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American Penality between Law and Police: Critical Analysis of Law and the New Police Science

Markus D. Dubber*

The title of this collection is “Theorizing the Modern Criminal System: Law and Sociology in Conversation.” I’ve taken this as an invitation to think about how one might try to come to grips with contemporary penality from an interdisciplinary perspective (rather than from two, or more, disciplinary perspectives), by constructing a framework for learning, thinking, talking, and writing about a penal regime, and the American penal regime in particular. In other words, this paper sets out to sketch an agenda for the interdisciplinary study of “the modern criminal system.”

I’ll start by discussing the terms of the interdisciplinary conversation. I’ll end by giving some illustrations of how one might put the proposed agenda into action. Along the way, I will suggest a topic, or subject, for the conversation (state penal power) (part I), propose two perspectives on that topic (law and police) (parts II & III), and outline a program for research from these perspectives (critical analysis of the American penal state) (part IV).

I. The Topic of Conversation

When thinking about “interdisciplinarity,” or interdisciplinary conversations, it’s useful to figure out the topic of conversation, or more specifically the subject and the object of inquiry. Interdisciplinary work in law can take different forms, depending on what’s being worked on (or with) and how (or why). Often interdisciplinarity in law means taking law as the source of raw material to be processed through some discipline’s methodological apparatus. Law is taken as static and uncomplicated, sitting patiently while it is being dissected by the professional sociologist, or historian, or psychologist, or economist, or philosopher, and so on. In these exercises of the “applied” version of a given discipline, law is at best the object of study (the means of inquiry) rather than its subject (the end of inquiry); law, in this case, is the occasion for the use, or the display, of the techniques of some discipline or other: it is that upon which the other discipline is applied.

Practitioners of this form of interdisciplinary work may be more or less aware of, or more or less open about, the (ir)relevance, or passivity, of law; they may go so far as to reduce the significance of law to the source of a hypothetical: under the following assumptions that may or may not describe a legal norm (or practice, etc.), some methodological apparatus will spit out the following hypothetical norm in terms of the active discipline’s language; some other hypothetical “description” of a legal fact may well generate a different hypothetical norm in that discipline’s language. In general, practitioners of applied economics, say, may be more likely to

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be explicit about this way of proceeding than practitioners of, say, applied literary studies, philosophy, or psychology. But the mode of inquiry is the same: interdisciplinarity as applied disciplinarity.

In this mode of interdisciplinarity, law is treated not as a fellow discipline, but as grist for some unidisciplinary mill; there is no conversation among disciplines, with law and some other disciplines chiming in on some topic external to both. Law is external, external to the only discipline having a conversation with itself.

In other words, this interdisciplinarity is, in fact, a form of intradisciplinarity. There is nothing wrong with intradisciplinarity. Just as there are more or less explicit forms of this practice, there are also more or less sophisticated versions of it; there’s no more of a necessary connection between explicitness and sophistication than there is between sophistication and interdisciplinarity.

What matters is not whether one’s perspective qualifies as inter- or intradisciplinarity, but whether it facilitates the critical analysis that is essential to any disciplinary project and for any normative project in particular, regardless under what disciplinary banner it is pursued. Take comparative analysis of law, for instance. A comparative perspective from within law—as from within any other discipline, including sociology—creates critical distance to the object of inquiry. That distance facilitates both analysis and critique; it allows us to see things we otherwise would not have seen, to understand them in new and different ways, and then, based on this analysis, to subject them to critique in light of the appropriate norms.¹

In this respect, the (intradisciplinary) comparative analysis of law performs the same function as an ostensibly interdisciplinary practice such as historical analysis of law; one shifts the perspective to a different place, the other to a different time, and their combination (in the form of comparative history) to both at once.² By comparative analysis of law I mean not only external, intersystemic, comparison, the traditional preoccupation of the field of “comparative law” in general, and comparative criminal law in particular—which has consisted primarily in comparing one system with another, or several others; in the case of U.S. law, the standard comparator in comparative law is “civil law,” an amalgam of selections from various European legal systems, generally with particular emphasis on Germany, France, and perhaps Italy. Comparative law in the present sense also includes internal, or intrasystemic, comparative law, such as the comparative analysis of criminal law and tort law, on one side, and administrative law, on the other. Note that “American criminal law” itself already is an intersystemic comparative project, insofar as criminal law is primarily a “state matter,” and more

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specifically emanates from the sovereign power to police, which is held by, and only by, the states.³

What, then, is the object of critical analysis for present purposes, i.e., "theorizing the modern criminal system"? What is its subject? The object is state power, and the subject its critical analysis from two perspectives, law and police. Put another way, the study of state power has two aspects: critical analysis of state power as law and critical analysis of state power as police. The discipline of law, in other words, concerns itself with the state as a law state (Rechtsstaat); the discipline of police regards the state as a police state (Polizeistaat).

Within this framework of inquiry, the “criminal system” represents one aspect of the exercise of state power: the state’s penal power. The critical analysis of that power from the perspective of law—as penal law—is the subject of the discipline of penal law. Its critical analysis qua penal police is the subject of the discipline of penal police.

II. Law and Police

This programmatic framework turns on a distinction between law and police, as the two modes of modern state governance, which I will set out in greater detail below.⁴ For now, it is enough to point out that the relationship between law and police is historically constructed in at least two senses. First, law and police themselves manifest two longstanding, foundational, modes of governance, autonomy and heteronomy, which can be traced back at least to classical Athens (i.e., if you like, the beginnings of Western civilization, or at least Western political and social history). Second, the modern concept of law emerged as a fundamental, even revolutionary, critique of the modern concept of police; the Rechtsstaat is a critical reaction against the Polizeistaat. More specifically, it manifests in the legal-political realm the enlightenment’s idea of the equality of personhood as defined by the capacity for autonomy.

The conversation between law and sociology, now, can contribute to the critical analysis of “the modern criminal system” in several ways. At the level of analysis, legal scholars can bring to bear their expertise in the form and substance, the design, generation, interpretation, and implementation of legal norms and texts, in short their knowledge of “the law” as a technique of governance in its myriad manifestations. To appreciate the operation and interaction of these techniques, or tools, however, requires seeing them in their institutional, political, and social context, rather than as isolated "doctrines" that add up to a more or less coherent,

but static and “autonomous,” account of the law of the land. In other words, analysis requires both a legal and a sociological (anthropological, historical, etc.) sensibility, whether it is undertaken from the perspective of penal law or of penal police. The conversation between law and sociology here is more an interdisciplinary collaboration, or rather a multidisciplinary soliloquy.

At the level of critique, legal knowledge will help identify and interpret the relevant “principles” and “policy goals” as well as the norms, standards, rules, doctrines, policies, individually and in their systematic contexts, to be measured against and evaluated in light of these principles (autonomy, culpability, responsibility, and so on) or policy goals (crime control, harm prevention, security, and so on). The sociological (anthropological, historical, etc.) torch will elucidate the operation and effect of these norms in practice and in their various social, historical, etc. contexts.

Here, too, it is a matter of continuously blending modes of inquiry, rather than of conducting parallel inquiries that engage in occasional interdisciplinary conversation. For purposes of critical analysis, the line between the legal and the sociological (or other) approach is no clearer, and no more significant, than that between questions of law and questions of fact, or between law in the books and law in action, or between law and policy. A “lawyer” who is blind to the social (institutional, historical, etc.) context within which a given legal doctrine operates is no better off than the “sociologist” (or “literary scholar,” or “historian,” or “philosopher,” etc.) who is blind to the finer points of legal technique.

The difference between critique from the perspective of penal law and that of penal police lies not in the difference between the contributions that law and sociology (or some other discipline) make to it, but in the difference between the two perspectives: from the perspective of penal law, the “modern criminal system” opens itself up to legitimacy (or “justice”) scrutiny in light of the Grundnorm of modern law (autonomy of the person); from that of penal police, the “modern criminal system” may be measured against its effect on the state’s “police,” in the sense of “public welfare” (including, but not limited to, order and security). From the perspective of penal law, the question is whether an exercise of state power is legitimate (or just, justified, right, etc); from that of penal police, the question is whether it is prudent (or competent, wise, efficient, good, etc).

Before we take a closer look at what critical analyses of penal law and penal police might look like, let’s pause for a moment to consider the object of inquiry, state power. There are of course other places to start, and other phenomena to ponder. But every inquiry has to start somewhere, and to ponder something, and it doesn’t matter much where, or what, as long as one identifies the object of inquiry

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5 See, e.g., Ernst Freund, The Police Power: Public Policy and Constitutional Rights iii (1904) (the police power as “the power of promoting the public welfare by restraining and regulating the use of liberty and property”).
and, at least as important, one’s choice doesn’t predetermine the process or result of the critical analysis.

One might think, for instance, that “state power” is too narrow a focus because it limits the critical analysis of law to what is often called “public” law at the exclusion of “private” law. This is only a concern, however, if one adopts an account of the distinction between public and private law that categorically denies the significance of state power in the latter, presumably limiting it to the former, perhaps even to the extent that the distinction between public and private law itself is drawn in terms of the significance of state power in one but not the other. That would seem like an odd conception of private law, and of law generally speaking, even to someone who doesn’t chant the mantra that “all law is public law”—which appears to assume the very limitation of state power to public law underlying the conception of private law it rejects. Whatever one might think about the nature, or origins, of private law norms, it would seem that private law as law—as opposed to an opportunity for mutual edification—rests on the state’s authority insofar as it draws on state institutions and relies on the availability of the state’s power to enforce judgments, including those based on negotiated “out-of-court” settlements, to issue, deliver, and enforce contempt orders, and so on.

Here it may be interesting to strike a historical-comparative chord, which—given its particular historical and systemic context—may do little to alleviate concerns about the narrowness of our inquiry. In Germany, the field of legal science (Rechtswissenschaft) was for a time, in the nineteenth century, regarded as one of two subfields within the broader field of state science (Staatswissenschaft), alongside the social sciences, including (macro) economics, sociology, and political science. (One university, Erfurt, has revived this disciplinary framework.) We could say, then, that legal science and police science are here conceived of as two aspects of the study of state power.

One might be tempted to take this excursion into German university history as evidence of the inappropriateness of focusing an inquiry into the “modern criminal system” unmodified—or certainly of the modern criminal system in early 21st c. America—on the phenomenon of state power. This temptation, however, may reflect an unfortunate, and ultimately counterproductive, prejudice that draws a basic distinction between a state-centered conception of law (associated with “civil law” countries, like Germany or France) and a conception of law that either does

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6 Even so, one easy answer that should suffice for present purposes would be that penal law is generally (and particularly by those who might distinguish between private and public law in the mentioned way) considered to be a species of public, not private, law. Actually, the question of how to classify criminal law is more interesting than it might appear. See Markus D. Dubber, “Criminal Law Between Public and Private Law,” in The Boundaries of the Criminal Law 191 (R.A. Duff et al., eds., 2011).

without the concept of state altogether, or at best assigns it some subordinate, or at least awkward, place. One would hope that this myth by now has been debunked by extensive evidence that the image of U.S. “government” as a laissez faire (non-)regime characterized by an absentee non-interventionist state is misleading at best and simply false, if not deliberately obfuscatory, at worst. The “American state,” as manifested in the governments of the various states of the Union and increasingly of the United States, made enthusiastic use of its power—and of its police power in particular (directly in the case of the states, indirectly via a patchwork of other explicit powers, such as the commerce power, in the case of the federal government)—from the very beginning of the Republic. State power has only grown since then, both at the state level and (most dramatically) at the federal level, to the point where by the turn of the twentieth century, it was widely understood that the federal government enjoyed a comprehensive police power in fact, if not in theory (which required the retention of the police power by the states, and only the states).

Of course, there is no more powerful reminder of the enormous power of the American state (again, both state and federal, local and national) than the “modern criminal system.” A prison population of over two million and the world’s highest incarceration rate (incidentally, nine times the rate in Germany and seven times that in France) is difficult to square with the conception of a non-interventionist state. That conception, however, is deeply ingrained, and has been perpetuated for decades, if not centuries. As recently as March 2013, a N.Y. Times op-ed piece (on financial regulation), reported the following, startling, “discovery”:

[O]ver the past three decades scholars have discovered that our government wasn’t as small as we thought. Historians, sociologists and political scientists have all uncovered evidence that points to a surprisingly large governmental presence in the United States throughout the 20th century and even earlier, in some cases surpassing what we find in Western Europe.

It’s one thing to overlook the extent of financial regulation, and perhaps even the state’s provision of public services (infrastructure, education, etc.), not to mention the sheer size of the United States military and its presence and activities around the world. It’s quite another to overlook a massive domestic use of state penal power by hundreds of thousands of state officials affiliated with that dizzying array of state

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10 716 (ranked #1) vs. 80 (#165) and 101 (#146), respectively (per 100000 population). Entire world - Prison Population Rates per 100,000 of the national population, International Centre for Prison Studies (Univ. of Essex), [http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate](http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate) (last visited June 25, 2013).
institutions and organizations, at the federal and state level, which constitute the massive American penal regime, from the beat cop “engaged in the often competitive enterprise of ferreting out crime” to the FBI undercover agent to the state prosecutor to the probation officer, the judge, the bailiff, the warden, the prison guard, the parole officer, and so on, who in any given year engage in millions of Terry stops, make millions of arrests, adjudicate millions of defendants, guard millions of inmates (including thousands on death row), supervise millions of parolees, and even execute hundreds of convicts.  

Put another way, it’s one thing to overlook the state, it’s another to overlook the penal state. Now there’s of course a long and distinguished tradition of denying the very existence of a state, and of preferring talk of “government” instead, first in England, then in the United States. This denial is striking in either case. The English state might have been hiding in plain sight, escaping attention because it was so well entrenched and ubiquitous by the time its existence was denied in the nineteenth century by the likes of A.V. Dicey.  

Now it may well be that the same phenomenon accounts for the denial of the existence of a state despite the existence of a global empire in nineteenth century England, on one hand, and the existence of a two-million strong carceral empire in twenty-first century America, on the other. In both cases, the exercise of state power was unproblematic and external: rather than being used against right-endowed citizens, it was brought to bear on subordinate human objects outside (literally and figuratively) the realm of political and legal rights. This exercise of state power was invisible because it did not require legitimation in terms of the autonomy Grundnorm of modern law. It was left to the exercise of the essentially discretionary police power instead. The penal state was invisible because its power was beyond doubt.  

More specifically, the penal state was invisible because it was a penal police state, an unquestioned exercise of the unquestionable power to police, an essentially discretionary and illimitable power of sovereignty defined by its very indefinability. Here it might be useful to step outside legal analysis, or perhaps inside a more sophisticated, contextual, legal analysis: it is no accident that it took an entry in the Encyclopedia of Social Sciences (1933), co-authored by an economist teaching at Yale Law School and a political scientist, to label the police power as an “idiom of apologetics.” Since the end of the so-called “Lochner era,” attempts to subject the police power to serious constitutional scrutiny have been dismissed as something akin to a bloodless intra-governmental coup attempt by means of an inappropriately

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13 See generally Janet McLean, Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere (2012).  
expansive, if not patently oxymoronic ("substantive"), reading of the federal
constitution’s “due process” cause. But the definition, or rather the description, of a
ubiquitous police power can be traced throughout American constitutional history:
as “the power of sovereignty, the power to govern men and things within the limits
of its dominion,”\textsuperscript{15} the police power “extends to the protection of the lives, limbs,
health, comfort, and quiet of all persons, and the protection of all property.”\textsuperscript{16}

The police power, in other words, is nothing less than a comprehensive
collection of state power, and the penal power is only one—if a particularly
invasive—manifestation of that power. The police power is state power as “the
power of sovereignty,” and more specifically still, a particular conception of
sovereign power, “the power to govern men and things within the limits of its
dominion.” It is worth unpacking this attempt to capture the nature of the police
power, which in its pithiness differs usefully from the more common attempts to
illustrate the police power’s all-encompassing and multifarious scope through ever
longer lists of actions and actors, states and risks within its purview (as we’ll see
shortly). The holder of the police power is the sovereign, with sovereignty
traditionally being celebrated as the most concentrated, most singular, independent
and original, indivisible, nondelegable, broadest, and most flexible conception of
political power. The power of sovereignty covers everyone and everything within
the limits of its dominion. The limits of the dominion (or demesne, domain, from
Latin \textit{domus}), however, are the limits of the household (\textit{domus}), and the person with
the power to govern it is the householder, \textit{dominus}.

In this interpretation, then, the sovereign is the householder, and sovereignty
the power of the householder over his household, of the \textit{oikonomos} over his \textit{oikos},
the \textit{pater familias} over his \textit{familia}, the \textit{dominus} over his \textit{domus}, and the lord over his
manor. The police power in turn can be seen as the power of the householder over
his household transferred from the private sphere to the public sphere, i.e., from the
micro household of the family to the macro household of the state, from the \textit{oikos}
to the \textit{agora}, from the \textit{familia} to the \textit{forum}. It is, literally, the power of the \textit{pater patriae},
the “pater-familias of the nation” (Blackstone\textsuperscript{17}) who governs “the men and things”
under his dominion. It is a power over men and things because it does not
distinguish categorically between persons and other objects of household
governance. Household resources may include “human resources,” along with
animals, plants, and real property. Prudence may counsel treating each resource
differently, so that the wise (or artful) householder may differentiate between the
governance of adult slaves and minor sons, dogs and pigs, tulips and potatoes, but
there is no qualitative distinction between persons and other household resources.
There is no conception of human household members as rightholders entitled to one

\textsuperscript{15} License Cases, 5 How. 504, 583 (1847).
\textsuperscript{16} Thorpe v. Rutland R.R., 27 Vt. 140, 149-50 (1854).
\textsuperscript{17} William Blackstone, Commentaries on the Laws of England, vol. 4, at 127 (1769); see also vol. 3
(1768), at 220 (“the king in his public capacity of supreme governor and pater-familias of the
kingdom”).
form of treatment or another, or to an explanation, never mind a justification, of the householder’s decision, say, whether or not to inflict discipline, not to mention what quantity and quality of discipline to inflict.

This is not to say that the householder might not choose to consult the advice of others in the exercise of his patriarchal power, so that he may maintain or even improve the welfare of his household, i.e., its police or “oeconomy.” In particular, he might refer to the good governance/best practices literature on the art and science of household government that goes back at least to Xenophon’s Oikonomikos of the 4th c. BC, and—after a medieval hiatus—continues with, for instance, the German Hausväterliteratur (16th through 18th century)18 and Southern antebellum slaveholder manuals,19 as well as, for our purposes particularly relevant, works of advice to macro householders such as the “mirrors for princes” (Fürstenspiegel)—most famously, Machiavelli’s The Prince (early 16th century)—and, especially noteworthy, the enormous literature on police science in Germany and France, even—if only sporadically—across the Channel, in England and Scotland.20

This police science literature—produced by princely advisers, bureaucrats, and eventually teachers and scholars employed at university faculties—took it upon itself to canvass, systematize, and rationalize state power in all of its manifestations. Take, for instance, Nicolas Delamare’s Traité de la police, published in four volumes between 1705 and 1738. At the beginning of his treatise, Delamare set out a list of police objects, which he claimed had remained unchanged since Antiquity, except for their order (“[T]he sanctity of our religion does not permit us to place the needs of the body ahead of those of the soul.”21):

- Religion
- Discipline of morals (Discipline de mœurs)
- Health
- Provisions
- Security and public tranquility
- Infrastructure
- Sciences and liberal arts
- Commerce, manufactures & mechanical arts

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20 See Adam Smith’s discussion of police in his Glasgow “Lectures on Juris Prudence”: “The name is French, and is originaly derived from the Greek πολιτεία, which properly signified the poliece of civil government, but now it only means the regulation of the inferiour parts of government, viz. cleanliness, security, and cheapness or plenty.” Lectures on Juris Prudence, pt. II (“Of Police”) (available at http://oll.libertyfund.org/title/196/55650) (last visited July 1, 2013).
21 Traité de la police, où l’on trouvera l’histoire de son établissement, les fonctions et les prerogatives de ses magistrats; toutes les loix et tous les reglemens qui la concernent etc, vol. 1, at 3 (1705) (available at http://gallica.bnf.fr/ark:/12148/bpt6k1098988/f40.image) (last visited June 25, 2013).
• Domestic servants, laborers & the poor

Police scientists like Delamare (a Parisian magistrate under Louis XIV) faced the daunting task of bringing some order into the mass of police ordinances that often appeared as random lists of “men and things” to be governed. Take, for instance, this early German police ordinance (First Imperial Police Ordinance, Holy Roman Empire of the German Nation (1530)):

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• Of blasphemy and oaths
• Of drunkenness
• Of disorderly and Christian dress
• Of excessive expenses for weddings, baptisms, and funerals
• Of day laborers, workers, and messengers
• Of expensive eating in inns
• Of civil contracts
• Of Jews and their usury
• Of the sale of wool cloth
• Of the sale of ginger
• Of measures and weights
• Of servants
• Of carrying weapons on horse and on foot
• Of beggars and idle persons
• Of gypsies
• Of jesters
• Of flute players
• Of vagrants and singers
• Of sons of craftsmen and apprentices

Two and half centuries later, and across the Atlantic, little had changed, other than that the list of (human and non-human) police objects had continued to grow. Consider the collection of New York State police regulations enacted in the first two decades of the New Republic (1781-1801).23

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• lotteries
• hawkers and peddlers
• firing of guns
• usury
• frauds
• buying and selling of offices
• beggars and disorderly persons
• rents and leases
• firing woods
• destruction of deer
• stray cattle and sheep
• mines
• ferries
• apprentices and servants
• bastards
• idiots and lunatics
• counsellors, attorneys and solicitors
• travel, labor, or play on Sunday
• cursing and swearing

• drunkennes
• exportation of flaxseed
• gaming
• inspection of lumber
• dogs
• culling of staves and heading
• debtors and creditors
• quarantining of ships
• sales by public auction
• stock jobbing
• fisheries
• inspection of flour and meal
• practice of physic and surgery
• packing and inspection of beef and pork
• sole leather
• strong liquors, inns, and taverns
• pot and pearl ashes
• poor relief
• highways

III. Police Power and Police Science

The significant distinction, in fact, between continental Europe (France and Germany in particular), on one side, and England and the United States, on the other, did not lie in the conception, or even the use, of a police power. Compare Rousseau’s definition of “political economy” with Blackstone’s roughly contemporaneous definition of “police and economy,” which was quoted by American courts as late as the 1960s (as the origin of the doctrine of common law misdemeanors!):24

The word Economy, or Oeconomy, comes from oikos, house, and nomos, law, and originally signified only the wise and legitimate government of the household for the common good of the whole family. The meaning of the term was subsequently extended to the government of the large family which is the State.25

The king, as the “father” of his people, and “pater-familias of the nation,” is charged with “the public police and economy[, i.e.,] 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.”26

Now, despite these similarities, the police power—or the concept of police—clearly was invoked earlier, more often, and more explicitly in France and Germany than in England (where most commentators, not including Blackstone, studiously avoided mention of the

word “police” on account of its often remarked upon French origin\(^2\) or even in Scotland (*pace* Colquhoun and Smith) or the early American Republic. Still, even this distinction fades once one sees the connection between the concepts of *peace* and *police* and their common origin in the household as a locus, and model, of governance; as Pollock made clear some time ago, the notion of peace was central to English political and constitutional history from very early on.\(^2\)

At any rate, more significant than the differences between continental and Anglo-American police power is the fact that, unlike France and Germany, England and the United States never developed a *science* of police to go along with the power of police. Two exceptions prove the rule: Patrick Colquhoun in England at the turn of the nineteenth century and Ernst Freund in the U.S. a century later took on the sort of ambitious project of rationalizing, or at least documenting, the police power in its scope and variety that occupied generations of continental police scientists between the seventeenth and nineteenth centuries. But neither of them continued or established a broader sustained project of inquiry into the nature, structure, diversity, and exercise of the power to police.

Colquhoun, a Scottish transplant to England, produced police treatises that rivaled the output of his continental peers in number and ambition (several of them were translated into French and German). But he made his mark not as a lone police scientist, who published treatises on the police of the poor, education, micro households, and macro households (including the city of London and, most ambitious, the British Empire),\(^2\) but as a proto police reformer, where “police” is taken in the “modern” narrow sense of, functionally, “law enforcement” or, institutionally, “police force.” In particular, the London Thames River Police he founded in 1798 today is often cited as a precursor to the “modern” London Metropolitan Police Force established by Robert Peel in 1829.

Freund, a German transplant to the U.S., received his doctorate in law from the University of Heidelberg in 1884. He then immigrated to the U.S. and, after practicing law in New York for a few years, started teaching in the political science department at Columbia, and then at the University of Chicago. In 1902, Freund joined the founding faculty of the law school, where he taught until his death in 1932.\(^3\) His magisterial 800-page study *The Police Power* (1904) is the closest thing to an American police science treatise. Organized by the various interests protected by the police power “over men and things,” the treatise is filled with the now familiar diffusely indiscriminate lists of objects of police control. Take, for instance, the section on “sanitary legislation” in the chapter on “safety and health,” ranging from “persons” (“immigration and quarantine”\(^3\)) to “dead bodies” and “land, structures and buildings”:

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\(^{2}\) “Police,” n., Oxford English Dictionary, at 1069, 1069, col. 2 (definition 3); see also Smith, supra note __.

\(^{2}\) Frederick Pollock, “The King’s Peace,” 1 L. Q. Rev. 37 (1885).

\(^{2}\) See, e.g., Patrick Colquhoun, *A Treatise on the Wealth, Power, and Resources of the British Empire* etc. (1813).


\(^{3}\) For a classic case on immigrant police, see New York v. Miln, 36 U.S. 102 (1837) (upholding statute
Sanitary legislation. §§ 122-133.

122. Scope of state activity.
123. Persons. Immigration and quarantine.
124. Marriage.
125. Burials and cemeteries.
126. Dead bodies.
127. Land, structures and buildings.
129. Foodstuffs, &c.
130. Other articles of consumption.
131. Employment.
132. Qualification for the exercise of callings affecting health.
133. Practice of medicine.

Like Colquhoun before him, Freund is considered a pioneer, though, also like Colquhoun, not of police science. While Colquhoun came to be seen as a precursor of the “modern” English police force established by Peel, Freund went on to play a key role in the establishment of the new field of administrative law. Either way, through a contraction of the police project from the exercise and study of the power of sovereignty, the power over men and things, to the design and operation of a particular institution of “law enforcement,” in Colquhoun’s case, or through its transformation into a new branch of public law, in Freund’s case, the belated and sporadic attempts at Anglo-American police science never managed to take hold.

By the time Colquhoun and Freund turned their attention to the study of the police power, continental police science already looked back on a centuries-long history and, at the turn of the nineteenth century, itself began a fundamental transformation that paralleled developments in England and the United States. This change came about as a result of the launching of another, similarly comprehensive and fundamental, conception of government, based on the enlightenment postulation of personhood as the capacity for autonomy.

Under this radical new conception, which pitted the ideal of the law state (Rechtsstaat) against that of the police state (Polizeistaat), the exercise of power required legitimation in light of the fundamental principle of autonomy; the objects of state power, the “men and things” within the sovereign’s dominion, were no longer en masse inherently incapable of autonomy, and destined for domination by those who possessed this rare capacity: instead, they were capable of governing themselves, they were now the subject-objects of government (as long as they were classified as “men” rather than “things”).

To appreciate the nature and significance of this, in some cases literally, revolutionary shift in perspective, it is worth briefly considering it in historical context. Originally, at least since classical Athens, the sovereign-householder’s power over his household was essentially heteronomous, based on the distinction between the subject and object of requiring captains to post bond for human cargo under state’s power to police “the persons and things within her territorial limits”).
governance. The householder, and only the householder, was the subject (sui juris). The household, including “men and things,” was the object. The householder’s power “within the limits of its dominion,” was without limits.

By contrast, governance in the public sphere was essentially autonomous, based on the identity of subject and object of governance. Householders, who governed their households heteronomously in the private sphere, governed themselves autonomously in the public sphere, as the only beings with the capacity for autonomy, i.e., political and legal subjecthood. Governance in the household (oikos) was by domination, through the use or threat of force; governance in the city-state (polis) was by rhetoric, through persuasion.

The police power, in this conception, emerges through the transference of the householder’s power over his household from the private to the public sphere, from the oikos to “that great family, the State,” from the micro household of the family to the macro household of the realm. This transference from private to public power occurs through an expansion of one householder’s power at the expense of others’. Over time, one householder “centralizes” power by integrating other households into his own, transforming a multitude of adjoining micro households into a single macro household, and a patchwork of original sovereignties into a single original sovereignty with a system of delegated sovereignties. For instance, initially, there are as many treasons as there are households, treason being regarded as the ultimate act of disloyalty to one’s householder; then there is only one “high” (or grand) treason, broadly construed to cover “imagining” the (macro) householder’s death, and a multitude of “petit” treasons, limited to the actual killing of one’s (micro) householder; and eventually only one treason remains, the killing of one’s (micro) householder now being classified as just another homicide. The limits of delegated sovereignty are no longer defined by the limits of dominions, but by the terms of the delegation (ultra vires). Sovereignties over time become administrative entities, and sovereigns administrators.

This development can also be traced in terms of the expansion of one householder’s peace at the expense of all others’. The story of the extension of the power of the English king, for instance, is the story of the widening of his “royal” peace. Each householder, as Pollock and Maitland put it, had his peace, which referred both to the scope and the status of his dominion, and which he was empowered to protect and defend against any offense, or “breach.” Over time, however, the king’s peace integrated the peaces of lesser householders, to the point where his peace covered the entire realm; the realm had been transformed into his (macro) household, the peace of his micro household (Hausfriede) having merged with the peace of his land (Landfriede), and the breach of the one (Hausfriedensbruch) having become indistinguishable from the breach of the other (Landfriedensbruch). Any offense against anyone under his protection was an offense against the householder; and so any offense against one of the King’s subjects became an

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32 Treason Act 1351, 25 Edw 3 St 5 c 2.
33 Offences against the Person Act 1828.
offense against the King himself (as reflected in indictments of offenses against the king's peace).

Now, as the police power is the modern manifestation of heteronomous private governance transferred onto the state, so the law power is the modern manifestation of autonomous public governance expanded from householders to all persons as such. The capacity for self-government is no longer a distinguishing feature of householders, but the distinguishing feature of personhood.

The modern conception of law, and state government according to law (Rechtsstaat), emerged as a critique of the police power model. In the police state, the notion of the capacity for autonomy as a distinguishing feature had been radicalized to the point where it was limited to one person, the sovereign, all micro householders having been reduced to holders of delegated authority subject to sovereign control. Under the modern conception of law, this trend is reversed, and the resulting conception of sovereignty stood on its head: where once sovereignty was limited to one, it was now shared by all.

This conception of state power based on the assumption of universal sovereignty should be seen in historical context: it is the reflection, in the political and legal sphere, of the central discovery—or invention or postulate—of the enlightenment: that the capacity for autonomy, without more (in the form of wealth, beauty, smarts, education, etc), is the essence of personhood, the basis of dignity, and the target of respect. Dignity, then, too evolves from social distinction to political status, and respect from social obligation to political entitlement to legal right.

We can now see how this contrast, between heteronomy and autonomy, frames the radical new legitimacy challenge of the Rechtsstaat: how can the exercise of state power against objects of governance be legitimated to those very objects considered as subjects, i.e., as persons with the capacity for autonomy? Or, put differently, how can the police power be reconciled with the new legitimacy demands of the concept of modern law? The explicit shrinking of the police project to its apparently least controversial aspect and the conversion of the study of police from a comprehensive science of the police power as the power of sovereignty into a branch of "law" can be seen as one, formal, response to this challenge. The legitimacy challenge of modern law is met, in other words and with considerable irony, by fiat: the police power has been legalized because the state declares it so.

IV. Critical Analysis of the Penal State

Now, no other exercise of state power poses the challenge of modern law with more urgency than the power to punish. How could the direct and intentional interference with a person’s autonomy be justified, as an exercise of that person’s capacity for autonomy?

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35 The protection of public safety through something called a “police force.” See supra ___.
36 First from police science (Polizeiwissenschaft) into “police law” (Polizeirecht) and then “administrative law” (Verwaltungsrecht). See supra ___.

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This is the central question, or the animating puzzle, of the study of state penal power—or the “modern criminal system,” if you prefer—from the perspective of law. It is not a sui generis, isolated, inquiry, but one that considers state penalty as an exercise of the law power. The account of penal law it pursues is an account of penal law as law and therefore builds on a broad account of law as a mode of governance, and in particular of modern law as a mode of governance that emerged in direct contradistinction, and opposition, to police as a mode of governance.

In other words, the critical analysis of penal law is part of a critical analysis of law. The critical analysis of law, however, itself should be see in a broader context, as one aspect of the critical analysis of state power, complementing the critical analysis of police as the other mode of state governance, both intimately connected with, and radically distinct from, law.

A critical analysis of state power in general, and of state penalty in particular, must proceed from a comprehensive analysis of the type of state power in question, here the modern penal state (or, the “modern criminal system”), including its norms, institutions, and practices, ranging from the definition of norms (substance: substantive criminal law) to their imposition (process: criminal procedure) and the infliction of sanctions upon their violation (execution: corrections). Only this comprehensive analysis makes critique possible, in terms of the relevant norm (legitimacy or justice, on one hand, and prudence or effectiveness, on the other).

This analytic project—tedious and difficult, if not impossible or at least foolhardy, given the scope and diversity of contemporary state power—was the ambition of police science. As we saw earlier, that project was never attempted in the common law world, where police science never took hold, and was abandoned in continental Europe, where police science morphed into administrative law (via the oxymoronic construct of “police law”).

The “New Police Science” attempts to revive this comprehensive analytic project, without however limiting itself to analysis, or to dispensing words of wisdom to householder-sovereigns. After the challenge of modern law, the analysis of the state’s police power operates against the backdrop of the ideal of the law state and the accompanying assertion—or at least assumption—that the rule of law or the Rechtsstaat in fact defines, and determines, the exercise of state power. In other words, within the law state project, the police power itself faces a legitimacy challenge and a policial analysis of state power, and of state penalty in particular, itself draws into question the assertion of a paradigm shift from police state to law state.

As the critical analysis of police can be seen as a reconceptualization of police science, so the critical analysis of law can be regarded as a reconceptualization of legal science.

Unlike in the case of police science, there once was a project of legal science in the common law world, though there may as well not have been, given how thoroughly this enterprise was repudiated around the middle of the twentieth century. Again unlike in the case of police science, the project of legal science is alive and well in the civil law world. In fact, the complete replacement of police science with legal science parallels the (ostensibly) complete replacement of the police state with the law state in continental Europe. In the civil law world, then, the task of a new legal science would be one of reform, rather than of revival. 38

There is of course something refreshingly honest, even (if self-consciously) humble, about dropping the pretense of scienceness and its attendant claims to objectivity. But why should it not be possible to carry on a scientific project without pretensions? An unpretentious self-critical science of state power, consisting of police science and legal science, would not need to present “science” as a panacea or as a status symbol (in keeping with the reclassification of bachelor’s degrees in law as “doctoral” degrees). Here a new legal science would join a reconceived new police science in assembling a comprehensive analysis of state power as it manifests itself in fact, despite the still wide-spread pretense of laissez-faire minimalist non-state “government,” and then subjecting it to parallel critiques, from a legal and a policial perspective.

More specifically, this new legal science is new insofar as it does away with models of “inductive” or “deductive” scientific inquiry associated, rightly or wrongly, with pre-Realist jurisprudence that regarded legal science as occupied with the generation of principles either by painstakingly harvesting legal raw materials (in the form of appellate opinions) or by deriving them from the “heaven of legal concepts” ridiculed by the Legal Realists (and their continental forebears, Jhering and Hermann Kantorowicz39), where it matters little— for our purposes—how a concept’s membership in this heaven is determined, say, by its pedigree in natural or in Roman law.40 The new science of law would recognize the historical and systemic context of its subject matter: it would be concerned with modern law as it emerged at the turn of the eighteenth century in certain (“Western” “liberal”) states as a critique of police as a comprehensive mode of apersonal state governance of “men and things.”

In sum, the new legal science would be dedicated to the critical analysis of state power as law. This analysis is essentially critical because, as one aspect of the broad

38 For some recent efforts along these lines, in France and Germany, see Philippe Jestaz, & Christophe Jamin, La doctrine (2004); Das Proprium der Rechtswissenschaft (Christoph Engel & Wolfgang Schön eds., 2007); Rechtswissenschaftstheorie (Matthias Jestaedt & Oliver Lepsius eds., 2008).
39 Whose influential 1906 pseudonymous tract was entitled “Der Kampf um die Rechtswissenschaft” (“the struggle over legal science”). See also Hermann U. Kantorowicz & Edwin W. Patterson, “Legal Science: A Summary of Its Methodology,” 28 Colum. L. Rev. 679 (1928).
40 Whether the Legal Realists’ rejection of the project of legal science—as opposed to a particular, possibly caricatured, version of it—was as categorical, universal, and definitive as tends to be assumed is another question. See, e.g., Huntington Cairns, The Theory of Legal Science (1941); Morris R. Cohen, “Philosophy and Legal Science,” 32 Colum. L. Rev. 1103 (1932); see also Karl N. Llewellyn, “The Theory of Legal Science,” 20 N.C. L. Rev. 1 (1941).
enlightenment project of critique, the concept and project of modern law is essentially critical. But this critique presupposes analysis. And for purposes of this analysis, the new legal science uses any analytic tool at its disposal, from “legal” analysis of legal techniques to “sociological” (and historical, and anthropological, and economic, and psychological...) analysis of the generation, application, and implementation of norms, and, more generally, of the social, historical, institutional context of these techniques and norms.

At the same time, the new legal science would remain as inseparable from the new police science as law and police are historically and substantively connected, in two senses. The tension between law and police itself reflects the tension between autonomy and heteronomy that extends back to the very origin of “Western” thought and practice of (private and public) government in classical Athens. Now, the emergence of police as a mode of governance in the early modern period as the medieval state expanded into the modern state preceded that of modern law at the turn of eighteenth century. The connection between police and modern law therefore is not necessarily temporal; and yet it is no less historical and substantive than that between heteronomy and autonomy because the concept of modern law arises in critical counterpoint to the notion of police governance as manifested in the high police state of the eighteenth century, exemplified by Friedrich II’s rule of Prussia (1740-86) and Louis XIV’s of France (1661-1715).

Given the essential connection between modern law and police it is clear that modern law’s question about, and challenge of, the legitimacy of state power, and of state penal power in particular, cannot be addressed in isolation. Unless one uncritically accepts the official declaration that the law power has displaced the police power, and the law state the police state, the analysis of state power, and state penal power, from the perspective of police remains a crucial element of the study of state power.

It may turn out, for instance, that a penal system in general, or at least certain of its features, are usefully analyzed as manifesting a police model, rather than, say, as exceptions to a law model. Parallel analysis of state penal power from a law and a police perspective may reveal so many “policial” aspects that it may be difficult to sustain the conception of a given penal system as a penal law regime with policial exceptions, rather than the other way around.41 In that event, the further question may arise how one could account for the development of this state of affairs, particularly in a country that ordinarily is considered, and generally presents and regards itself, as part of the Western liberal tradition.42 It might turn out, for instance, that the challenge of the “legalization” of the state’s penal power has never been posed, perhaps because the objects of penal power—offenders—have never been fully recognized as legal subjects and instead have remained


beyond the realm of legitimation, as mere objects of state power, rather than its subject-objects.43

Without an alternative analytic model—penal police—the inquiry could not advance beyond the repeated discovery of deviations from the legal norm, of exceptions from the rule of law, adding up to a sense of puzzled frustration at the failure to address apparent fundamental injustices, systematic oppression, or “malign neglect.”44 Instead, it may be more productive to pursue analysis from a police perspective in greater detail and wider scope, to get a sense—apart from questions of legitimacy or compliance with supposed norms of legality or “fundamental principles” of criminal law—of how the system operates, as a system of penal police.45 This policial analysis then may lay the foundation for critical analysis from within the police paradigm, in an attempt to develop a science of penal police that sets out not only to describe existing practices but also to rationalize them in light of some end (public welfare, crime control, etc.) or norm (prudence, good governance, wisdom, efficiency, etc.). The Model Penal Code’s efforts in this vein were remarkable, but remained limited in scope and have not been developed since its completion over fifty years ago—nor has the Code even been recognized as an attempt to codify the “substantive” component of a model American penal police regime.46

Conclusion

Much work remains to be done on both aspects of the critical analysis of the American penal state: a systematic account of the penal law state has remained as elusive as a comprehensive analysis of the penal police state. Conversations between law and sociology (along with many other disciplines) can contribute to both aspects of the project of critical analysis: to generate a comprehensive analysis of state penality in its multifarious normative, institutional, and practical reality (rather than as a collection of self-executing rules) and continuously to match that reality against the relevant evaluative criteria (e.g., justice or prudence, legitimacy or effectiveness).