Dubber, The Principle of Legality as a Bundle of Maxims[*]

The legality principle, or *nullum crimen sine lege* (or *nullum crimen nulla poena sine lege*) … is thought to consist of not only one maxim, "no common law crimes," but of a bundle of maxims, including "void-for-vagueness," "lenity," "strict construction," and "*ex post facto,*" that are either unconnected, or whose connectedness at least is not considered worth exploring, or particularly interesting.[1] The very fact that *nullum crimen* functions more as a loose label, or a convenient organizing device akin to a "miscellaneous" file, already hints that it hardly qualifies as a "principle," and certainly not one that can claim fundamental status in general, and derivation from some more basic account of "legality" in particular. It is unclear what sort of "legality" is at stake, or, more precisely, just what the "lex" is without which *crimen* (or *poena*) is said to be impossible (or is it illegitimate). The point here is not the indeterminacy of the concepts involved, but the absence of even the beginning of an account of how that indeterminacy might be resolved.

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

> I. Every infliction of punishment requires a criminal statute. (*Nulla poena sine lege*. [No punishment without law.]) Because only the statutory threat of harm justifies the concept and the legal possibility of a punishment.
>
> II. The infliction of punishment presumes the existence of the conduct threatened with harm. (*Nulla poena sine crimine*. [No punishment without crime.]) Because only the statute connects the threatened punishment to the act as a legally necessary precondition.
>
> III. The act subject to the statutory threat of punishment (the statutory precondition) presumes the statutory punishment. (*Nullum crimen sine poena legali*. [No crime without legal punishment.]) Because the statute connects the specific violation of the law to the harm [of punishment] as a necessary legal consequence.

Needless to say, citations of *nullum crimen* in American criminal law make no reference to Feuerbach's broader account of punishment, or *nullum crimen*'s place within it. Again, the point is not that Feuerbach's account is particularly compelling or that it deserves attention, but that American criminal law has developed nothing in its place. This is not the place to sketch such an account, but it is easy to see what that account might look like, if only to cause us to marvel at its absence. Even if we imagine the principle of legality as a single norm, rather than as a grab bag for disconnected norms, it

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[*] From "*Commonwealth v. Keller*: The Irrelevance of the Legality Principle in American Criminal Law," in Criminal Law Stories (Robert Weisberg & Donna Coker, eds., forthcoming 2010).

[1] Fuller might have said that these maxims are not aspects of some principle of legality, or the rule of law, but guidelines of "managerial direction." See Lon L. Fuller, *The Morality of Law* 207 (rev. ed. 1969).

is not, for instance, grounded, as one might think, in "the rule of law" nor in its early American version of the insistence on "a government of laws and not of men."[2] Nor is it connected to the fundamental principle of self-government that has driven the liberal democratic rhetoric of American legal and political discourse since the Founding Era. As a "principle," what we call the legality principle has no content; some other label, perhaps "a collection of maxims for good governance," would serve the same organizing function, if with less pathos.

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

Their constitutional cousin, the doctrine of "void-for-vagueness," is of indeterminate constitutional status.[3] Courts—and commentators—seem unable, or unwilling, to locate it firmly within the "due process" guarantee or in the first amendment, with its relation to the first amendment "overbreadth" doctrine still awaiting clarification, or for that matter serious attention. The "void-for-vagueness" doctrine is itself astonishingly vague, beginning with its very name, with no effort being devoted to account for the voidness—rather than the unconstitutionality or illegality or illegitimacy—that may result from its application. Its two-pronged test has no substantive content: The first prong, having to do with notice, is routinely ignored on the (implicit) prudential ground that any meaningful notice requirement would cut a wide swath of voidness through modern criminal law; the second prong is concerned with process, rather than substance, and vaguely and flexibly considers whether the statute under scrutiny provides state actors, notably law enforcement personnel, with meaningful guidance in the exercise in their generally unfettered discretion.

Consider that, from the perspective of the police power model, vagueness is not a problem, but an opportunity. Vague criminal statutes supply state officials with the necessary flexibility to identify and eliminate offensive behavior that, thanks to the ingenuity of the criminal mind or the lack of ingenuity of the legislative mind, might not fall under more specifically framed criminal statutes. Prime examples of purposely vague criminal statutes include the Racketeer Influenced and Corrupt Organizations Act (RICO), which explicitly provides that it "seek[s] the eradication of organized crime" and to that end "shall be liberally construed,"[4] and the federal mail fraud law, which has

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[2] Massachusetts Constitution, Part The First, art. XXX (1780).

[3] For a recent representative statement of the void-for-vagueness doctrine, which is recited with remarkably little variation (and apparent) attention in case after case, see Chicago v. Morales, 527 U.S. 41 (1999): "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."

[4] Pub. L. 91-452, §§ 1, 904, 84 Stat. 922 (1970).

drawn praise from the judiciary as "a stopgap device to deal on a temporary basis with [a 'new' fraud], until particularized legislation can be developed and passed to deal directly with the evil."[5]

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

It did not bode well for the clarity of the *ex post facto* norm (another Latinism), that the U.S. Supreme Court almost immediately decided that the Constitution did not in fact mean that "No … ex post facto Law shall be passed," but rather that it prohibited only retroactive criminal (not civil) statutes (not judicial decisions, as the U.S. Supreme Court recently made clear in *Rogers v. Tennessee*[6]) that either (1) criminalize previously noncriminal conduct, (2) increase the seriousness of an existing criminal offense (e.g., from misdemeanor to felony), (3) increase the punishment for an existing criminal offense, or (4) diminish the evidentiary requirements for conviction of an existing criminal offense.[7] Since then, the *ex post facto* norm, in its drastically reduced form, has interpreted and applied with the same flexibility that characterizes the other prudential maxims collected under the *nullum crimen* label, most notably through the distinction between criminal and civil state action. The most notorious recent example here is the exemption of sweeping and highly intrusive registration, notification, and indefinite detention regimes for various dangerous offenders (thought to be even more abnormally dangerous than the normal abnormally dangerous offender[8]) from the *ex post facto* prohibition.[9]

The malleability of the apparently firm constitutional prohibition of "ex post facto Law" may be related to the failure to ground this norm in anything other than the constitutional text. *Ex post facto* may be the only *nullum crimen* maxim that appears in the federal constitution, but it nonetheless remains just as disconnected from the "principle of legality"—or any other account of the nature and limits of state action in general, and state punishment in particular. The prohibition did not attract much attention during the Founding Era, or during the constitutional convention, and was, at any rate, not regarded as a revolutionary innovation in light of new principles of American government; instead it was simply lifted from English sources, including Blackstone's *Commentaries*.[10]

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[5] United States v. Maze, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting).
[6] 532 U.S. 451, 121 S. Ct. 1693 (2001).
[7] Calder v. Bull, 3 Dallas 386, 390 (1798).
[8] On abnormal dangerousness as the touchstone of criminal liability, notably under the Model Penal Code, see *infra*.
[9] Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072 (1997).
[10] 1 William Blackstone, *Commentaries on the Laws of England*, intro. § 2 (Of the Nature of Laws in General) (1765).