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Version Post-print/accepted manuscript

Citation (published version) Dubber, Markus D., Ultima Ratio as Caveat Dominus: Legal Principles, Police Maxims, and the Critical Analysis of Law (July 3, 2013). <http://dx.doi.org/10.2139/ssrn.2289479>

Publisher's Statement This is the peer reviewed version of the following article:
Dubber, Markus D., Ultima Ratio as Caveat Dominus: Legal Principles, Police Maxims, and the Critical Analysis of Law (July 3, 2013).

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Ultima Ratio as Caveat Dominus:
Legal Principles, Police Maxims, and the Critical Analysis of Law

Markus D. Dubber*

The so-called ultima ratio principle, like other law-Latinate phrases, wears its broad (presumably Roman law-based) scope and deep historical roots on its sleeve. One expects to find signs of it everywhere, or at least pretty much anywhere, in the familiar cluster of Western legal systems, over centuries, if not millennia. In other words, the ultima ratio principle is ready made for comparative and historical analysis, as two modes of critical analysis of law.

Or so it would seem. In the first part, I attempt a comparative and historical analysis of the ultima ratio principle. This attempt, however, encounters two initial difficulties. First, it turns out that the ultima ratio principle is a feature of German criminal law discourse with an at best negligible non-derivative role in other legal systems, making comparative analysis pointless. Second, ultima ratio turns out to be a fairly recent addition to German criminal law discourse, making historical analysis, never mind comparative historical analysis, pointless as well.

If one leaves behind comparative and historical analysis, and takes a closer look at the principle itself, a third difficulty arises, apparently still more formidable than the first two: this local historyless norm turns out to be an empty catchphrase so vague and varied in meaning as to have neither content nor teeth. In other words, the ultima ratio principle turns out to be neither particularly “ultima ratio” (as opposed to some other norm, like “subsidiarity” or “proportionality,” for instance) nor “principle” (assuming a principle has normative significance, never mind bite). Positively speaking, it fails as a description of actual practice; normatively speaking, it has no impact. And yet it is frequently invoked, just as often endorsed, even praised as one of the defining characteristics of criminal law *and* one of its fundamental principles, not to mention the guiding light of “criminal policy” (or criminalization), all at the same time.

This is odd. Odder still, this is hardly news.¹ And so the second part of the paper moves on to consider why this is so: why a local and historyless *ex machina* “principle” that is easily—and routinely—exposed as contentless and baseless and toothless nonetheless plays a central role in contemporary criminal law discourse, and more specifically in a criminal law discourse that regards itself as committed—perhaps even singularly committed—to “the rule of law” or, rather, the *Rechtsstaat*.

To answer this question, I will turn to a *different* comparative and historical analysis: considering our principle in light of other so-called principles of criminal

* Faculty of Law, University of Toronto. Many thanks to participants in the workshop “Ultima Ratio 2.0,” University of Helsinki, June 19, 2013, for helpful comments on an earlier draft.

¹ To cite a few recent examples, see Nils Jareborg, “Criminalization as Last Resort (*Ultima Ratio*),” 2 Ohio St. J. Crim. L. 521 (2004); Panu Minkkinen, “The ‘Last Resort’: A Moral and/or Legal Principle?” 3 Oñati Socio-legal Series 21 (2013); Cornelius Trendelenburg, *Ultima ratio? Subsidiaritätswissenschaftliche Antworten am Beispiel der Strafbarkeit von Insiderhandel und Firmenbestattungen* (2011); Rudolf Wendt, “The Principle of ‘Ultima Ratio’ and/or the Principle of Proportionality,” 3 Oñati Socio-legal Series 81 (2013).

law. This will be an exercise in *internal* and *external* comparison: I will compare the ultima ratio principle to other German criminal law principles as well as to criminal law principles in common law systems, and in American criminal law in particular. I will pay particular attention to a comparison between the ultima ratio principle and the principle of legality, *nullum crimen sine lege*, a less parochial principle ripe for internal *and* external comparison; other principles may make an appearance as well: the non-Latinate *Rechtsgut* principle from German criminal law as well as the common law's mens rea requirement (*actus non facit reum nisi mens sit rea*),² not to be confused with the German *Schuldprinzip* (also known as *nulla poena sine culpa*).

This comparative and historical analysis will draw on the distinction between law and police as basic modes of governance, and more specifically between legal principles and policial maxims.³ Police here is used in the broad traditional sense captured, for instance, in the pithy 1745 definition by a German police scientist, as "the good order and constitution of a state's persons and things,"⁴ or a few years later (1769), by Blackstone in his *Commentaries on the Laws of England*, as "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."⁵

In light of the distinction between law and police, ultima ratio may appear less like a legal principle of foundational significance across space and time than a self-contradictory, and ultimately pointless, counsel of caution directed at a sovereign endowed with broad discretionary power "to govern men and things within the limits of its dominion."⁶ In other (similarly faux Latinate) words, the legal principle of *ultima ratio*, stripped of its categorical veneer, looks more like a police maxim of *caveat dominus*.

More generally, a comparative and historical analysis of the so-called ultima ratio principle as a supposed legal principle reveals a basic similarity and—perhaps not surprisingly—a matching difference. Both systems (German/civil law and American/common law) share a failure to address the fundamental legitimacy

² This phrase is traditionally attributed to the 17th c. English jurist Edward Coke. On Coke's tendency to generate Latin legal proverbs of dubious validity, see Stephen's comment, in *R. v. Tolson*, 16 Cox C. C. 629, 644-45 (1889) ("Coke's scraps of Latin"). Unable to "ascertain its origin," Stephen, concluded that "[l]ike most legal Latin maxims, the maxim of *mens rea* appears to be too short and antithetical to be of much practical value." *Id.* at 644.

³ For extended discussion of this distinction, see Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005), and, as applied to criminal law, "The New Police Science and the Police Power Model of the Criminal Process," in *The New Police Science: The Police Power in Domestic and International Governance* 107 (Markus D. Dubber & Mariana Valverde eds., Stanford University Press, 2006).

⁴ Justus Christoph Dithmar, *Einleitung in die oeconomische Policei- und Cameral-Wissenschaften* 4, 1, § 4 (1745); see also 1 Johann Christian Majer, *Teutsches weltliches Staatsrecht* 102 (1775) (cited in Franz-Ludwig Knemeyer, "Polizei," in *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* 875, 885 (Otto Brunner, Werner Conze, and Reinhart Koselleck eds., 1978).

⁵ William Blackstone, *Commentaries on the Laws of England*, vol. 4, at 162 (1769).

⁶ *License Cases*, 46 US (5 How.) 504, 583 (1847).

challenge of penalty in a modern democratic state, a political system based on the conception of the potentially autonomous person as the subject-object of government. They differ in the mechanics of that failure. One (Germany) recognizes the legitimacy challenge but mistakes its recognition for its resolution and, with the legitimacy question settled, defines itself as an essentially positivistic enterprise centered around the development of legal “doctrine,” content to refer all legitimacy questions to a collection of empty faux historical and universal (often Latinate) “principles” that concern (normative or “political”) matters of “criminal policy” outside the proper realm of (positive) criminal legal science. The other (U.S.) does not recognize the legitimacy challenge in the first place and instead regards penal power as an obvious and unquestionable aspect of the least limitable and most discretionary form of state power, the power to police,⁷ a power so central to the very idea of sovereignty that a state without the power to police is a state without sovereignty.⁸ One system generates toothless descriptive-normative principles that are satisfied as soon as they are announced, as a testament to its unquestioned legitimacy. The other sees no need to generate principles in the first place.

In the conclusion, I briefly consider this approach to legal principles in general, and to the ultima ratio principle in particular, in a broader methodological context, as a symptom of a particular mode of the study of, and discourse on, law. Here I’m particularly interested in the project of legal science as it is practiced in civil law countries, most notably in Germany, the ambition of legal science having fallen into disrepute in the common law world around the middle of the twentieth century. I briefly explore an approach to legal scholarship, New Legal Science, that aims to overcome the limitations of the dominant model of legal science in an effort to broaden legal discourse beyond its current parochial boundaries through a common project of continuous and comprehensive critical analysis of law, which alongside a critical analysis of police, New Police Science, might contribute to a critical analysis of state power, New State Science.

I. Comparative History and Content

Comparative and historical legal analysis are two useful modes of critical analysis of law. They locate the object of analysis within a given context; they are both comparative, one across system (or some other unit of comparison, including intrasystemic units such as areas of law (internal comparison)), the other across time, and together across system and time.

Neither approach is particularly helpful in getting an analytic handle on the “ultima ratio principle.” Comparison (of the external, intersystemic kind) sheds no light because the object of analysis is a phenomenon of German law (apart from bringing out the interesting contrast between its centrality in German law and its

⁷ Which is why, in the American federalist regime, the American States refused to grant the federal government the police power and instead made it a government of limited, specifically and explicitly delegated powers. See Dubber, *The Police Power*, supra note __, ch. 6.

⁸ Which is why the American States retained the police power, while denying it to the federal government. *Id.*

irrelevance elsewhere). There are of course references to the principle outside German law, but these are easily traced—and in fact have been easily traced—to German sources. Even these derivative references are generally limited to the civil law realm. In the common law world, references to an ultima ratio principle are limited to the exceptional scholarly article, which is the exception that proves the rule, twice over, once by being exceptionally rare and, twice, by investigating the principle with a curious, but skeptical eye, as one might an exotic dish popular in the foreign country of its origin.⁹

Perhaps this is unfair, or crabbed. Undoubtedly, one would find references, and eventually weighty tomes, on the subject of ultima ratio, if one only defined the subject sufficiently broadly, and flexibly. But this is both harder and easier said than done, for the same reason. As we will see in a moment, the subject is in fact so broad and flexible as to be quite impossible to get one's hands on, so much so that discussions of the subject in German (or German-derivative) texts tend to be about whether our principle adds anything to already existing principles or shouldn't simply be treated as synonymous with one, or the other, of these principles (popular candidates include subsidiarity and proportionality).¹⁰ Certainly, if one treated ultima ratio as an instance of "proportionality" or the "presumption of innocence" or even more theoretical fare like Bentham's principle of parsimony, common law references could be found in great abundance. But then they would not be about ultima ratio as an independent principle, but as a label for other things really worth talking about.

So let us assume that ultima ratio is so parochial a norm as to make comparative analysis pointless. Let us, then, behold ultima ratio in its natural German habitat. If comparative analysis sheds no light, surely historical analysis will.

Not so. Ultima ratio is not only parochial; it is also without history, other than the sort of *Zeitgeschichte*, or history of the present, even the present has. Not surprisingly, ultima ratio also has no historiography. While other legal principles—such as the *Rechtsgut* principle and, to a lesser extent, also the *nullum crimen* principle—come with potted standard histories and, in some cases, even with less formulaic attempts at historiography, ultima ratio has neither, not even the sort of quick formulaic account that might appear as a sort of historical prelude, or warm up, before the serious business of a lecture, textbook, or commentary. If the need is felt at all to provide a "historical introduction" to a discussion of our principle, one might find a reference to Richelieu's adorning cannons in the Thirty Years' War with the phrase "ultima ratio regum." After this observation, the relevance of which the reader may or may not have been invited to ponder, attention is fairly quickly fast forwarded to some reference to "ultima ratio" in a late 20th century German legal text, and two sources in particular: the German Constitutional Court's first abortion

⁹ See Douglas Husak, "Applying Ultima Ratio: A Skeptical Assessment," 2 Ohio St. J. Crim. L. 535 (2004); "The Criminal Law as Last Resort," 24 Oxford Journal of Legal Studies 207 (2004); see also Jareborg, *supra* note ____.

¹⁰ See, e.g., Trendelenburg, *supra* note ____ (subsidiarity); Kaarlo Tuori, "Ultima Ratio as a Constitutional Principle," 3 Oñati Socio-legal Series 6 (2013) (proportionality).

decision of 1975 and, more recently, Claus Roxin's treatise on the general part (first published in 1992). (More on these two *loci classici* later.)

Unlike *ultima ratio*, principles like the *Rechtsgut* principle or *nullum crimen* are said to have identifiable historical sources, permitting scrutiny both of this claim of origin and of developments since then. For instance, the *Rechtsgut* principle is commonly traced back to an 1834 article by an obscure German criminal law scholar (and poet), J.M.F. Birnbaum.¹¹ The *nullum crimen* principle is said to have been discovered by none other than P.J.A. Feuerbach in 1801.¹² These historical origins are thought to confirm, if not to establish, these principles as fundamental, even essential and definitive features of German criminal law science.

Whether their pedigree can bear this weight is, of course, another question. As has been pointed out before, grounding the *Rechtsgut* principle in Birnbaum's article is problematic because that article does not in fact establish, or even mention, a "Rechtsgut principle," nor does it establish a principle of any kind, or for that matter mention the word *Rechtsgut*. Birnbaum instead *attacked* a normative principle, set out by none other than Feuerbach (the supposed discoverer/inventor of the *nullum crimen* principle), and argued for a positive account on the simple ground that Feuerbach's normative principle did not match the *lex lata* of the time, which criminalized all manner of "police offenses" (in particular offenses against morals and religion) that did not violate anyone's subjective right, a central component of Feuerbach's account of crime. It was the committed positivist Binding who coined the *Rechtsgut* concept, citing Birnbaum's paper, at the turn of the 20th century. Since then the *Rechtsgut* principle has vacillated between its positivist origin(s) and occasional claims of normative significance, the latter suffering a serious, and perhaps definitive, setback in the 2008 Incest Judgment of the German Constitutional Court, which rejected its independent constitutional significance out of hand.¹³

The historical origins, and the standard historiography, of the *nullum crimen* principle are similarly contestable. Unlike in the case of the *Rechtsgut*, there is no doubt that Feuerbach did enunciate a *nullum crimen* principle in his common criminal law textbook of 1801. Or rather he set out three differently worded "subordinate" principles, *nulla poena sine lege*, *nulla poena sine crimine*, *nullum crimen sine poena legali*, each of which he claimed, without elaboration, flowed inexorably from the "highest principle of penal law," that "every legal punishment in the state is the legal consequence of a statute which is based on the necessity of maintaining the rights of others and which threatens the violation of a right with a sensual evil."¹⁴ Feuerbach, in other words, does not justify the *nullum crimen*

¹¹ Johann Michael Franz Birnbaum, "Ueber das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens, mit besonderer Rücksicht auf den Begriff der Ehrenkränkung," in 1834 *Archiv des Criminalrechts*, Neue Folge 149 (English translation available at Foundational Texts in Modern Criminal Law, <http://www.law-lib.utoronto.ca/bclc/crimweb/web1/foundational.html>).

¹² *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts* § 20 (1801) (English translation available at Foundational Texts in Modern Criminal Law, <http://www.law-lib.utoronto.ca/bclc/crimweb/web1/foundational.html>).

¹³ 120 BVerfGE 224 (2008).

¹⁴ Feuerbach, *supra* note __, § 19.

principle (or its other variations, the relationship between which also remains unexamined) so much as announce it. Insofar as we can surmise—as others have—that the principle derives from his endorsement of general prevention as the rationale of punishment, with which he made his name, it obviously stands and falls with that rationale, and which in fact fell into disfavor soon after. Since then the principle continues to be attributed to Feuerbach, even as other possible rationales have been suggested over time, including the principle of separation of powers, which like general prevention has fallen onto hard times since the eighteenth century (with, once again, Binding emerging as a particularly blunt critic). It is no surprise then that a closer look at the history of the principle of *nullum crimen* reveals a far more ambivalent, if not outright critical, stance toward it than the continued reference to its Feuerbachian origins might suggest.¹⁵

More recently, the question of the foundation of “the” principle of *nullum crimen* seems to be treated as settled with a reference to its appearance in the German Basic Law, perhaps with an additional remark that, even if it had not been explicitly mentioned in the constitution, it would flow inexorably from the *Rechtsstaat* principle, an unwritten yet more fundamental principle underlying the constitution itself. Just why a reference to a constitutional provision or, for that matter, a concept said to undergird the constitution itself, addresses the foundational question (other than as a matter of positive law) remains unclear. More to the point, it appears less as an argument than as a declaration, much like Feuerbach’s original text.

Just what principle is at issue, incidentally, remains oddly ambiguous. The three “subordinate” principles—as opposed to the “highest principle,” from which they are announced to flow inevitably (and self-evidently), and which has been ignored by posterity in general, and as the foundation of the *nullum crimen* principle in particular—have since been joined by several others, some more obviously related to the original trio than others, including “the” principle of *nullum crimen sine lege* (which does not appear in Feuerbach’s text), *nulla poena sine lege scripta*, *nulla poena sine lege praevia*, *nulla poena sine lege certa*, *nulla poena sine lege stricta*, and—most remarkably—even *nulla poena sine culpa* and (in pre-1989 socialist criminal law) *nulla poena sine periculo sociali*.¹⁶

The sheer number of principles that have been spawned by Feuerbach’s text leaves some doubt about how, precisely, each variation (including *nulla poena sine culpa* and *nulla poena sine periculo sociali*) relates to whatever the foundation of the source principle (or principles) is supposed to be. Instead the impression is created that the connection to the original phrase is linguistic, superficial, rather than justificatory, substantial. What these “principles” have in common, in particular, is that they are phrased in Latin and, more specifically, begin with the same three Latin words, with the rest of the phrase to be completed with one word, or concept, or another (lege, lege scripta, lege praevia, lege certa, lege stricta, culpa, periculo

¹⁵ See the excellent Hans-Ludwig Schreiber, *Gesetz und Richter: Zur geschichtlichen Entwicklung des Satzes nullum crimen, nulla poena sine lege* (1976).

¹⁶ Andrzej Zoll, “Die Gesellschaftsgefährlichkeit der Tat als Element des Verbrechensaufbaus,” *Modernes Strafrechts und ultima-ratio-Prinzip* 85 (Klaus Lüderssen et al., eds., 1990).

sociali). Perhaps, then, what is indicated is less a derivation, or normative connection, than resemblance, or a proximity. The point of generating a Latinate version of the *Schuldprinzip* is to make it *look like* other, perhaps more familiar, variations on the *nullum crimen* theme, or rather on the *nullum crimen* phrase (which, again, does not appear in Feuerbach's text in the first place).

What we have here, in other words, appears to be a case of justification (if not legitimacy) by association. The linguistic surface similarity between one phrase and another marks it as similar to the latter in other, substantive, respects as well, most notably its status as a fundamental legal principle. But this just brings us back to the original question of what justifies the original, source, principle in the first place. And as we saw, in the case of *nullum crimen* (or, more precisely *nulla poena sine lege*, *nulla poena sine crimine*, and *nullum crimen sine poena legali*), the status as principle flowed self-evidently, and unhelpfully, from a yet higher principle (which has been forgotten).

Note there that, rather than setting out a detailed justification (or a derivation from the master principle) of the three *nullum crimen* phrases, Feuerbach himself indicates their fundamental nature externally, by putting them in Latin, marking them as exceptional among the German of his textbook. In Latin they appear both historically rooted and universal, even if their historical roots or their universal scope remain unexplained. Today, the use of Latin suggests not only historical roots and universal validity, but more specifically an origin in Roman law. In Feuerbach's case, a connection to natural law, or the philosophy of law, carried on in Latin as the scholarly lingua franca until well into the eighteenth century would have been more likely.

Ultima ratio, now, is like *nullum crimen*, but without the Feuerbach. In other words, all *ultima ratio* has is the thin Latinate veneer of indistinct historical foundation and universality. Its Latin "roots," or more precisely the fact that it is composed of two Latin words that—unlike "*nullum crimen*"—are not even the short form of a complete slogan ("*nullum crimen sine lege*"), fully captures and exhausts the contribution that *ultima ratio* as label makes to criminal law discourse: it adds faux history and universality.

This is a far cry from the original German School of Historical Jurisprudence, still the model of legal science, which sought to unearth pure Roman legal principles of universal scope and then to build a logically coherent doctrinal system of positive law upon them (if abandoning its historical basis in the process). All that is left is the vague intimation of Roman foundations, a veneer that is easily stripped away if one considers that the very idea of a principle of Roman law governing, and perhaps even limiting, the exercise of the power to criminalize is farfetched if only because Roman law is essentially private law, accounting for the private law focus of Savigny and the Romanist historical school after him (reflecting the *Institutes*, which, after setting out the still foundational distinction between private and public law, proceed to deal with private law exclusively).¹⁷

But never mind comparison, or history, let us—as promised—take a closer look at contemporary references to our parochial and historyless principle in German

¹⁷ See Mathias Reimann, "Nineteenth Century German Legal Science," 31 B.C.L. Rev. 837 (1990).

legal texts. Here two stand out: one, and probably the most commonly cited source, is Roxin's treatise on the general part, first published in 1992;¹⁸ the other, and probably the most common reference to an official legal text, is the German Constitutional Court's first Abortion Judgment (joined, more recently, by the Court's 2008 Incest Judgment, which we already encountered in the context of the Rechtsgut principle).¹⁹

Let us begin with the standard reference to Roxin, in the chapter on "The Material Concept of Crime: Punishment as Subsidiary Protection of Legal Goods and Its Distinction from Quasi-Punitive Sanctions." This chapter begins by asserting a connection between two concepts, "material concept of crime" and Rechtsgut, each of which is quite notorious for its vagueness and toothlessness, in an effort to suggest limits on the legislature's power to criminalize.²⁰ Immediately preceding the appearance of our principle, however, is a brief account of the *duty* to punish, which Roxin describes as "another unsolved problem."²¹ (More on the duty to punish and *ultima ratio* below.)

The *ultima ratio* principle, now, according to Roxin, "already follows from the above," where neither "the above" nor its supposed relation to our principle remains unspecified. Criminal law, Roxin explains, "may only be employed, when other means of social problem solving—such as a civil law suit, provisions under police or commercial law, non-criminal sanctions, etc.—fail." And it is "for this reason" that "one calls punishment the 'ultima ratio of social policy,' and defines its function as *subsidiary* protection of legal goods." This observation is followed by another, that, insofar as criminal law protects only some legal goods and then only against particular types of attack, "one also speaks of the 'fragmentary' nature of criminal law." These observations are then followed by a further assertion, that "this limitation of criminal law follows from the proportionality principle, which itself can be derived from the Rechtsstaat principle of our constitution." Nonetheless, this supposed constitutional foundation turns out to be—surprisingly—irrelevant. It turns out that, even though state action that violates our principle would "technically" be unconstitutional, this is not to so: first, and remarkably, "minor" violations would be constitutionally unobjectionable as long as they triggered only "appropriately mild punishments," and second, and less

¹⁸ Claus Roxin, *Strafrecht Allgemeiner Teil: Band 1* (1st ed. 1992).

¹⁹ 39 BVerfGE 1 (1975).

²⁰ Much more could be—and has been—said about this topic. For present purposes, I merely recall Roxin's well-known definition of legal goods as "conditions or chosen ends, which are useful either to the individual and his free development within the context of an overall social system based on this objective, or to the functioning of this system itself," a definition that encompasses, in order of appearance in Roxin's treatise: "life, bodily integrity, honor, the administration of law, ethical order, sexual autonomy, property, the state, the currency, dominant moral opinions, heterosexual structure of sexual relations, undisturbed operation of administration, purity of German blood, public peace, traffic congestion, the life and well-being of animals, the environment, morality, 'purity of soil, air, water, etc.,' the variety of species in flora and fauna, maintenance of intact nature, the people's health, life contexts as such, and purity of the system of proof." Markus D. Dubber, "Theories of Crime and Punishment in German Criminal Law," 53 *Am. J. Comp. L.* 679, 685 (2006).

²¹ Roxin, *supra* note __ at __.

remarkably, the legislature enjoys a wide margin of discretion when it comes to gauging the availability of non-criminal sanctions that have a “sufficient” effect.

This *locus classicus* of the ultima ratio principle nicely captures its main features. It is an empty label that is said, without explanation, to follow from two notoriously vague concepts defined in relation to each other (material crime and Rechtsgut). Having been thus deduced, it is immediately connected to two other concepts (subsidiarity and fragmentarity, the former of which appears to be normative, and the latter descriptive). Next come to other principles (proportionality and Rechtsstaat) from which our principle is said to follow, which perform the additional function of establishing its constitutional bona fides. When all is said and done, however, the preceding accumulation of supposedly logically related or synonymous, normative or descriptive, concepts, our principle (now referred to as the subsidiarity principle), in the end, is revealed as “more a guideline of criminal policy than a mandatory requirement.” No bite, no foul?

Again, pointing out that the ultima ratio principle is empty and toothless is nothing new.²² Still, it is remarkable just how opaque its basis and origins remain even in the text that is now treated as the *locus classicus*. The source of its particular formulation, merely quoted by Roxin (and since then repeated by others), that “one calls punishment the ‘ultima ratio of social policy’” is obscure.²³ It appears nowhere in a Roxin’s well-known 1966 article that Roxin cites (and is in turn cited by others). The formulation itself does not refer to criminal law, but to punishment, and reappears elsewhere, occasionally in other variations, and generally repeating Roxin’s indistinct claim (without indicating a specific source) that “one” calls, or has called, criminal law (or punishment, or imprisonment, or—particularly interesting—preventive incapacitation!), the “ultima ratio of legal policy (Rechtspolitik)”²⁴ or “of the protection of legal goods.”²⁵ These phrases tend to be treated as synonyms, with no apparent significance attached to the reformulation. In other words, that Roxin specifically refers to “punishment” as the subject is as immaterial as his reference to “social policy” as the object. It is as though the only thing that matters are the two words “ultima ratio,” the use of which in some phrase, with some subject and some object, is then attributed to some “one,” who is never identified.

As in the case of other Latin labels, notably *nullum crimen* (see above), variations on these two words have appeared (alongside variations on the X and Y in “X is (said to be) the ultima ratio of Y”), usually for rhetorical effect, as the label ultima ratio is adapted for different signaling purposes, or messages. So it has been said that criminal law (punishment, etc.) is not in fact (contrary to suggestions, not only by Roxin) “ultima ratio,” but “prima” or even(?) “sola” ratio, ordinarily with negative

²² Supra note 1.

²³ There appears to be a general sense that the phrase stems from Franz v. Liszt, but no specific citations appear, and I could not find an instance of the phrase in v. Liszt’s work (nor could others, as far as I know).

²⁴ Trendelenburg, supra note __, at __.

²⁵ Hermann Blei, “Strafbedürfnis und Auslegung,” in Grundfragen der gesamten Strafrechtswissenschaft 109, 109 (Claus Roxin et al. eds., 1974).

connotations.²⁶ Cornelius Prittwitz has suggested, in his contribution to the 2011 Roxin Festschrift “Strafrecht als *Scientia Universalis*,” that “criminal law” should be not (only) ultima ratio—never mind prima, or sola—but “propria ratio.”²⁷ This label here signals an insistence on the normative significance of the principle, as a measure not only of means, but ends, contrary to a crabbed, positivistic “technocratic misunderstanding of the ultra ratio norm.”

Now among the parade of synonyms in Roxin’s discussion of ultima ratio one deserves special mention: the fragmentary nature of criminal law that “one” speaks about. The “one” in this case is Karl Binding. Binding, however, used the term descriptively, to describe not so much the “nature of criminal law” as the nature of criminal lawmaking.²⁸ His point was that the unsystematic character of criminal law resulted from legislators’ approach to criminal lawmaking as an ad hoc response to issues and problems that present themselves, in contrast to a principled, scientific, approach that would produce a comprehensive and systematic body of criminal law. If this term carried a normative meaning it was a critique of the *failure* to extend criminal law to every pocket and corner of its proprium, i.e., of under- rather than of overcriminalization.

This raises an interesting issue that, in discussions of ultima ratio and in particular of ultima ratio’s supposed normative significance, tends to remain unmentioned and unaddressed. If it is not taken as a mere description of the “nature” or even the (present?) state of criminal law, the ultima ratio principle is seen exclusively as a limit on the power of the state to criminalize. Ultima ratio’s normative significance, in other words, is very specific, it is substantive rather than formal. It is less a tool of critical analysis of state action, a critical vantage point, than a particular critical message: the less criminal law (punishment, imprisonment, etc) the better. It is a reason not to criminalize, rather than a reason to criminalize. It captures less a critical stance than a shared conviction about proper outcomes.²⁹

This issue also arises in connection with the other *locus classicus* of our principle: in the German Constitutional Court well-known First Abortion Judgment of 1975. This judgment (still) tends to be the cited source of the ultima ratio principle in an official legal text, though the Court’s references to the principle in subsequent cases, notably in its Incest Judgment of 2008, have now joined the relevant citation strings. The original abortion judgment is noteworthy beyond the immediate abortion context because it contains the best known judicial discussion of the state’s *duty* to punish, or rather the state’s duty to exercise its criminal law power. The entire point of the judgment is that the legislature’s attempt to

²⁶ Winfried Hassemer, *Erscheinungsformen des modernen Rechts* 193 (2007).

²⁷ Cornelius Prittwitz, “Strafrecht als propria ratio,” in *Strafrecht als Scientia Universalis: Festschrift für Claus Roxin zum 80. Geburtstag*, vol. 1, at 23, 37 (Bernd Schünemann et al., eds. 2011).

²⁸ See, e.g., Rainer Zaczyk, “Die Notwendigkeit systematischen Strafrechts: Zugleich zum Begriff ‘fragmentarisches Strafrecht’,” 123 ZStW 691 (2011).

²⁹ According to Trendelenburg, ultima ratio is (and is worth studying, despite its vapidness) a “convenient abbreviation” for the “commonplace” that “the criminal law as a panacea is neither appropriate nor suitable.” Trendelenburg, *supra* note ___, at 18. Since no one thinks that the criminal law is a panacea, this description of the shared conviction signaled by ultima ratio seems overly broad.

decriminalize abortion, i.e., its attempt not to exercise its criminal law power, faced a constitutional limit. That limit was marked by the *ultima ratio* principle, which imposes an obligation on the state to exercise its criminal law power if, and only if, the legal good in question (here the life of the fetus) cannot otherwise be protected “effectively.”

In other words, the *locus classicus* of the *ultima ratio* principle in an official legal text employs the principle to place constitutional limits on under- rather than on overcriminalization. (It otherwise confirms the now familiar vapidness of the principle by declaring that “the criminal law represents *in a manner of speaking* the ‘ultima ratio’ in the legislator’s tool book” (emphasis added) and identifying it as a mere instance of the proportionality principle.)³⁰ In the 2008 Incest Judgment, the Court once again cites our principle, but once again in the context of the proportionality principle and, immediately followed by the remark that the decision whether to exercise its power to criminalize is “fundamentally” up to the legislature.³¹ The principle makes no further appearance in the Court’s judgment upholding the challenged criminal incest prohibition.

II. Legal Principles, Police Maxims, and the New Legal Science

As a parochial and vaguely contemporary (if not ahistorical) norm, the *ultima ratio* principle originally resisted comparative and historical analysis. Now that a closer look at its current *loci classici* has brought the details of its emptiness and toothlessness into full view, however, a different comparative historical analysis suggests itself, not of the substance of the *ultima ratio* principle, but of its *lack* of substance. This comparative historical analysis can come in two forms, internal and external: within and outside the context of German legal discourse.

Let’s start with internal comparison, to the *Rechtsgut* principle. There is of course the substantive connection, if not identity, illustrated by the mentioned formulation of our principle as “criminal law is the *ultima ratio* of the protection of legal goods” and the context of its appearance Roxin’s scholarly *locus classicus*. Formally, and not surprisingly, *ultima ratio* and *Rechtsgut* are similar not only in that they come in both descriptive (or positive) and critical (or normative) varieties, but also in that it is often unclear just which version is in play at any given moment. This ambiguity is understandable if the two versions are identical in fact, in other words if positive law matches its normative ideal, either because things are in fact as they should be or because they are close enough to what they should be, within the appropriate margin of appreciation. A more radical interpretation of both so-called principles, and the perfect match between fact and norm, might suggest, of course, that there is in fact only one version of the principle: the descriptive one.

At its normative best, our principle becomes a guideline, a maxim the relevant state official is free to heed, or to ignore, a sort of pointer of good governance addressed to the prudent state official, as opposed to a principle the violation of which renders the state action illegitimate (and may expose the state actor to legal,

³⁰ 39 BVerfGE 1, 47 (1975).

³¹ 120 BVerfGE 224, 239 (2008).

even criminal, liability). There are various ways of capturing this distinction, between principle and maxim, and in fact much of the literature on *ultima ratio* (though less on *Rechtsgut*) is devoted to this classification question: is *ultima ratio* a legal norm, or a constitutional one, or perhaps a moral, or ethical, or political one?³² Though the choice of categories matters little as long as they are tolerably well defined, I propose to frame the question in terms of the distinction between law and police, which I take to be the two modes of state governance that, also in their tension, capture the modern liberal political (rule of law, *Rechtsstaat*) project.

We will return to the distinction between legal principle and police maxim shortly. But for now, a point of difference between our principle and the *Rechtsgut* principle is worth mentioning in our comparative analysis of the two. The saving grace of the *Rechtsgut* concept—if not the principle—in the face of overwhelming (and it perhaps now definitive) evidence of its toothlessness is often said to be its doctrinal usefulness; at least the *Rechtsgut* is a convenient way to structure the analysis of, say, cases involving the defense of necessity, which includes the balancing of one *Rechtsgut* against another. That said, it makes no difference just what label is used, as long as it is used consistently, though presumably the reference to *Recht* may be useful in focusing the analysis on questions of “legal” significance, unlike, say, the inquiry into a “balance of evils” or “choice of evils” or between one “harm or evil” and another familiar from the common law of crime.³³ No similar claims have been about the descriptive version of the *ultima ratio* principle, however, notwithstanding occasional references to the label in doctrinal discussions, for instance in the context of the use of force in self-defense or, again, necessity. Here *ultima ratio* appears to be used simply as a Latinate synonym for necessity: to justify an otherwise criminal act, the use of force must have been necessary/*ultima ratio*.³⁴

The distinction between law and police, and legal and policial norms, will be helpful as we expand the scope of our comparative analysis of the *ultima ratio* principle, from internal to external comparison, and turn our attention to another comparator: the legality principle, or as it is also known, by one of its Latinate monikers, *nullum crimen sine lege*. The legality principle makes a promising comparator for our legal principle, for two reasons: its name and its ubiquity. The legality principle explicitly holds itself out as a principle of law, in fact as the principle of lawness itself, which sets out the requirements of legality in various realms of state power. Also, the legality principle is not limited to German criminal

³² E.g., Jareborg, *supra* note __ (“obviously not” constitutional principle,” but “principle of legislative ethics”); Minkinen, *supra* note __ (neither “moral” nor “legal,” but “constitutionalist” principle).

³³ See Dubber, *supra* note __, at 692-96 (with citations).

³⁴ Perhaps the use of the same *ultima ratio* concept in this, individual and non-official, context and in discussions of the official use of force by the state in the name of punishment could indicate some essential, or at least interesting, connection between the two, one that would not be captured as conveniently by using the broader term “necessity,” perhaps thereby highlighting not only the general illegitimacy of unjustified state punishment in the abstract but also the criminality of the punitive use of force in particular cases (“unjustified punishment is crime”). But, as far as I know, this connection has not been made, or invoked in support of the continued relevance of *ultima ratio* despite its normative (and descriptive) emptiness.

law, or any other parochial legal system, but appears—if less frequently and explicitly and more recently—even in common law systems, and American law in particular.

A closer comparative and historical analysis reveals, however, that the so-called principle of legality represents only one way of conceptualizing a particular, though quite indeterminate, collection of norms (mainly prospectivity, specificity, legislativity, lenity, publicity), namely from the perspective of law.³⁵ From another perspective, that of police, these norms instead appear as a bundle of maxims that need not lay claim to a common denominator, nor to normative bite. As maxims of police, they are instead a set of flexible and entirely discretionary prudential guidelines that a sovereign, or quasi-householder of any kind, may consult if and when appropriate.³⁶

Let's begin by taking a brief look at the distinction legal principles and police maxims.³⁷ Police maxims are as old as household government itself. Since Ancient Greece, the art, and eventually the science, of household governance—oeconomics—has generated advice for the householder who is willing to consider, and even to seek out, counsels of prudence, or good governance. Household resources needed governing, perhaps maximizing, as the radical distinction between householder and household did not imply the irrelevance of differentiating among household resources themselves for governing purposes. Manuals on the art and science of household management, then, suggested how a good, i.e., a competent, householder might exercise his discretionary and unlimited power over the human and non-human, animate and inanimate resources constituting his household. This oeconomical literature ranges from Xenophon and Aristotle to the *Hausväterliteratur* and *Fürstenspiegel* (including Machiavelli's *Prince*, originally translated into German, in 1694, as *Machiavelli's Policei*³⁸) and, in the United States, antebellum slave owner manuals.³⁹

The private mode of governing the Athenian *oikos* contrasted sharply with the public mode of governing the *agora*, which was as autonomous as household governance was heteronomous. In private, Athenian citizens governed their household; in public, they governed themselves. The exercise of public heteronomy presupposed the exercise of private heteronomy. Household governance, however, was expanded, and eventually transferred, from the private to the public sphere, initially through the rise of major households and then the emergence of one, qualitatively distinct, macro household of the king, which transforms all other

³⁵ For more extensive discussion, see Markus D. Dubber, "The Legality Principle in American and German Criminal Law: An Essay in Comparative Legal History," in *From the Judge's Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials* 365 (Georges Martyn et al., eds., Duncker & Humblot 2013); Markus D. Dubber, "The Story of Keller: The Irrelevance of the Legality Principle in American Criminal Law," in *Criminal Law Stories* 23 (Robert Weisberg & Donna Coker, eds., Foundation Press 2012).

³⁶ Cf. Lon L. Fuller, *Morality of Law* 207-14 (2d rev'd ed 1964) (managerial direction vs. legality).

³⁷ See Dubber, *Police Power*, supra note ____.

³⁸ Arnold J. Heidenheimer, "Politics, Policy and Policey as Concepts in English and Continental Languages: An Attempt to Explain Divergences," 48 *Review of Politics* 3 (1986).

³⁹ Jonathan Bush, "Free to Enslave: The Foundations of Colonial American Slave Law," 5 *Yale J.L. & Human.* 417 (1993).

households into micro households no longer endowed with originary sovereignty. Whereas once every householder had his peace, as the king's household becomes the public household, his peace comes to cover the entire realm.

By the seventeenth century, police had become the peace of the state, as the macro householder cemented, and justified, the qualitative distinction between himself, and his household, and other, micro householders, and their households. In this way, the king as police sovereign reasserted the traditional radical distinction between householder and household, governor and governed, in the new public sphere of "the state." The state holds the monopoly over public government, reducing all other loci of household—or quasi-household—government to private realms within the great family of the state, and therefore subject to the sovereign power of its father, the *pater patriae*.

The householder of the police state now receives advice from an entire new science, police science, which analyzes the public household (through statistics, recordkeeping, accounting, reports, etc.), coordinates its operation (through the establishment of a bureaucracy, reviews, visitations, etc.), and produces recommendations for its good governance (eventually, in the form of comprehensive detailed treatises on all aspects of the police of the state, including education, morals, religion, health, security, order, industry, natural resources, infrastructure, etc.). Police encompasses the entirety of the government of the state considered as the public macro household of its sovereign householder. The power to police becomes synonymous with sovereignty.

The police power is, in other words, "the power of sovereignty, the power to govern men and things within the limits of its dominion,"⁴⁰ which "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property."⁴¹ Note that these are the words of the U.S. Supreme Court. Despite the persistent (self-)image of American laissez-faire government, the American states have made extensive use of their sovereign police power from the early days of the American Republic. And, despite the similarly persistent insistence on the absence of a federal police power, the federal government similarly has claimed—and ever more aggressively exercised—a national police power *de facto*, if not *de jure*, through very generous, and virtually unchecked, interpretations of its enumerated powers (most notably the power to regulate intra- and interstate commerce, which accounts for, among other things, the vast bulk of federal criminal law, including most notably federal drug criminal law).

While a power to police, with remarkable similarities in conception and scope, appears both in Germany (and France, Italy) and in the United States (and England), no American (or English) science of police develops. With two notable exceptions that prove the rule,⁴² there are no American or English treatises on the police of the

⁴⁰ License Cases, 46 US (5 How.) 504, 583 (1847).

⁴¹ Slaughter-House Cases, 83 U.S. 36, 49-50 (1873).

⁴² In England, at the turn of the nineteenth century, Patrick Colquhoun established the Thames Police in London and published a series of tomes that on the Continent would be considered police science treatises, and some of which were in fact translated into German. In the U.S., a century later, the German Ernst Freund published a treatise on the police power, in 1901, and then went on to become a leading figure in the establishment of administrative law in the United States.

state, no police science academies, no police science chairs at universities (although it should be noted that Thomas Jefferson did establish a chair of “Law and Police” at the College of William and Mary).⁴³

Put another way, while there was both a German and an American police power, there was never an American police state. Without a centralized project of a police state, i.e., a state explicitly devoted to the implementation of the sovereign’s police power, a systematic effort to develop a science in support of governing that police state could hardly have developed (which is not to say some, like Jefferson, might not have wished otherwise). There is of course a long English tradition of denying the very existence of such a thing as “the state,” which for quite some time was considered—like the concept “police” itself, as opposed to the properly English “peace”⁴⁴—a foreign notion, and a French one in particular.

Without a police state, however, there also can be no law state. The concept of the law state (*Rechtsstaat*) on the Continent emerged as a critique of the police state. The law state is the ideal of state government that applies the enlightenment postulation of the person as an individual with the capacity for autonomy, or self-government, to the political sphere. It rejects the categorical distinction between governor and governed and instead posits the identity of the subject and object of government. It reasserts autonomy as the mode of governance in the public sphere against the police state’s expansion of private heteronomy into the state macro household, but transforms the capacity for autonomy from a special status (held by householders) to the universal characteristic of all persons; it counters the expansion of heteronomy with the expansion of autonomy.

In other words, there never was a critical moment in American (and English) political history, when an existing comprehensive system of state norms, institutions, and practices faced radical scrutiny *en masse*. Instead of a police state, there was only police power, wielded without an acknowledged state in a supposed decentralized laissez-faire environment, and this police power survived the American Revolution virtually unscathed, as one sovereign (the king) was replaced with another (the people), and one peace (the king’s peace) with another (the public peace).

We will return to this point a little later on. For now, let us apply this framework, and this distinction between law (and legal principle) and police (and police maxim), to the so-called legality principle, in Germany and in the United States. In Germany, it is commonplace to point out that the legality principle, or rather the *nullum crimen* principle, appears in the German constitution. This does not settle the question of its foundation, and justification, although it does signal its significance. If one looks more closely, it quickly becomes apparent that justifications for the principle are hard to come by. As mentioned previously, the two primary rationales—general prevention and separation of powers—by end of the nineteenth century (even earlier in the case of the former) had lost their luster and, as a result, could no longer sustain the legality principle. Note that, at any rate,

⁴³ Thomas Jefferson, A Bill for Amending the Constitution of the College of William and Mary, and Substituting More Certain Revenues for Its Support (1779).

⁴⁴ E.g., Frederick Pollock, “The King’s Peace,” 1 L. Q. Rev. 37 (1885).

these rationales bear no obvious relation to the touchstone of legitimacy in the new (post-Enlightenment) law state: the capacity for autonomy of every person as such in all spheres of life, including the public political-legal sphere.

A coherent justification of the legality principle, both as a whole and in its individual parts, in terms of the autonomy of the person/citizen has proved difficult to develop. Instead, a mere citation of the relevant provision in the Basic Law appears sufficient, perhaps coupled with the familiar general reference to the *Rechtsstaat* principle. With the constitutional basis thus apparently secured, the relation between the general principles and its aspects is indicated through the creation of subordinate Latinate labels, the above mentioned *nulla poena sine lege scripta* (legislativity), ... *sine lege praevia* (prospectivity), ... *sine lege certa* (specificity), ... and *sine lege stricta* (strict construction/no analogy).

The same procedure, ironically, was appropriated by socialist criminal law, and pre-1989 Polish criminal law in particular, to mark the “fourth element” in the analysis of Soviet criminal law, social dangerousness, as yet another—presumably newly discovered—aspect of the principle of legality: *nulla poena sine periculo sociali*.⁴⁵ Interestingly, this attempt drew heavy criticism by a perceptive German criminal law scholar (Felix Herzog) on the ground that, while this additional prerequisite for criminal liability at first glance appears to comport with the “tradition of criminal law in the liberal *Rechtsstaat*,” it must be rejected because it has not been shown to be a condition that “fights for the liberty of citizens in a continuous, predictable, consistent and universalizable manner.”⁴⁶ This criticism may well be apt; but it may apply also to the norms that are widely listed, accepted, and linguistically marked as aspects of the legality principle in German criminal law. The argument that Herzog seeks is precisely the connection between the supposed “legality principle” and its various supposed aspects to the fundamental principle of legitimacy of in the *Rechtsstaat*: the liberty, or capacity for autonomy, of its constituents.

Recent efforts to supplement the (since Binding discredited) traditional rationales have made reference to a smorgasbord of more or less connected or developed considerations, including “political liberalism,” “democracy,” and the omnipresent *Schuldprinzip* (also known as *nulla poena sine culpa*).⁴⁷ None of this is to say that a systematic justification, drawing on the modern liberal autonomy-based conception of law, of something like a legality principle with certain implications addressed to various state officials or functions is impossible, merely that the precise connection between the principle of lawness and the concept of law remains noticeably obscure and indistinct.

Apart from the question of the *legal* foundation of the principle of legality, there is also that of its *principleness*, i.e., its normative bite. This is not the place to attempt a comprehensive review of German *nullum crimen* jurisprudence. Suffice it to say

⁴⁵ Andrzej Zoll, “Die Gesellschaftsgefährlichkeit der Tat als Element des Verbrechensaufbaus,” *Modernes Strafrechts und ultima-ratio-Prinzip* 85 (Klaus Lüderssen et al., eds., 1990).

⁴⁶ Felix Herzog, “Nullum crimen sine periculo sociali oder Strafrecht als Fortsetzung der Sozialpolitik mit anderen Mitteln,” *id.* at 105.

⁴⁷ Roxin, *supra* note __, at 102-04.

that it reflects considerable flexibility in the principle's interpretation and application. Take, for instance, the requirement of prospectivity, which is generally portrayed as a—if not the—core aspect of the principle of legality (and as such has its very own Latinate label: *ex post facto*). Neither the 1996 Border Guard Case in which the German Constitutional Court upheld homicide convictions of border guards for fatal shootings under the East German regime,⁴⁸ nor the less sensational, but more recent, cases in which the Court rejected *ex post facto* challenges against the retrospective application of detrimental amendments to the German preventive detention regime are examples of an aggressive application of the prospectivity requirement.⁴⁹ When it comes to the specificity principle, the Court employs a flexible sliding scale of constitutionality: the more serious the sanction, the higher the specificity requirement. In addition, the legislature enjoys considerable discretion in defining crimes “to come to grips with the multiplicity of life,” so that an element like *Untreue* can stay clear of the vagueness prohibition, even though it appears in the definition of a felony (§ 266 StGB).⁵⁰ The analogy prohibition is broadly construed as applying only to judicial interpretations that exceeds the “possible meaning” of a term.⁵¹

Let us now shift perspectives, from law to police. What, from the perspective of law, may appear (merely, and perhaps puzzlingly) as deviations from some ideal of a law-based account of the so-called principle of legality now appear as features of police governance. From a policial perspective, the general principle of legality appears as a maxim of prudence, and the various aspects of the principle of legality as sticks in a bundle of prudential, and advisory, guidelines. A state sovereign, as the householder of the state regarded as a macro household, may well decide that it is prudent, as a rule, to issue public, prospective, and specific norms, to monopolize and centralize their production, and to control the discretion of state officials (in this case, judges, but also others) charged with their implementation, even to systematize the norms into a code, as a comprehensive coordination and rationalization measure. But, again, the measure of this decision is a matter of prudence rather than justice, efficiency rather than legitimacy, of resource management rather than right. Addressed to the sovereign-householder, maxims of police are flexibly framed; there is no external obligation to comply with maxims of police, no external sanction for non-compliance. They are, ultimately, a matter of internal self-restraint, of self-police.

As such, police maxims may be usefully contrasted with the norms the generation of which they aim to advise, in other words norms issued by, rather than addressed to, the sovereign. These are a matter of external other-restraint, or other-police; whether they address state officials (i.e., those exercising delegated police power, the modern analogues to members of the royal micro household) or others

⁴⁸ 95 BVerfGE 96 (1996).

⁴⁹ E.g., 109 BVerfGE 133 (2004); M. v. Germany, European Court of Human Rights, Application no. 19359/04 (Dec. 17, 2009).

⁵⁰ Judgment of June 23, 2010, 2 BvR 2559/08, 105/09, 491/09, BVerfGE.

⁵¹ Judgment of 19 March, 2007 BVerfG 2 BvR 2273/06 (overturning conviction).

(i.e., members of the state household *en masse*⁵²), they may be as formal, precise, rule- rather than standard-like, hard rather than soft, as the sovereign (or its delegate) may deem appropriate (perhaps subject to the prudential maxims mentioned above), backed up by the threat of sanctions within the sovereign's (or, where appropriate, its delegates'⁵³) wide discretion.

An external comparative look at the United States, now, reveals remarkable similarities between the status of the legality principle in both systems. As I set out in greater detail elsewhere, the American principle of legality, too, turns out to be so undermotivated, undertheorized, and undersharpened that it invites analysis not merely as an imperfectly manifested legal principle but also as an appropriately flexible and advisory maxim of police, or rather a bundle of maxims of police without a clear understanding of what holds them together. To pick one example, the apparently clear enunciation, not once but twice in the federal constitution, of a prohibition against passing an "ex post facto Law" (or bill of attainder), was almost immediately subjected to an extremely narrow interpretation. In a 1798 opinion, in a civil case, the U.S. Supreme Court set out the far more limited version of the so-called ex post facto prohibition that is today simply taken for granted (in the U.S. as well as in Germany). This interpretation does not, as the constitutional text plainly provides, apply the prohibition to any "Law," but only to criminal norms, and only to a modest segment of those to boot: changes in substantive criminal law detrimental to the accused.⁵⁴ Even this narrow version of the ex post facto prohibition has been interpreted narrowly, and flexibly, as illustrated, for instance, by recent rejections of ex post facto challenges against new preventive detention regimes and registration and notification schemes for convicted sex offenders,⁵⁵ changes in parole eligibility,⁵⁶ and retroactive judicial decisions.⁵⁷

Now, even if the norms associated with the "principle of legality" (keeping in mind that it often remains unclear just what norms these are, not to mention how are to be formulated) might appear not only as legal principles but also as police maxims in both Germany and the United States, some interesting differences remain.

To the extent that the source of the power to punish is named, if not explored, in American legal texts it is identified as the police power.⁵⁸ It is therefore perhaps not surprising—or at any rate perhaps less surprising than in Germany—that a set of criminal law norms turns out to be compatible with a policial conception of penalty. Given the intimate connection between sovereignty and the police power, that the

⁵² On the interesting question of penal police jurisdiction, see Markus D. Dubber, "Criminal Jurisdiction and Conceptions of Penalty in Comparative Perspective," 63 UTLJ 247 (2013).

⁵³ In the penal process, for instance, police officers, prosecutors, judges, prison wardens, who exercise their discretion on *whether* to invoke *what* penal sanctions and *how* to inflict them. On the principle of compulsory prosecution (*Legalitätsprinzip*), see *infra* __.

⁵⁴ *Calder v. Bull*, 3 Dallas 386, 390 (1798).

⁵⁵ *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003).

⁵⁶ *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995); *Garner v. Jones*, 529 U.S. 244 (2000).

⁵⁷ *Rogers v. Tennessee*, 532 U.S. 451 (2001).

⁵⁸ See Dubber, *Police Power*, *supra* note __, at __.

police power is cited as the source of the penal power is less significant than that American courts or commentators have so rarely felt the need to identify that source. It is not as though the various maxims that are said to relate to the principle of legality have been explicitly traced back to a particular conception of the police power, perhaps elucidating why—within that conception—prudence recommends the adoption of prospective, specific, and public penal commands. The connection between the penal power and the police power instead is significant primarily because it illustrates that no such detailed inquiries are required. The mere association, without further elaboration, of the penal power with the police power (that “idiom of apologetics”⁵⁹) signals the imperviousness of both to critical analysis; the police power survived the American Revolution unchallenged and unchanged, and so does the penal power as one of its myriad manifestations.⁶⁰

As an aspect of the police power, the power to criminalize escaped the broad scrutiny of government power in the American revolutionary moment. The object of this scrutiny, it is important to recognize, was not the fully developed eighteenth century French or Prussian police state, but English “government,” which rejected the very project of state building, never mind of police state building as un-English, and instead relied on traditional notions such as the king’s peace—rather than the state’s police—to govern the realm (or at least the English, colonial subjects were another matter). The English conception of criminal law as grounded in the protection of the king’s peace, then, was simply adopted by the new American governors and recast in terms of an offense against the public peace, to match the transfer of sovereign status from the “king” to “the people.”

There was, then, no comprehensive critique of the state—as police state or in any other form—and therefore also not of the penal state. The Law is King, as Thomas Paine put it, reflecting the tension between law and police that also drives the distinction between police state and law state on the Continent, while also highlighting that English royal government (rather than the state) remained the frame of reference. The American Revolution sought law government in place of personal government; the European enlightenment sought the law state in place of the police state.

While penal power escaped scrutiny in the United States, in Europe it faced critique as a part—and a particularly visible and violent part—of the police state. In the United States, the challenge of legitimating penal power in a new conception of government based on the notion of autonomy was never clearly formulated because the penal power was regarded as an unquestioned aspect of the unquestionable police power, which in turn regarded its objects, following Blackstone, as “members of a well-governed family” or, in the words of the U.S. Supreme Court, as the “men and things within the limits of its dominion.”⁶¹ The treatment of criminal offenders

⁵⁹ Walton H. Hamilton & Carlton C. Rodee, “Police Power,” in *Encyclopedia of the Social Sciences*, vol. 12, at 190 (E. R. A. Seligman, ed.) (1933).

⁶⁰ See Dubber, *Police Power*, *supra* note __; 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).

⁶¹ *License Cases*, 46 U.S. (5 How.) 504, 583 (1847).

was a matter of public household governance, which raised at best questions of prudence (or Christian, and particularly Quaker, benevolence⁶²), but not of political legitimacy; they were objects, not subjects, of government, along with women, slaves, as well as children, animals, and all other household constituents.

By contrast, in Europe, the legitimacy question of penal power in the law state was raised early, and clearly. Criminal law was sharply distinguished from criminal police; in Germany, this distinction was central, for instance, to the pioneering work of P.J.A. Feuerbach. The various principles he set out in his 1801 textbook, including the *nullum crimen* principles discussed above, can be seen as an attempt to state principles of a criminal law as such, and thereby to face, and to address, the legitimacy challenge posed by the enlightenment's critique of state power.

At first blush, one might therefore associate the United States with a policial conception of penalty, and of the legality principle in particular, and Germany with a legal one. And yet, as we saw, the treatment of the norms said to constitute the legality principle in both legal systems bears a striking resemblance, so that they in both cases can profitably be considered from both perspectives, law and police. Germany has a Feuerbach, the United States does not. Germany has a *nullum crimen* principle (or rather two *nulla poena*, and one *nullum crimen*, norms) set out by Feuerbach in 1801, in the most influential comprehensive treatment of German criminal law during its formative law state phase, with each aspect of the legality principle explicitly—if shallowly—connected to the mother principle (*nulla poena sine lege scripta, praevia, certa, stricta*). In the United States, by contrast, the *ex post facto* prohibition (explicitly mentioned twice in the federal constitution) and the void-for-vagueness doctrine (based on the federal constitution's due process clause) are generally treated as separate constitutional norms, with little effort to relate them to a common principle (such as the *nullum crimen* provision in the German Basic Law). The term "legality principle" only entered American legal discourse in the second half of the twentieth century.

German legal and political observers, then, recognized the legitimacy challenge facing state penalty as part of the comprehensive critique of state power that manifested itself in the call for replacing the police state with the law state. They developed principles and norms to address the challenge. And then the critical impulse waned as the establishment of principles was mistaken for their implementation, the recognition of the legitimacy challenge with its satisfaction. After Feuerbach came Birnbaum and his defense of police offenses (for the "maintenance of religiousness, decency and morality"),⁶³ and after Feuerbach's Bavarian Criminal Code of 1813 came the draft of a Bavarian Criminal Code of 1822, part II of which featured a "police criminal code," ridiculed mercilessly by Feuerbach in a posthumous essay, beginning with the question: "whether a police criminal code or a police criminal law is possible and legally permissible, as is assumed today."⁶⁴ Similarly, the announcement of a principle like the vaunted "Legalitätsprinzip," or

⁶² See Dubber, "An Extraordinarily Beautiful Document," *supra* note __, at __.

⁶³ Birnbaum, *supra* note __, at 164.

⁶⁴ Über die Polizeistrafgesetzgebung überhaupt und den zweiten Teil eines „Entwurfs des Strafgesetzbuchs, München 1822", in Biographischer Nachlaß, vol. 2, at 346 (2d ed. 1853).

principle of compulsory prosecution, is one thing; its implementation quite another.⁶⁵ The mere citation of the principle does not, in particular, address the reality of plea bargaining, or of prosecutorial (and police) discretion broadly speaking.⁶⁶ And the announcement of a counter principle (Opportunitätsprinzip), which provides for exceptions to another principle, does not eliminate discretion either, but at best guides it.

By contrast, American legal and political discourse never identified the legitimacy challenge of state penal power in a system of self-government under law. As a result, it made no attempt to meet it, nor to set out legal principles to reflect it, nor to implement these non-existing principles. It also did not develop a systematic account of penalty as an aspect of the police power, a power that operated *sub rosa*, not only at the federal level, and without the assistance of a continental police science, as the English reluctance to acknowledge the very existence of a state survived the Revolution intact. As a result, both the legal and policial account of the legality principle in American jurisprudence are underdeveloped.

And yet, in the end, both systems, one with a phalanx of legal principles that through its very existence creates, and confirms, the shared sense of having identified and met the legitimacy challenge to state penalty mounted by a conception of law grounded in the idea of personal autonomy, the other without awareness of the legitimacy challenge or legal principles to meet it, fall short of the task of continuous critical analysis of the state's penal power, one because it considers the task (long?) complete, the other because it doesn't (yet?) see the task.

Before we move on to the conclusion, where we can briefly consider the implications of this comparative and historical analysis of the treatment of the legal principle in American and German law, let us return to the original topic of our investigation: the ultima ratio principle. Like the *nullum crimen* principle, ultima ratio can be seen from a legal and from a policial perspective. Also like *nullum crimen*, ultima ratio's connection to autonomy as the touchstone of legitimacy in the modern liberal law state remains somewhat obscure. Unlike *nullum crimen*, however, ultima ratio was not announced as a formative principle of the ideal of a law state applied to the state's penal power. It is an indistinct flexible prudential observation that functions primarily as a label for a presumed consensus about the desirability of non-penal tools of "social policy," or "legal policy," and thus ultimately about the legitimacy of the penal system.

Unlike the "legality principle," however sporadic, the ultima ratio principle has not entered American penal discourse, either at the formative moment of American political project at the turn of the eighteenth century or more recently. As a label for a shared consensus about a preference for non-penal sanctions, ultima ratio would, and could, find no place in American penal discourse, where no such consensus exists.

⁶⁵ For a surprisingly rare integrated discussion of the (procedural) "Legalitätsprinzip" and the (substantive) "legality principle," see Wolfgang Naucke, "Der Zustand des Legalitätsprinzips," in *Modernes Strafrecht und ultima-ratio-Prinzip* 149 (Klaus Lüderssen et al., eds., 1990).

⁶⁶ See Markus D. Dubber, "American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure," 49 *Stanford Law Review* 547 (1997).

Conclusion

The role and treatment of the *ultima ratio* principle in contemporary legal science suggests that Savigny's two-centuries-old historical-positivist model of legal science is alive and well, even as Savigny's initial insistence on the foundational role of historical research into purified and (supposedly) universal (even logically necessary) Roman law norms has given way to an ahistoricism occasionally masked by a thin historical veneer in the form of the use and production of Latinate norms. These norms, despite their faux Roman credentials, remain essentially parochial, both internally and externally, by capturing a shared self-conception of the field of criminal law: *internally* insofar as they serve to enforce distinctions among legal academic disciplines, particularly between criminal law and constitutional law (and public law generally speaking); *externally* insofar as they differentiate between German criminal law (and, in this context, German law in general) and other legal systems.

It is no surprise, then, that these parochial principles would struggle to find a role in a broad conception of legal science that seeks to overcome the limitations of the original, still-dominant, Savignian model of legal science by pursuing a common project of *critical analysis of law* shared by all states that profess adherence to a general political project of the rule of law, or the *Rechtsstaat*, i.e., so-called modern Western democratic states. This project of a New Legal Science as critical analysis of law would aim not at the discovery of truths, the distillation of "pure" law, the construction of conceptual heavens or even of aesthetically pleasing doctrinal systems; instead it would dedicate itself to continuously subjecting a given legal system—in all its norms, institutions, and practices—to the challenge of the legitimacy of state power in general, and state penal power in particular, that inheres in the modern concept of law, based on the enlightenment's discovery—or postulation—of the person as an individual with the capacity for autonomy.

Just as the essentially positivistic Savignian model of legal science requires reconsideration, so does the categorical rejection of the project of legal science in the common law world. The failure to recognize penalty as a matter of the exercise of state power through law requiring legitimation in light of the posited autonomy of persons, including both "offenders" and "victims," rather than merely as a matter of the policing of human resources, and human threats in particular, reveals a failure to undertake the sort of systematic and comprehensive critical analysis of exercises of the state's law power for which legal scholars should be well suited and to which a reconceptualized legal science might devote itself.

The critical analysis of law would include not only the critical analysis of doctrines, institutions and practices, but also of the tools of critical analysis, and their implementation, including supposed normative legal principles such as *ultima ratio*, *Rechtsgut*, and *nullum crimen*, along with common law chestnuts like *actus non facit reum nisi mens sit rea*, as illustrated in this paper. Critical analysis without normative principles is impossible; critical analysis with faux normative principles is pointless at best, and counterproductive at worst.

The project of *legal science* would complement a critical analysis of police, New Police Science, reflecting the historical connection, and genealogical tension, between the modern concept of law and that of police, and more broadly, between autonomy and heteronomy in public and private governance.⁶⁷ New Legal Science and New Police Science would combine to form a New State Science, a critical analysis of state power.⁶⁸

As a parochial and ahistorical, empty and baseless catchphrase, the *ultima ratio* principle could not, in its current form, contribute to the project of critical analysis of law. Without a foundation in the principle of autonomy in particular (as opposed to a mere assertion of its “derivation” from the “*Rechtsstaat* principle,” say, not to mention the patina of universalism and historical rootedness provided by its Latinate formulation), the invocation of *ultima ratio* by itself would be pointless at best. Perhaps such a foundation could be established; whether it is worth the trouble, simply because “the *ultima ratio* principle” has become a popular common reference point for the like (and right) minded is another question.

⁶⁷ See *The New Police Science: The Police Power in Domestic and International Governance* (Markus D. Dubber & Mariana Valverde eds., Stanford University Press, 2006); *Police and the Liberal State* (Markus D. Dubber & Mariana Valverde eds., Stanford University Press 2008).

⁶⁸ See Markus D. Dubber, “New Legal Science and Dual Penal State” (unpublished draft) (available at <http://individual.utoronto.ca/dubber/NLS%20and%20DPS.pdf>).