generally speaking.

This apparent weakness, however, in fact is *Keller’s* great strength, insofar as it shifts attention from the secondary, institutional, question of who wields the power

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to punish through criminal law to the primary, substantive, question of whether, and if so, why the state legitimately could violate the very rights to person and property of the very persons it legitimately exists to protect. This question is significant, and demands an answer, or at least a sustained attempt at an answer, in and of itself. Incidentally, the answer to it may well suggest an answer to the more limited, and subsidiary question at issue in Keller, namely who should, or may, exercise this most awesome state power in general, or in a particular case.

It is not surprising that Keller, in 1964, makes no effort to address a question as fundamental as the legitimation of state punishment through criminal law. Rather it takes the answer to the question for granted, if that is possible in the case of a question that has never been asked with the appropriate urgency. More surprising, or at least noteworthy, is the failure of the Founding Generation, some two centuries before, to tackle this question, or even to recognize its crucial importance for its comprehensive project of legal-political reform. Keller thus both gestures at the fundamental challenge of legitimating the state’s power to punish through criminal law and, at the same time, highlights the failure to meet, or even to frame, that challenge in American legal and political discourse.

Without a comprehensive reconception of criminal law as law, rather than as an unexamined and unchallenged exercise of the ultimately patriarchal power to police, American criminal law remains without principled foundation, resting uneasily and uncritically on empty lawyers’ Latin maxims that are thought, or rather vaguely felt, to emanate from a Whiggish lawyers’ history of the common law of crime as an ever widening, and –thickening web of precedents held together by various “golden threads.” Among these golden threads are nullum crimen sine lege (at issue in Keller) and actus non facit reum nisi mens sit rea. In the police power model, these supposed principles, or requirements, are in fact maxims, or guidelines that the state, in the end, is free to mold and even to ignore entirely if it sees fit under the circumstances.

The principle of legality, in particular, is neither a principle, nor is it a principle of legality; it is a maxim of police—or, yet more precisely, it is not even a single maxim, but a collection of unconnected maxims, including “no common law crimes,” “void-for-vagueness,” “leniency,” “strict construction,” “ex post facto,” etc.

But before we return to Keller and the principle of legality, we need to take a closer look at the origins and contours of the American police power model glimpsed through Keller’s overbroad answer to the apparently narrow and straightforward question, “What is a common law crime?”

State Punishment as Sovereign Police

The most noteworthy feature of the Founding Generation’s revision of the foundation of state punishment through criminal law was its absence. On the continent, and even in England, the radical critique of state power that (also) was the enlightenment produced, as a matter of course, a series of fundamental

12 See, most explicitly and notoriously, Woolmington v DPP, [1935] AC 462.
reconceptions of state punishment, from Beccaria in Italy (and, in his footsteps, Bentham in England and Voltaire in France) to Kant and Hegel (and, less comprehensive but more immediately influential, P.J.A. Feuerbach) in Germany. After all, what was the point of challenging existing structures and traditions of state power in light of the invention, or discovery, of the right-bearing (or at least pleasure-and-pain feeling), rational and autonomous, individual, the person, without taking a good hard look at the most intrusive and therefore troubling exercise of state power against that individual—the threat, imposition, and infliction of punishment, through imprisonment, expropriation, beating, maiming, and killing in the name of the state?

One would have thought that the American Founding Generation would have felt a particular urge to challenge the state’s depriving, in the name of punishment, its constituents of the very rights it existed to preserve: the right to life, to liberty, to property, and even the pursuit of happiness. Instead the thinkers and doers of the Founding Era focused on taxation without representation, i.e., taxation in violation of their right to self-government as persons endowed with the capacity for autonomy. By contrast, the far more obvious and grievous violation of that right, and the far more obvious and grievous interference with that capacity, in the form of punishment—threatened, imposed, and inflicted—was not thought to raise basic questions of legitimacy.

The state’s power to punish through criminal law, instead, was simply taken for granted; in fact, it was so taken for granted that the English model of state punishment was left undisturbed, and unexamined—in substance and, largely, even in form—with the exception of the occasional relabeling, using with a global, though occasionally imperfect, find-and-replace command that replaced references to, say, the “King’s peace” with the “public peace” or the “peace of the commonwealth” or the “peace of the state,” reflecting the more general, but similarly straightforward, substitution of “the King” as sovereign with “the people,” without, however, challenging the underlying conception of sovereignty itself.

Punishment remained an aspect of the power to police, which in turn remained central to the very notion of sovereignty, having been transferred from the person of the King to the amorphous construct of “the people” (or “the commonwealth,” “the state,” “the public” and so on). The offense of treason, for instance, remained unchanged, retaining the definition, word for word, of the English Treason Act of 1351, with the one obvious exception of eliminating the clause having to do with the death of the King—reference to whom had fallen victim to the above-mentioned find-and-replace procedure.13 The definition of the police power, like that of treason, was simply lifted from its English source; in fact, so obvious and unworthy of attention was the matter of defining the sovereign’s power to police that Blackstone’s definition—in one example of incomplete finding-and-replacing—simply was adopted lock, stock, and barrel, with no effort to update royal references. The police power was the king’s power, as “pater-familias of the nation” to govern

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13 See Markus D. Dubber, “The State as Victim,” in Offences Against the State (Mordechai Kremnitzer & Khalid Ghanayim, eds. forthcoming 2010).
“the individuals of the state, like members of a well-governed family”\(^\text{14}\) and to maintain “the public police and oeconomy,” thereby attending to “the due regulation and domestic order of the kingdom”\(^\text{15}\) in Blackstone’s England of 1769. And it remained so, \textit{verbatim}, in the new United States, after the Revolution—in fact, as \textit{Keller} illustrates, well into the twentieth century.

It is stunning that American legal and political discourse would simply swallow the deeply patriarchal, hierarchical, and monarchical English concept of police power whole. That power, by its nature, was discretionary, flexible, and in the end, unlimitable, as American courts and commentators pointed out again and again, waxing positively poetic about a power that, “is and must be from its very nature, incapable of any very exact definition or limitation.”\(^\text{16}\)

The career of the police power in American constitutional law is a worthwhile subject by itself, even apart from its role as the source of the power to punish, which concerns us in particular.\(^\text{17}\) Throughout, its essential connection to the very notion of sovereignty, and sovereign power, remained constant; as a result, it served as the site for many of the basic struggles in the American constitutional system, including that between the states and the federal government and among the branches of government, notably between the judiciary and the legislature (and, to a lesser extent, the executive).

So central was the police power to the concept of sovereignty that the entire federalist system rests on the fiction that the states retained the power to police while denying it to the federal government. By, at the same time, insisting on the police power as an essential ingredient of sovereignty and denying it to the federal government, the federal system is built on the paradox of establishing a national sovereign state without sovereignty. This paradox, however, resolved itself (or perhaps was replaced by another paradox) by the exercise of a \textit{de facto} federal police power in the face of the continued insistence on its \textit{de jure} absence.\(^\text{18}\)

This arrangement has allowed the steady, and eventually enormous, expansion of the federal state in the name of other officially recognized federal powers, notably the power to regulate interstate commerce, which is only very rarely interrupted by the insistence that the \textit{de jure} exercise of some recognized federal power or another amounts to a \textit{de facto} exercise of a non-existent federal police power.\(^\text{19}\) At any rate, even very occasional reminders of the federalist police power arrangement do nothing to challenge the notion of the limitlessness of the power to police; on the contrary, they rely on it since it is this unchallenged characteristic of the police

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  \item[15] Id.
  \item[16] Slaughter-House Cases, 83 U.S. 36, 49 (1873).
  \item[18] Of course there is also the denial of the existence of a federal “state” altogether, requiring carefully replacing references to “state” with references to “government.” No one doubts the federal “government’s” sovereignty in any number of other contexts, including the government, or self-government, of Indian tribes. See, e.g., United States v. Lara, 541 U.S. 193 (2004).
\end{itemize}

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power that, if exercised by the federal state officials, threatens the sovereignty of the states of the union.

That essential limitlessness of the police power, springing from its intimate connection to the concept of sovereignty, also animates its role as a site of interbranch relations, and occasionally conflicts. The police power, in general, functioned as an “idiom of apologetics” in constitutional discourse, with courts hesitating to interfere with the exercise of the police power by the legislature (as well as de facto, if not de jure, by the executive, which instead relied on such stand-ins as “executive privilege” or “presidential prerogative”).\(^{20}\) *Lochner v. New York*,\(^ {21}\) where the U.S. Supreme Court overturned an ostensible exercise of (state) police power, is regarded as a shocking outlier in American constitutional history, an embarrassing instance of judicial overreach and (conservative) disrespect for an exercise of the state’s police power by a (progressive) legislature.

The police power’s role in conflicts among governments (the states and the federal government), and among branches within a government (judiciary vs. legislative vs. executive\(^ {22}\)), both illustrates and obscures its significance in the American constitutional regime. It is important to recognize that the police power is an incident of sovereignty; it is a state power, not a power of one state, or one sovereign, rather than another or, for that matter, of one state branch, rather than another. It is neither a state power, nor a federal power, neither an executive, nor a legislative, nor a judicial power. As a power of the state it can be wielded by any and all state officials, no matter how loudly some states, or some branches within the state apparatus, may insist on their exclusive, or even superior, power to police.

To talk about the police power, then, is to talk about state power and so to talk about the possibility—or rather the impossibility—of its limitation, definition, or legitimation, is to talk about the limitation, definition, or legitimation of state power first. The question of who, or what, is best suited to exercise that power in a particular case is of secondary importance. It is the sort of matter of institutional competence that exercised the Legal Process School, which proceeded from an assumed, if only implicit, consensus about the primary, substantive, issue of legitimacy.\(^ {23}\)

This fundamental substantive issue is obscured in American constitutional discourse in general, which simply takes the police power and its essential connection to sovereignty for granted; it is likewise ignored, and therefore remains unaddressed, in American penal discourse, which after all simply takes the power to punish to be a manifestation of the power to police. And so, the same debates about

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\(^{21}\) 198 U.S. 45 (1905).

\(^{22}\) While judicial interference with legislative exercises of the police power (à la *Lochner*) tend to get all the attention, legislative interference with the executive’s exercise of the police power (dubbed privilege or prerogative) should not be overlooked. In each case, the challenged branch insists on being the exclusive, or ultimate, holder of the power.

\(^{23}\) See generally Hart and Sacks’ The Legal Process: Basic Problems in the Making and Application of Law (William N. Eskridge, Jr. & Philip P. Frickey, eds. 1995).
the who, rather than the why, play themselves out at the level of the power to punish.

Part of the general federalist police power compromise was the strict prohibition of federal common law crimes, i.e., of judge-made federal criminal law, in order to prevent the federal state from using its judiciary to evade the denial of a federal police power or, put another way, to limit the denial of a federal police power to the federal legislature, leaving federal judges to make federal criminal law instead. Of course, the federal judiciary eventually came to exercise the same de facto police power as the federal legislature, if only through the co-creative interpretation of deliberately broad criminal statutes as partners in the fight against federal crime.

The issue in Keller—courts’ power to recognize new crimes, and common law misdemeanors in particular—likewise reflects, at a less abstract level, the question of which branch of (police power-ful) government should, or may, exercise the police power. But as Keller, if unintentionally, makes clear by citing Blackstone’s definition of the state’s (or rather the king’s) power to police in general, and as the House of Lords in Shaw emphasizes by insisting on its common law power, as the King’s court, to wield the patriarchal power to police, the judiciary’s power to recognize common law misdemeanors is not a self-standing doctrine, but merely one aspect of the state’s power to punish.

What matters is not who wields the power, but that it is a basic power of the state, and just as important, that its assignment to a particular state official, or branch, or institution, is not only a secondary issue, but also a matter of discretion, rather than of principle. As an incident of the essentially discretionary, unlimitable, and indefinable, police power, it is up to the state to determine who is best suited to exercise it in a particular circumstance. Any constraints on this determination are self-imposed by the state; they are matters of efficacy, or competence, or perhaps prudence, rather than of legitimacy.

Note, in light of the fact that American law tends to frame legitimacy critiques in constitutional terms, that there has never been a successful, or even a serious—or (perhaps) any—constitutional challenge to the judiciary’s common law crime-making power. Many American (and English) courts continue to enjoy this power, which they generally decline to exercise or, more to the point, they simply have no occasion to exercise given the proliferation of legislative and executive criminal laws and “regulations.” When American legislatures, through criminal codes, explicitly restrict criminal law to legislative codes or at least statutes (criminal and others, not to mention, once again, administrative regulations), they do so not on account of some fundamental principle, or constitutional norm, but rather without fanfare and in passing, as confirming a state of affairs in which the courts’ practice of making criminal law has fallen into desuetude, as part of a kind of gentleman’s agreement.

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26 The relevant provision in the Pennsylvania Crimes Code, modeled closely on the American Law Institute’s Model Penal Code and adopted some years after Keller, did not prompt any legislative
-which is liable to be revoked, or amended, at any time, as the House of Lords made clear in Shaw, a case that is significant not so much for the exercise of the courts’ power to make criminal law as for the insistence on the courts’ discretion, and even the duty, to exercise it when appropriate.

Now, the principle of legality is of course precisely that “principle” which is thought to place constraints of “legality” on the assignment of the power to punish to one state branch or another. Under a police power model of penalty, however, which regards the power to punish as an instance of the power to police, there can be no such principles in general, nor principles of legality in particular. At best, then, the principle of legality, is a maxim of police, a self-imposed and self-policed guideline that the state might adopt, or follow, in furtherance of the “due regulation and domestic order of the kingdom.”

The Legality Principle as Police Maxims

The legality principle, or nullum crimen sine lege (or nullum crimen nulla poena sine lege), as we noted before, is thought to consist of not only one maxim, “no common law crimes,” but of a bundle of maxims, including “void-for-vagueness,” “lenity,” “strict construction,” and “ex post facto,” that are either unconnected, or whose connectedness at least is not considered worth exploring, or particularly interesting.27 The very fact that nullum crimen functions more as a loose label, or a convenient organizing device akin to a “miscellaneous” file, already hints that it hardly qualifies as a “principle,” and certainly not one that can claim fundamental status in general, and derivation from some more basic account of “legality” in particular. It is unclear what sort of “legality” is at stake, or, more precisely, just what the “lex” is without which crimen (or poena) is said to be impossible (or is it illegitimate)? The point here is not the indeterminacy of the concepts involved, but the absence of even the beginning of an account of how that indeterminacy might be resolved.

Feuerbach did attempt to provide such an account, based on his idiosyncratic theory of punishment that combined retributive and consequentialist components in a way that anticipated the mixed theories of punishment associated with Hart and Rawls by some 150 years. In fact, in his Textbook of Common Criminal Law in Germany (1st ed. 1801), he distinguished between three principles, which he thought were interrelated:

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27 Fuller might have said that these maxims are not aspects of some principle of legality, or the rule of law, but guidelines of “managerial direction.” See Lon L. Fuller, The Morality of Law 207 (rev. ed. 1969).
I. Every infliction of punishment requires a criminal statute. (*Nulla poena sine lege.* [No punishment without law.]) Because only the statutory threat of harm justifies the concept and the legal possibility of a punishment.

II. The infliction of punishment presumes the existence of the conduct threatened with harm. (*Nulla poena sine crimine.* [No punishment without crime.]) Because only the statute connects the threatened punishment to the act as a legally necessary precondition.

III. The act subject to the statutory threat of punishment (the statutory precondition) presumes the statutory punishment. (*Nullum crimen sine poena legali.* [No crime without legal punishment.]) Because the statute connects the specific violation of the law to the harm [of punishment] as a necessary legal consequence.

Needless to say, citations of *nullum crimen* in American criminal law make no reference to Feuerbach’s broader account of punishment, or *nullum crimen’s* place within it. Again, the point is not that Feuerbach’s account is particularly compelling, or that it deserves attention, but that American criminal law has developed nothing in its place. This is not the place to sketch such an account, but it is easy to see what it might look like, if only to marvel at its absence. Even if we imagine the principle of legality as a single norm, rather than as a grab bag for disconnected norms, it is not, for instance, grounded, as one might think, in “the rule of law” nor in its early American version of the insistence on “a government of laws and not of men,”[28] nor is it connected to the fundamental principle of self-government that has driven the liberal democratic rhetoric of American legal and political discourse since the Founding Era. The legality principle, as a principle of legality, has no content; some other label, perhaps “a collection of maxims for good governance,” would serve the same organizing function, if with less pathos.

If we leave aside the label, and consider the individual norms collected under it, we find prudential guidelines, rather than principles with independent, never mind shared, foundations. We already have seen the free floating flexibility of the “no common law crimes” maxim at issue in *Keller.* The “rule of lenity” and its indeterminately close sibling the “rule of strict construction” do not generally—occasional hints of constitutional status notwithstanding—even pretend to principle status and are honored in their breach (if it is possible to breach a prudential guideline), with courts invoking or ignoring them willy-nilly.

Their constitutional cousin, the doctrine of “void-for-vagueness,” is of indeterminate constitutional status, as courts—and commentators—seem incapable of, or unwilling to, locate it firmly within the “due process” guarantee or the first amendment, with its relation to the first amendment “overbreadth” doctrine still awaiting clarification, or for that matter serious attention. The “void-for-vagueness” doctrine is astonishingly vague, beginning with its very name, with no effort being devoted to account for the voidness—rather than the unconstitutionality of

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28 Massachusetts Constitution, Part The First, art. XXX (1780).

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illegality or illegitimacy—that may result from its application. Its two-pronged test has no substantive content, as the first prong, having to do with notice, is routinely ignored on the (implicit) prudential ground that any meaningful notice requirement would cut a wide swath of voidness through modern criminal law; the second prong is concerned with process, rather than substance, and vaguely and flexibly considers whether the statute under scrutiny provides state actors, notably law enforcement personnel, with meaningful guidance in the exercise in their generally unfettered discretion.

Consider that, from the perspective of the police power model, vagueness is not a problem, but an opportunity. Vague criminal statutes supply state officials with the necessary flexibility to identify and eliminate offensive behavior that, thanks to the ingenuity of the criminal mind or the lack of ingenuity of the legislative mind, might not fall under more specifically framed criminal statutes. Prime examples of purposely vague criminal statutes include RICO, which explicitly provides that it “seek[s] the eradication of organized crime” and to that end “shall be liberally construed,” and mail fraud, which has drawn praise from the judiciary as “a stopgap device to deal on a temporary basis with [a ‘new’ fraud], until particularized legislation can be developed and passed to deal directly with the evil.”

The ex post facto norm obviously enjoys constitutional status—given that it appears in the federal constitution itself. It is clear that no criminal statute could threaten punishment for conduct that occurred prior to its enactment. Still, it is remarkable both how flexible the apparently clear federal constitutional provision that “No ... ex post facto Law shall be passed” has turned out to be in the American legal regime, and the penal legal regime in particular, and how rootless the criminal ex post facto norm has remained, despite—or perhaps also because of—its constitutional source.

It did not bode well for the clarity of the ex post facto norm (another Latinism), that the U.S. Supreme Court almost immediately decided that the constitution did not in fact mean that “No ... ex post facto Law shall be passed,” but rather that it prohibited only retroactive criminal (not civil) statutes (not judicial decisions, as the U.S. Supreme Court recently made clear in Rogers v. Tennessee that either (1) criminalize previously noncriminal conduct, (2) increase the seriousness of an existing criminal offense (e.g., from misdemeanor to felony), (3) increase the punishment for an existing criminal offense, or (4) diminish the evidentiary requirements for conviction of an existing criminal offense. Since then, the ex post facto norm, in its drastically reduced form, has interpreted and applied with the same flexibility that characterizes the other prudential maxims collected under the nullum crimen label, most notably through the distinction between criminal and civil state action. The most notorious recent example here is the exemption of sweeping and highly intrusive registration, notification, and indefinite detention regimes for

various dangerous offenders (thought to be even more abnormally dangerous than the normal abnormally dangerous offender)\textsuperscript{33} from the \textit{ex post facto} prohibition.\textsuperscript{34}

The malleability of the apparently firm constitutional prohibition of "ex post facto Law" may not be unrelated to the failure to ground this norm in anything other than the constitutional text. \textit{Ex post facto} may be the only \textit{nullum crimen} maxim that appears in the federal constitution, but it nonetheless remains no less disconnected from the "principle of legality"—or any other account of the nature and limits of state action in general, and state punishment in particular. The prohibition did not attract much attention during the Founding Era, or during the constitutional convention, and was, at any rate, not regarded as a revolutionary innovation in light of new principles of American government; instead it was simply lifted from English sources, including Blackstone's \textit{Commentaries}\.\textsuperscript{35}

The \textit{ex post facto} prohibition shares this story of origin with the clause in the Bill of Rights that would appear to be most directly concerned with the state's power to punish through criminal law, the Eighth Amendment prohibition of inflicting cruel and unusual punishments.\textsuperscript{36} That provision, too, did not spring from any consideration of the legitimacy challenge faced by state punishment in a republican democracy ostensibly grounded in the ideals of autonomy and equality. Instead, the prohibition was copied without debate from a provision in the very English, and decidedly pre-revolutionary and -republican, Bill of Rights of 1689 (which itself derived from the \textit{Magna Carta} of 1215).\textsuperscript{37} In fact, the very formulation of the prohibition parallels maxims long familiar from limitations on the disciplinary authority of householders; cruel and unusual measures were taken as evidence of the sort of malignant, malicious, and wantonly arbitrary character that marked a householder as unfit for his governing post.\textsuperscript{38}

The principle of legality, or \textit{nullum crimen}, and the various and sundry prudential maxims collected under its head, thus are not alone in lacking a foundation in the new and distinctly American conception of law that drew

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\item On abnormal dangerousness as the touchstone of criminal liability, notably under the Model Penal Code, see infra.
\item 1 William Blackstone, Commentaries on the Laws of England, intro. § 2 (Of the Nature of Laws in General) (1765).
\item Compare the U.S. Const. amend. 8 (1787) ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.") with An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (1689) ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.") and \textit{Magna Carta} chap. 20 (1215) ("A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his livelihood, and a merchant in the same way, saving his merchandise, and a villein shall be amerced in the same way, saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood."). See also R.H. Helmholtz, "Magna Carta and the ius commune," 66 U. Chi. L. Rev. 297, 326-27 (1999) (\textit{ex post facto} prohibition in \textit{ius commune}).
\item See Dubber, The Police Power, supra at 6, 31, 39-41.
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legitimacy from the self-government of equals, rather than manifesting the essential distinction between king as ruler and his subject as ruled. The Eighth Amendment was not seen as addressing a new republican legitimacy challenge to the state’s power to punish through criminal law. In fact, the Eighth Amendment itself played virtually no role in even the constitutional, never mind the systematic, scrutiny of American criminal law.\textsuperscript{39}

The lack of interest in the \textit{nullum crimen} norm, and the cruel and unusual punishments prohibition, reflects the lack of interest in the foundations of state punishment through criminal law in general. Another lawyer Latinism, \textit{actus non facit reum nisi mens sit rea}—which combines the supposed bedrocks of American criminal law, \textit{actus reus} and \textit{mens rea}—is likewise best understood as a police maxim, rather than as a legal principle. As a maxim copied without critical analysis from the same English penal regime that regarded crime as an offense against the King’s peace and an affront against his sovereignty, and therefore posited the King as the ultimate victim of all crime, to the point that even homicide \textit{se defendendo} was at best excusable, rather than justified, because any homicide deprived the King of one of his subjects, and that saw the harm of maiming as partially depriving the King of a human resource to use as he saw fit (notably in wartime),\textsuperscript{40} and that by the late eighteenth century had produced the Bloody Code that threatened roughly two hundred offenses with death, \textit{actus non facit reum nisi mens sit rea} would, one might think, have been ripe for a fundamental reconsideration; that reconsideration never occurred. So \textit{actus reus} remained as an undermotivated appendage to \textit{mens rea}, serving merely as evidence of \textit{mens rea}, rather than fulfilling some other, independent, function.

\textit{Mens rea}, however, was a symptom of character, or more precisely of status, that identified the offender as malicious or, literally, base or mean, and therefore susceptible to penal discipline at the hands of the king as \textit{paterfamilias}, or state householder (\textit{pares patriae}), who may, in his discretion, decide to exercise his disciplinary power to assert the sovereignty offended by his malicious subject’s criminal act.\textsuperscript{41} It was the \textit{mens rea} that marked an act as offensive, as a disturbance of the king’s peace, and therefore a challenge to his authority and ability to maintain that peace. Note, however, that the discretionary penal power of the householder extends to both the exercise and the non-exercise in a particular case; since crime was an offense against the king’s sovereignty, it was up to the king, acting through his officials, both to diagnose the offensiveness of the conduct (or, in the extreme case of high treason, of the “compassed” conduct) and to respond to the offense as he saw fit. English criminal law, copied with surprisingly superficial relabeling in the New Republic, does not recognize the procedural principle of compulsory prosecution, or legality principle (\textit{Legalitätsprinzip}), adopted after considerable debate in the German criminal procedure code of 1877, which is designed to

\textsuperscript{39} Robinson v. California, 370 U.S. 660 (1962), here is the late, rare, and awkward exception, quickly contained in Powell v. Texas, 392 U.S. 514 (1968).

\textsuperscript{40} See J.H. Baker, An Introduction to English Legal History 601 (3d ed. 1990).

eliminate, or at least to constrain, the discretion not to exercise the state’s penal power (as exercised by law enforcement officials, including police officers and prosecutors).

This conception of mens rea and penal discretion persists in American criminal law to this day. Take, for instance, the most ambitious effort to codify, though not to legitimate, American criminal law, the American Law Institute’s Model Penal and Correctional Code of 1962. The Model Code similarly regards mens rea as an indicium of that characteristic which triggers the state’s power to punish, though that characteristic is no longer malice or meanness, but a similarly amorphous “criminal dangerousness” directed no longer at the king and his peace, but at the public (and its peace, or less archaically, its security, welfare, or “interests”).

The flexibility of nullum crimen sine lege in a police power model is matched by that of actus non facit reum nisi mens sit rea. Consider, for instance, the central role of possession offenses in American criminal law. The punishment of possession flies in the face of an actus reus principle (or “act requirement”) since possession is not an act, but a status; to be in possession of an object is to stand in a certain relation to it, whether or not that relation is accompanied by an act of some kind or not. Nothing stands in the way of criminalizing possession under a police power model, however, which may regard possession of certain objects (“contraband”) as an indicium of dangerousness, particularly when that possession is combined with some other status (felon, alien, prison inmate). The actus reus maxim then is addressed by definitional fiat, i.e., by simply declaring possession to be an act.

Possession offenses also illustrate the widespread flouting of the so-called mens rea requirement, both explicitly in the form of strict liability possession offenses that requiring no mens rea whatsoever, or no mens rea with respect to some element of the offense (regarding the “conduct” element or, more commonly, attendant circumstance elements such as the quality or quantity of the item possessed), and implicitly through the common use of presumptions (running both ways, from some extraneous fact—proximity, say—to the fact of possession or from the fact of possession to some other fact—larceny, for instance).

Keller and the Legitimacy of Morals Offenses

42 See generally Thomas Vormbaum, Einführung in die moderne Strafrechtsgeschichte 95, 107 (2009) (citing Adolf Hertz, Die Geschichte des Legalitätsprinzips (Diss. Freiburg/Breisgau 1935)).
43 Under the Code, the judicial assessment of mens rea amounted to a rough preliminary diagnosis of dangerousness (under Code’s the more differentiated, yet still course, taxonomy of purpose, knowledge, recklessness, and negligence), to be adjusted as necessary in light of an expert penological evaluation by the department of corrections. Model Penal and Correctional Code § 7.08 (“When a person has been sentenced to imprisonment upon conviction of a felony, whether for an ordinary or extended term, the sentence shall be deemed tentative ... for the period of one year following the date when the offender is received in custody by the Department of Correction [or other state department or agency].”). See generally Markus D. Dubber, Criminal Law: Model Penal Code (2002).
44 Model Penal Code § 2.01(1) & (4); N.Y. Penal Law §§ 15.00(2), 15.10.
What’s more, as Keller illustrates, the rootlessness of American criminal law extends beyond principles of the general part of criminal law, such as *nullum crimen sine lege* and *actus non facit reum nisi mens sit rea*, to its special part. The special part of American criminal law (or, rather, the special parts of the fifty-plus systems of American criminal law, including those of the states, the federal government, the District of Columbia, and the American military, not to mention the Model Penal Code) likewise never underwent a fundamental critique and revision in light of the basic principles of legitimacy underpinning the American political project. American legislatures and courts simply continued to criminalize the same conduct, or status, for the same reasons as their English counterparts and predecessors. If anything, American state officials displayed a particular zeal in performing their function as custodians of *bonos mores et decorum*, i.e., as protectors of the public’s moral police, where police is used in the traditional sense of welfare, well-being.\(^46\)

Recall that Keller involved two so-called morals offenses, not only the common law crime that gets all the attention, indecent disposition of a dead body, but also a statutory one, adultery. Keller thus merely illustrates the judiciary’s long-standing contribution to the state’s comprehensive moral police regime through criminal law. Turning, once again, one’s attention from the secondary issue of institutional competence (the who, or what) to the primary issue of state action (the why, or whether) raises the question of the legitimacy of employing the state’s power to punish through criminal law, no matter who exercises it, against behavior that threatens the public’s moral police. John Stuart Mill’s harm principle (“That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”), widely considered the best candidate for a limiting principle of American criminal law, had so little impact on American penal discourse that reports of its “collapse” are less premature than misplaced,\(^47\) not merely because Mill did not formulate it until 1859, decades after the Founding Era, and the opportunity for fundamental critique it represented, had passed.\(^48\) That is not to say that the harm principle, even if it had exerted greater influence, could have provided the special part of American criminal law—or any

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\(^{46}\) For discussion, see Dubber, *The Police Power* 98-104, 127-28, 153, 197, 202, 205-06, 214.


\(^{48}\) Jefferson occasionally made remarks, in different contexts, notably his insistence on the distinction between law and religion, that could be, but never were, interpreted as precursors of Mill’s principle. Jefferson also was the only member of the Founding Generation to devote, however reluctantly, any significant time to the problem of criminal law. His draft Virginia criminal law bill, however, notoriously failed to advance beyond a promising general preamble; the bulk of the bill is an anachronistic gloss on Coke and Anglo-Saxon dooms. See Markus D. Dubber, “‘An Extraordinarily Beautiful Document’: Jefferson’s Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment,” in Modern Histories of Crime and Punishment 115 (Markus D. Dubber & Lindsay Farmer eds., 2007).
other criminal law system— with a principled foundation given its vagueness and unresolved relation to an account of law, as opposed to ethics.\textsuperscript{49}

In this light, the question in Keller is not whether the trial court had the authority—or even the duty, as the Law Lords in Shaw would have it—to define new common law crimes in general, or offenses against bonos mores et decorum, but whether morals offenses in general could be legitimated. This question has remained remarkably unexplored in American legal and political discourse, undoubtedly because it had an answer as obviously affirmative as the question regarding the legitimacy of the state’s power to punish as an instance of its power to police. The Supreme Court’s recent opinion in Lawrence v. Texas is the exception to the otherwise universal rule, not only by striking down a specific morals offense, here homosexual sex, but also by drawing into question the legitimacy of morals offenses in general.\textsuperscript{50} It is no surprise that the majority in Lawrence would have to invoke a principle that is as abstract and fundamental as it was previously unannounced, and all the more noteworthy for it:

Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

The basic substantive question that underlies the institutional question explicitly addressed in Keller, and which is raised indirectly through Keller’s invocation of Blackstone’s classical definition of the English king-patriarch’s power to police, cannot be resolved by restricting the power to punish through criminal law to the legislature. At bottom, the court-created morals offense of “indecent disposition of a dead body” in Keller faces the same legitimacy concerns as the legislature-created morals offense of adultery or, after the recodification of Pennsylvania criminal law in the wake of the Model Penal Code, the morals offense of “abuse of corpse.”\textsuperscript{51}

\textsuperscript{49} For a critical discussion of the German concept of Rechts gut (or law good), which is said to play this foundational role in German criminal law, see Markus D. Dubber, “Theories of Crime and Punishment in German Criminal Law,” 53 Am. J. Comp. L. 679 (2006).

\textsuperscript{50} 539 U.S. 558 (2003).

\textsuperscript{51} Pa. Crimes Code § 5510 (“Except as authorized by law, a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor of the second degree.”); compare Model Penal Code § 250.10.