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Autonomy and the Legitimacy of State Punishment

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A Political Theory of Criminal Law: Autonomy and the Legitimacy of State Punishment

Markus Dirk Dubber

Introduction

As the most severe form of state coercion, punishment poses the most serious challenge to the legitimacy of state action. If punishment can be justified, so can other, lesser, forms of coercive state action. If it cannot, what’s the point of legitimizing, say, taxation?

One therefore would expect that inquiries into the legitimacy of the state would begin with a critique of the legitimacy of punishment. That’s not so, however. Political theory instead has found it difficult enough to discern principles for the distribution of benefits, rather than for the infliction of punitive pain. Theories of justice are theories of distributive justice, not of penal—or retributive—justice; they are “ideal” theories for “well-ordered societies,” rather than non-ideal theories for ill-ordered societies marked by considerable noncompliance.¹

Political theory’s unwillingness to deal with the problem of punishment is certainly understandable. Legitimating punishment is hard. Punishment, after all, is prima facie illegitimate; in punishing its constituents, the state harms the very people it is supposed to protect, by interfering with the very rights it claims to guarantee, in the name of guaranteeing them.² Without more, the state has no right to harm those it is meant to protect: At bottom the “presumption of innocence” is a general presumption of inviolability.³ In fact, technically speaking state punishment isn’t just illegitimate, it’s criminal. The various acts that constitute the practice of punishment match the definitions of criminal offenses: The statutory threat of punishment looks suspiciously like “menacing,”⁴ wiretapping like “eavesdropping,”⁵ entrapment like “solicitation” (or

¹ Professor of Law & Director, Buffalo Criminal Law Center, SUNY Buffalo, <dubber@buffalo.edu>. I thank participants in workshops at the University of Michigan, the University of Iowa, the University of Wisconsin, Johann-Wolfgang-Goethe-Universität Frankfurt, Ludwig-Maximilians-Universität Munich, the University of Edinburgh, and the University of Stirling, for comments, the Alexander-von-Humboldt-Foundation and Dean Nils Olsen for generous financial support, and Professor Bernd Schünemann for his hospitality at the Institute for Legal Philosophy, Munich.


⁴ See N.Y. Penal Law § 120.15 (menacing: “intentionally plac[ing] or attempt[ing] to place another person in fear of death, imminent serious physical injury or physical injury”).
even “conspiracy”), searching a suspect’s house like “trespass,” searching (or frisking) the suspect herself like “assault,” arresting her like “battery,” seizing her property like “larceny,” a drug bust like “possession of narcotics” (with or without intent to distribute), indicting—and convicting—a defendant like “defamation,” imprisoning the convict like “false imprisonment,” and executing her like “homicide” (“murder,” to be precise).

At first glance it appears that legal theory has given the justification of punishment more serious attention. After all, retributivists and consequentialists, deontologists and utilitarians have been plowing the field of “punishment theory” for decades, if not centuries. Punishment theory, however, is in fact an exercise in moral, rather than legal, theory. As an instance of moral theory, this perennial debate consistently neglects one crucial fact of state punishment, namely that it is a form of state coercion. Perhaps punishment in other contexts may be of some interest to a theory of state punishment. We might wonder, for instance, whether a parent has the “right” to “punish” her child and, if so, whether that authority resembles the state’s right to punish constituents who violate a criminal norm. At any rate, the two questions would remain distinct, no matter how related their answers might turn out to be.

Clearly moral theorists should have something to say about punishment, insofar as punishment also is a moral, and not merely a legal, practice. For one thing, the mode of judgment in cases of legal punishment closely resembles that of moral judgment; both require the ascription of responsibility for a norm violation, even if the norm is moral in one case and legal in the other.

And yet it is just as plain that punishment is not only a moral matter. Moral theorizing can make an important contribution to punishment theory, but it cannot exhaust the subject. Punishment is ultimately a legal-political phenomenon, the infliction of state violence in the name of the state according to the criminal law. After centuries of essentially moral theorizing, it’s high time we attended to the legal and political aspects of punishment.

This article answers two questions. First, as a matter of political theory, how can punishment be legitimated in a modern liberal democracy? Second, as a matter of legal theory, what would a system of criminal law look like that satisfied the basic requirements of political legitimacy set out in response to the first question?

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5 See id. § 250.05 (eavesdropping: “wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication”)
6 See id. arts. 100, 105.
7 See id. § 140.05 (trespass: “knowingly enter[ing] or remain[ing] unlawfully in or upon premises”).
8 See id. art. 120.
9 See id. arts. 220-21 (drugs), 265 (weapons).
10 See N.H. Crim. Code § 644:11 (defamation: “purposely communicat[ing] to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule”).
11 See id. § 633:3 (false imprisonment: “knowingly confin[ing] another unlawfully . . . so as to interfere substantially with his physical movement”).
12 See N.Y. Penal Law § 125.25 (murder in the second degree: “[w]ith intent to cause the death of another person, . . . causing the death of such person”).
14 On the distinction between the power to discipline and the power to punish, see Markus Dirk Dubber, Polizei-Recht-Strafrecht, in Festschrift für Klaus Lüderssen zum 70. Geburtstag 179 (Klaus Günther et al., eds., Baden-Baden: Nomos 2002).
We will take a historical approach to the first, political, question. Rather than simply setting out a theory of political legitimacy, this approach will allow us to better understand how the question of the legitimacy of punishment came to be framed and what efforts were made—or not made—to address it at a time when the basic institutions of modern American government were set up and when broad questions of legitimacy were raised more clearly than ever before, or since.

Needless to say, developing a comprehensive account of criminal law would far exceed the scope of this paper. Instead its second, legal theoretical, part pursues a more modest goal: to put in place the basic conceptual framework for such a general account, and to illustrate the framework’s power by applying it to central themes in the various aspects of the law of crime and punishment, ranging from criminal law to criminal procedure, and eventually to prison (or correction) law.

In short, part I defines the parameters of the problem of punishment in a modern democratic state. Part II shows how the problem might be solved. To appreciate the significance and roots of the legitimacy crisis of punishment, part I begins by exploring how the Framers conceptualized the question of punishment in terms of the distinction between two basic modes of governance, “police” and “law,” and how this conceptual vocabulary shaped American criminal law in theory and practice. From early on, the power to punish was viewed as a thoroughly unproblematic instance of the “police power,” generally regarded as “the most essential, the most insistent, and always one of the least limitable of the powers of government.”

The power to police, which every state was thought to enjoy over its subjects by definition, in turn derives from the householder’s virtually unlimited power to discipline the members of his household, which was transferred from the head of the family, the pater familias, to the king, as pater patriae, and eventually to the state.

As “an idiom of apologetics,” the police power cannot generate meaningful limitations on criminal law. At best it gives rise to flexible guidelines of prudence and fitness that focus on the punisher’s motives, rather than the punished’s rights. Already in medieval law, a householder—or other superior—who disciplined exclusively out of malice lost his authority to discipline because he had proved himself unfit for the post.

For principles of criminal law one must instead turn to the external constraints that legitimacy, not police, place on the power to punish. Ever since the Enlightenment, and the American Revolution, the most basic principle of political legitimacy, however, is the requirement of autonomy, or self-government. In part II, this basic principle is applied to the various aspects of state punishment: criminal law, criminal procedure, and prison law.

I. The Legitimacy of State Punishment

A. The Challenge of Republican Punishment

The Founding Fathers paid little attention to the question of punishment. In fact, they showed remarkably little interest in sub-constitutional matters of government generally.

Thomas Jefferson was the exception to the rule. His Virginia “Bill for Proportioning Crimes and Punishments” promised a system of criminal law “deduc[ed] from the purposes of society.” In fact, it fell considerably short of this goal, as Jefferson was largely content to invoke the authority of common law—and even Anglo-Saxon—statutes and commentators.

Still, Jefferson is a good place to start; at any rate, it is the best we have. Jefferson saw the connection between government in general and punishment in particular more clearly than anyone at the time, or perhaps since. In the Declaration of Independence, he famously laid out the theory of legitimacy of the new American state:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

In the preamble to his criminal law bill, Jefferson set himself the task of applying this general theory of government to the power of punishment, through which the state infringes the very “unalienable rights” it exists to protect, in order to protect them:

Whereas it frequently happens that wicked and dissolve men, resigning themselves to the dominion of inordinate passions, commit violations on the lives, liberties, and property of others, and the secure enjoyment of these having principally induced men to enter into society, government would be defective in its principal purpose, were it not to restrain such criminal acts by inflicting due punishments on those who perpetrate them; but it appears at the same time equally deducible from the purposes of society, that a member thereof, committing an inferior injury, does not wholly forfeit the protection of his fellow citizens, but after suffering a punishment in proportion to his offence, is entitled to their protection from all greater pain . . . .

The principle from which the new republican form of government drew, and continues to draw, its legitimacy was “the consent of the governed.” The consent of the governed in turn mattered not for its own sake, but because republican government is self-government, “of the people, by the people, for the people,” in Lincoln’s memorable phrase. Ultimately the legitimacy of the state, then, rests on the autonomy of its constituents, “the capacity of mankind for self-government,” as Madison put it in the Federalist Papers.

All of this is obvious enough. What’s not so obvious, or at least hasn’t been so far, is that as a type of state action, criminal law must derive its legitimacy from the same

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17 Thomas Jefferson, A Bill for Proportioning Crimes and Punishments § 1 (1778).
18 We learn, for instance, that “the laws of Æthelstan and Canute,” a set of Anglo-Saxon dooms from the 10th and 11th centuries, punished counterfeiters with cutting off the hand “that he the foul [crime] with wrought,” and then displaying it “upon the mint-smithery.” (Æthelstan was King of England from 924 to 939, Canute from 1016 to 1035.) The full text of the provision reads, in a more modern translation: “Of moneyers. 15. Thirdly: that there be one money over all the king’s dominion, and that no man mint except within port. And if the moneyer be guilty, let the hand be struck off that wrought the offense, and, be set up on the money-smithy but if it be an accusation, and he is willing to clear himself; then let him go to the hot-iron, and clear the hand therewith whereupon he is charged that fraud to have wrought. And if at the ordeal he should be guilty, let the like be done as here before ordained.”
19 Thomas Jefferson, A Bill for Proportioning Crimes and Punishments § 1 (1778).
20 The connection between consent and autonomy is important. Consent is but one manifestation of the capacity for self-government. Participation, or the opportunity to participate, is another. Consent, in other words, functions as one, but not the only, proxy for autonomy.
21 No. 39.
This means that, to put it bluntly, punishment in a democratic republic can be legitimate only as self-punishment. Reconceiving the sharpest weapon of oppressive government as a manifestation of autonomy, rather than an instrument of heteronomy is no small task. The notion of self-government in general was revolutionary enough, and putting it into practice has been notoriously difficult. But how could the criminal law, in the particular form of the notorious Bloody Code of late eighteenth century Britain, be rendered consistent with autonomy, the central principle of political legitimacy?

B. Police and Law

American law has never quite managed to come to terms with the requirement of self-punishment. The reason for this failure, or refusal, systematically to work out the ideal of autonomous punishment is this, I believe: offenders are not considered as constituents of the state, and punishment therefore is not a matter of government at all, but an issue of public health. Or, to put it another way, punishment is not about law, but about police.

Take the Federalist Papers, for example, the most comprehensive, and influential, treatment of the principles of American government. The Federalists, it turns out, weren’t particularly interested in questions of punishment. They were happy to leave criminal law to the states, more specifically to each state’s power to regulate its “domestic police,” i.e., its “internal order, improvement, and prosperity.” When they did claim punitive power for the United States, it was only to “exact obedience,” by punishing “disobedience to their resolutions” and “the disorderly conduct of refractory or seditious individuals.” This power was necessary for the simple reason that “seditious and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body.”

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24 In the words of one Anti-Federalist, the Americans’ newfound liberty was in dire jeopardy if its preservation “depend[ed] on the single chance of men being virtuous enough to make laws to punish themselves.” Speeches of Patrick Henry, June 5, 1788, 5.16.8, in 5 The Complete Anti-Federalist 226 (Herbert J. Storing ed., 1981).

25 That’s not to say that crime can’t be studied profitably as a matter of public health, just that treating it as such doesn’t help us legitimate punishment, the state’s response to crime through criminal law. In terms of the distinction between police and law, discussed below, economic analysis in particular can help us understand the reality of American punishment as a—badly run—police system, rather than as a system of law, or a “criminal justice system.” Cf. Tomas J. Philipson & Richard A. Posner, The Economic Epidemiology of Crime, 39 J. Law & Econ. 405 (1996).


27 No. 17 (Hamilton).
28 No. 45 (Madison).
29 No. 21 (Hamilton).
30 Id.
31 No. 16 (Hamilton).
32 No. 28 (Hamilton).
to prevent the “contagion” of insurgency, and should it erupt nonetheless, to ensure it did not “communicate itself.”

Grounded in the power to police, criminal law as a species of law was an oxymoron, and has always remained so. For the power to police is the power of the householder over his household, transferred onto the state. The power to punish thus is thought to originate in the householder’s limitless and discretionary authority to discipline members of his household.

Police differs from law in several important respects. Police presumes the hierarchical relationship between the members of the household—human or not, animate or not—and its head. The governor of police is the pater familias (dominus in Rome, oikonomos in Athens), the governed his household (domus, oikos).

By contrast, the governor of law is the person, who is the governed as well. Under conditions of legality, the governor and governed stand in a relationship of equality, not difference. At bottom the governor and the governed are identical, insofar as they are both persons, rather than householder and household, father and son, husband and wife, master and servant, and so on.

The police power elevates household management to the level of state governance. In this way it combines the two modes of Athenian government, economics (household management) and politics (state government), into one, “political economy.”

Police and law, as two basic modes of state governance, can be traced throughout the history of political thought and practice. Governance through law is defined by the basic norm of autonomy, or self-government. Management through police is defined by heteronomy, or other-government, of the people by the state. These two modes of governance have characterized American political and legal thought and practice from the very beginning. When, in 1779, Jefferson wanted to train citizen-governors for his newly independent state of Virginia, he established not the first American professorship of law, as is commonly supposed, but a chair in “law and police.”

Law and police reflect two ways of conceptualizing the state. From the perspective of law, the state is the institutional manifestation of a political community of free and equal persons. The function of the law state is to manifest and protect the autonomy of its constituents in all of its aspects, private and public. From the perspective of police,
the state is the institutional manifestation of a household. The police state, as *pater familias*, seeks to maximize the welfare of his—or rather its—household.

While the two basic modes of governance may be as old as are interactions amongst householders, and between householder and household, the concept of autonomy in particular has undergone considerable, even dramatic, development. The modern notion of autonomy is not older than the enlightenment. It was only the enlightenment which established—or invented, if you prefer—the principle of personal autonomy, that every person as such possesses a capacity for autonomy.40 Autonomy no longer was the privilege of householders governing the public sphere that they constituted. Instead, the enlightenment empowered all persons, even those who constituted the household from the perspective of police, by ascribing to them the distinguishing characteristic shared by all persons, including householders: the capacity for self-government.41

For the first time, the two modes of governance came into conflict. Autonomy, or law, was no longer reserved for the householders. As free and equal persons, members of the household enjoyed the same right to exercise their capacity for autonomy as their governors. As persons, rather than as members of *someone’s* household, they deserved equal protection by the state and its laws. They were no longer economic resources, but also carriers of rights of personhood. They were owed justice, rather than (at best) merciful treatment according to their status in households large and small.

With the assertion of personal autonomy came a comprehensive legitimacy crisis that engulfed all institutions of governance, including the criminal law. That crisis has not been resolved, as criminal law continues to treat its objects as objects of police, rather than of law, as inferior household members rather than as persons. A legitimation gap remains, as a perverse sort of exceptionalism has exempted this, the most extreme, form of state governance from principled scrutiny.

From this perspective, the legitimacy crisis of criminal law consists of what one might call its incomplete legalization. The task of transforming a system for eliminating inferior threats to the welfare of the household into a system for treating offenders as equal autonomous persons is the task of transforming police into law.

Over the years, the distinction between police and law has manifested itself in various ways. So in general discussions of governmental powers, police has been associated with the pursuit of “public welfare” (or “opulence,” “wealth,” “order,” or, most simply, “police”42), and law with the “maintenance of right and the redress of wrong.”43 In other contexts, the distinction between police and law has been said to track that between modes of interference (prevention vs. remedy), objects of interference (threats,
nuisances, annoyances, diseases, common scolds, or vagabonds vs. persons\(^{45}\), grounds for interference (disobedience vs. harm\(^{46}\)), styles of governance (informality, discretion vs. formality, definiteness\(^{47}\)), types of sanction (commitment, treatment, discipline vs. punishment\(^{48}\)), and measures of success (effectiveness or “expediency” vs. justice\(^{49}\)). Beneath these particular distinctions remained that between two modes of governance, defined by different relationships between the governor and the governed: hierarchy and equality, difference and identity, and thus heteronomy and autonomy.

The most influential articulation of the broad notion of police as household governance, and the distinction between police and law that it implies, appeared in Blackstone’s *Commentaries on the Law of England*, which “rank second only to the Bible as a literary and intellectual influence on the history of American institutions.”\(^{50}\) There Blackstone derived the power to police from the king’s status as “father” of his people,\(^{51}\) and “*pater-familias* of the nation”.\(^{52}\)

By the public police and oeconomy I mean 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.\(^{53}\)

That Americans took their definition of police from Blackstone doesn’t mean, of course, that Blackstone didn’t take it from someone else himself.\(^{54}\) By the 1760s, when Blackstone published his *Commentaries*, the concept of police had been around for four hundred years, and had become a mainstay of continental political and legal thought and practice for at least a century. Particularly in France and then in Germany, an entire “science of police” had been created, and since the fifteenth century police laws, regulations, and ordinances, as well as police courts, and eventually police officials, and

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\(^{45}\) E.g., 4 William Blackstone, Commentaries on the Laws of England 163 (1769); In re Nott, 11 Me. 208, 211-12 (1834); Spalding v. Preston, 21 Vt. 9, 14 (1848).


\(^{47}\) Ernst Freund, The Police Power: Public Policy and Constitutional Rights 6 n.7 (Chicago: Callaghan & Company 1904) (quoting Chief Baron Fleming’s argument in Bates’ case (1606)); Julius Goebel, Jr., Constitutional History and Constitutional Law, 38 Colum. L. Rev. 555, 573 n.50 (1938) (quoting Rex v. Hampden, 3 Howell, State Trials 825, 1194 (1637) (Hutton, J.), id. at 860 (St. John for defendant)).

\(^{48}\) In re Nott, 11 Me. 208, 211-12 (1834).

\(^{49}\) Introduction, Adam Smith, Lectures on Jurisprudence 1, 3 (R.L. Meed, D.D. Raphael, & P.G. Stein eds. Oxford 1978) (quoting Dugald Stewart, Account of the Life and Writings of Adam Smith, LL.D.);


\(^{52}\) Id. at 127.

\(^{53}\) Id. at 162.

\(^{54}\) See, e.g., Jean Jacques Rousseau, A Discourse on Political Economy (1755) (“The word Economy, or οἰκονομία, is derived from oikos, a house, and nomos, law, and meant originally only the wise and legitimate government of the house for the common good of the whole family. The meaning of the term was then extended to the government of that great family, the State.”); Jeremy Bentham, The Theory of Legislation 270 (C.K. Ogden ed. Harcourt, Brace: New York 1931) (“The magistrate and the father, or he who stands in the father’s place, cannot maintain their authority, the one in the state, and the other in the family, unless they are armed with coercive means against disobedience. The evil which they inflict is called punishment or chastisement. The whole object of these acts is the good of the great or little society which they govern . . . .”).
officers, had appeared all over continental states and cities. In Scotland too, “Commissioners of Police” had been appointed by Queen Anne in 1714 for the “general internal administration of the country.”

The Scottish Enlightenment took a particular interest in the concept, as illustrated by Adam Smith’s Lectures on Justice, Police, Revenue and Arms, delivered at Glasgow in the 1750s and early 1760s. Smith differentiated between “political regulations” founded “upon the principle of justice” and upon the principle of “expediency,” the latter being “calculated to increase the riches, the power, and the prosperity of a State.”

Jurisprudence, according to Smith, involves both right and prudence, justice and police:

Jurisprudence is the theory of the general principles of law and government.
The four great objects of law are Justice, Police, Revenue, and Arms.
The object of Justice is the security from injury, and it is the foundation of civil government.
The objects of Police are the cheapness of commodities, public security, and cleanliness.

Smith was mainly interested in one particular aspect of police, the “cheapness of commodities,” or “the opulence of a state.” The other two aspects of police, cleanliness and public security, he mentioned only briefly, finding them “too minute for a lecture of this kind.”

His concern with the opulence of a state, of course, eventually produced the Wealth of Nations.

In his brief account of the origins of the concept of police, Smith cites the conventional wisdom that “police” is of French origin, a fact that made little difference

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56 Queen Anne, 13 Dec. 1714; “Police,” n., Oxford English Dictionary, at 1069, 1069, col. 2 (definition 3.).
57 See Lectures on Justice, Police, Revenue and Arms delivered in the University of Glasgow By Adam Smith Reported by a Student in 1763 (Edwin Cannan ed. 1896); see generally Adam Smith, Lectures on Jurisprudence (R.L. Meed, D.D. Raphael, & P.G. Stein eds. Oxford 1978).
59 Adam Smith, Juris Prudence or Notes from the Lectures on Justice, Police, Revenue, and Arms delivered in the University of Glasgow by Adam Smith Professor of Moral Philosophy, in Lectures on Jurisprudence 396, 398 (R.L. Meed, D.D. Raphael, & P.G. Stein eds. Oxford 1978).
60 Id.
61 A fellow Scot, who later made his career in London, personified the comprehensiveness of police: Patrick Colquhoun (1745-1820). Colquhoun was a police scientist of continental ambition. Most relevant for our purposes, he called for the establishment of a national police system (A treatise on the police of the metropolis (1795)). He also wrote, among many other things, a treatise on river police (A treatise on the commerce and police of the river Thames (1798)), education police (A new and appropriate system of education for the labouring people; . . . containing an exposition of the nature and importance of the design, as it respects the general interest of the community: with details, explanatory of the particular economy of the institution, and the methods prescribed for the purpose of securing and preserving a greater degree of moral rectitude, as a means of preventing criminal offences by habits of temperance, industry, subordination, and loyalty, among that useful class of the community, comprising the labouring people of England (1806) (emphasis added)), as well as treatises on the police of the micro household (Useful suggestions favourable to the comfort of the labouring people, and of decent housekeepers explaining how a small income may be made to go far in a family, so as to occasion a considerable saving in the article of bread (1795) (emphasis added)) and, eventually, the macro household, a sort of Wealth of Nations for the British Empire (A treatise on the wealth, power, and resources of the British Empire (1814)). Colquhoun’s works on police science were quickly translated into French and German. See, e.g., Traité sur la police de Londres (L. Collin trans. Paris 1807); P. Colquhoun’s Polizey von London (J.W. Volkmann trans. Leipzig 1802).
62 In fact, there are perhaps only two features of police that could claim something like widespread agreement. One is that it’s indefinable. The other is that it’s French. See, e.g., Jeremy Bentham, An Introduction to the Principles of Morals and Legislation ch. XVIII, in 1 The Works of Jeremy Bentham 102 n.† (John Bowring ed., New York: Russell & Russell 1962) (1789); L.A. Warnkönig, Französische Staatsgeschichte 309, 365, 474 (1846) (quoted in Georg-
to thinkers like Smith (or Bentham, or Blackstone), but may explain why, in England, the word police “was still viewed with disfavour after 1760.”63 Government through police, according to Smith’s conventional account, is characterized by the employment of certain means (prevention and intimidation) in the pursuit of certain ends (public security, public peace, and “cleanliness”), as well as the nature of its objects (“disturbances” and “villains”).64 The public call for “égalité, liberté, fraternité” as requirements in the realm of law is contrasted with the royal command to maintain “neteté, surete, and bon marché” in the realm of police.

It was Blackstone’s definition of police, however, not Smith’s that shaped American police discourse, including the law of police (later: “regulatory”) offenses, until well into the 20th century. So when it came time for American state legislators to order the internal police of their state, they turned to Blackstone for drafting advice.65 As a matter of course, every major American treatise on the police power, from Cooley to Tiedeman to Freund, quoted, in its introduction, Blackstone’s definition of police.66

Judges, and counsel, also frequently invoked Blackstone’s concept of police, often quoting his definition at length. General discussions of the police power were not complete without reciting Blackstone’s demarcation of the king-father’s responsibility for maintaining “the public police and oeconomy” of his kingdom-family. The quote appears, for example, at the heart of a widely cited Pennsylvania Supreme Court opinion from 1881, which framed judges’ traditional common criminal lawmaking power as the power to define and to punish all acts that “injuriously affect the public police and economy,”67 as defined by Blackstone.68

Police appeared in American political discourse within a few years after the publication of Blackstone’s fourth and last volume of the Commentaries. Many of the early state constitutions referred, somewhat mysteriously, to “the internal police” of a

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63 “Police,” n., Oxford English Dictionary, at 1069, 1069, col. 2 (definition 3.). The OED quotes a magazine article from 1763, which explains that “from an aversion to the French . . . and something under the name of police being already established in Scotland, English prejudice will not soon be reconciled with it.” In 1756, another magazine writer had commented that “[w]e are accused by the French . . . of having no word in our language, which answers to their word police, which therefore we have been obliged to adopt, not having, as they say, the thing.”

64 Report of 1762-3, Adam Smith, Lectures on Jurisprudence 1, 331 (R.L. Meed, D.D. Raphael, & P.G. Stein eds. Oxford 1978) (original spelling retained). Smith also specifically refers to de la Mare’s famous and weighty treatise on police. Id. at 332 (citing Nicolas de la Mare, Traité de la Police (Paris 1705-38)).

65 As Freund explained in the introduction to his treatise, “[t]he influence of Blackstone’s arrangement is noticeable in the legislation of those states which have made police one of the principal divisions of their statutory revisions.” Freund goes on to point out that the “term police appears first as a division of legislation in the Revised Statutes of New York in 1829, Massachusetts adopted it in the Revision of 1836, it is now also found in Delaware, Iowa, New Hampshire, Ohio, Rhode Island, Washington, and Wisconsin.” Ernst Freund, The Police Power: Public Policy and Constitutional Rights 2 & n.2 (1904).


A decade later, at the federal constitutional convention, James Wilson insisted on the preservation of state governments “in full vigor,” for the sake not only of “the freedom of the people,” but also “their internal good police.”

As we noted above, in 1779 now-Governor Jefferson established a chair of “law and police” as one of eight professorships at the College of William & Mary. According to the appendix to Jefferson’s bill to amend the college’s constitution, this chair was to cover both “municipal” and “oeconomical” law. Municipal law, or law in the narrow sense, included “common law, equity, law merchant, law maritime, and law ecclesiastical.” “Oeconomical law,” or police, encompassed “politics” and “commerce.”

The 1770s also witnessed the establishment of the first American institutions of police, i.e., the appointment of officials whose job it was to keep the “internal police,” particularly in the cities. In 1777, the English did what they wouldn’t (yet) do in England, and appointed a “Superintendent General of the Police” for New York City with supreme authority over “all . . . matters, in which the economy, peace, and good order of the City of New York and its environs are concerned.” After the revolution, other American cities began to appoint police officials. So Boston, in 1786, put in place “Inspectors of the Police,” whom Christopher Tomlins describes as performing “a general regulatory function as the administrative arm of the town’s selectmen in matters of market regulation, sanitation, street lighting, and disease control.”

In the struggle over the new national constitution, the “internal good police” of the states emerged as a central locus of the debate between Federalists and Anti-Federalists. In fact, the states’ retention of the police power in the federalist system of government became so important that the question of police to this day remains intimately connected to the question of federalism, and to the tension between local and central government in general. That the states, and only the states, have the power to police became one of the fundamental precepts of American constitutional law. And as any sufficiently fundamental precept, it was honored in its breach, and reaffirmed, all at the same time. In constitutional law doctrine, the conflict between local and federal authority played itself out as that between the power to regulate “police” and the power to regulate “commerce,” with the former belonging to the states, and the latter to the nation.

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73 Christopher L. Tomlins, Law, Labor, and Ideology in the Early American Republic 56 (Cambridge UP 1993) (quoting Roger Lane, Policing the City: Boston 1822-1885, at 249 n.2 (Cambridge, Mass.: 1967). The appointment of Commissioners of Police in London was not proposed until 1785 (in the London and Westminster Police Bill), and put in place only in 1829 (with the Metropolitan Police Force Act, 10 Geo. 4 c.44). In Ireland, by contrast, the establishment of a metropolitan police for Dublin in 1786 (Dublin Police Act, 27 Geo. 3 c. 24 Ireland) was followed the next year by creation of a uniformed and armed rural police (Preservation of the Peace Act, 27 Geo 3 c. 40 Ireland). None of this is to say, of course, that policing in fact had been as foreign to England as policing in name.
74 Id.
75 See., e.g., Gibbons v. Ogden, 22 U.S. 1 (1824).
And these states quickly went to work regulating their police. At the state level, good police was established and maintained by an ever wider and denser net of statutes. To ensure a comprehensive police in every corner of the state, the states also delegated policing authority to smaller governmental entities. And so cities, towns, and villages set out to provide for the good police of their community. This comprehensive policing effort at all levels of government has been impressively documented by William Novak.76

In the nineteenth century, the police power also framed the more general, substantive, question of the scope of state power generally, no matter who might exercise it, the individual states or the national government. Constitutional law was conceived of as the study of the limits of the police power. Treatise writers explored the constitutional limitations on the power to police in large tomes. Courts scrutinized individual exercises of the police power by the legislature, and even strike them down once in a while, most famously in *Lochner v. New York*.77

The era of the police treatises has long since passed, and with it went the conception of the police as a mode of governance. Police instead leads a fragmented existence scattered in various subdisciplines of constitutional law, notably takings jurisprudence, and in the new field of administrative law which studies the legal constraints not upon the legislature, but upon the executive, or rather a particular component of the executive, namely the myriad administrative agencies that have grown over the past century or so, and which today perform the functions once assigned to the Boston “Inspectors of the Police.” Once administrative law had come into its own as a legal discipline, the concept of police vanished. Police treatises became treatises (and casebooks) on administrative law. The last great police theorist, Ernst Freund, became one of the first great administrative law theorists.

The distinction between police and law disappeared with the concept of police itself. This is unfortunate because it captures, however imperfectly, a basic distinction between two modes of governance that are subject to different constraints of legitimacy. Thinking about the distinction between police and law, and the ways in which it has been employed in various corners of political and legal discourse, provides a convenient framework for critically analyzing the nature and scope of state power, and its foundations and limitations.

Contrasting law and police locates an inquiry into the legitimacy of punishment at the proper level of generality, by identifying it as a question of law. A theory of the law of crime and punishment—the criminal law—needs not only a theory of crime and punishment, but also one of law. It’s a mistake to seek a freestanding theory of punishment; what we need is a theory of punishment as a species of state action through law.

Focusing on the broader notion of police allows, even forces, us to expand the focus of critical analysis from punishment to criminal law and thus to law in general. The distinction between police and punishment is only one manifestation of that between police and law. Through policing in the narrow sense, the state as macro householder safeguards the “good police” of its household in a particular way, namely by disciplining

77 198 U.S. 45 (1905).
members of that household for “disobedience” and by taking preventive measures to extinguish threats to the “public welfare” (or “social” or “collective” interests). 78

An attempt to resurrect the original notion of police could draw on some remnants of it in various pockets of legal and political discourse. We’ve already mentioned the retention of the police power as a doctrinal category in takings jurisprudence, where “police power regulations,” which don’t require “just compensation,” are carefully distinguished from “eminent domain takings,” which do. 79 The police power, which the states have, but the federal government doesn’t, also still functions as a point of contrast to the commerce power, which the federal government has, but the states don’t. 80 There are also reflections of the distinction between police and law in first amendment theory (for example, in Robert Post’s contrast between “managerial authority” and “governance” 81) and general legal theory (such as in Fuller’s distinction between “managerial direction” and “law” 82 and Hayek’s vision of law as a “rule of just conduct” 83), as well as in criminal law theory (in Herbert Packer’s celebrated distinction between two models of the criminal process, “managerial” Crime Control and Due Process 84).

In political and social theory, the concept of police hovers closer to the surface than in American legal discourse. In certain branches of these disciplines, police is very much en vogue. Thanks to Foucault’s characteristically suggestive remarks about the concept of police, police is now studied, or at least invoked, as a distinct, and slightly mysterious, mode of “governmentality.” 85

At a lower level of abstraction, the distinction between police and punishment—as opposed to that between police and law—requires less digging still. The mass of “public welfare offenses” that populate American criminal law are direct descendants of “police offenses.” 86 The typical police offence was statutory. Designed to police undesirables, police offenses were handled by a police court in summary proceedings run by a

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84 Herbert L. Packer, The Limits of the Criminal Sanction (1968).
86 Francis Bowes Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933).
magistrate (or police judge), without a jury. Disposition (rather than conviction) might result in “declaration” as a vagrant and “commission” to the “work-house.”

Today the distinction between police and punishment still does considerable work in constitutional law. There is no prohibition against cruel and unusual police measures, only against cruel and unusual punishments. And so the eighth amendment doesn’t apply to corporal “discipline” in school, a quasi-familial institution, nor to the indefinite “commitment” of “sexually violent predators” beyond their “punishment,” to eliminate them as threats to the public police.

In fact, the concept of police in general, and the state power that carries its name, performs roughly the same rhetorical function throughout constitutional discourse: It insulates state action from principled, and constitutional, scrutiny. As the authors of the entry on “police power” in the Encyclopedia of the Social Sciences put it in 1933:

\begin{quote}
Police power is an idiom of apologetics which belongs to the vocabulary of constitutional law. In American government the validity of any regulatory statute may, in “a genuine case in controversy,” be tested by judicial review. If the act is sustained, the police power is usually invoked as the sanction . . . .
\end{quote}

Takings jurisprudence provides one illustration of the continuing insulating effect of the police concept. As we saw, this branch of constitutional law still is concerned with the classification of state acts as exercises of the police power. And if they are, then they remain outside the realm of justice, and of “just compensation” in particular.

Police, in other words, is essentially illegitimate. This is not surprising, once we view the police power in its historical, and conceptual, context. As household management at the state level, police is not constrained by legitimacy, or justice; it is instead guided by considerations of expediency. The householder’s concern for the welfare of his household is the police scientist’s concern for the welfare of the state. And that concern expresses itself positively and negatively, in the correction of inferior members of the households as well as in the protection of the household against threats.

The police power “is, and must be from its very nature, incapable of any very exact definition or limitation.” It is “the most essential, the most insistent, and always one of the least limitable of the powers of government” and “extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property. The householder’s authority has always been defined by its indefinability. Its indefinability derives from the father’s virtually unlimited discretion not only to discipline, but to do whatever was required for the welfare of the household.

\begin{footnotes}
\item[88] Ingraham v. Wright, 430 U.S. 651 (1977)
\item[91] Slaughter-House Cases, 83 U.S. 36, 49 (1873).
\item[92] Constitutional Law, 16A Am. Jur. 2d § 317.
\end{footnotes}
The police power extends over the entire state household as resources for the maximization of welfare. It is “the power to govern men and things.” The ahumanity of its object derives from the essential sameness of all components of the household, animate and inanimate, as tools in the householder’s hands. That essential sameness, however, also meant essential difference, of householder and household, which explains the strictly hierarchical aspect of police.

C. Internal and External Constraints

We are now in a position to reframe our initial question. If the power to punish is an instance of the power to police, and the power to police is legitimate, how can punishment be legitimated?

It’s clear that the police power has no place in a theory of legitimacy if one continues to use police as “an idiom of apologetics.” But perhaps we shouldn’t be so quick to judge police by its rhetorical use. Police power, and the householder’s power within the family, may have been limitless in fact. Nonetheless, throughout the history of governance patriarchal power has been subjected to some constraints, at least in theory. The macro householder at the level of the state, it turns out, has always retained the discretion to discipline the micro householder at the level of the family for behavior not befitting his station, both vis-à-vis the members of his familial household and vis-à-vis the pater patria, who ruled over him as a member of the macro (state) household.

To give police its due, it may be useful to distinguish internal from external limitations on the power to police, i.e., between limitations that are inherent in the concept of police itself and those that aren’t. I’ll begin by considering the internal limitations, and two in particular, prudence and fitness.

In the end, however, the internal constraints of police are no substitute for the external demands of equality and autonomy. Even a well-policed police state remains illegitimate. The legitimacy of any exercise of the police power instead will turn on its compliance with external constraints, and in particular the fundamental principle of political legitimacy: autonomy. The best-ordered society, and the most “expedient” system of criminal police, will be illegitimate if it presumes a qualitative distinction between governor and governed, and thus fails to respect each of its constituents as capable of self-government.

1. Expediency: Prudence and Fitness

Within the realm of police the householder is subject to guidelines of prudence, not to principles of right, in the terms of Smith’s distinction between the two aspects of jurisprudence. The assembly of these rules of prudential princely conduct occupied the minds of political thinkers for millennia, and generated guidebooks of governance as diverse as Marcus Aurelius’s Meditations, Machiavelli’s The Prince, and, in colonial America, slave owners’ “plantation manuals and rule-books, . . . enforced with whipping

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94 License Cases, 46 U.S. 504, 583 (1847) (emphasis added).
95 Marcus Aurelius, The Meditations (George Long trans. 1991) (167 A.D.)
and other punishments, including death.” 97 The need for “good police” did survive the enlightenment, but it can no longer legitimate itself, without more.98

Now in some cases policing may be so bad, and the connection between means and end so unfathomably remote, that one might suspect that the policer is bad, or at least incompetent. Inexpediency in such a case would amount to evidence of unfitness on the part of the householder, or quasi-householder. In colonial America, for instance, the master in his management of the slave as of any other resource within his household was presumed to act for the well-being of his household, the plantation. This presumption was not irrebuttable, at least in theory if not in practice, and in this limited sense the master’s police power was not entirely unlimited.99 This limitation, however, derived not from the slave’s status as a person endowed with rights, but instead sprang from the nature of the police authority itself. Moreover, the enforcement of these limits upon the micro householder’s authority in turn constituted an exercise of the police power of the macro householder, the state sovereign—in this case the English king. From the king’s perspective, the master enjoyed authority over his household only by delegation of the king’s supreme police authority over every members of his royal household, which included slave and master alike.100

Policers thus could prove themselves unfit to police, and better suited to being policed themselves. That evidence of this unfitness came in two basic forms. First, the policer could prove himself incapable of discharging his duty to maximize the welfare of the household through behavior evincing bad faith. Second, even a policer acting in good faith could lose police authority if he proved simply incapable of preserving his household. This failure might then justify the state’s assumption of householding authority in loco parentis.101

Since we’re concerned with the criminal law, the first limitation on the householder’s disciplinary authority is particularly relevant. In the context of the family, for example, the father’s right to discipline members of his household was specifically limited to measures undertaken in “good faith” and “prompted by true paternal love.” “[P]arental control and custody” was justified “on the theory of the child’s good, rather than the parent’s.”102 By contrast, punishment out of “malice” was not permissible, for it was motivated not by concern for the welfare of its object, or of the family as a whole. Self-gratifying cruelty was impermissible.103 Similar rules applied to the use of correctional measures in quasi-households. A military officer, for instance, was entitled to enforce

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98 Government as police thus may well be subject to certain ethical, as opposed to moral, constraints. See, e.g., Max Weber, Politics as a Vocation, in Max Weber: Essays in Sociology 77 (H.H. Gerth and C. Wright Mills trans. & eds., 1946) (ethic of responsibility).
99 Arthur P. Scott, Criminal Law in Colonial Virginia 299 (Univ. of Chicago 1930) (“almost unlimited”).
100 This limitation upon the power of one householder thus presumes the superior power of another. This limitation, in this sense, is itself an exercise of the power to police.
101 See supra text accompanying notes ——.
103 State v. Black, 60 N.C. 262 (1864).
obedience, even by whipping, unless it turned out his “heart is wrong,” which is just another way of saying that he acted out of malice.

Restrictions on the means of correction reflected restrictions on its end. The use of measures “so great and excessive to put life and limb in peril, or where permanent injury to the person was inflicted” provided evidence of that “malicious and wrongful spirit” which marked the policer as unfit for his supervisory post. In the context of discipline on board of a ship, as enforced by the captain against his crew, “clear and unequivocal marks of passion on the part of the captain,” punishment “manifestly excessive and disproportionate to the fault,” and, for our purposes most interesting, the use of “unusual or unlawful instruments,” likewise revealed that the disciplinary measure wasn’t in fact disciplinary at all, but motivated by the policer’s self-regarding interest in gratifying an evil impulse.

Note that from the perspective of these traditional limitations upon the policer’s power over his inferiors, the constitutional prohibition of “cruel and unusual” punishment appears as an internal limitation upon the state’s power to police, inherent within the power itself. From the perspective of police, cruel and unusual punishment is prohibited because it reveals an improper, self-regarding, motive. And indeed the cruel and unusual punishments clause has been interpreted to prohibit correctional measures inflicted out of “malice or sadism” in another quasi-household, the prison. In matters of internal prison discipline, good faith on the part of the warden, or other correctional officers, is presumed. Disciplinary sanctions are presumed to have been motivated by a concern for the welfare of their object (the prisoner), or at least of the prison community as a whole. A prison official who punishes with “malice or sadism,” however, has proved himself unfit for police authority.

By contrast, a less permissive standard (“deliberate indifference”), and one does not turn on the policer’s character and fitness, is applied to actions taken in the course of executing legal punishments prescribed by the legislature and applied by the judiciary. Here the correctional officer is not acting as a micro householder intent on maintaining order within his household. He instead is giving effect to a judgment of law, and thus functions as an instrument of the law rather than as a keeper of “good police.” The prison official’s authority in this—legal—function is more carefully circumscribed: In executing a legal sentence, the guard confronts the inmate not as a (superior) policer faces the (inferior) policed within the hierarchy of a household. Instead, the inmate in

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105 Id.; see also Com. v. Eckert, 2 Browne 249 (Ct. of Quarter Sessions Pa. 1812) (malice evidence of “a depraved or wicked heart”).
106 State v. Mabrey, 64 N.C. 592, 593 (1870).
108 For a similar interpretation of the constitutional prohibition against ex post facto laws, see Calder v. Bull, 3 U.S. 386, 389 (1798) (ex post facto lawmaking “stimulated by ambition, or personal resentment, and vindictive malice”).
110 The malice test still can be seen reflected, more or less clearly, in attempts to circumscribe the disciplinary power of householders, actual and quasi, in various context. See, e.g., White v. Frank, 855 F.2d 956 (2d 1988) (tort of “malicious prosecution”); Wayne R. LaFave, Jerold H. Israel, & Nancy J. King, Criminal Procedure § 13.5 (1999) (due process defense of “vindictive prosecution”); Ingraham v. Wright, 430 U.S. 651, 677 (1977) (malicious corporal punishment inflicted by teachers upon students).
111 Estelle v. Gamble, 429 U.S. 97 (1976). In both cases, the overarching issue is whether the measure involved the “unnecessary and wanton infliction of pain.”
this context appears as an object of law, i.e., as a person, and therefore on equal footing with those charged with putting the legal judgment into effect.\textsuperscript{112}

2. Legitimacy: Autonomy and Respect

In the end, police policing itself cannot take account of the fact that punishment is a human institution, something done by persons to persons (punishment) for something done by persons to persons (crime). “Inhuman treatment” of prisoners, or slaves, or other objects of discipline, is not objectionable from the perspective of police, or at least not objectionable as a matter of justice.\textsuperscript{113} For, strictly speaking, the humanness of a threat to the police is irrelevant. A householder who handles the human resources within his household exactly as he does his other resources, including animals and inanimate objects, may be a bad householder, but he’s not evil.\textsuperscript{114} His treatment of a human resource as “inhuman” may be unwise, or inept, just as it would be if he treated an animal “inanimately,” but it is not illegitimate.

As an interpersonal practice, punishment is subject to basic principles of legitimacy, insofar as humans, as persons, are (the only) bearers of rights. The constraints upon state action that arise from this fact cannot be fully captured by internal limits police places upon itself. The point is not to police police, but to legalize it, i.e., to bring it into compliance with the basic principles of law, which reflect the basic principles of morality in the realm of the state, or politics.

Police presumes not only the difference between governor and governed, but also their inequality, in particular the inferiority of the governed vis-à-vis the governed. As a result, police is not subject to the principle of self-government.\textsuperscript{115} The consent of the policed is irrelevant precisely because they are the policed. They are resources to be employed, and often enough threats to be eliminated, in the public interest. Their consent adds nothing to the legitimacy of the police actions against them—though their consultation may render that action more effective. Acceptance, if not consent, or even prior notice may be prudent as a matter of wise police, as such measures may improve compliance, because obedience is more likely, and because it’s easier to obey orders after they have been given, rather than before.\textsuperscript{116}

From the perspective of law, and of right, constraints upon state power, including the power to police, ultimately derive from the rights of its objects as persons. This shift in

\textsuperscript{112} And yet, even in this legal context, the prison inmate remains in the custody and charge of the warden, much as every “inmate” of a Teutonic household was under the power of the householder. Paul Vinogradoff, Foundations of Society (Origins of Feudalism), 2 Cambridge Medieval History 630-54 (1913). Prison officials not only prevent the inmates from escaping, but they also are responsible for their well-being. The prison makes its inmates entirely helpless, and thereby places them at the mercy of their keepers. To show “deliberate indifference” toward inmates thus constitutes a violation of the warden’s duty of care, as a failure to provide the necessary conditions for the execution of legal punishment against persons. Unlike in the case of prison discipline, however, the point here is not to maintain order in the prison household, but to make a particular mode of legal punishment, imprisonment, possible.


\textsuperscript{114} On the need for differentiating management of different household resources, see already Aristotle, Politics bk. I, sec. XIII.

\textsuperscript{115} Cf. Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978) (status as object of “police jurisdiction” does not imply right to vote).

\textsuperscript{116} Cf. Lon L. Fuller, The Morality of Law 207-17 (rev. ed. 1969) (rule of law principles as prudential guidelines of “managerial direction”).
perspective generates different constraints and different interpretations of, and foundations for, familiar limiting principles. So, for instance, the constitutional prohibition against “cruel and unusual punishments” appears not as an evidentiary mechanism for the determination of the motivation underlying a particular exercise of the power to police, but is seen as manifesting the principle of the equal dignity of all persons, or in the words of Justice Stevens: “the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.”

Once read as safeguarding “the dignity of man,” the cruel and unusual punishments clause develops a much sharper critical bite, opening up new ways of subjecting exercises of state power to critical analysis. Consider, for instance, Justice Brennan’s constitutional critique of capital punishment based on reading the clause as embodying a principle of right, rather than a rule of police:

The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

Brennan here articulates the basic legitimacy problem faced by the exercise of police power over persons, from the perspective of law: its treatment of persons as nonpersons, and in particular as resources for the public welfare at best, and as threats to that welfare at worst. From the perspective of law, the legitimacy of punishment in general, and its particular manifestations, turns not on its consistency with a prudential ideal of the punisher, but on its consistency with a moral ideal of the punished. So capital punishment, Brennan argues, is illegitimate because it treats its object as something other than, and less than, a person. Whipping similarly would be illegitimate, not because it evinces the punisher’s malice, but because it “degrades” the punished, or rather treats him as an object of householder discipline, rather than as a person.

To be a person, however, simply means to be capable of self-government. To be treated as a person, then, and to be accorded human dignity, is to be treated as capable of autonomy. After the enlightenment, and the Declaration of Independence, personhood is the sufficient precondition for treatment according to the principles of justice, rather than the maxims of police. Nothing about this principle has changed since then; what has changed are our judgments regarding who possesses the required capacity for self-governance, and therefore personhood. Non-whites, women, and the poor no longer are thought to lack that capacity; the mentally incompetent, children, animals, trees, water, and inventory, as well as—for our purposes most relevant—prison inmates (including

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120 This idea is made explicit in analogous norms of international human rights law. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
121 Cf. The Constitution of Rights: Human Dignity and American Values (Michael J. Meyer & William A. Parent eds. 1992); see also Kant’s Concept of Dignity and Modern Political Thought, 8 History of European Ideas 319 (1987) (discussing Thomas Paine, Rights of Man (1791) and Mary Wollstonecraft, A Vindication of the Rights of Man (1790)).
incarcerated suspects), parolees, probationers, and “felons” still are. And so they lack the rights of citizenship, including the right to vote. They, in other words, have remained objects of police, rather than of law.

II. The Legality of Punishment

We’ve set up the distinction between police and law. We’ve explored the internal limitations upon police, and criminal police in particular. Now it’s time to see whether criminal law is possible, and if so, what it might look like, at least in its very basic contours.

For analytic purposes, we will divide the system of criminal punishment into three phases, the definition of criminal norms (the realm of criminal law), their application to a particular case (the realm of criminal procedure law), and the infliction of sanctions (the realm of prison law).

As we explore the implications of the principle of autonomy for the system of state punishment, we will begin with the tail end of the system, the actual infliction of punitive pain on individuals in the execution of the punishment threatened in criminal codes and imposed in criminal trials. While this—last—step in the process of punishment tends to receive the least attention, it is the one most in need of legitimation. For it is here, in the bowels of the beast, so to speak, rather than in the threat of punishment in criminal codes or the ceremonials of the criminal trial, that the autonomy of state constituents faces its greatest threat.

A. Prison Law

The fundamental challenge of prison law is the extension of legal rights to individuals who have been removed from the political community and placed in a state institution that traditionally has been governed as a quasi-household. The prison in other words is a paradigmatic instance of discretionary and virtually limitless police power in action.

To place the challenge of prison law into proper historical perspective, let’s go back to Jefferson once more. As we saw, Jefferson went some way toward recognizing criminal law as a problem of law, rather than police. In the preamble to his criminal reform bill he spoke of an offender as a “member” of “society” who need “not wholly forfeit the protection of his fellow citizens.” But it’s only the offender “committing an inferior injury” who remains within the realm of law; others, “whose existence is become inconsistent with the safety of their fellow citizens,” are “exterminate[d],” even if only as “the last melancholy resource.” For the latter group, which includes traitors and murderers, punishment is not a matter of government, but a matter of disposal. Literally outlawed beyond the community of the governed, these sources of danger must be disposed of, with or without their consent. The legitimacy question doesn’t arise in these cases of “extermination,” rather than punishment.

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124 Thomas Jefferson, A Bill for Proportioning Crimes and Punishments § 1 (1778).
Jefferson thus fell considerably short of recognizing the problem of legitimating punishment in its full scope. In Jefferson’s view, punishment did require the familiar legitimation through the consent of its object, but only in some cases, namely in those minor enough so that the offender retained his status as citizen.

The distinction between minor and major offenders is but one way in which those who have a right to legitimate punishment, and thus to consent, have been differentiated from those who don’t. The line between freeman and slave is another. The “criminal law” of slaves was regarded as primarily a matter of discipline, first by the owner and then, if this proved unsatisfactory, by the state. Slave “criminal law” was household, or plantation, police. As an inferior member of the household, the slave was subject to the discipline of the household head. The slave’s consent to his discipline was as irrelevant as the consent of other inferior household members, in particular children, but also animals.

Military “criminal law,” i.e., the disciplining of military subordinates, likewise was a form of aconsensual policing. In the quasi-household of the military, whipping continued to be used as a correctional measure until well into the 19th century. Military discipline did not seek to mete out justice; its point was to maintain the authority of the superior, who was charged with caring for the welfare of his troops.

When imprisonment became the sanction of choice in the 19th century, they were run like families and—in the South—plantations, and laid out like military barracks. In the end, it mattered little which inferior position in the quasi-familial hierarchy the prisoner assumed, as child, military subordinate, or “slave of the state,” or all three. The point was that like other households and quasi-households, prisons were built around the radical distinction between the objects of punishment—the inmates—and its subject—the warden.

The introduction of imprisonment as the paradigmatic punishment thus meant the transformation of all objects of punishment into objects of police. To be punished meant to be policed. Modern imprisonment infantilized inmates by depriving them of all means of self-support. Isolated from the outside world, the inmate could not exist

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125 Note that the opposite view is also frequently held, namely that minor offenders may be policed, while major ones must be punished. This view underlies the attempt to legitimize minor strict liability police offenses. See Francis Bowes Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933); see also Model Penal Code § 2.05(1)(a) (strict liability limited to minor offenses labelled “violations”).


127 For the claim that modern criminal law—and not merely its paradigmatic sanction, imprisonment—traces back to the householder’s disciplinary authority, particularly over his slaves, see Gustav Radbruch, Der Ursprung des Strafrechts aus dem Stande der Unfreien, in Elegantiae Juris Criminalis: Vierzehn Studien zur Geschichte des Strafrechts 1 (1950); Roscoe Pound, Introduction, in Francis Bowes Sayre, A Selection of Cases on Criminal Law xxix, xxxiii (1927). On Roman criminal law, see Theodor Mommsen, Römisches Strafrecht 16-17 (1899); but see James Leigh Strachan-Davidson, Problems of the Roman Criminal Law 28 (1912).


130 See Ruffin v. Commonwealth, 62 Va. 790, 796 (1871) (felons as slaves of the state).

131 Note that the view of imprisonment as enslavement was neither unconsidered, nor was it limited to the United States. See Cesare Beccaria, Of Crimes and Punishments § 16 (imprisonment as enslavement), § 30 (enslavement as punishment for theft); Immanuel Kant, Rechtslehre A199/B229 (same), A193-194/B222-224 (punishment as enslavement), B163 (same).
without the warden’s assistance. Even if he had been a legal subject before; in prison he became an object of police.

According to one—commonly held—view, prisoners are removed from the realm of law through their classification as “offenders.” Up to the point of conviction, they were treated as members of the commonwealth with the right to participate in the making of penal norms (through voting) and their application to them (through the exercise of procedural rights). At the moment of conviction, however, they lost their status as equal political persons and, thus reduced to inferior members of a household subject to the discipline of its head, they have no right to participate in the infliction of their punishment upon themselves. Their consent becomes irrelevant.

According to this view, prisoners may—but need not\(^\text{132}\)—regain their right to self-government, having been reformed into citizens, or in Jefferson’s words, having “been restored sound members to society, who, even under a course of correction, might be rendered useful in various labours for the public.”\(^\text{133}\) But until the point of release, prisoners have no more right to just treatment than a son or slave who felt the whip of his father or master. This attitude would explain the essentially extralegal reality in many American prisons even today, long after the “slave of the state” doctrine is no longer officially endorsed, or sanctioned.\(^\text{134}\)

On another view, prison inmates retain some participatory rights. So constitutional human rights have been extended to them, at least in theory. The emergence of “prison law,” however, didn’t convert prison governance into legal government, anymore than the invention of “administrative law” put an end to the police power. Even in theory, the constraints upon the power of wardens and prison guards are consistent with traditional limits upon the disciplinary authority of the householder. Recall that the medieval householder too had always been prohibited from discipline motivated by malice, rather than concern for the welfare of the household and its members.\(^\text{135}\)

The prison thus remains a household, a realm beyond the constraints of consent. Earlier attempts to introduce components of self-government into the prison, such as the Mutual Welfare League of Thomas Mott Osborne, have been long since abandoned.\(^\text{136}\) The disenfranchisement of prisoners for the duration of their incarceration remains the norm. “Prisoner rights” are largely illusory, if not oxymoronic. Prison government is prison management, and risk management in particular. European countries, and France and Germany in particular, apparently have made some strides toward establishing a system of prison law worth its name.\(^\text{137}\) American prison governance, however, has taken

\(^{132}\) A more extreme view would hold that a person categorized as an “offender” never regains his rights of citizenship and, in essence, suffers “civil death.” See the discussion of felon disenfranchisement provisions infra.

\(^{133}\) Actually, many prisoners—particularly those marked as “felons”—don’t regain their rights of participatory citizenship on their release. They cannot vote (or be voted for), hold public office, serve as jurors (or as judges, or prosecutors, or other enforcement officials), or possess guns. See Sentencing Project, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States (1998).

\(^{134}\) See, e.g., Ted Conover, Newjack: Guarding Sing Sing (2000); James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe (2003).


\(^{136}\) Osborne set up the first Mutual Welfare League at Auburn Prison in 1914. See Thomas Mott Osborne, Society and Prisons (1916, repr. 1972); see also Frank Tannenbaum, Osborne of Sing Sing 66, 71-87 (1933).

\(^{137}\) As documented in James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe (2003).
a very different turn. The prison paradigm has shifted from the “Big-House” to the “warehouse,” but it remains a house nonetheless. Prisoners simply have been downgraded from one type of household resource, the child or the slave or the military subordinate, to another: inanimate objects, “ware.”

A commitment to legitimating punishment as an exercise of autonomy implies a commitment to rendering even, and especially, its execution consistent with the autonomy of its objects. It is difficult to construct a system of self-punishment if the punishment itself is nothing but police. Self-punishment in the broad sense, in other words, is impossible without self-punishment in the narrow sense. Self-punishment in the narrow sense can be facilitated in various ways. So prison law might provide inmates with the option of engaging in limited prisoner self-government (perhaps on the model of the Mutual Welfare League, which turned the adjudication of minor disputes and rule violations over to prisoner courts), of contributing to the design of the conditions of their incarceration, or their respective programs of reform or training, in addition to the familiar calls for greater inmate privacy, procedural protections against disciplinary measures, outright abolishment of cruel and inhuman sanctions (certain forms of solitary confinement and punitive deprivation), effective adjudication of prisoner complaints, and so on.

The requirement of treating those who find themselves in the final, executionary, phase of the criminal process as persons capable of self-government also prohibits the blanket disenfranchisement of prison inmates, parolees, and probationers, nor of ex-prison inmates, ex-parolees, and ex-probationers. Note that disenfranchisement disqualifies prisoners not from self-government in prison, but from self-government in the state. Without the right to vote, they cannot participate in the making of norms governing any aspect of the system of criminal law, or of any other system of law for that matter. They have no say in the definition of substantive, procedural, or executionary norms. But if they are denied legal status, how can the state legitimately subject them to legal punishment? If they lack the capacity for autonomy, then they are immune from condemnation for their exercise of that capacity in the commission of a crime.

In general, the development of prison law should not be left to the constitutional jurisprudence of the courts. Instead prison law—just like substantive criminal law and criminal procedure law—should be codified in detailed corrections codes that clearly delineate the rights and duties of inmates and guards. The point here is not to deny the essential painfulness of imprisonment, but to design a system of imprisonment that treats inmates as legal subjects, rather than as objects of police.

B. Criminal Procedure

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139 It should be noted that current law does recognize a constitutional principle of participation in the execution of punishment. Ironically, this principle was announced in a capital case, as the requirement of competency to be executed (or the right not to be executed when incompetent). Ford v. Wainwright, 477 U.S. 399 (1986). Underlying the requirement of competency to be executed is a broader requirement of competency to have any type of punishment executed upon oneself. An incompetent prison inmate isn’t released, anymore than an incompetent death row inmate has her sentence commuted. She is treated instead and nursed back to competence.
140 See, e.g., StVollzG (German Prison Code) § 4 (inmate shall “participate in devising his treatment”).
141 See, e.g., Correctional Services Act 1998 (S. Africa); StVollzG (Germany).
As we move through the criminal process in reverse chronological order, we next address the requirements of autonomy in what is commonly referred to as the criminal process, i.e., the realm of criminal procedure law. In the law of the imposition of criminal norms, we find a host of manifestations of autonomy in current law that, however, aren’t always recognized as such.

At the outset, it might be useful to distinguish between two types of autonomy, active and passive. Criminal procedure rights manifest both active and passive autonomy, where active autonomy is the freedom to participate in the process, and passive autonomy the freedom not to, and more generally, not to be interfered with, often referred to, somewhat misleadingly, as privacy.¹⁴²

The first, and most basic, requirement of autonomy in the criminal process is that the defendant must be “competent.” Without the ability to understand the nature of the criminal process and the charges against her, or the ability to cooperate with her representatives in that process, she cannot participate in it, and thereby make it her own.

This basic requirement of competence is traditionally labelled as “competence to stand trial.” It’s important to recognize, however, that it is a requirement that runs through the entire criminal process. Competence to stand trial is but one manifestation of the general competence to participate in the criminal process, i.e., to be not merely the object of the criminal process, but its subject as well. No incompetent defendant can enter a plea, can be convicted (assuming he was found competent to stand trial), or “punished.” The most dramatic instance of the requirement of competence, in fact, is not competence to stand trial, but competence to be punished by death, i.e., to be executed.¹⁴³

An incompetent defendant is a defendant whose capacity for self-determination is compromised to such a degree and in such a way that she could not be anything more than an object of inquiry which passively awaits labelling.

An incompetent defendant therefore is incapable of exercising either active or passive autonomy. She would not only fail to participate in the criminal process, but would be incapable of doing so.

Prime examples of passive autonomy protections include the fourth amendment, which the Supreme Court has read as protecting “expectations of privacy,”¹⁴⁴ and the privilege against compelled self-incrimination.¹⁴⁵ Note, however, that the self-incrimination privilege also has an active side, the right to incriminate oneself, whether outside the trial (most dramatically, in the form of a “confession”) or during it (in the form of testimony). It is often overlooked that *Miranda v. Arizona*, for example, was a case not about confessions, but about *coerced* confessions.¹⁴⁶ The Court was careful to point out that it did not mean to preclude a suspect from “talk[ing] to the police without the benefit of warnings and counsel, but whether he can be interrogated.”¹⁴⁷ Otherwise, to

¹⁴² The freedom not to participate finds expression not only in particular procedural rights (like the right to remain silent), but also in the right to *waive* those rights, or—as in the case of fourth amendment protections—to *consent* to state conduct that would otherwise would violate them.
¹⁴⁷ Id. at 478.
protect the suspect’s passive autonomy—by deterring police from obtaining coerced confessions—the Court would have interfered with her active autonomy—by preventing her from making a voluntary confession.

It’s useful to remind ourselves at this point that until late in the nineteenth century, “criminal defendants in this country, as at common law, were considered to be disqualified from giving sworn testimony at their own trial by reason of their interest as a party to the case.”148 Continental criminal procedure to this day disqualifies defendants from testifying under oath. German criminal procedure law, for instance, categorically exempts the defendant from the oath requirement, along with children and the insane.149

That’s not to say, of course, that continental criminal procedure precludes the accused from testifying, or confessing, altogether, anymore than American criminal procedure. The act of confession, most dramatically if it occurs in open court, after all can be regarded as the ultimate exercise of the accused’s active autonomy, in that she literally applies the relevant provisions of the criminal law to herself, even if a procedural distinction between confession and conviction remains in all legal systems, not to mention the universal practice of insisting on the execution of the self-imposed punishment by a third party.150

Contrast the right to testify with the requirement of a confession for conviction, which gave rise to torture as an evidence gathering tool.151 The right to enter a plea, unknown in continental criminal procedure, also should be seen in contrast to the requirement of a confession. The defendant in the American criminal process has the option of ending the proceedings against her by entering a plea, an option that is unavailable to continental defendants who, even after having struck a deal with the judge (the prosecutor tends not to play much of a role in negotiations), must go through the ordinary—though probably now shortened—criminal process, including the interrogation by the presiding judge and a public confession in open court.152

The availability of pleas—as opposed to confessions followed by conviction—doesn’t just have passive significance, however, by allowing the defendant to opt out of the full-fledged process. It also empowers the defendant to participate in the resolution of the process through plea negotiations.153 Whether plea negotiations are autonomy enhancing or limiting depends of course on the distribution of power among those doing the negotiating. As a matter of fact, the prosecutor (often aided by the defense attorney and the judge) enjoys such enormous, and virtually unchecked, power in the American criminal justice system that plea negotiations, as a matter of fact, are autonomy limiting. To render them consistent with the principle of autonomy would require a concerted effort to level the playing field, either by equipping the defendant with greater rights in the process (for example, by establishing meaningful voluntariness review) or limiting

149 StPO § 60. Discretionary exemptions—determined by the presiding judge—apply to youths (17-18 year-olds), the victim and her relatives, the defendant’s relatives, and witnesses with a prior perjury conviction. StPO § 61.
153 Id. at 603-05.
the prosecutor’s power (for example, by constraining her charging discretion or reducing the level, and range, of penalties), or both.\textsuperscript{154}

The sixth amendment right to counsel likewise has an active and a passive, autonomy-enhancing, side. Passively, it works, indirectly, to put meat on the bones of the privilege against self-incrimination.\textsuperscript{155} Actively, it enables the defendant to participate fully, though indirectly, in a lawyer-dominated process that disposes of “her” case. At the same time, however, the defendant has the right to participate directly, pro se, and take her chances as a laywoman among trained jurisprudences.

Either directly, or indirectly, the accused also has the right to participate in the impositional process by assembling evidence, through investigation and “discovery”, and introducing it, in whatever form, as inanimate objects or records, or as “live testimony” by herself or another “witness,” or an “expert.” In fact, the accused has a constitutional right to state assistance in this regard, in particular “to have compulsory process for obtaining witnesses in his favor.”\textsuperscript{156} By contrast, the accused in the continental process has no such right of production. She instead has the right of petition. Only the court has the right, and the duty, to assemble and introduce evidence, either upon its own motion or upon motion by one of the parties.\textsuperscript{157} Note, however, that German criminal procedure extends the right to question witnesses not only to defense counsel, but also to the defendant herself. In general, defendants in German criminal trials enjoy the same, parallel, procedural rights as their counsel, including the right to file motions, to question witnesses, to comment on the evidence, and to make a closing statement.\textsuperscript{158}

In the American criminal process, the accused not only has the right to assemble and introduce her own evidence, but also to participate in the introduction of evidence by the state. In particular, the accused has the right “to be confronted with the witnesses against him,” and to subject them to “cross-examination.”\textsuperscript{159} Once again, the accused has the right to participate—or not to participate—in the assembly of evidence, through submitting to interrogation, “cross-examination,” and supplying other, non-testimonial, evidence to the state.

Several rights pertain to the selection of those who sit in judgment of the criminal defendant, i.e., those who are charged with applying criminal norms to him.\textsuperscript{160} The defendant, after all, doesn’t literally convict himself. Here the criminal process relies on what one might call constructive autonomy, or indirect self-government.

1. Empathy and Indirect Autonomy

\textsuperscript{154} See id. at 591-601.
\textsuperscript{156} U.S. const. amend. VI.
\textsuperscript{158} Id. at 570-73. That’s not to say that they exercise these rights. The ordinary German criminal trial continues to be dominated by the presiding judge, regardless of what procedural rights might be extended in theory to other process participants, including not only the defendant and her attorney, but also the prosecutor and other professional, or lay, judges on the panel, if any. Id. at 580-91.
\textsuperscript{159} U.S. const. amend. VI.
\textsuperscript{160} For analogous rights in continental criminal procedure, see Markus Dirk Dubber, American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure, 49 Stan. L. Rev. 547, 571-72 (1997).
To see how indirect autonomy works, we need to introduce an enabling concept, empathy, or mutual role-taking. In American political theory, the consent of the governed, including the punished (and the taxed), is crucial, but it needn’t be direct. The American system of government, and the system of modern government in general, is that of a representative, not a direct, democracy. The participation of the governed in their government is mediated through the transferal of the right of consent from the individual person to another, who acts as her substitute, agent, or representative. In the sphere of legislation, that representative is the legislator. In the sphere of adjudication, that representative is the jury, first and foremost, but also the judge and, given the prevalence of plea bargaining in American criminal law, the prosecutor, at least in jurisdictions where these officials are elected.\footnote{Id. at 591-93.}

Punishment raises the problem of representation with particular urgency for two, related, reasons. The unique intensity of the state sanction of punishment places a unique strain on any attempt to legitimate its threatened, and actual, employment. At the same time, actual consent on the part of the object of the sanction is particularly unlikely. Nowhere is merely constructive consent less appropriate, and yet at the same time more necessary. Put another way, nowhere is the danger of hypocrisy greater than in the attempt to legitimate punishment as self-government, and yet nowhere is the need for that very legitimation more acute.

The precise nature of the relationship between representative and represented has been as contested as the best method of institutionalizing it ever since the foundation of the American republic. In general, however, it’s clear that—as a phenomenon—it presumes a mutual identification between governor and governed. For representative self-government to work, the self of the representative and the represented must, if they cannot merge, become so closely connected that one can easily take the position of the other. As none other than James Madison put it in the Federalist Papers, “it is particularly essential that the [legislative] branch . . . should have an immediate dependence on, and an intimate\footnote{Federalist No. 52 (emphasis added).} sympathy with, the people.”\footnote{Federalist No. 52 (emphasis added).}

Sympathy here should not be confused with affection, or even pity.\footnote{For a more detailed discussion of the role of sympathy in law, and criminal law in particular, see Markus Dirk Dubber, Law’s Empathy: The Sense of Justice and the Life of the Law (forthcoming NYU Press 2005).} Instead, following Adam Smith,\footnote{Adam Smith, The Theory of Moral Sentiments (1759); see also David Hume, Enquiry Concerning the Principles of Morals 10.1, 10.5 (1751); Treatise of Human Nature III.iii.1 (1739). To Smith, sympathy was a moral sentiment, a “sense of justice.” Needless to say, it was not a sense of police. Recall that police, in Smith’s view, had nothing to do with justice, and everything with “expediency.” Introduction, Adam Smith, Lectures on Jurisprudence I, 3 (R.L. Meed, D.D. Raphael, & P.G. Stein eds. Oxford 1978) (quoting Dugald Stewart, Account of the Life and Writings of Adam Smith, LL.D.).} it should be understood as fellow-feeling, enabled by the ability to put oneself in the other’s shoes, to see things as she would see them. That ability in turn presumes a mutual identification, i.e., a basic sense of identity shared by the representative and the represented. Sympathy differs from affection because, as a cognitive process, it is emotionally neutral. To avoid the confusion between sympathy as a general cognitive mechanism and as a specific emotional effect (often contrasted with antipathy), the less ambiguous term “empathy” is preferable. In contrast to sympathy—
literally “feeling-with” (Mitgefühl), empathy—“feeling-in” (Einfühlung)—generally refers to the vicarious experience of another.\textsuperscript{165}

Empathy is the mechanism that keeps the “self” in representative self-government. Without empathy, representative self-government turns into oppressive other-government, mediated self-judgment into immediate other-judgment, and indirect autonomy into direct heteronomy.

An account of legitimate punishment on the basis of autonomy and empathy in turn presupposes an account of those engaged in the practice: offender, victim, and onlooker. The persons constituting the practice of crime and punishment must be presupposed to possess the capacity for autonomy and empathy. Individuals lacking these capacities can qualify as neither offender, nor victim, nor judge. All three must possess what Rawls has called the two moral powers, the capacity for autonomy (or for the rational) and the capacity for empathy (or for the reasonable).\textsuperscript{166} Without these capacities, the discourse of crime and punishment is no longer a legal discourse, i.e., an interpersonal discourse subject ultimately to moral principles of legitimacy. Criminal law would become criminal police.

If autonomy is the fundamental substantive principle of American government, then empathy is its fundamental procedural principle. Autonomy makes government legitimate; empathy makes it possible. Autonomy without empathy is unworkable not only for the familiar reason that direct democracy is impractical in a large complex modern state. Autonomy without empathy, in the application rather than the making of law, also makes state coercion possible in the absence of direct consent by its object. In the criminal law, for instance, requiring confession for conviction threatens, rather than bolsters, the autonomy of the accused. Nothing illustrates this danger more drastically than the once common use of torture to generate requisite confessions.\textsuperscript{167}

2. The Jury

The principle of indirect, or representative, autonomy manifests itself in several features of the criminal process. The most obvious is the institution of the jury. The legitimate core of the idea that the jury manifests the “sense of justice” of the community is that it represents not some community, but also the community of the defendant. Composed of the defendant’s peers, it speaks for the defendant and thereby makes possible a process of vicarious self-government, which respects the defendant’s autonomy, or capacity for self-government, without forcing the defendant to literally judge himself.

But the jury is an institution of justice only insofar as it judges the defendant from the standpoint of justice, i.e., as a person. This means that a juror may not judge the defendant solely as an insider (i.e., a member of her community, which may or may not be the same community as that of all or any other jurors) or as an outsider (i.e., a non-member of her community).


The challenge of the institution of the jury therefore is to ensure that it functions as a forum of justice—a discourse among persons as such—without disregarding its role as a mechanism for indirect, or vicarious, self-judgment. That justice discourse and that vicarious self-judgment are possible only if jurors act on their sense of justice. But they can only act on their sense of justice if they identify with one another, and with the defendant, as persons.

This is not enough, however. While the legitimacy of their judgment is made possible through mutual identification among jurors, and between jurors and defendant, the enterprise of judgment itself only makes sense if the jurors also identify with the victim as another person. Without that identification, they will not experience the empathy that motivates them to pass judgment on the offender in the first place; they will not feel the vicarious resentment that turns an otherwise private conflict into a matter of public justice, and therefore of law.

It’s in this sense that the jury’s representativeness and impartiality are crucial. Each juror must be representative in that he must share, and be conscious of sharing, with the offender and the victim the characteristic that marks all three as subjects and objects of justice judgments, i.e., their shared personhood. From this point of view, representativeness and impartiality coincide; representativeness implies the juror’s conscious possession of the relevant similarity (namely membership in the community of persons), while impartiality implies the juror’s ability to disregard all other, irrelevant, similarities (such as membership in the same bowling team, or race, or whatever).

To ensure the representativeness and impartiality of the jury, the defendant has the right to participate in the selection of the jury, through challenging potential jurors who would lack the capacity to empathize with her for one reason or another, notably prejudice or bias. She also has the right to request the removal (recusal) of the judge, on similar grounds. At the same time, however, the defendant does not have the right to adjudicators who are predisposed in her favor. Relatives of the victim and of the defendant alike are barred from adjudication—and so is the victim and the defendant herself. While relatives, or friends, might well be able to identify with the victim and the defendant, respectively, that identification would not be relevant in a legal process because it would be based on characteristics of the defendant other than her status as a person, i.e., as an object of justice.

\[168\] In continental criminal procedure, there is no directly analogous right. There of course can be exactly analogous right if there is no jury. But that’s not the point. The representativeness of the adjudicatory body, however composed, is thought to be sufficiently guaranteed by the adherence to a uniform, and nondiscriminatory, process for the selection and assignment of lay judges, who sit with professional judges on mixed panels and who are appointed for several years, rather than assembled for a particular trial. Challenges against the composition of the court thus are based on perceived deviations from this, rather cumbersome, selection process. See Markus Dirk Dubber, American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure, 49 Stanford Law Review 547, 588-89 (1997). Once the court has been properly assembled, the accused also has right to file recusal motion based on an allegation of bias, often said to have manifested itself in the court’s denial of previous defense motions, including occasionally previous motions for recusal. See Markus Dirk Dubber, American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure, 49 Stanford Law Review 547, 571-72 (1997).

\[169\] The right to request a change of venue belongs here as well. A defendant is entitled to venue change when the presumption of representativeness that ordinarily attaches to adjudicators drawn from the locus of the crime does not hold. That presumption of course is itself questionable given the mobility of modern society. Offenders are no longer as likely to live in the political community where the crime was committed as they once were. This also means, of course, that the notion of jurors as the defendant’s peers, drawn from his vicinage, largely survives as a fiction, but an important fiction, because it properly shifts the inquiry from the level of judgment from intercommunal (neighborly) sympathy to interpersonal empathy.
C. Criminal Law

So much for our discussion of the central, but rarely acknowledged, role of autonomy in procedural criminal law. Let us consider, finally, the significance of autonomy in substantive criminal law, that aspect of the system of punishment which is farthest removed from the actual infliction of punitive pain and (yet?) receives the most theoretical attention. The criminal law itself is conveniently divided into a general part, which includes the general principles of liability that apply across to the board and a special part, which includes the definitions of the various offenses for which criminal liability might be assessed according to the principles delineated in the general part.

1. General Part

The concept of autonomy figures prominently in the criminal law’s general part. To begin with, criminal liability can attach only to persons capable of autonomy. Anyone without that capacity is not punishable—including the criminally insane and children.

   a. objective offense elements

As we’ll see when we turn our attention to the discussion of excuses, the capacity for autonomy is a necessary precondition for criminal liability. It is not, however, sufficient. First, consider the so-called objective elements of criminal liability. To be punished, rather than merely punishable, a person must have actually exercised her capacity for autonomy in committing the crime. The voluntary act requirement ensures that punishment attaches only to actual manifestations of one’s capacity for autonomy. This manifestation ordinarily constitutes a commission. Omissions, too, can represent an exercise of one’s capacity for autonomy, insofar as I consciously refrain from engaging in certain required conduct. What matters is the exercise of autonomy, not what form it takes.

To account for the act requirement, rather than the voluntary act requirement, and the concomitant nonpunishability of “mere” thoughts, we need to expand our focus from the offender’s to the victim’s autonomy. Insofar as the state addresses the objects of its governance through law as persons, i.e., as individual with a capacity for autonomy, then victims in the criminal law must be conceived of as persons as well. In fact, we might think of crime as a particular kind of interaction between two persons, both capable of autonomy. In this light, crime appears as a particular type of interference with one person’s autonomy (the “victim”) by another (the “offender”); more specifically, it is one

170 The concept of autonomy plays a crucial, if not sufficiently appreciated, role in Herbert Packer’s influential book on American criminal law, substantive and procedural. Herbert L. Packer, The Limits of the Criminal Sanction (Stanford UP 1968)
person’s autonomous assault upon the autonomy of another. The offender manifests her autonomy at the expense of the victim’s. In some cases, this act of interpersonal violation permanently destroys the victim’s capacity for autonomy, through death or catastrophic brain injury. In others, it compromises the victim’s ability to exercise that capacity to a greater or lesser degree. Criminal law is the state’s response to crime through punishment, designed to reaffirm the autonomy of the victim without denying the autonomy of the offender.\footnote{173}

It is the victim’s right of autonomy that the offender has violated, or at least has done his best to violate.\footnote{174} The law’s function is to protect that autonomy from serious interference. The criminal law helps the state discharge that function through deterrence and, if necessary, through punishment—i.e., through the threat, imposition, and infliction of punishment, the various aspects of the criminal process which correspond to increasing levels of coercion. In this sense, one might say that the victim has a right to have the offender punished, provided that no other measures to vindicate her autonomy, such as through the law of compensation, are available.\footnote{175} Analogously, the offender can be said to have the right to be punished, insofar as treating her as an ahuman source of danger denies her the “dignity and respect” she “deserves,” not as a victim, or an offender, but as a person.\footnote{176}

Now, if crime is one person’s autonomous violation of the autonomy of another, such a violation will be impossible without an external act. The offender’s act is the manifestation of her autonomy through the subjugation of the victim—the offender’s “acts out” her capacity for autonomy through heteronomy over the victim.\footnote{177} Thoughts may be autonomous, but they do not, without more, threaten another’s autonomy. We need more than an act requirement, but a voluntary act requirement, because otherwise this interference with the external world, however harmful to others it might be in a broad sense, is not a manifestation of the offender’s autonomy.

The causation requirement too incorporates the notion of autonomy, most explicitly in the law of proximate, or legal, causation, specifically the doctrine of intervening acts (or novus actus interveniens).\footnote{178} The idea here is that a voluntary act can block the attribution of a proscribed result to another, earlier, voluntary act, insofar as the second act manifests the autonomy of the person committing it. The central question of the law of causation is to what extent a result can be ascribed to a particular person as the manifestation of her

\footnote{173} See generally Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims’ Rights (2002).
\footnote{174} Punishment thus can be seen as the state’s assertion that the offender’s attempt to reduce her victim to an object of power, rather than a subject of rights, has failed. Cf. G.W.F. Hegel, Elements of the Philosophy of Right § 99 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge 1991). In this sense, and only in this sense, attempt is the paradigmatic crime. In contemporary American doctrine, attempt is not so much a crime as the manifestation of dangerousness that calls for penal, and specifically, incapacitative treatment. See Model Penal Code and Commentaries (Official Draft and Revised Comments) §§ 3.01-5.07, at 323, 325 (1985); People v. Dlugash, 41 N.Y.2d 725 (1977); Commonwealth v. Henley, 504 Pa. 408 (1984).
\footnote{175} See Jan Phillip Reemtsma, Das Recht des Opfers auf die Bestrafung des Täters—als Problem (1999). This, I think, is the legitimate core of the idea of victims’ rights. See Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims’ Rights (2002).
\footnote{177} 3 Joel Feinberg, The Moral Limits of the Criminal Law: Harm to Self 34 (OUP 1986).
autonomy, rather than to another person or to an apersonal cause (such as bad weather or bad luck).

Consider also the law of complicity, the imputation of one person’s act (or omission) to another. There one might distinguish between principal and accomplice by differentiating between the person whose autonomy was directly manifested in the criminal act (the principal) and the person whose autonomy is manifested indirectly, or constructively, through the principal’s act (the accomplice, or accessory). To the extent that the criminal act then would be more the principal’s than the accomplice’s, and so would be imputed more to the principal than to the accomplice, one could justify punishing the principal more harshly than the accomplice. This in fact has been the common law rule (and continues to be the rule in continental legal systems), but has been abandoned by the Model Penal Code and those jurisdictions that follow it on this point. (Still, even there the distinction between accomplice and principal likely affects the sentencer’s discretion in particular cases.)

b. subjective offense elements

The traditional requirement of intent is easily squared with the principle of autonomy: Without intent, the offender’s act is not sufficiently directed at the denial—and even the destruction—of the victim’s autonomy to qualify as a crime, i.e., an assault on the victim’s as a person. The expansion of criminal liability to negligent crimes, however, is not obviously compatible with the principle of autonomy. It is for this reason that the criminal law has treated the punishment of negligent “crimes” with embarrassed silence—and has generally limited negligence liability to the infliction of serious harm (specifically death). The victim of a negligent crime cannot be considered the object of the offender’s act, “against whom” the crime was committed. A person harmed as a result of a negligent crime is not victimized in the same way as the victim of an intentional crime.

Negligent and intentional crimes share several features. So negligent crimes may end up severely compromising a person’s autonomy, even to the point of destroying her autonomy altogether (as in the case of negligent homicide). They also are committed by a person, rather than a dog, or a tree, and thereby satisfy another aspect of the definition of crime as the assault by one person upon the autonomy of another.

But negligent crimes differ from intentional ones in that they do not represent an attempt by one person to subjugate, or objectify, another. They may interfere with a person’s autonomy, but they do not do so for the sake of manifesting another’s. It is this personal assault on her personhood, however, that entitles the crime victim to victims’ rights, in particular the right to have the offender punished. The offender’s

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180 See, e.g., StGB § 27.
181 The Model Penal Code, for example, recognizes three negligence offenses, negligent homicide (§ 210.4), a type of assault (§ 211.1(1)(b); causing bodily injury with a deadly weapon), and a variety of criminal mischief (§ 220.3(1)(b); damaging property with “fire, explosives, or other dangerous means”).
182 This consideration also apply to so-called strict liability crimes.
183 Needless to say, strict liability crimes, which have no subjective element of any kind and simply consist of an objective act without requiring any attitude upon the “offender’s” part toward the “victim,” are more difficult still to square with the principle of autonomy.
punishment is the dramatic reaffirmation of the victim's autonomy after the offender's criminal attempt to deny that autonomy for the sake of her own. And a crucial aspect of that reaffirmation is putting the offender in her place, so to speak, among the community of persons, alongside the victim. The victim's personhood is reaffirmed by exposing the offender's attempt to deny it as unsuccessful and in fact futile. Punishment communicates to the offender, the victim, and the onlooker that the offender did not succeed, and could never have succeeded, in reducing the victim to a nonperson. The offender at best can treat the victim as a nonperson, she cannot transform him into one.

c. defenses

So much for the notion of an offense. The principle of autonomy also accounts for, and helps structure, the system of criminal defenses, which fall into two groups, justifications and excuses.184

Justifications respect a particular act of self-government by the putative offender who resolves a conflict among abstract norms in a particular case.185 The law of necessity (or balance of evils), for instance, treats a defendant's choice made under conditions of necessity as a present direct act of self-government that deserves legal recognition even when it conflicts with a past indirect act of self-government taken by others (the legislators) on her behalf.186 (In this sense, justification defenses fulfill a function similar to jury nullification, condensed into one person's deliberation.) In circumstances of necessity, the correct choice among inconsistent norms—say, among the norm against setting fire to someone's house and the norm against permitting an entire city to burn—deserves to be recognized as lawful, or at least as not unlawful.

In the case of self-defense, the legislature has defined a class of cases in which it is on balance not unlawful to violate the norm underlying a criminal statute. The use of force against another in self-defense (and thus the violation of the criminal norm against the use of force against another person) is not unlawful only if it serves the purpose of averting the unlawful imminent use of force against oneself.187 If the actor meets the criteria of this ex ante balance of harms, she is justified. The balancing of harms that underlies the defense of necessity thus implicitly also drives the defense of self-defense (and its analogues, defense of property and defense of another).

The defense of consent can be seen as insulating punishable conduct from criminal liability on the ground that consented-to conduct doesn’t interfere with the autonomy of

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184 I will ignore factual, rather than legal, defenses which are not a matter of substantive criminal law and, at any rate, are based on concerns for accuracy without any need to have recourse to notions of legitimacy. One doesn’t need the principle of autonomy to permit a defendant to argue that he had an alibi for the time of the crime or that the eyewitness couldn’t have seen the burglar because she wasn’t wearing her glasses.

185 The autonomy of the “victim” of justified acts—say, the owner of the house set aflame to contain the oncoming fire storm—too finds recognition, in the provision that her rights not be violated except in circumstances where their harm is clearly less considerable than the harm avoided (passive autonomy), see, e.g., Claus Roxin, Strafrecht: Allgemeiner Teil (Band I: Grundlagen—Der Aufbau der Verbrechenslehre) § 14 nos. 41 & 48, § 16 no. 41 (Munich: C.H. Beck 3d ed. 1997) (“principle of autonomy” in necessity), and in cases highlighting a defendant’s failure to obtain the victim’s consent in some way (e.g., notice, consultation, voting, or the drawing of lots), see, e.g., United States v. Holmes, 26 F. Cas. 360 (E.D. Pa. 1842) (lifeboat); The Queen v. Dudley and Stephens, 14 Q.B.D. 273 (1884) (same).

186 See Model Penal Code § 3.02.

187 See Model Penal Code § 3.04
By consenting, the apparent victim rebuts the presumption of victimhood that—more or less ordinarily—attaches to the phenomenon of a particular crime captured in its statutory definition. He indicates that another’s act which satisfies the elements of a crime on its face does no harm to his autonomy in fact. In the light of consent, an apparent act of heteronomy is revealed as an act of autonomy.

“Consent” in fact is the main doctrinal category in the law of punishment that functions as a placeholder for considerations of the victim’s personhood, i.e., his capacity for autonomy. American criminal law has yet to fully appreciate the central significance of the consent defense. Consent as a reflection of the criminal law’s basis in personal autonomy is less a defense than a general limitation, less an exception than the rule. Consent deprives the criminal process of its legitimacy, of its reason for being. It finds its broadest recognition in the Model Penal Code. According to the Code, consent is a defense if non-consent is an element of the offense charged, or if it “precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.” That harm, however, is always the interference with the victim’s autonomy. That interference is absent in the presence of consent.

One therefore would expect consent to be a defense to, or non-consent an implicit element of, every offense. It isn’t, not even in the Model Code. The Code instead preserves the traditional, and traditionally ill-supported, exception for serious bodily harm.

Attempts to justify exceptions to a general consent defense tend to consist of general references to the “unique” nature of criminal law. Criminal law, so it is said, is not about individual victims, but about the state (or the king). Insofar as this view of the criminal law as police reflects a hierarchical political community it is, as we’ve seen, inconsistent with the ideal of equal personhood that underlies not only the political theory of American government in particular, but also of enlightenment moral and political theory in general. Moreover, it proves too much. If it is correct that the state is the victim of every crime, then consent should be a defense to none.

Not recognizing consent as a defense in the law of punishment amounts violates the prima facie victim’s fundamental right to autonomy. It also violates the apparent offender’s right to autonomy, at least cases where her facially criminal conduct manifested an agreement between her and the apparent victim (as opposed to merely carrying out the “victim’s” orders, say). Punishing the apparent offender therefore would do nothing to vindicate autonomy. On the contrary, it would deny the autonomy of offender and victim alike.

Excuses, in contrast to justifications, exonerate on the basis of an autonomy deficit, rather than of a proper (or at least not improper) exercise of one’s capacity for autonomy. If we think of crime as the autonomous violation of another person’s autonomy, one would expect that the lack of the capacity for autonomy or the inability to exercise that capacity bar criminal liability. In the case of the so-called “incapacity” excuses, insanity


189 Model Penal Code § 2.11(1).

190 See, e.g., Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 481 (2d ed. 1986).
and infancy, the actor can not be blamed for his criminal and unjustified conduct he lacks the capacity (a) “to appreciate the criminality [wrongfulness] of his conduct” or (b) “to conform his conduct to the requirements of law.”

In other words, he is incapable of governing himself because (a) he either cannot understand legal norms or apply them to his conduct (or to himself in general) or (b) because he lacks the self-control to refrain from acting in a way that he knows violates a legal norm.

The child is either irrebuttably or, above a certain age and/or in serious offenses, rebuttably presumed to lack the same capacities, but is not considered abnormal. Unlike insanity, childhood is a normal stage of human development, which culminates in full personhood with the requisite capacity for autonomy.

In “inability” excuses—duress, entrapment, superior orders, provocation—exculpate because an actor’s ability to exercise his capacity for autonomy is compromised so that his conduct cannot be attributed to him as a person. In the case of duress, the actor is prevented from exercising his capacity for autonomy by an irresistible threat. In the case of entrapment, it is an irresistible enticement that exonerates him. Superior orders operate as an excuse because of the unusual power a military superior holds over a subordinate, so that an order always implies a threat of considerable physical harm, including death in war time, and in this sense is analogous to the excuse of duress. Finally, the (partial) defense of provocation covers situations that trigger such “extreme mental or emotional disturbance” on the part of the actor as to compromise his actual—as opposed to his potential—autonomy at least to such a degree as to mitigate (or “diminish”) his responsibility for his conduct.

2. Special Part

Autonomy shapes not only the general part of criminal law, but also its special part, which deals with specific offenses, as opposed to general principles of criminal liability applicable to any offense. Rather than provide a comprehensive review of the vast array of offenses in modern criminal law, I will focus on a few illustrative examples.

Whereas the general part of criminal law concerns itself primarily with the offender’s autonomy, the special part shifts attention to the victim’s autonomy. The scope of criminal law is defined by the state’s authority to protect the autonomy, or personhood, of

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191 See Model Penal Code § 4.01.
192 See Model Penal Code § 4.10. In New York, for instance, the presumption of incapacity is irrebuttable below the age of seven. Children under seven cannot commit a criminal or a delinquent act. After that, the presumption becomes increasingly more rebuttable: Children between seven and 15 years of age can commit delinquent acts, resulting not in punishment, but in a declaration of delinquency. Children under 13 cannot commit a criminal act. Children under 16 cannot commit most criminal acts. Children between 13 and 15 years of age, however, can commit certain serious felonies, including noncapital murder.
193 See Model Penal Code § 2.09.
194 The traditional limitation of entrapment to cases where the enticer is a state official is not compatible with this account of entrapment. From the standpoint of autonomy, the enticer’s status makes no difference. That’s not to say that official entrapment might not be objectionable in the context of a criminal process grounded in autonomy. Entrapment here would be analogous to the use of enticements so overwhelming as to render a confession “involuntary.”
195 See Model Penal Code § 2.10.
196 See Model Penal Code § 210.2(1)(b). On this account, there is no reason why the defense of provocation should be limited to murder cases. Criminal liability presupposes the ability to exercise one’s capacity for autonomy; if this ability is limited in some way, then an actor deserves a mitigation in punishment for all offenses, or for none.
its victim-constituents. Autonomy, in other words, helps define the nature of criminal harm—as well as the nature of criminal conduct. It puts meat on the bones of Mill’s “harm” principle, which recently has been rediscovered—by commentators and courts alike—as a stand-in for criminal harm. Not all harm, however, is criminal harm. Criminal harm is limited to what one might call autonomy harm. From the perspective of criminal law (as opposed to, say, medical science), a bruise suffered at the hand of an assailant is significant not for its own sake, but insofar as it affects the victim’s autonomy, by compromising her ability to conduct her life as she sees fit, at the time of the assault or in the future, or both.

From the perspective of victim autonomy, it can be seen that the criminal law protects different qualities and quantities of autonomy harm. One might, for instance, draw a qualitative distinction between harm to the capacity for autonomy, and harm to the ability to exercise that capacity (paralleling the distinction between incapacity and inability excuses), and provide for harsher punishments for qualitative than for quantitative harm.

Among harms to the capacity for autonomy, another line might be drawn between harm that amounts to a destruction of the capacity and harm that merely compromises it. Certain offenses permanently deprive the victim of her personhood. These include homicide and certain types of assault that eliminate the victim’s capacity to govern herself, i.e., to generate and to recognize norms as her own and to follow them in her conduct—assaults, in other words, that transform the victim into someone who, if charged with an offense, would be entitled to an insanity defense. The law further distinguishes homicide from these depersonalizing assaults, presumably on the ground that only the former definitively works a permanent destruction of personhood—no matter how reliable the predictions of medical science might be regarding the extent and the curability of a particular condition short of death.

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The German Penal Code highlights the significance of autonomy by classifying various crimes as crimes against autonomy. In particular “crimes against personal autonomy” and “crimes against sexual autonomy.” On the latter, see Tatjana Hörnle, Penal Law and Sexuality: Recent Reforms in German Criminal Law, 3 Buff. Crim. L. Rev. 638 (2000); see also Stephen J. Schulhofer, Taking Sexual Autonomy Seriously: Rape Law and Beyond, 11 Law & Phil 35-94 (1992); Dorothy E. Roberts, Rape, Violence, and Women’s Autonomy, 69 Chi.-Kent L. Rev. 359 (1993); Note, Feminist Legal Analysis and Sexual Autonomy: Using Statutory Rape Laws as an Illustration, 112 Harv. L. Rev. 1065 (1999); Sara Y. Lai & Regan E. Ralph, Female Sexual Autonomy and Human Rights, 8 Harv. Hum. Rts. J. 201 (1995). That’s not to say that it doesn’t include many crimes that have nothing to do with autonomy. Also note that this categorization may mislead one into thinking that sexual autonomy is not an aspect of personal autonomy, and that autonomy is not an attribute of personhood.

Among harms to the ability to exercise one’s capacity for autonomy, one might draw quantitative distinctions based on the centrality and permanence of the autonomy harm. These distinctions, being merely quantitative, don’t generate hard and fast rules. But we might conclude that, in general, physical health is more significant to the exercise of one’s capacity for autonomy than psychological health, though psychological harm may of course also be debilitating. In the end, the distinction between physical and psychological harm may not be particularly useful. Regardless of their relative seriousness—understood as the degree of interference with the ability to exercise one’s capacity for autonomy—it might still be useful to retain analytic distinctions among various aspects of autonomy that the criminal law, in its special part, sets out to protect, and to manifest.

This focus on harm to autonomy draws into question a significant portion of the special part of modern criminal law. If autonomy is the legitimating principle of law, then the legitimacy of a particular exercise of law power turns on its proximity to autonomy. Among offenses of suspect legitimacy are “public welfare offenses,” and “police offenses” generally speaking, which set out to extinguish threats to (rather than actual violations of) “public welfare” and “police” (rather than to particular groups, nor to individual persons, never mind their autonomy). The legitimacy of these offenses is suspect for three reasons. First, they are not concerned with the protection or manifestation of autonomy of persons, but instead with the “welfare” or “interests” of the “public.” The pursuit of public welfare, however, does not imply concern for personal autonomy, and may in fact be inconsistent with it. Consider, for instance, the criminalization of homosexual sex—and other so-called “deviate sexual intercourse”—in the name of the moral welfare of the public. What’s more, the distinction between the public welfare and state authority may be difficult to maintain in the long run, given the vagueness of the concept of public welfare and the opportunity—in fact the need—for state officials to give it meaning not only in legislation but, at least as important, in the day-to-day application and enforcement of legislative and administrative norms.

Second, public welfare offenses are—at least in their most common form, the strict liability offense—not concerned with autonomous violations of these interests, but with offenses or threats to them, regardless of the personhood of the source of these offenses or threats. In other words, the legitimacy of police offenses is suspect because they treat neither victims nor offenders as persons capable of autonomy—they are, in this sense, both victimless and offenderless at the same time. In the final analysis, these offenses police threats to the authority of the state. They police disobedience, rather than punishing criminal conduct.

Third, public welfare offenses are only tenuously connected to autonomy harm for the simple reason that they are only tenuously connected to any type of harm. This feature they share with all so-called endangerment offenses, which criminalize conduct that

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199 For an interesting attempt to categorize criminal harm along different, but related, lines, see Andrew von Hirsch & Nils Jareborg, Gauging Criminal Harm: A Living-Standard Analysis, in Principled Sentencing 220 (Andrew von Hirsch & Andrew Ashworth, eds. 1992).
200 See generally Francis Bowes Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55 (1933).
poses a threat of harm in a specific case (actual endangerment offenses) or poses a threat of harm in general, but necessarily in the specific case (abstract endangerment offense).  

Take, for instance, the paradigmatic abstract endangerment offense of possession. Possession offenses punish the relation between an object and its possessor, often without regard to the possessor’s awareness of the particular nature of the object, solely on the ground that this relation has been declared “unlawful” by the state. As a status (or relation) rather than a type of conduct, possession is inherently incapable of inflicting harm. For the same reason, possession is farther removed from the infliction of harm than “preparation,” which at least requires a preparatory act. (And preparation is not punishable because it falls short of a punishable attempt). Drug possession, more specifically, criminalizes a status that bears within itself the risk that the item possessed may be used in conduct that may pose a risk to the possessor herself, in the case of consumption, or to another person, in the case of distribution. As an inchoate form of distribution, possession poses an abstract risk of distribution which in turn poses an abstract risk of consumption or distribution, and so on. Note also that, as an abstract endangerment offense, possession does not require proof that any of these risks, however small and however remote from the infliction of harm, were present in a particular case. Possession is punishable even if there were a zero chance of the possessor ever putting the item possessed to any use, harmful or not.

Conclusion

In this paper, I have tried to do two things: to explain why we (still) need to develop a theory of the legitimacy of state punishment through criminal law, and to suggest how we might meet, or at least approach, this challenge. In particular, I have argued that the distinction between law and police may be helpful on both counts. The reason we don’t yet have a theory of criminal law is that we have yet to grasp the implications of recognizing punishment as a species of law, not police, where law is understood as autonomous governance by persons of persons, and police as heteronomous governance by the householder of his household.

Having reconceptualized punishment as an exercise of the state’s law power, rather than of its police power, of its power to do justice rather than of its power to regulate the

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204 Possession offenses today account for a far greater proportion of statutes, arrests, convictions, and penalties than is generally supposed. See Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims’ Rights pt. 1 (2002). For instance, by last count there were 153 possession offenses on the books in New York, 115 of them felonies, and eleven that provided for a maximum sentence of life imprisonment. Id. at 15-16; see also Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding Michigan statute mandating life imprisonment without the possibility of parole for simple drug possession). In 1998, these possession offenses accounted for over 100,000 arrests in New York State, or about 18% of all arrests, roughly one third of which resulted in a prison or jail sentence. (By comparison, there were 60,000 arrests for all violent felonies combined.) One in every five prison or jail sentences handed out by New York courts that year was imposed for a possession offense. Id. Also in 1998, drug possession offenses alone resulted in over 1.2 million arrests nationwide. U.S. Dep’t of Justice, Bureau of Justice Statistics, Estimated Number of Arrests, by Type of Drug Law Violation, 1982-99, available at http://www.ojp.usdoj.gov/bjs/dcf/tables/salespos.htm.

205 For this reason general justification defenses, which assert the lawfulness of facially criminally conduct, have been dismissed as irrelevant in possession cases. People v. Almodovar, 62 N.Y.2d 126 (1984) (no justification as defense against “unlawful” possession charge); but see United States v. Gomez, 92 F.3d 770 (9th Cir. 1996) (self-defense as defense against felon-in-possession charge).
state household, we can then proceed to transform the system of punishment into a species of law by rendering it consistent with autonomy, the basic principle of political legitimacy in the modern state.