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The Legality Principle in American and German Criminal Law: An Essay in Comparative Legal History

Markus D. Dubber *

This paper begins by briefly recounting the (non-)history of the principle of legality in American criminal law. This account of an absence of lawness is complemented by an account of the presence of policeness, the history of American penalty being presented within the framework of the relationship and tension between law and police as two fundamental modes of governance. The predominant history of American penalty turns out to be the history of American penal police, rather than of penal law, as the state’s power to punish is conceptualized as an instance of the state’s power to police.

The short history of the non-legality of American penalty is then transformed, and expanded, into an exploration of the potential of comparative legal history as a tool of critical analysis of law, outlining the contours of a cross-temporal and cross-systemic analysis of the principle of legality, with the history of the principle of legality in German criminal law as a point of comparison.

The history of the legality principle in American criminal law is short and not-so-sweet. There is no such thing as a legality principle in American criminal law, nor was there ever such a principle. As with the history of principles of American criminal law in general, the history of the principle of legality, therefore, is the history of an absence. This absence, however, is significant, because it reflects a core feature of American penalty; American penalty is essentially alegal, as the power to punish is regarded as an instance of the power to police. The police power, however, is distinct from the law power, and police is distinct from law as a mode of governance, a mode of governance that is not governed by principles of any kind, and certainly not by principles of legality.

There is an irony, and perhaps even a paradox, associated with the legality principle in American criminal law. America is both said to be the birthplace of the principle and, with England, its most flagrant violator. In fact, to the extent that the Founding Fathers paid any attention to constitutional provisions that have been associated (by others, and more specifically continental European observers) with the principle of legality, which

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was rare enough, they argued over whether they were too obvious and well-established or, more interestingly, too frequently honored in their breach—not only in ancient English constitutional history, but more to the point in very recent, if not current, *American* constitutional history—to mention.\(^3\) In fact, these very Founding Fathers found it expedient to violate some of these very norms.\(^4\)

The history of the American principle of legality, however, is more than the history of an absence. It is not, or at least not simply, the history of disregard for the rule of law and of a failure to conceive of the power to punish as subject to principled constraints. It is, also, the history of a presence; the history of American penalty is the history of a particular, and a particularly central—and potent—exercise of the power to police, which as a direct manifestation of sovereignty was not governed by principled constraints, but instead was defined by its very indefinability, an essentially unlimited discretionary power subject at best to self-policed guidelines as flexible as they were advisory. The police power was, and remains, not governed by principles of justice because it did not seek justice; it instead seeks good governance, perhaps efficiency, welfare, the common weal of the state conceived as a macro household under the authority of a macro householder—the king in England and “the people” in the New Republic.

A historical study on the principle of legality in American criminal law, then, is about both the history of an absence and of a presence, about the history of the absence of a principle of legality that reflects the presence of an alegal penal power, about the history of the absence of law and the presence of police. In the end, the history of American penalty, rather than of American criminal law as such, is the history of the relationship between these two modes of governance, police and law, which trace their complementary roots to the original sites of Western government in Ancient Greece—the familial household and the city-state. As the sites of private and public government, the household and the city, the oikos and the agora, police and law are the paradigms of two modes of governance, one heteronomous, the other autonomous, one discretionary, the other formal, one hierarchical, the other egalitarian. From the start, oeconomic and political government were complementary paradigms, with their respective spheres of significance, and the predictable disagreements about where one sphere began and the other ended and whether, and if so to what extent, a given mode of governance could be transferred from one sphere to another, or more radically, even could render the other irrelevant altogether. As Aristotle and Plato differed on the transferability of oecomics


\(^4\) Consider, for instance, Jefferson’s drafting of a 1778 bill of attainder against Josiah Phillips in the face of an explicit and unequivocal constitutional prohibition of this precise mechanism in state constitutions and, later on, in the federal constitution (not to mention, most startling, the Virginia constitution Jefferson himself proposed in 1783). Jefferson later privately conceded that “these acts of attainder have been abused in England as instruments of vengeance by a successful over a defeated party,” but then went on to ask, rhetorically and ominously: “But what institution is insusceptible of abuse in wicked hands?” Thomas Jefferson to L.H. Girardin (Mar. 12, 1815), The Writings of Thomas Jefferson, vol. 14, 272, 273 (Andrew A. Lipscomb & Albert Ellery Bergh, eds., Washington: Jefferson Memorial Association 1905); see generally Leonard W. Levy, Jefferson & Civil Liberties: The Darker Side 33-41 (Cambridge, MA: Belknap 1963).
from the familial household to the state, and the conception of the family as a locus of originary or merely delegated sovereignty (and the attendant conception of the householder as a sovereign or merely as an intermediate state official), so the intrusion of “the market” and (other?) liberal social and political conceptions into the sphere of “the family” has been anxiously documented, triggering visions of intrafamilial contracts defining loveless post-familial micro (o)economic units.

In this telling, the modern idea of law appears as arising in explicit contradiction to the idea of police, as the idea of the Rechtsstaat (law state) cuts its teeth on the idea of the Polizeistaat (police state). The police state having expanded the notion of heteronomous oeconomics from the micro household of the family to the macro household of the state, that “large family” (Rousseau), the law state (re)asserts autonomy as a mode of governance by citizens, of citizens, rather than by householders, of household resources, human and otherwise, for the household (personified, literally, by the householder). In the face of a power of “public police and oeconomy” to maintain “the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations” (Blackstone), the law state reasserts autonomy in the general and traditional sense of self-government, but also asserts autonomy in a novel, revolutionary, way, by radically reconceiving the self at stake in self-government.

In, and since, ancient Greece, the self in political self-government was none other than the self in domestic other-government. The self-as-householder who governed others in the private sphere of oeconomics was the self-as-citizen who governed himself in the public sphere of politics. Citizenship, in other words, was a distinctive and exclusive status that differentiated certain (“free”) beings from other (“unfree”) ones and marked them both as private other-governors and public self-governors. Only private other-governors were regarded as having the capacity for self-government required for

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6 Jean-Jacques Rousseau, Discourse on Political Economy, in On the Social Contract with Geneva Manuscript and Political Economy 209, 209 (Roger D. Masters ed. & Judith R. Masters trans., 1978) (1755) (“The word Economy, or Œconomy, comes from oikos, house, and nomos, law, and originally signified only the wise and legitimate government of the household for the common good of the whole family. The meaning of the term was subsequently extended to the government of the large family which is the State.”).


both private heteronomy and public autonomy. There were governors, of others and of themselves, and the governed.

The Enlightenment discarded this assumption of radical difference. It instead asserted the fundamental identity of all persons as such. This did nothing for the nonhuman constituents of the oikos—though the concept of personhood is not essentially human and therefore does not categorically preclude inclusion of nonhuman beings, including not only Kantian aliens but also, less fancifully and currently more relevantly, nonhuman animals—but required a literally radical critique of government in general, and the exercise of state power in particular. All human persons—and nonhuman ones as well—were fundamentally identical, and therefore equal, insofar as they all possessed the requisite capacity for autonomy as persons; in fact, that capacity was the distinguishing feature, and the only distinguishing feature, of personhood. What had once been the mark of superiority now was the mark of equality, what had been the basis of political power now became its challenge, what once had been taken for granted was now in need of legitimation.

Now that everyone had the requisite capacity for autonomy, the human household constituents along with the householder, the once governed along with the once governor, autonomy was no longer the answer but the question, a move so radical that the Enlightenment doesn’t merely restate the question of governance, but poses it for the first time. With the Enlightenment’s discovery of the autonomous person, the legitimacy of state power is challenged: The analysis of state power is no longer a matter of wisdom, or prudence, or propriety, or efficiency, or frugality, or rationality (as developed most meticulously and concertedy in the police science (Polizeiwissenschaft) of the 17th and 18th centuries), but a matter of right (Recht), i.e., of law and of justice, in the specific, and new, sense of juridical justice, rather than the traditional sense of harmony, order, balance that was easily accommodated by fluid (virtue) ethical notions of good governance, or housekeeping.

The distinction between Recht und Polizei continues to frame the legal-political project in modern liberal societies, i.e., the project of the possibility and continued struggle to manifest the idea of the Rechtsstaat. In Germany, the radical distinction between Rechtsstaat and Polizeistaat has given way to an accommodation between the fundamentally different, yet complementary, modes of governance, as the Polizeistaat has morphed into the Wohlfahrtsstaat, then Sozialstaat, and most accommodatingly, the soziale Rechtsstaat. There is even the oxymoronic construct of Polizeirecht (police law), which as a branch of the less obviously oxymoronic Verwaltungsrecht can be seen as an attempt to resolve the essential tension between law and police through doctrinal—sovereign-legislative—fiat.  

9 See generally Franz-Ludwig Knemeyer, Polizei- und Ordnungsrecht [Police and Order Law] (Munich: C.H. Beck 11th ed. 2007); see also Franz-Ludwig Knemeyer, “Polizei,” 9 Economy & Society 174 (1980) (English translation of Knemeyer’s encyclopedia entry on Polizei). 174.. Unlike criminal law, police law is state law, rather than federal law. Police law is woefully understudied and has largely returned to the police academies from which it originated as police science prior to its integration into university faculties. Police science morphed into administrative law in the late nineteenth century, both on the continent and in
It is not obvious that the American—or for that matter the English—legal-political project as a whole fits into this broad Enlightenment-based conception of the modern liberal project. If it does, and let’s say it does for present purposes, then American penality stands outside the American legal-political project. In other words, American penality would appear not as an instance of external American legal-political exceptionalism, but as internal exceptionalism. Offenders were among the original remainders of the American legal-political project, along with women, slaves, the poor. Unlike their fellow original remainders, however, offenders have remained the exception: they are the remainder’s remainder.\footnote{10}

This shift of focus from American exceptionalism to penal exceptionalism within the American legal-political project appears, at first sight, to preclude a comparative approach. Rather than representing an inward turn of historical analysis, however, this move opens up new opportunities for comparative inquiry. Rather than wondering, again, whether the Enlightenment passed America by, this comparative inquiry would investigate the question of penal exceptionalism across legal-political systems. The question would not be whether, say, Germany is more perfectly legalized or had more perfectly manifested the Rechtsstaat than the United States, but whether, and to what extent, German penality in particular had been integrated into the German Rechtsstaat project or whether, and to what extent, German penality retains policial aspects. Comparative analysis thus can ultimately facilitate intra-systematic critique.

This is an important point. Continental ears have a tendency to mishear a critical analysis of the principle of legality in American penality, such as the one outlined above, as an argument for American exceptionalism in general and for American penal exceptionalism in particular. The discovery of American lawlessness in general and of penal lawlessness in particular then is easily interpreted as a confirmation of continental lawfulness in general and penal lawfulness in particular. This parochial version of comparative analysis, though apparently critical, in fact blunts comparative legal history’s critical edge. To consume, or perform, comparative analysis in general, and comparative legal history in particular, as self-mollifying self-confirmation is not only a pointless scholarly exercise, at best, but also ultimately self-defeating, since it blocks critical analysis of one’s “own” system rather facilitate it. (Of course, as with any comparative exercise, a comparative critical analysis of the principle of legality from a historical perspective at the same time should avoid facile celebration of “foreign” systems for critical effect at home.)

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\footnote{10} Bonnie Honig, Political Theory and the Displacement of Politics ch. 5 (Cornell 1993); Judith Shklar, American Citizenship, The Quest for Inclusion (Harvard 1998).
The principle of legality marks a particularly promising site for comparative legal historical analysis, which I see, like all historical analysis of law, ultimately as a mode of critical analysis of law, i.e., the analysis of law as a mode of governance in light of the relevant principles of legitimacy. Comparative legal history in general has extraordinary critical potential by combining two critical perspectives, cross-temporal and cross-systemic comparison. Bringing this doubly critical analysis to bear on the principle of legality, which—understood broadly as a fundamental norm of lawness—is central to the legal-political identity of the modern democratic state (the Rechtsstaat), goes to the heart of the project of critical historical analysis of law.

(1) As historical analysis, comparative legal history interrogates the often-asserted connection between modernity, and the Enlightenment in particular, and the principle of legality. Historical inquiry may reveal that the roots of the legality principle reach back into medieval law, to a time when common law, or customary law, gave way to, or was joined by (or incorporated?) statutory law, where the distinction between statutory law and common law itself is subject to scrutiny, in light of the fact that, after all, they both represent not only forms of lawness but also, at least arguably, manifestations of central royal power (given that the “common law” also was royal law enforced by royal judges in royal courts). In fact, it may turn out that the roots of the legality principle reach back farther still, as some have suggested, to ancient Greece, where occasionally references to the impropriety at least of retroactive legislation can be found. Suppose premodern roots of the legality principle, or at least of some of its aspects, of course raise questions both about the “principledness” and the “lawness” of the legality principle, given that it is at the very least not obvious how, say, the ancient Greek notions of principle or of law relate to their modern manifestations.

Consider, for instance, that Greek texts apparently did not distinguish between the retroactivity of criminal and civil norms (assuming we can get a rough sense of what that distinction might have amounted to then) nor between that of beneficial and detrimental norms. For instance, in one example cited as evidence of the “Greek roots” of “the

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12 For a comparative legal historical perspective on this issue, see Anthony Musson, “Criminal Legislation and the Common Law in Late Medieval England,” and Heikki Pihlajamäki, “Positivism before Positivism? Statutes and Swedish Early Modern Criminal Law,” both in this volume.


14 See, for instance, the (private) law code of Gortyn. Das Recht von Gortyn (Franz Bücheler & Ernst Zitelmann eds., Frankfurt a.M.: Sauerländer 1885). Interestingly, scholars of ancient Greek law tend to regard references to the non-retroactivity (or retroactivity?) in the Gortyn laws, or other ancient codes (notably Draco’s homicide law) not as manifestations of some deep commitment to a proto-principle of legality, but as evidence that these laws were “true legislation, i.e., legislation “intended to guide litigants and judges/jurors in actual cases” rather than carve in stone an image of the king’s fairness for the benefit of present and future generations. Michael Gagarin, “The Unity of Greek Law,” in The Cambridge Companion to Ancient Greek Law 29, 37 (Michael Gagarin & David Cohen, eds., Cambridge: Cambridge University Press 2005). I thank Lorenzo Perilli for bringing the Gortyn Code to my attention.
Timokrates was criticized for bringing a bill that exempted debtors of the state from imprisonment in default of payment if they could produce sureties and then repaid the debt within a certain period of time, which it was apparently “not difficult to show” was designed to shield three ambassadors from a judgment requiring them to replay public funds they had misappropriated. “This,” Vinogradoff concludes, “shows that the Greeks recognized the principle clearly stated in the constitution of the United States of America that no law should be retroactive.”\(^\text{15}\) Instead, the speech against Timokrates illustrates qualms about favoritism, or personalized legislation, in this case the beneficial mirror image of a bill of attainder (likewise prohibited in the constitution of the United States of America).

Then again, historical analysis might challenge the legality principle’s modernist pretensions by suggesting a more recent, rather than a more ancient, origin. John Jeffries, for one, concluded after a preliminary investigation into the legality principle’s history in the United States that references to the principle did not appear until well into the twentieth century, in an ex post attempt to give the U.S. Supreme Court’s earlier forays into void-for-vagueness analysis a broader principled veneer borrowed from early mid-century encounters between common law commentators and continental jurisprudence, particularly in totalitarian regimes which were thought to run afoul of “the legality principle” in various ways.\(^\text{16}\)

Drawing the assumed connection between the modern legal-political project and the legality principle into question, and bringing to light the purported role of “the legality principle” in premodern regimes and its more recent use as a rhetorical device, has a two-fold critical purchase. First, it cautions against vague, formulaic, and ahistorical assertions both about the nature of the legality principle and about its implementation. Second, and related, it urges a careful analysis of the content and function of the legality principle in contemporary liberal democracies. Claims about the premodern roots of the legality principle do not necessarily question the principle’s connection to the modern legal-political project; they are just as likely to trigger an exploration of that connection, not as a historical, but as a theoretical matter. In fact, the claimed premodern roots of the legality principle instead may help to sharpen our understanding of the principle by exposing a similar, but essentially different and complementary, phenomenon within the realm of police, rather than within the realm of law.

While this isn’t the place for pursuing this point in detail, what I have in mind is an exploration of the possible relevance of aspects of the principle of legality in police governance, not as principles, or aspects of a single principle (and obviously not as a principle, or principles, of legality), but as guidelines of prudence, or wisdom, or governmental craft (or art, or science). In other words, the mere presence of prudential norms, self-defined, self-imposed, and self-policed, that may resemble various aspects of


the principle of legality is not inconsistent with an alegal (i.e., policial) mode of governance. Although Lon Fuller had something different—or at least something more—in mind in drawing it up, his well-known list of rules of managerial discretion (i.e., control not under the “rule of law”) provides an example of policial analogues to the components of the principle of legality (existence of rules, publicity, prospectivity, understandability, consistency, possibility, constancy, compliance).\textsuperscript{17} A prudent householder, or slaveholder, or military officer, or other quasi-paternal figure may well choose to devise rules, publish them, apply them prospectively, make them understandable, and so on, and even at least to create the impression of self-compliance, without any reference to legitimacy in general, or legal legitimacy in particular.\textsuperscript{18}

What is distinctive, in other words, about “the principle of legality” is not only that it is a principle of \textit{legality} (i.e., of law, rather than police), but also that it is a \textit{principle} (rather than, say, a maxim or, for that matter, a rule) and, what’s more though not necessarily more important, \textit{the} principle of legality (rather than a bundle of maxims, sticks, etc.).

(2) As \textit{legal} analysis, comparative legal history homes in on the lawness of the principle of legality. Even the most fleeting attention to the principle of legality as such, it seems, would reveal the obvious connection between it and the concept of law, and of the rule of law. That this connection is so rarely made in American legal-political discourse attests to the general lack of interest in, and lack of significance of, the legality principle. At best, to the extent the concept of the legality principle has appeared in American legal-political discourse at all, it has tended to function as a more or less convenient catch-all label attached to a more or less random collection of doctrines, rules, and maxims, that are expanded and contracted, ordered and reordered without rhyme or reason, or attention. So the legality principle might refer to—“include” would be misleading—the void-for-vagueness doctrine in constitutional law, the rule of lenity, the maxim of strict construction, the prohibition of ex post facto laws, the requirement of publicity, the prohibition of common law crimes, i.e., a grab bag of prescriptions and proscriptions that no one saw fit to reduce, and translate, into a single command or prohibition. Not having received the minimal attention required to state a single principle of any kind, it is not surprising that not much progress would have been made on accounting for the \textit{legality} of that single principle, i.e., in grounding the legality principle in the rule of law, or the concept of law more generally.

The absence of principle, rather than mottos, however, does more than merely indicate the policial nature of this ragged bundle of normative sticks; it also points to the limits of a legal inquiry into the principle of legality. What’s at stake, at bottom, is a political, or statal, issue: the connection between the principle of legality as principle

\textsuperscript{18} For an interesting bit of soul-searching on E.P. Thompson’s part on a related point, the significance of the rule of law as a non-instrumental principled constraint on state power, see Morton J. Horwitz, “The Rule of Law: An Unqualified Human Good?,” 86 Yale Law Journal 561 (1977). Recall here also the interpretation of early law codes as statues rather than statutes, i.e., as monuments to the king’s greatness and wisdom, rather than as norms governing behavior. See Gagarin, supra.
with the core task of the critical analysis of law as a mode of governance, the legitimation of state power (specifically, through law).

The principle of legality, in this sense, is not itself a legal principle, but the principle of law. It is distinctive of law in two senses. First, law, unlike police, is subject to principled, rather than prudential, external normative constraints. Law government is essentially limited, and was specifically designed that way, and for that reason. The limited formal Rechtsstaat emerged against the limitless discretionary Polizeistaat. Second, and related, the modern concept of law is grounded in the principle of autonomy, and more specifically the autonomy, or capacity for self-government, of all persons as such (as opposed to, say, the autonomy of all Athenian householders or Roman patres familias as such). The aspects of the principle of legality, in other words, must be connected not simply to “the rule of law” but more specifically to the rule of law as the self-rule of autonomous persons.

In this context, the components of the legality principle have no independent significance; they are not separate sticks bundled together and labeled “legality principle.” They are specific manifestations of the general principle of self-government that drives the project of government under and through law. And law in turn occupies a central place in the account of the modern state itself; the modern state doesn’t just happen to be a Rechtsstaat, but is essentially a law state. The modern state isn’t a law state among many other things, such as a state with a certain state flower, fruit, or flag, rather than another; its lawness is an essential feature.

(3) As comparative analysis, comparative legal history facilitates the critique of obvious and familiar cross-temporal and cross-systemic chauvinism. Cross-temporal chauvinism, or Whiggism, is rampant in continental accounts of the principle of legality, which tend to chronicle the historical march of the legality principle toward an ever higher degree of perfection, occasional dips in the upward trajectory of legalityness notwithstanding—as for instance in the aberrational abandonment in 1935 of the prohibition of interpretation by analogy in section 2 of the German Penal Code, the significance and practical impact of which, however, is debated and which, at any rate, was corrected, to the extent a correction was required, immediately after the end of the Dark Age of German criminal law. In this hopeful account, the United States (and England, by extension) differ in lagging behind the progressive manifestation of the legality principle, not having managed to extract themselves from the unprincipled, and unlawful, morass of medieval common or customary law.

And so cross-temporal morphs into cross-systemic chauvinism, providing more fodder for critical comparative analysis. Here the story is that the legality principle is in fact a distinctively civil law concept that, facile comparative legal history reveals, is alien to the common law world, which by implication is therefore inferior, as well as behind the times. The most straightforward version of this analysis proceeds on the implicit assumption that legality requires codification; having noticed that common law countries either came late to criminal codification (as, for instance, Canada), never managed to adopt a comprehensive criminal code (as, for instance, the United States), or—as in the
case of England—never managed to adopt a criminal code of any kind, the common law country in question is found in more or less egregious violation of the legality principle. At the same time, the presence of codification is, again implicitly, thought to indicate perfect compliance with the legality principle, to the point where legality is simply treated as synonymous with codification, and law with codified law.

As a result, this version of a comparative legal history of the principle of legality would manifest not only cross-systemic chauvinism but also would be ultimately self-defeating, as the unquestioned identification of codification with legality blocks the very legitimacy critique of the exercise of state power in the form of law that the legality principle both manifests and is intended to facilitate. In fact, this view of legality reveals a basic misunderstanding of the principle of legality and its foundation in the constant scrutiny of the legitimacy of state power characteristic of the modern state, and therefore indicates the absence of a culture or praxis of legality despite the presence of what are mistaken for objective positive markers of legality, i.e., codified legal norms.

In this way, codification in fact can be seen as a violation of the principle of legality in fact, if not in form. Codification here serves to insulate state action from legitimacy critique and the historical moment of codification preempts legitimacy challenges.

Critical analysis, however, reveals that civil law countries do not in fact have criminal codes that comprehensively codify criminal law; this is so not only because the pursuit of a comprehensive criminal code, or a comprehensive code of any type, is either impossible or foolhardy, or both (pace Bentham), but also because it is historically dubious that criminal codes in fact were drafted and passed to facilitate legitimacy critique of state power, i.e., to manifest the principle of legality properly understood.

The discussion and rationale of James Fitzjames Stephen’s English criminal code draft, for instance, which though unsuccessful in his home country served as the model for the Canadian criminal code of 1892, is devoid of concerns about the principle of legality as a means of critiquing the exercise of state penal power. In England, Stephen regarded it—and it was rejected—as an attempt to domesticate the Indian penal code drafted by Thomas Macaulay in 1837 but not enacted until after the Indian Mutiny twenty years later.19 Macaulay’s code of course was intended to better police India rather than to implement the principle of legality and, not surprisingly, the English balked at the notion of being demoted from subjects to objects of colonial governance.

Similarly there is no evidence, or even the suggestion, that nineteenth-century Canadians regarded “their” code in light of the principle of legality, or the legitimacy of state power in general. Proposed motivations instead include an (early) effort at Canadian nation-building and, more yet more prosaically, an attempt to unify if not Canada, then Canadian criminal law in the wake of the British North America Act of 1867 which had assigned the federal government the criminal law power, in explicit

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19 See generally Barry Wright, “Macaulay’s Indian Penal Code: Historical Context and Originating Principles.”
contradistinction to the United States, where the power to criminalize—as an instance of the police power—had remained with the states, leaving the federal government to rely on other, less all-encompassing, sources of legislative power ceded to it by the states (which by the late nineteenth century, however, added up to a police power *de facto*, if not *de jure*) and resulting in a patchwork of criminal law systems and criminal codes.  

Yes, there were, and are, U.S. criminal codes. Some of these codes, of course, were more comprehensive and systematic than others, but it is a still common misperceptions, not only among casual continental observers, that American criminal law was never been codified, even if some American codes amounted to little more than alphabetized collections of criminal offense definitions, as the federal criminal code remains to this day. The American Law Institute’s Model Penal Code, which was completed in 1962 and not only fundamentally reshaped the study and teaching of American criminal law but also triggered criminal recodification projects in most American jurisdictions, rivals and—in fact in many respects exceeds—continental criminal codes in comprehensiveness and detail. The Model Penal Code, and the many American codes that followed it to a greater or lesser extent, therefore arguably comply with the legality principle more closely than does, say, the German criminal code whose code- and legality-ness is generally considered beyond doubt.

The Model Penal Code, for instance, includes detailed, systematic, and comprehensive definitions of the various modes of culpability (or mens rea).  

In fact, it would not be an exaggeration to say that the Model Code’s provisions on mental states are the heart of the Code and that the lack of consistency, systematicity, and legality (as opposed to morality) of the jurisprudence of mens rea was among the central deficits, if not the central deficit, in American criminal law that gave rise to the Model Code project in the first place.  

The German criminal code, by contrast, included no definition of mental states in its original version of 1871, nor were definitions inserted during the fundamental revision of the code in the mid 1970s. Instead, the code is content merely to mention two general types, or rather categories, of mens rea, *Vorsatz* (dolus) and *Fahrlässigkeit* (culpa), making no reference to the distinctions between various forms of dolus (*Absicht*, dolus directus, dolus eventualis, etc.) and of culpa (conscious and unconscious culpa). The reason for leaving these crucial matters out of the German criminal code, despite calls for their inclusion (most recently in the Alternative Draft prepared by a group of law

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21 Model Penal Code § 2.02 (1962).

professors in connection with the 1970s reform of the code\textsuperscript{23} is instructive: they were left to the development of criminal law science, i.e., to criminal law professors.\textsuperscript{24}

While the history of the German criminal code has attracted little attention, in contrast to the history of criminal codification efforts—successful and unsuccessful alike—in common law countries (including, for instance, England, Canada, the United States, and—particularly interesting—India), it appears no less bound up with concerns about nation-building, centralization, and doctrinal uniformity than, say, the Canadian criminal code adopted some twenty years later (1892) based on Stephen’s drafts from 1878/1879.\textsuperscript{25} Certainly the occasion for the enactment of the German criminal code was not a movement for an accessible and comprehensive statement of penal norms as an instance of liberal self-government but, simply, the creation of the German Empire under Prussian control in 1871; the code itself simply expanded and relabeled the Prussian criminal code of 1851.

Rather than as a monument to the constraint and critique of state power manifested in the principle of legality, the German “imperial criminal code,” then, instead appears as a straightforward monument to the confident exercise of consolidated state power and as the product of the emerging, and staunchly positivistic, German science of criminal law. That science was personified by such figures as Karl Binding, the leader of the so-called classical school of German criminal law, whose still influential critical views on the legality principle we will considered in some detail a little later on.

First, however, it is worth pointing out that “the” continental, and particularly the German, “principle of legality” is not significantly less fractured than the American version. Ironically, the English term “legality principle” itself is of continental origin; as we noted earlier, it doesn’t appear in American legal discourse until well into the twentieth century, in the context of discussions of what were considered deviations from the principle in the criminal law of totalitarian regimes, mainly in continental Europe (Germany, Italy, and the Soviet Union). The only extended treatment of the legality principle in American criminal law is the English translation, published by a Dutch press in The Hague, of a Polish book originally published in Warsaw written by a Polish scholar who had spent some time as a visiting scholar at Harvard in the mid-1960s.\textsuperscript{26} It is therefore perhaps not surprising that a unitary concept of the legality principle did not develop in the United States.

\textsuperscript{23} Alternativ-Entwurf eines Strafgesetzbuches: Allgemeiner Teil 56-57 (2d ed. 1969).
\textsuperscript{26} This is an excellent, remarkably detailed, sympathetic, careful study, whose author later joined the faculty at Rutgers-Newark. Stanislaw Pomorski, American Common Law and the Principle Nullum Crimen Sine Lege (2d rev. ed. Mouton: The Hague 1975) (originally published in 1969).
At the same time, however, and no less ironic, there is strictly speaking no “principle of legality” in German jurisprudence either. There is of course the German Legalitätsprinzip, which literally translates as “principle of legality.” But the proper, and nonliteral, translation of this term is “principle of compulsory prosecution,” which requires police and prosecutors to pursue every factually colorable criminal case, under pain of criminal punishment. (Prosecutors, but not police, are also subject to a competing principle, the Opportunitätsprinzip, or principle of discretionary prosecution, which provides for exceptions from the principle of compulsory prosecution in certain cases, notably minor cases of negligible public interest.)

Without a “principle of legality” per se, the German literature struggles even to name the principle at issue or, once a principle is named, to stick with one name, rather than a freely expandable and contractable list of similar sounding candidates. In other words, in German discourse, there is not a bundle of aspects of legality principle, as in the United States, so much as a bundle of formulations of the principle itself. Everyone agrees that there is one principle of legality, but there is little agreement about, or particular interest in settling on, the precise definition of the principle. The two leading candidates are nullum crimen sine lege and nulla poena sine lege, which also appear in combination as nullum crimen, nulla poena sine lege. But they are often joined, even in the course of a single discussion and without apparent motivation, by nulla poena sine culpa, nulla poena sine lege scripta, nulla poena sine lege criminali, nullum crimen sine lege poenali anteriori, and so on.

These formulations of “the principle” appear so often and so quickly that one is tempted to view them as opportunities for jurisprudes to display their rudimentary Latin skills. Less charitable interpretations are possible, of course. One might suspect, for instance, that the insistence on using Latin formulations, and only Latin formulations, represents not only pseudo-learned affectation but also an attempt to provide “the principle” with the veneer of theoretical gravitas and historical fundus in place of a description of the principle followed by a careful exploration of its historical and theoretical foundation or foundations. One is surprised to find, for instance, that a sub rosa reformulation of “the principle” from, say, the generic nulla poena sine lege to, say, nulla poena sine lege scripta, is mistaken for an argument that the principle of legislativity (or the prohibition of common law crimes) is an essential aspect of “the principle of legality.”

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27 The “principe de légalité” in French criminal (and administrative) law appears to be closer in meaning to that of the “principle of legality.” It is commonly said to be reflected in article 8 of the Déclaration des droits de l’homme et du citoyen of 1789.

28 This practice is by no means limited to German law, nor to civil law in general. See, e.g., Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 (principle that “the innocent not be punished … is so old that its first enunciation was in Latin actus non facit reum nisi mens sit rea”); see also Markus D. Dubber, “The Story of Keller: The Irrelevance of the Legality Principle in American Criminal Law,” in Criminal Law Stories (forthcoming New York: Foundation Press 2011) (variations on the nullum crimen theme in U.S. jurisprudence).
It doesn’t help matters, of course, that the almost universally cited origin of the principle in question is section 20 of P.J.A. Feuerbach’s *Textbook of Common Criminal Law in Germany*, which first appeared in 1801,\(^{29}\) i.e., during a pre-historic period of German criminal law *avant la lettre*, incidentally, before there was a German criminal code, or for that matter a Bavarian criminal code (which, drafted by Feuerbach, went into force in 1813). The entire discussion of the issue of the legality principle consists of the following series of declarations:

§ 20

I. Every infliction of punishment requires a criminal statute. (*Nulla poena sine lege.*) 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.*) 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.*) Because the statute connects the specific violation of the law to the harm [of punishment] as a necessary legal consequence.

It is easy to see why continental, and particularly German, commentators find so little use for this passage, other than as a source of Latinisms, or rather as a source of encouragement, and inspiration, for their own creation of Latinisms. Feuerbach’s declarations about the principle of legality in his textbook come out of nowhere and go nowhere. The relevant section (§ 20) is not so much a discussion of the principle of legality as a series of Latin phrases that appear where one would expect analysis and justification instead. In other words, it establishes the *modus operandi* that characterizes treatments of the legality principle in German discourse to this day.

Feuerbach’s Latinisms are cryptic, appear without a rationale, and disappear without trace. In the textbook itself, they are as soon forgotten as they are stated. Even in the later literature on the legality principle, despite the soon obligatory recognition of Feuerbach as the originator of the principle, or at least of a label for the principle (as we’ve seen the distinction between the two is often difficult to discern), references to the other two formulations of the principle besides “nulla poena sine lege”\(^{30}\) can be hard to find.

\(^{29}\) P.J.A. Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* § 20 (1st ed. 1801).

\(^{30}\) One wonders whether Feuerbach here might have had in mind a mode of exposition used by Immanuel Kant, whom he greatly admired, in the *Metaphysics of Morals*, published only four years prior, in 1797. There Kant famously set out several formulations of the categorical imperative, leaving readers to puzzle over their connection, or common foundation, ever since.
More significant, in later editions of the textbook, K.J.A. Mittermaier in his extensive editorial comments to section 20 refers to Feuerbach’s formulation of the legality principle only indirectly, in the context of a broad critique of Feuerbach’s general prevention theory of punishment. The idea is, though it is not made explicit in the textbook, that general prevention requires notice of at least the consequences (poena) of one’s act. Mittermaier’s comments are significant not only for what they do not include (namely a serious engagement with Feuerbach’s nonexistent rationale for his formulations of the legality principle), but also for what they did: It turns out that the general preventive rationale for the legality principle, which Mittermaier imputed to Feuerbach, is one, and perhaps the dominant, rationale for the legality principle that can be found in the generally highly unenlightening German literature on the subject.

This rationale, of course, stands and falls on the merits of the theory of general prevention. That theory, however, had already come under attack within Feuerbach’s lifetime, as evidenced by Mittermaier’s sustained attack on it in Feuerbach’s own textbook. In fact, as a judge in the Bavarian hinterland, where he had been dispatched after falling out of favor with the Bavarian court, Feuerbach would experience first hand the potential for injustice of a general preventive approach that threatens punishment so that the potential offender refrains from offending if the (anticipated) pain of the threatened punishment (discounted by the likelihood of detection and so on) exceeds, but only by the narrowest necessary margin, the (anticipated) benefit he would derive from the commission of the offense. So distraught was Feuerbach by the brutality of the very code that he had drafted in light of his strict endorsement of general prevention that he was moved to collect and publish individual “remarkable” cases before his court.

This is not the place to rehearse the arguments against general prevention as a rationale for punishment. Suffice it to say that its connection to basic principles of legitimacy is uncertain and, at any rate, irrelevant. It survives only as a shadow of its former self, in the form of a theory of so-called “positive general prevention” which is perhaps best thought of as a collective label for the appealing features taken from various proposed rationales for punishment (retribution, prevention, incapacitation, rehabilitation) but, for our purposes more relevant, lacks precisely the feature that connects it to the principle of legality, i.e., the idea that threats of punishment are, may or should be calibrated so as to provide the minimal necessary deterrence to potential offenders (resulting among other things in increases in the threat of punishment proportional to the stimulus driving a potential offender to consider the commission of a criminal offense, so that duress appears not as an exculpatory but as an inculpatory factor). Modern positive general prevention instead focuses on reaffirming the “loyalty to law” among the law-abiding population at large. Again, the merits of positive general prevention are beside the point for present purposes. What matters is that the imputed

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A general preventive rationale for the legality principle has long since been abandoned in German criminal jurisprudence.

Binding made this point explicit when in the late nineteenth century he launched an extended assault on the principle of legality that remains influential to this day and, in fact, remains unanswered. He recognized two rationales for the principle: Feuerbach’s general preventive theory (which, of course, is not unique to Feuerbach but could just as easily, and more appropriately, have been attributed to Bentham or, for that matter, Beccaria) and the theory of the separation of powers, which Binding attributed to Montesquieu. Binding rejected both and therefore the principle of legality. Whatever the merits of the separation of powers, or the historical accuracy of its recognition as a source of the principle of legality, it is obvious why the separation of powers cannot account for the principle of legality as such or in toto: it has nothing to say about precisely that aspect of the principle that Feuerbach, and many others, appear to regard as its core, namely the requirement of notice. Separation of powers concerns might affect the assignment of certain tasks in the penal process to one branch rather than another. They say nothing about retroactivity, publicity, or specificity. In fact, without more, they say nothing about legislativity itself since what matters for a separation of powers is that the powers—here of making and applying (or interpreting) criminal norms, assuming this distinction can even be drawn with sufficient cogency—be separate, not that they be assigned to one branch or another. At best then, separation of powers concerns may help account for one the maxims in a bundle of legality, or for that matter in a bundle of policiality, notably the prohibition of interpretation by analogy or—assuming the task of criminal lawmaking has been assigned to the “legislature” (why not the “executive”?!) and that of the application of the norms made in this way by this branch (or branches) to the “judiciary”—the principle of legislativity (or the prohibition of judicial crime definition).

Binding did not stop at, first, making explicit the implicit rationales for the legality principle in German criminal law and then, second, demolishing them. He also set out a rationale for a much more limited version of the principle, one that rests on his so-called norm theory of criminal law. The norm theory is interesting in its own right and can even be said to have retained some influence in areas of German criminal law doctrine, but certainly does not now, nor ever did, enjoy the status of a consensus account of German criminal law and therefore cannot supply a rationale for even the reinterpreted remnants of the legality principle that Binding would have endorsed. Whether these remnants could still be considered even maxims of legality is another question, given that Binding found the prospectivity requirement satisfied whenever a prohibitory norm of any kind, in any form, statutory or not, existed at the time of the conduct in question. In Binding’s view, assuming the existence of a norm at the time of the conduct, the statutory manifestations of that norm and the threatened consequences of their violation could

legitimately be applied retroactively to that conduct, so long as they were in place at the
time of their application (which goes without saying since a nonexistent norm cannot be
applied).

Binding, a committed positivist who regarded the offender as the object of the
exercise of the state’s penal power according to the norms set out by the state to govern
the behavior of its officials, thus either rejected the legality principle or reduced it to a
tautology.\textsuperscript{35} To Binding, retroactive punishment was impossible, rather than illegitimate.

At any rate, since Binding it is clear that the principle of legality in Germany, or
rather the collection of Latinisms including prominently the rule of \textit{nulla poena sine lege},
is without foundation, even if we can assume, for purposes of argument, that there is such
a thing as a single “principle of legality” in Germany, a point German jurisprudences appear
to continue to take for granted.\textsuperscript{36} As with other fundamental principles of German
criminal law, such as the \textit{Rechtsgru}\textsuperscript{37}t, the German criminal law literature has generally
been content to assert and reassert, and to describe and redescribe, the legality principle
in the full glory of its centrality and obviousness.\textsuperscript{37} One learns, for instance, that—like
the \textit{Rechtsgru}\textsuperscript{37}t—the legality principle flows directly from, is essentially implied by, and so
on, basic principles of German constitutional law, or more fundamental yet, the German
constitutional order. To embellish this point, reference is often made to another principle,
perhaps yet more fundamental than the legality principle or at any rate quite fundamental
in its own right, the guilt or culpability principle, \textit{Schuldprinzip}, which likewise is said to
be embedded in the very idea of the German constitution and the protection of human
dignity in particular. As further evidence for the intimate connection between \textit{nulla poena sine lege} and the \textit{Schuldprinzip}, if such evidence for the obvious were needed, it is
not uncommon to find a reformulation of the principle as \textit{nulla poena sine culpa}.

There have been sporadic attempts in the German literature to reassess the
foundations of the principle of legality. Rather than uncover a hidden history of the
principle and its rationale, however, these contributions simply reinforce the absence of
such a rationale, and arguably of the principle itself. In fact, they all agree that the

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\textsuperscript{35} On Binding’s (and for that matter also the progressive school’s) staunch positivism, see, e.g., Markus D.
Dubber, “Theories of Crime and Punishment in German Criminal Law,” 53 American Journal of
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\textsuperscript{36} For an excellent critical assessment of the foundations and significance of the legality principle in
German criminal law, see Tatjana Hörnle, “Human-Rights Issues in the General Part of Substantive
Criminal Law: German Constitution, Penal Code and Court Practice” (unpublished manuscript, on file with
author). Hörnle also deals with the question of the application of the various aspects of the legality
principle (finding that they are often more bark than bite), an important issue not covered here. See also
various aspects of the legality principle and policification as characteristics of securitization of German
criminal law). For the American situation, see Markus D. Dubber, “The Story of Keller: The Irrelevance of
the Legality Principle in American Criminal Law,” in Criminal Law Stories (forthcoming New York:
Foundation Press 2011).
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\textsuperscript{37} For a case exposing the lack of a constitutional grounding of the so-called \textit{Rechtsgru}\textsuperscript{37}t principle, see
BVerfGE 120, 224 (Feb. 26, 2008) (affirming constitutionality of incest prohibition in German criminal
code). On the \textit{Rechtsgru}\textsuperscript{37}t principle, see generally Markus D. Dubber, “Theories of Crime and Punishment in
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principle, such as it is, remains (surprisingly) without justification and then proceed to offer just such a justification or justifications, if not for the principle as such, then at least for some or all of its aspects. Hans-Ludwig Schreiber’s study Gesetz und Richter (based on his habilitation of 1970) is the best of the lot, and in fact is a brilliant example of the historical critical analysis of law and, given Schreiber’s careful consideration of non-German historical, theoretical, and doctrinal sources, even of the critical analysis of law through comparative legal history in particular. Like the others, however, Schreiber’s account is far more convincing as history than as theory.

And so, in the end, the history of the legality principle in German criminal law is, and remains, the history of an absence. Unlike in the United States, the connection between the principle of legality and the Rechtsstaat project is understood, or rather felt. But upon closer inspection, that connection turns out not to have been substantiated, but rather to have been asserted, and reasserted from generation to generation, as Latin formulae are revised and reincanted without any serious effort to mount the continuing challenge of the legitimacy of state power that defines the modern liberal legal-political project. Unlike in the United States, the objects of German state penal power are not the remainder’s remainder of the Rechtsstaat; still, though the challenge of legitimating the exercise of state power upon them under and through law is framed, that challenge remains essentially unmet in substance, if not in form. In the United States, the question of the legitimacy of state penal power was never asked. In Germany, the question was asked and but never answered in fact, rather than in Latin.