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

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This paper begins by briefly recounting the (non-)history of the principle of legality in American criminal law.¹ 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.² 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

* University of Toronto, Faculty of Law. Many thanks to Lorenzo Perilli for helpful suggestions and discussions of ancient Greek sources and to Jim Whitman for alerting me to Hans-Ludwig Schreiber's brilliant study of the legality principle in German criminal law. This paper was prepared for "From the Judge's Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials," Ghent University, Nov. 28-Dec. 1, 2010.

¹ For a more detailed, but less historical, discussion, 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).

² See generally Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005); see also 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., Stanford: Stanford University Press 2007).

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