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Criminal Jurisdiction and Conceptions of Penalty in Comparative Perspective

Markus D. Dubber*

The concept of criminal jurisdiction attracted almost no attention until the recent rise of international criminal law. Today, there is much discussion of criminal jurisdiction in international criminal law, both in the sense of the criminal law of the international community and in the sense of the extraterritorial application of domestic criminal law. Discussions of jurisdiction in the latter context tend to concern themselves with administrative or political questions of coordination, comity, diplomacy, and so on. Discussions of jurisdiction in the former context, by contrast, often consider difficult and important theoretical questions about the nature of penal power.

Despite the recent upsurge of interest in criminal jurisdiction in the international sphere, domestic criminal jurisdiction remains understudied. This is a shame because, as in the international context, thinking about domestic criminal jurisdiction leads one fairly quickly to issues at the heart of state penalty. Turned inward, conceptions of 'international' criminal jurisdiction in a given domestic system reflect that system's fundamental conceptions of domestic criminal law, including most importantly the notions of crime and penal power itself, notions that can then be subjected to—and sharpened through—historical and comparative analysis.

This paper has three parts. In part I, I briefly rehearse the basic features of the distinction between two conceptions of governance, police and law, and their manifestations in the penal realm, penal police and penal law. This analytic framework, in part II, structures an analysis of the concept of jurisdiction, occasionally drawing on German legal concepts to highlight aspects of the concept that otherwise might remain obscured. German law, it turns out, does not have an overarching, unifying concept of jurisdiction in the common law sense, making a comparative analysis of the concept both impossible and possibly fruitful at the same time. Instead, German law recognizes several concepts, all of which capturing aspects of the common law notion of jurisdiction, without however adding up to anything. This difference may or may not be interesting by itself (perhaps reflecting a more private-law and judiciary-focused approach, depending on whether one focuses on the concept's—Roman—private-law roots or its distinction from 'legislation'), but it is certainly useful for analytic purposes.

I will focus on German criminal law because these principles are conveniently listed in the German criminal code, though I will also cast comparative glances at jurisdictional norms in common law countries: England, the US, and Canada. Unlike

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in other areas of criminal law, German scholarship has not showered significantly more attention on the question of criminal jurisdiction than has scholarship in common law countries; in fact, the history of German scholarship on this issue, such as it is, is the history of not entirely self-serving complaints about the lack of just such a history. Without giving away too much at the beginning, it will turn out that German accounts of criminal jurisdiction are no more sophisticated or principled than common law accounts. While it is sometimes at least tempting to contrast Anglophone and German efforts in the field of criminal law by drawing a line between the presence and absence of at least a recognition of the need to subject penality to principled and systematic scrutiny, criminal jurisdiction in both systems has remained on the pile of largely unexamined penal practices only occasionally disturbed by prudential political considerations. In other words, any attention criminal jurisdiction has received in the German literature has been from the perspective of international law, not from that of criminal law. Or, put another way, even in Germany criminal jurisdiction has been all police, no law.

Part III, finally, turns to an analysis, from the perspectives of police and law, of the contemporary jurisprudence of criminal jurisdiction. This jurisprudence exhausts itself in listing, generally without any attempt to render coherent, a generally agreed-upon set of bases of so-called extraterritorial criminal jurisdiction: active personality, passive personality, protection ('the protective principle'), and universality. In the end all jurisdictional bases can be accommodated within either conception of penalty, even if certain bases may fit more closely with one conception than another.

As with Fuller's list of governmental norms that are consistent both with a legal and a managerial (that is, policial) conception of governing—i.e., that can either appear as manifestations of some fundamental 'principle of legality' or as a potpourri of maxims of good governance—so too the palette of jurisdictional 'theories' can rest either on principle or on prudence. ¹ In both cases, what matters in the end is the conception of the norms, their foundation and significance; are they requirements of legitimacy or guidelines for effective governance, are they principles or maxims, necessary or discretionary, is there another, perhaps silent but essential metanorm of compliance, or is adherence to the individual norms as discretionary as their definition and the circumstances of their application?

It is difficult to avoid the conclusion that matters of criminal jurisdiction have remained largely untouched by critical analysis in light of basic requirements of legitimacy, and instead are the result of the accumulation of undermotivated guidelines invoked, or ignored, haphazardly as tools to assuage concerns about inter-sovereign comity. In other words, jurisdictional norms are, in their conception, less law than police.

I. The Police and Law of Jurisdiction

¹ Lon L Fuller, The Morality of Law, rev ed (1969) at 207.
An analysis of the concept of jurisdiction in light of the distinction between law and police feels perfectly natural. Jurisdiction, in at least one of its many senses, after all lies at the very heart of the distinction between law and police. Setting out the analytic framework, in this case, already performs part of the analysis.2

A. Law and Police

The distinction between police and law can be traced back to the distinction between heteronomy and autonomy as modes of governing in Ancient Greece. Heteronomy—or other-government—was the mode of governing the household, autonomy—self-government—that of governing the city (and the (city-)state); heteronomy was private, autonomy public. Household governance was the realm of economics (from oikos, household) and prudence, city governance that of politics and justice. The economic and the political sphere were radically separate, yet intimately connected. They were as radically separate as was the distinction between heteronomy and autonomy; household governance was marked by radical inequality, the city by radical identity. Household governance was defined by the distinction between governor (householder/oikonomos) and governed (household resources, human, animate, inanimate, etc); the city was characterized by the identity of governor and governed.

At the same time, household and city government were intimately connected because participation in the latter presumed governor status in the former. Citizenship presumed householder. City government, ordinarily described as a democracy, was government by and for the householder; the demos was composed of only the householders. Household government, by contrast, was government of (and prudentially for, but certainly not by) the household, by the householder. Political personhood, i.e., citizenship, was limited to the householder and denied all household members. Legally speaking, too, the householder, and only the householder, was sui iuris, an independent legal person capable of acting on his own behalf, and on behalf of those in his charge (the household). Here, as Holmes recognized, is the origin of the law of agency, of respondeat superior, among other legal norms.3 The householder was sovereign within the sphere of his household, over his household.

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The householder represented the household in the public sphere, i.e., in the interaction with other householders, governed by mutual respect for the other's householder status, and the distinctive qualities of governship, including self-mastery or autonomy, which was a prerequisite for other-mastery or heteronomy (as well as for the participation in the community of householders-peers). As head of the household, its embodiment and literal personification in the external word, each householder—and only each householder—had dignity, a status marker that deserved respect from others, from within and without his household, including other heads of household who shared this status. Command, and if need be force, was the means of governing in the household; outside of the household, in the public realm of equal householders, it was rhetoric, and if need be persuasion.

Whether the internal respect for the householder by the household differs categorically from the external respect by the fellow householder is an interesting question, and one that occupied Hegel in the sharpened form of the relation between the master and his slave. Similarly interesting, and difficult, is the question of the nature of the relationship between the member of one householder's household and another householder. Clearly, the other householder is entitled to deference simply qua householder (which marks him as categorically superior, as a member of a superior class: think of the relationship between blacks and whites qua whites, regardless of social status in white society); whether householder B is also entitled to obedience from a member of householder A's household—that is, from someone not 'his man'—is less obvious, unless he stands in A's shoes (in loco parentis, or rather in loco patris familias—think of a parent's authority to discipline another's child on the playground), but certainly not in the event of a conflict between his commands and A's.

The second question in particular, of one governed's relationship to different householders, is central to the evolution of modern government, though interestingly not only, or even primarily, as a source of conflict among householder-governors, but as an occasion for a denial of that conflict. For the history of modern government is the history of the expansion of one householder's household at the expense of another's. As one householder simply integrates another's household into his own, absorbs the other's realm into his own, conflicts between the two householders become impossible. Instead, the once-proud independent householder, with his very own household to govern heteronomously, now finds himself reduced to the status of household member himself. His innate power has been redefined as merely delegated, and the now-superior householder is the sole possessor of sovereignty. The once-independent and equal householder is reduced to the status of a micro householder under the control, i.e., within the household, of the macro householder, ultimately the king. The macro householder no longer relates to the micro householder as an equal, but governs him heteronomously, by reserving the discretion to discipline him for behavior unbecoming of a household member, i.e., disobedience and disloyalty.
The micro householder remains a householder and as such is owed respect, obedience, and loyalty from members of his and other micro households. Acts of disloyalty, including the ultimate disloyal act of taking the micro householder’s life, remains treason, but only the petit variety. High treason is reserved for disloyalty toward the macro householder, which may manifest itself in a wide range of acts (far beyond homicide) as well as in the mere imagining of the macro householder’s death.

The micro householder’s delegated powers are the power of an overseer, a mid-level bureaucrat, an administrator. The macro householder, on occasion, may choose to police these boundaries of power and chastise the micro householder for acting ultra vires, out of bounds, reminding him of the delegated nature of his power and, therefore, also of the fact that the members of the micro household are also members of the macro household and as such subject to the macro householder’s protection and authority. In this light the distinction between micro householder and 'his' household collapses in the face of their shared inferiority vis-à-vis the macro householder.

B. Jurisdiction and Police

In other words, and here we might as well bring in the concept under investigation, the macro householder may subject the micro householder to his jurisdiction. Every householder as such has jurisdiction over his household, including the resolution of disputes among household members and between household members and himself. Yes, this means that the householder can very well be a judge in his own case, as a matter of household governance and discipline. The householder is sui iuris in this specific sense; in his household court (seigniorial courts, manor courts, courts leet, courts under the eaves, etc.) he is the only legal person and makes and applies, gives and speaks, his own law. As a result, within the household, there can be no other legislator or judge or executioner; the household is, to borrow a term from contemporary administrative law, a government in miniature.

When the macro householder holds the micro householder to account, he is subjecting him to his household jurisdiction. This has nothing to do with protecting the rights of a member of the micro household, and everything to do with asserting the macro householder’s superior loyalty claim, and, if you like, his superior claim to the household member as macro household resource. (And so, the royal governor of Virginia declared in the early 18th c. 'that in this Dominion, no Master has such Sovereign Power over his Slave as not to be liable to be called to an Account whenever he kills him; that at the same time, the Slave is the Master’s Property he is likewise the King’s Subject; and that the King may lawfully bring to tryal all persons here, who shall be suspected to have destroyed the life of his subject.'4)

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Members of a micro household have been known to appeal to the macro householder for protection against the incompetence or more specific ultra vires acts of their micro householder. In fact, there is a way of telling the story of the American revolution and subsequent legal and political history from within this framework, so that the household structure remains in place and only the sovereign householder is replaced (the king by the people).

The more familiar version of the origin story of contemporary American government is of course more radical: that the household, or economic, conception of government was tossed out to make room for a revolutionary conception, based on a new idea, of the 'individual' as the subject and object of government. In other words, personhood was no longer a status of the few, who had dignity and were owed respect precisely because they were different, and better, than the indistinct mass of the governed, but a characteristic of all individuals regardless of status, including all human members of the household, who were once thought to be essentially incapable of government. And so the rule by householders was transformed into a true democracy, of, by, and for 'the people.'

In other words, in this story, law replaced police as the mode of governance. In America, the law is king, Thomas Paine said. This meant, in this context, that the supreme macro householder, the sovereign, had been replaced with an abstract concept, law. Rule of men had given way to rule of law. Note that the basic commitment to autonomy as the mode of public governance remained in place; what changed was the wider, some would say 'universal,' ascription of the capacity for autonomy to all (human) individuals. Once every human was a person, and the distinctive characteristic of personhood was the capacity for self-government, the power to govern could no longer be restricted to householders, as every exercise of governmental power—most acutely the power to punish—now required legitimation, i.e., justification to all persons in a way that respected their shared capacity for autonomy. All forms of governmental power were subjected to a legitimacy critique, and shared autonomy was its measuring stick.

This story in the High Revolutionary style turns on a radical distinction between this conception of law and its predecessor. This modern conception of law as based on the shared capacity for self-government of all natural persons as such, and the attendant ideal of the rule of law (or the Rechtsstaat) in which this conception is realized, in other words, is essentially a critical concept (also critical in the enlightenment sense) that must be seen, and was meant to be seen, in contrast with the tradition it challenged, and replaced. That tradition, however, was the publicized and expanded conception of government as household rule by householder of the household, which since the 16th century had been scientized, rationalized, and pre-modernized in the science of police (Polizeiwissenschaft) on the continent, and named—less frequently and without the same scientific ambition—in England and then in America as the power to police (defined by Blackstone as the king's power of '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. The literature of the science of police and its many tomes covering 'the police' (i.e., the due regulation and domestic order) of every aspect of the public household (including private households insofar as they, too, could be seen as sites of delegated public power), from cities to rivers to schools to forests to the poor to the British Empire, giving advice to the macro householders from fathers to princes to kings, underneath its advanced scientific and institutional apparatus (use of statistics, comprehensive and systematic record keeping, establishment and professionalization of a bureaucracy, etc.) fits into a long tradition of advice manuals for prudent householders, from oeconomic guidebooks like Xenophon's and Aristotle's Oikonomikos through the German Hausväterliteratur and Machiavelli's The Prince.

C. Penal Law and Penal Police

The distinction between police and law is easily applied to the penal realm. Penal police is a matter of discipline; a penal police offense is, literally, offense, against the householder's sovereignty; it is a breach of the duty of loyalty and obedience every human member of the household owes his householder. The paradigmatic offense of penal police is treason, the paradigmatic victim the sovereign, and the paradigmatic offender anyone, or anything that gives offense against the sovereign, described generally as an offense against his peace. Every householder, as Pollock & Maitland put it, has his peace, which refers both to the nature of his authority over his household and to its extent. The householder's peace reaches as far as his household; his authority is absolute (within the limits of ultra vires) in his house, or more generally within the territory of his household, but goes not farther. (In the German late middle ages, the 'law of the manor' (or house law: Hausrecht) was also known as the 'law of the gutter' (Dachtraufrecht) because the householder's peace extended as far as the line marked by the rain runoff from the roof of his house.) Originally, there must have been difficulties in distinguishing between offenses committed by members of the household and others, particularly if the others are members of another's household (and not outlaws, or lordless men, who can be disposed of at will, without the danger of affronting another householder's dignity). These complications, however, become less frequent as one macro householder spreads his peace, and therefore his jurisdiction, over the entire realm. They never disappear altogether, however, and

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8 At least in English law, this area appears to have been extended to include 'the curtilage.' See Blackstone, Commentaries vol 4 at 225 ('the capital house protects and privileges all its branches and appurtenances, if within the curtilage or home-stall,' including structures 'not under the same roof or contiguous').
today survive at a more general level in the norms of international criminal law. But more on this later.9

By contrast, penal law is ultimately person law. Having discarded the distinction between householder and household, and instead having discovered autonomy as the universal capacity shared by all persons as such, the modern concept of law cannot sustain the notion of punishment as discipline in the name of sovereign authority. Every person has dignity, rather than every householder. The paradigmatic offense, then, is not an offense against the householder’s dignity derived from his distinctive capacity for autonomy, but a violation of the dignity of a person as such, that is, as possessed of the capacity of autonomy. The paradigmatic offender and the paradigmatic victim are both the person. Offender and victim are distinguished not categorically, but only momentarily, in the act of offense as ‘offender’ and ‘victim.’ Punishment through penal law manifests the personhood of both victim and offender by treating both as persons with the capacity for autonomy. Crime then is one person’s autonomous violation of another person’s autonomy.

D. The Relationship between Law and Police

Having sketched the distinction between police and law in general and in the realm of penalty, it is worth briefly considering the relationship between law and police, and penal law and penal police, both historically and currently, before moving on to a more detailed analysis of jurisdiction in light of this distinction. I’ve already mentioned the perhaps dominant conception of the relation between police and law, which we might call the triumphalist (or Whiggish) version: law replaced police, and that was that. Then the history of modern law, and criminal law in particular, is of a move from police to law (much as the history of the law of contracts is of a move from status to contract), with disagreements limited to the question of the extent of the transition, or its moment, but not about the existence of the transition itself. Then there is the parochial (or nationalist) story, which is really a version of the triumphalist one: law manifested itself in my own country or legal system, but not in another (or any other). Traces of this story can be found (in the area of substantive criminal law) in both the German and (in the area of procedural criminal law) the Anglo-American literature.10

The triumphalist and parochial accounts of the relation between police and law may be useful, and even interesting, if only as a matter of comparative historiography, but in this paper, and elsewhere, I’m adopting a different approach. Rather than seeing the relationship between police and law in terms of distinctions

9 I’m ignoring for present purposes the formalist (or private/public) story, which sees a parallel between the private/public distinction and that between law and police; since the focus of this paper is criminal law, which generally is classified as public law, this distinction is not useful, except to suggest the impossibility of the very notion of penal law.

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in time, space, or structure, I prefer to think of it as one of ongoing tension, between two modes of governance reflected in practices and conceptions of governing, a tension that can be traced historically and currently, comparatively within and across legal systems, and that may ultimately itself reflect a more fundamental, and yet older, tension between heteronomy and autonomy.

II. Aspects of Jurisdiction

Jurisdiction is a tremendously rich and varied concept, so much so that political and legal histories can be told through it, moving among its various meanings, from the nature and foundation of government on the one end to the composition and competence of a specific court on the other. For instance, Pollock and Maitland saw English political and legal history as the history of jurisdiction, insofar as the creation and expansion of local and eventually central power is the history of the creation and expansion of jurisdiction, the classification and reclassification of jurisdiction as natural and original, or as artificial and delegated. Eventually, the centralization of power means that the king, in English legal history, becomes the supreme judge and, as the *fons et origo* of jurisdiction, grants it out 'as though it were so much land.'

The struggle among sovereigns, and their households, and the transformation of a feudal society with its smorgasbord of lords and their local households into a modern state and its single public household, plays itself out in a struggle over jurisdiction, and in the language of jurisdiction. At the same time, jurisdictions define institutions and communities; much as every man has his household, so every community has its court: 'In the main the organization of [medieval English] communities is justiciary; the shire has a court, the hundred a court, the manor a court, the borough a court, and in a large measure it is this that makes the shire, the hundred, the manor, the borough into a *communitas*.' In Maitland’s telling, then, jurisdiction sets the boundaries of a community, politically, personally, and geographically. (Ultimately, jurisdiction plays a central role in Maitland’s attempt to uncover the reality of corporate personality in English legal history, following Gierke’s German example.)

This intimate connection between jurisdiction and the nature and extent of state power makes it a promising point of entry into an analysis of fundamental conceptions of penalty of a given legal and political system. Before we turn to this task, in Part III, however, let us take a closer look at the various aspects of our analysand, the concept of jurisdiction, within the framework of the distinction between law and police.

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12 Ibid, vol 1 at 528.
It is useful to differentiate between three basic senses of jurisdiction: jurisdiction as activity, jurisdiction as the power to perform the activity (jurisdiction as power), and jurisdiction as the manifestation of that activity (jurisdiction as scope).

A. Jurisdiction as Activity

Beginning with jurisdiction as activity, the word itself tells us that it refers to speaking, stating, or declaring (dicere) something, that something being ius. Starting with ius, and without for now getting into the notoriously difficult distinction between ius and lex, it is clear that jurisdiction is not the declaring of other non-legal norms, or commands. It is, in other words, law-diction, not police-diction. To put it in German terms, it is Rechtsprechung not Machtspruch, i.e., the declaring of ius (Recht) rather than the declarative exercise of superior power (Macht). This distinction, arguably between law and police, underlies the famous story of the interference by Friedrich II of Prussia in the case of a miller who had lost his appeals of a judgment rendered against him by the very local lord who was also the defendant in his suit. Friedrich, so the story goes, overruled the highest Prussian court, taking the miller’s side and, in so doing, manifested the very disrespect for (self-imposed) limitations on his sovereignty for which he chided the lord who blatantly had sat as a judge in his own case. In the end, Friedrich reclaimed the seat as the highest judge in the land, a crucial aspect of his sovereignty which he had never relinquished, but merely self-limited as a matter of prudence, rather than of right.

Jurisdiction as an activity, then, declares legal norms, rather than moral norms, or police norms. The nature of these norms remains unspecified; they could be principles, maxims, guidelines, even commands, if one takes a positivist view of ius. At the same time, however, they are norms of ius and not of lex. Significantly or not, there is no legis-diction—not for that matter jurisration. The distinction between ius and lex is laden, probably overladen, with significance, ordinarily by seeing in it the basis of, or at least paralleling, other distinctions, between droit and loi, Recht and Gesetz, diritto and legge, and so on, whether the second half of the term pair is thought to refer to positive law, and the first half to supra-positive legal norms. English-language attempts to capture this distinction include the term pairs justice and law, right and law, or—yet more confusingly—law and statute, or even Law and law. At any rate, this linguistic gesturing would suggest that jurisdiction is the declaring of right, or perhaps the dispensing of justice generally speaking, rather than (merely) the enunciation of a rule of positive law. Consider here the German term pair Rechtsprechung (speaking right) and Gesetzgebung (giving law), jurisdiction (as the activity of the judicial branch) and legislation (the activity of the

14 For an English-language account of this case, see David M Luebke, ‘Frederick the Great and the Celebrated Case of the Millers Arnold (1770–1779): A Reappraisal’ (1999) 32 Central European History 379.
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'given Right.' Although it could be applied sensibly to the act of adjudication, both in the sense of 'agree with' and given Right.


autonomy.\textsuperscript{18} (And even if it had, its private law origin would have little significance in the public law context of the exercise of the state’s penal power against a person.)

B. Jurisdiction as Power

The broadest, and most significant, sense of jurisdiction is as a form of power, ranging from the power to engage in the activity of jurisdiction just discussed (in German, \textit{Gerichtsgewalt}), i.e., jurisdiction in the narrow sense, to governmental power itself: sovereignty (\textit{imperium, Hoheitsgewalt}).\textsuperscript{19} While originally \textit{iurisdictio} in Roman law apparently referred to the resolution of a private law dispute through the declaration of a party’s legal right, or entitlement, it eventually entered the realm of public law with medieval glossators speaking of a ruler’s \textit{iurisdictio} as a marker of, if not synonymous with, sovereignty. The expansion of central authority, then, is measured in terms of the expansion of the macro householder’s jurisdiction.

Bartolus’s famous scheme of the distribution of power in feudal society was a ‘tree of jurisdictions.’\textsuperscript{20} Macro householder and micro householders alike had jurisdiction, but the macro householder’s was sovereign, or original, and the micro householder’s merely delegated, granted to him by the macro householder. In this sense the lords were merely ‘petit’ sovereigns, while the king as the only true (‘high’) sovereign, paralleling the distinction between petit and high treason familiar from the Treason Act of 1351. There was only one jurisdiction, with one law, the king’s law, that the magistrate and the local lord merely applied. Eventually, the many-branched feudal tree of jurisdictions became a single trunk of unitary jurisdiction, with occasional offshoots, and the feudal pyramid was leveled as the king claimed ultimate and direct jurisdiction over every man, no matter to what micro household he belonged, i.e., whose man he was.

In expanding his jurisdiction to all disputes, the macro householder arguably erases the private law origins of the Roman concept of \textit{iurisdictio}; the king is taking ownership of the criminal case, both in the literal sense of benefiting financially from his assertion of jurisdiction and in the figurative sense captured by Nils Christie of reclassifying an interaction between two individuals as a violation of his peace, and an affront to his sovereignty.\textsuperscript{21}


\textsuperscript{19} The latter may include jurisdiction to enact legislation (!), including penal legislation, as in \textit{In Re Criminal Code Sections Relating to Bigamy} (1897) 27 SCR 461, where the Canadian Supreme Court considered whether a criminal prohibition of bigamy was intra vires of the parliament of the Dominion of Canada, a question that turned on the nature of the delegation of jurisdiction.


\textsuperscript{21} ‘Conflicts as Property,’ (1977) 17 Brit J Crim 1.
As synonymous with sovereignty, jurisdiction fits more comfortably with a policial conception of penalty. Penal police, after all, is the manifestation of sovereignty in the penal realm, where sovereignty is understood as the householder's power over his household. To have jurisdiction-qua-sovereignty in the penal realm, is to have the power to discipline for household infractions, i.e., for breaches of the householder's peace, regarded as a challenge to his authority to maintain the peace, to keep his household in good order (or 'good police').

Penal jurisdiction as the power of penal discipline is essentially discretionary and unlimited; the householder, after all, is the only rightholder, the only juristic person, in the household; the household disappears into the householder like a *feme covert* into her husband (or a corporation into its head22). The only limitation—other than self-defined, -imposed, and -policed constraints of prudence and conscience—on the householder's penal power is external, through interaction with another sovereign-householder. We've already mentioned the macro householder's power to police the micro householder's jurisdiction in terms of the conditions of his delegation of that power to him (*ultra vires*). If the micro householder oversteps the boundaries of his delegated disciplinary power he is, at least in theory, himself subject to discipline at the hands of the macro householder, now as a member of the macro household, if a relatively distinguished one.

Similarly, and more relevantly for the present inquiry, the penal jurisdiction of one householder may come into contact, or conflict, with that of another. Here then, we leave the internal realm of penalty—of penal law and police—and enter the external realm of comity—of international law and police. If one householder cannot incorporate another's household as a micro household, then it must cooperate with the other householder as one sovereign with another, under conditions of mutual respect for each other's dignity. This takes us to the third, and final, sense of jurisdiction: jurisdiction as scope.

C. Jurisdiction as Scope

When faced with a possible conflict of sovereign jurisdictions, one might begin by assessing whether there is a conflict in the first place. This requires an inquiry into the scope of each sovereign’s jurisdiction. Here jurisdiction is used in the sense of applicability or validity (*Zuständigkeit, Anwendbarkeit, Geltung, Kompetenz*), which tends to be thought of as a question of administrative coordination, ordinarily determined by reference to location or subject matter, and easily sliding into questions of venue or even court assignment within a given venue. Jurisdiction, in the sense of scope, is determined by the extent of one sovereign’s power, preferably measured spatially, with one jurisdiction ending—at a border, or boundary of some sort—as another begins. So the manorial jurisdiction may extend to the tip of the manorial gutter or its fenced curtilage, and no farther.

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Jurisdiction here is used as synonymous with peace (or mund, grith). Every householder has his peace, and every householder’s peace is defined by the boundaries of his household. The German offense of breach of the house peace (Hausfriedensbruch), as distinct from breach of the land peace (Landfriedensbruch), still captures the penal significance of the connection between household and peace. Of course, the recognition of an offense of breach of the house peace, or of trespass, already hints at the emergence of a macro household whose householder’s peace encompasses that of the micro households within his realm, so that even a breach of the (micro) house peace violates (also) the peace of the macro household.

There is no doubt that the householder has jurisdiction over offenses committed within his household. Within the territorial confines of the household, jurisdiction takes on an institutional meaning. Here jurisdiction, in its broadest sense, refers to the territory and to everyone and everything within it. A house becomes a jurisdiction, so does a country, a state, but also its inhabitants, including but not limited to those engaged in the activity of jurisdiction, or holding the power of jurisdiction (Gerichtshoheit), along with the institutions and their norms and practices, i.e., the entire legal system (Rechtssystem).

Jurisdiction as scope, then, is internally speaking, merely descriptive and administrative: it captures the fact of the extent of a given jurisdiction and its internal features and organization. Externally, jurisdiction as scope marks the boundary between one sovereign’s realm and another’s. It says nothing about those who find themselves within it and, on its face, does not differentiate among its objects, human or not, in personam or in rem. (Like police, jurisdiction in this sense, extends to ‘men and things’ alike.) If jurisdiction as scope, defined spatially, is to have a legal aspect, and not merely a policial one, then it is only by serving as a proxy for the nature of the political and legal community defined by, among other things, its territorial borders. We’ll take up the question of significance, or proxy, in greater detail in the next Part, which turns to a discussion of the norms of criminal jurisdiction.

III. Norms of Criminal Jurisdiction

Criminal jurisdiction is invisible except in times of conflict. Criminal jurisdiction is just there, unquestioned, as the obvious manifestation of the state’s penal power, itself the obvious manifestation of the state’s stateness, its very sovereignty. There is no theory of domestic criminal jurisdiction, nor of choice of criminal law, or conflicts of criminal law. The very possibility of such a theory would assume the possibility of a sovereign splintered within itself. There is no theory of the so-called territorality principle, which determines jurisdiction based on the location of the

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23 StGB ss 123, 125.
crime within some sovereign’s territory (or within some sovereignty, for short). Territorial jurisdiction just is.

In the face of a possible sovereignty conflict, however, there are two options (short of war): denial or mutual respect. If the other sovereign’s sovereignty is exposed as merely apparent, there is no conflict and therefore no need to appeal to jurisdictional norms of intersovereign comity; the only sovereign’s criminal norms apply without question or difficulty. Criminal jurisdiction then becomes the usual internal matter of state administration, of criminal law, not international law. The law of the so-called dual sovereignty exception to the double jeopardy prohibition in U.S. constitutional law is an example; when faced with a possible conflict, or at least overlap, between, say, federal criminal jurisdiction and tribal criminal jurisdiction, the question is whether the Indian tribe really is an independent sovereign or merely enjoys sovereignty delegated to it by the federal government. In the latter case, a tribal offense would offend the same sovereign as a federal offense, namely the United States, thus barring application of the dual sovereignty exception.\textsuperscript{25} (Similar questions arise in cases of overlapping state and municipal criminal prohibitions, the latter giving way to the former because the city’s sovereignty is delegated to it by the state, which remains the only original sovereign.\textsuperscript{26} Overlaps between federal and state jurisdiction cannot be resolved in this way in the United States, where the states have retained their sovereignty; instead, they are handled administratively, based on local norms and central guidelines, turning on such matters—using drug criminal law as an illustration—as the quality or quantity of the drugs seized.\textsuperscript{27})

If this option is unavailable, however, and the existence of another sovereign must be acknowledged, then the available bases of jurisdiction must be explored, in the name of intersovereign respect. Criminal jurisdiction now has become a matter of external relations, of international law, not criminal law.

Bases for jurisdiction in international criminal law fall into two groups: territoriality and everything else (active personality, passive personality, protection, universality). Put another way, there are two types of jurisdictional norms: territoriality and extra-territoriality. This is not a promising start for a systematic inquiry into the subject of criminal jurisdiction; it is not very helpful to divide the candidates into two groups, one called X and the other non-X. Accounts of the bases in the second, catch-all-but-one, category, either individually or as a whole, are hard to come by. The list instead has the haphazard ad hoc feel of a hastily drawn up shopping list or, more to the point, of the table of contents of a police ordinance.

\textsuperscript{25} Oliphant v Suquamish Indian Tribe (1978) 435 US 191; Duro v Reina (1990) 495 US 676.
\textsuperscript{26} Preemption
\textsuperscript{27} DOJ Memorandum
(which may deal with vagrants, floods, firecrackers, dogs, noxious fumes, and dairy)\textsuperscript{28}.

There is no evidence of an attempt to construct a comprehensive account of criminal jurisdiction based on some, any, principle of international law or international relations, and certainly not of criminal law. In particular, there is no evidence that criminal jurisdiction was ever run through the apparatus of an enlightenment critique. It appears, in other words, that criminal jurisdiction in the international sphere, as at home, just is.

A. Territoriality

The separation between territoriality and extraterritoriality is significant for two other reasons. First, because territoriality is typically assigned historical priority. Second, because it is not a principle or norm of any kind, but merely a statement of fact, apparently in no need of justification (and therefore arguably only normatively relevant as proxy for some other characteristic, e.g. community-membership of the offender). Courts, and commentators, in common law countries predictably begin their review of the history of criminal jurisdiction with the territoriality principle.

Claims about the historical priority of territoriality, even in the common law, are difficult to verify, and are ultimately beside the point. At a time when criminal jurisdiction concerned itself with such questions as whether the offender was caught in the act, and if so whether he was caught within the lord’s manorial jurisdiction or not (infangthief and utfangthief), and when the very notion of offense was that of a violation of a householder’s peace, which was defined by territorial limits, it is clear that territoriality (of the offense) and jurisdiction were closely connected. The right of utfangthief was significant not as a matter of jurisdiction over the underlying offense (theft), but as a matter of pursuing the suspect beyond the manorial borders.\textsuperscript{29} More interesting than the history is the historiography of criminal jurisdiction, especially in court opinions. Common law courts, considering the question of criminal jurisdiction one squarely within their (rather than legislature’s) ’jurisdiction,’ can often be seen engaging in prolonged reflection about the twists and turns of judicial attempts to come to grips with the issue, as is often the case with fundamental issues that rarely attract attention. Inevitably the story of criminal jurisdiction is one of territoriality, followed by various more or less ambitious and explicit deviations from territoriality, which in turn give way to a return to the bedrock principle of territoriality, only to be softened up once more in a later case, and so on.\textsuperscript{30}

\textsuperscript{29} Pollock & Maitland, The History of English Law Before the Time of Edward I, 2d ed (1898) vol 1 at 628.
\textsuperscript{30} For an illustration not from England, see Libman v The Queen, [1985] 2 SCR 178.
Even so, everyone in common law systems agrees that territoriality is the starting point of any inquiry into criminal jurisdiction and everything else is an exception to the rule. ("The primary basis of criminal jurisdiction is territorial. The reasons for this are obvious."\(^{31}\) It is either territoriality, or not territoriality. Some common law jurisdictions remain so committed to territoriality as primary, and even the only, basis of criminal jurisdiction that even exceptional instances of extra-territoriality are converted into the rule of territoriality. Take, for instance, the provision in the Canadian Criminal Code that

a crew member of a Partner State who commits an act or omission outside Canada during a space flight on, or in relation to, a flight element of the Space Station or on any means of transportation to and from the Space Station that if committed in Canada would constitute an indictable offence is deemed to have committed that act or omission in Canada, if that act or omission...

(b) ... damages ... a flight element provided by Canada.\(^{32}\)

Much of the law of criminal jurisdiction in England, then, consists of efforts to extend English jurisdiction to conduct that is ever more remotely connected to the British Isles. Considerable attention has been given to jurisdiction over inchoate offenses, which by their nature require either virtually no conduct or conduct that by itself does not inflict harm, or violate the peace, of any kind and only crosses over into criminality because of the danger of some future harm, which however may (but also did not in fact) occur elsewhere altogether.\(^{33}\) Also common has been the extension of territorial jurisdiction to an offense as long as the conduct manifesting at least one—perhaps even the most important (‘the gist’)—element of its definition occurred on the state’s territory, which itself included ships flying the state’s flag, along with such discretionary appendages as ‘any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States’ (18 USC s 7(4)).\(^{34}\)

Occasionally attempts are made, even in common law countries, to drop the dogma that territoriality has been, is, and always will be the only basis for criminal jurisdiction. But even comprehensive statements of jurisdictional norms tend to assign territoriality pride of place, carving out narrow exceptions to the rule. To stick with Canada, then, the Law Reform Commission of Canada’s 1980’s draft code recognized a combination of the protective principle and the active personality principle for ‘crimes against State security committed outside Canada by Canadian citizens and others who benefit from the protection of Canada…,’ while at the same

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\(^{32}\) Can Crim Code s 7(2.31) (emphasis added).

\(^{33}\) eg, Ariz Rev Stat s 13-108(A)(2) (out-of-state attempt or conspiracy to commit in-state crime); id s 13-108(A)(3) (in-state attempt or conspiracy to commit out-of-state crime). See also Farmer in this issue.

\(^{34}\) Paralleling similar moves in the law of actus reus/mens rea (so that the so-called voluntary act requirement/intent requirement was satisfied as long as one offense element manifested itself in a voluntary/intentional act). See also Farmer in this issue.
time retaining the notion of ‘protection’ as a marker of community membership, an interesting reminder of the connection between territoriality and the scope of sovereign peace.\textsuperscript{35}

Civil law countries, by contrast, have had no difficulty setting out all of the generally recognized bases of criminal jurisdiction, even if they consider territoriality the primary norm. The German Penal Code, for instance, at the outset lists territoriality (ss 3 & 4), protection (s 5: offenses against domestic legal interests), universality (s 6: offenses against internationally protected legal interests), passive personality (s 7(1)), and active personality (s 7(2)). More on these alternative jurisdictional norms below.

Now an account of territoriality from a policial perspective takes little effort. After all, territoriality circumscribes the limits of the householder’s power, the extent of his peace, which encompasses his household, and within which he enjoys unlimited discretionary power to keep his peace, and to maintain his authority. From the perspective of police, territory as the foundation of jurisdiction does not distinguish between the various components of the sovereign’s household. Anyone and anything can occupy territory, and the householder’s power extends over it all, without drawing a categorical distinction between human and other resources, animate or inanimate. Anyone and anything can be policed; the state’s police power is ‘the power of sovereignty, the power to govern men and things within the limits of its dominion.’\textsuperscript{36}

To construct a law-based account of territoriality requires more work. In particular, it requires interpreting territory, treating it as a proxy for some other notion that can do the requisite legitimatory work. After all, the move from police to law is, fundamentally, the move from description to justification.

So Michael Pawlik recently has attempted to justify, rather than merely to describe, the connection between territory and criminal jurisdiction, drawing on a conception of penal law, rather than on considerations of international relations, or internal household management. Citing Hobbes, he sees it as a proxy for the duty of loyalty, and of obedience, that the ‘inhabitants of a territory’ owe the state, which has assumed the duty of protecting them from the criminal harm.\textsuperscript{37} This notion of reciprocity, of course, also underlies the relationship between householder and household, between the lord and his man, with the oath of fealty binding one to the


\textsuperscript{36} License Cases, (1847) 46 US 504, 583.

other. Pawlik updates this account by replacing the duty of loyalty to one sovereign (the lord) with the duty of loyalty to another (the state).[^38]

Pawlik nonetheless clearly sees this account as a legal, rather than a policial, one; the connection to a modern autonomy-based conception of law, however, draws from his theory of crime and punishment, to which his brief account of territorial jurisdiction serves as a supplement. That obedience-based account fits with his theory of criminal law as law mainly because the theory itself rests on a duty of loyalty, not to the state, but to law (Rechtstreue), or at another point, interestingly, to 'the project of a "peace through law."'[^39] In this respect, Pawlik draws on his teacher Günther Jakobs's distinction between citizen criminal law and enemy criminal law (Bürgerstrafrecht and Feindstrafrecht), with the enemy being defined, at least in one telling, as lacking the requisite loyalty to law.[^40] For our purposes, Pawlik's attempt to consider the norms of criminal jurisdiction from the perspective of criminal law is significant simply because it exists, wholly apart from the merits of the general theory upon which it rests, any discussion of which exceeds the scope of this paper.[^41]

Territory may have justificatory significance in another, less idiosyncratic, way. The idea here is to treat the commission of the offense as (perhaps rebuttable) evidence of the membership of at least the offender in the relevant penal normative community. The inference from locus criminis to community membership of the offender (and even of the victim) is of course much more likely to be defeated today than at a time of less mobile rural societies. Yet similar notions continue to be invoked in support of the jury as an institution of constructive self-judgment of the offender by his 'peers,' or people of the neighbourhood, where the neighbourhood is presumed to be both his and the victim's. The point isn't the accuracy of the presumption, but the indirect connection between territory and legitimacy, now based not on a notion of a duty of loyalty to law, or some such thing, but on the Grundnorm of modern law: autonomy. Territoriality here stands for, however imperfectly, the commitment to justifying the exercise of all state power, and of state penal power in particular, in light of the autonomy of its object. Legitimate punishment is self-punishment, ideally through self-generation, self-imposition, and self-infliction of penal norms. (Another way of putting this is to say that territoriality is a proxy for residence and therefore for citizenship, a concept that, however, adds more heat than light, combining vague communitarian connotations with the attendant exclusionary potential, highlighted ironically by Jakobs's and


[^39]: Michael Pawlik, ibid at 92.


[^41]: For some further discussion in the context of the significance of citizenship in a theory of criminal law, see Markus D Dubber, 'Citizenship and Penal Law' (2010) 13 New Crim L Rev 190.
Pawlik’s analytically suggestive but normatively troubling distinction between citizen and enemy criminal law.\textsuperscript{42) 

B. Active Personality

The active personality (nationality) principle attaches criminal jurisdiction to offenders who are nationals or citizens or, in some cases, others who are connected in some significant way to the sovereign state in question (such as those ‘who benefit from [its] protection’\textsuperscript{43}). From the policial perspective, active personality simply reflects the significance of the offender’s membership in the household. The offender is a human household resource no matter where he might be, or act. The locus criminis in this context may matter if it falls within the household, the peace, of another householder, micro or macro. Prudential considerations governing relations among householders then may come into play, which might counsel against exercising the householder’s disciplinary power. Of course, an offense against the sovereign must have been committed in the first place, even if it occurred outside the territorial limits of the householder’s peace. What amounts to an offense against the sovereign’s dignity, however, is a matter of discretion for the sovereign and need not be constant (using discretion of norm \textit{enforcement}, as opposed to norm generation or imposition, familiar from the prosecutorial practice of plea bargaining), and may encompass the violation of any command.\textsuperscript{44

While the common law is ordinarily associated with a singular attachment to territoriality (with certain exceptions, including isolated instances of active personality—in particular based on British subjects’ ‘personal allegiance’ to the British sovereign\textsuperscript{45}), the civil law tends to be thought of as the domain of personality, and active personality in particular, presumably reflecting the influence of Roman law (\textit{jus civile as Roman citizens’ law}). Interestingly, the modern history of criminal jurisdiction in civil law countries, notably France and Germany, does not fit this pattern.\textsuperscript{46 While} France in the late eighteenth century briefly recognized the territoriality principle—based apparently on various and varying considerations, including that extraterritorial acts could not disturb the French public order, presuming the conception of an offense as a disturbance of public order—it continued to oscillate between territoriality and active personality throughout much of the 19\textsuperscript{th} and 20\textsuperscript{th} centuries. Developments in Germany were similarly unstable, if


\textsuperscript{44} For a completely unselfconscious invocation of the conception of crime as offense against the sovereign’s dignity (and, in fact, several sovereigns’ dignity) through mere violation of a penal norm, see \textit{Heath v Alabama}, (1985) 474 US 82 (dual sovereignty exception to double jeopardy prohibition); see also the conception of ‘contempt of court’ as an act of disobedience, including the mere violation of a court order, eg, NY Penal Law s 251.50.

\textsuperscript{45} eg \textit{In Re Criminal Code Sections Relating to Bigamy} (1897) 27 SCR 461.

\textsuperscript{46} For the following, see Dietrich Oehler, ‘Die Grenzen des aktiven Personalitätsprinzips im internationalen Strafrecht’ in Karl Engisch & Reinhart Maurach, eds, \textit{Festschrift für Edmund Mezger zum 70 Geburtstag} (1954) at 98.
not haphazard, moving back and forth between territoriality and active personality. For instance, France turned to active personality invoking German rationales at precisely the time when Germany abandoned active personality in favor of territoriality in the German Penal Code of 1871.

Then, in 1940, Germany again returned to the active personality principle, before switching, thirty-five years later, once more to the territoriality principle, supplemented by the other four bases of jurisdiction cited above (in ss 3-7 StGB), where it remains today.47 Starting in 1940, section 3 of the German Penal Code provided, simply, that 'German criminal law applies to the act of a German national whether or not he commits it in Germany or a foreign country.' Section 4 retained the territoriality principle for foreigners.

German criminal law thus applied to Germans, regardless of the locus criminis. Beginning in 1941, Poles and Jews, by contrast, were governed by an administrative order that radically simplified procedural and substantive penal provisions alike and was framed in personality terms, both active and passive. Active personality applied its provisions to Polish and Jewish defendants; the protective impulse animating the passive personality principle and the protective principle ran through its special part, criminalizing offenses against 'a German on account of his membership in the German ethnic community' as well as, generally, against 'the sovereignty of the German empire and people.'48 In 1940, the German Ministry of Justice developed plans for a revival of penal regulations governing German colonies, similarly drawing distinctions based on active personality, which had been in place from the late nineteenth century until 1919.

The personality principle is a central feature of colonial criminal law, as it was a feature of Roman imperial government. Colonizers were subject to the ordinary criminal law of the colonizing power, with perhaps some adjustments to reflect local conditions; the colonized were subject to a separate penal regime, also determined by active personality, ordinarily with separate definitions of, or enhanced punishments for, offenses against colonial institutions and members of the colonizing community.

The penal regimes of military occupation—which may precede, and morph into, a colonial regime—have similar personality-based features. For instance, the penal regime of the Allied military occupation of Germany after World War II originally drew sharp jurisdictional, and substantive, distinctions on the basis of active and passive personality; all offenses committed by, or against, the Allied occupational forces fell under Allied jurisdiction.49

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47 2d StrRG of July 4, 1969 [Jan 1, 1975].
48 Polenstrafrechtsverordnung (Dec 4, 1941).
49 Allied Control Council Law No 4, art III (Oct 30, 1945).
Military criminal law, wholly apart from the context of occupation, is among the penal systems that rely exclusively, or at least heavily, on active personality. Jurisdiction under the U.S. Code of Military Justice, for instance, is entirely personal: it applies 'in all places' to members of the military community (ss 802, 805). Military jurisdiction is entirely policial; its function is to maintain the discipline and good order (i.e., the police) of the armed forces. It applies only to certain persons whose character, and in particular whose loyalty and obedience, are policed by using acts or omissions for diagnostic purposes. The ultimate penalty is exclusion from the community, being marked as an outlaw, 'dishonorably discharged' after receiving a diagnosis of suffering from an incurable character flaw, an incorrigible human threat to the police of the military household.

Indigenous penal law is an interesting case. In the United States, tribes originally had criminal jurisdiction over offenses in 'Indian country,' based on the territoriality principle, as an incident of tribal sovereignty. This is no longer the case; tribal criminal jurisdiction now extends only to Indian offenders, including to both member and non-member Indians, but not to non-Indians. The active personality principle, in other words, is used as a limitation on the territoriality principle; tribal criminal law applies to offenses committed on its territory, provided they are committed by an Indian. The active personality has not an expansive role; it is not suggested that tribal criminal law could be applied to an Indian who committed an offense not on Indian land. The passive personality principle plays no role; the identity of a victim as Indian or non-Indian does not affect jurisdiction. Offenses with a non-Indian perpetrator and victim are subject to state jurisdiction.

More mundanely, but no less interestingly for our purposes, within ordinary German criminal law, the endorsement of the active personality principle in 1940 reflected a particular conception of penalty, Täterstrafrecht, 'actor criminal law' (in contrast to Tatstrafrecht, 'act criminal law'). Under this conception, the act was significant only as a symptom of the actor's characteristics; since crime was an act of disloyalty to the German people, or the Führer (the ultimate macro householder), and in its final analysis, treason. As with many other reforms implemented between 1933 and 1945, one can think of this conception of penalty as a National Socialist innovation or as having deeper roots, particularly in the Progressive school of criminal law and criminology associated in Germany with Franz v. Liszt, depending on whether one emphasizes its specific racist, nationalistic, and

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52 Jurisdiction is determined by 'Jurisdictional Summary Chart,' with four categories in the left-hand column: Indian perpetrator, Indian victim; Indian perpetrator, Non-Indian victim; Non-Indian perpetrator, Indian victim; Non-Indian perpetrator, Non-Indian victim. US Att'y Criminal Resource Manual 689.

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communitarian aspects or its general shift of focus onto the offender’s personality and the diagnosis of penal abnormality.

In contemporary German criminal law, Täterstrafrecht is generally invoked as the contrast to Tatstrafrecht, the generally accepted conception of criminal law; at the same time, it is acknowledged that Täterstrafrecht is alive and well in juvenile criminal law, which turns on the diagnosis of 'harmful tendencies,' and even helps limit the scope of general criminal law by insisting that criminal liability requires not only commission of the proscribed conduct but also possession of the requisite characteristics in general—as, for instance, in Jakobs' and Pawlik's term, insufficient loyalty to law—and in particular—as envisaged in the conception of the offense. The prime example here is the definition of murder, which not coincidentally was adopted around the same time as the active personality principle. Under the German Penal Code, a definition of the crime has been replaced with a definition of the criminal: 'A murderer ... is any person who kills a person for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence.'

From the yet broader perspective of the distinction between law and police, the active personality principle as a manifestation of Täterstrafrecht fits snuggly into a policial conception of penalty. Täterstrafrecht in general is policial in approach insofar as it regards the offender not as a person with the capacity for autonomy, but instead as a site of abnormality that, depending on the diagnosis, is either treatable or not. In the first case, he is subjected to rehabilitative, or reformative treatment; in the latter, to incapacitative treatment. One way of thinking about the modern versions of this approach to penalty as disciplinary treatment is to regard it is a project of penal police science, which rationalizes the householder’s otherwise haphazard discretionary diagnosis of the offender’s potential threat to his sovereign authority.

From the perspective of law, the active personality principle may appear as a recognition of the legitimatory significance of the offender’s membership in the penal normative community. The legitimatory significance would be indirect, as in the case of territoriality, but less remote; nationality or citizenship or even residence is a more direct proxy for membership in the penal normative community, and therefore the opportunity to participate in the generation of norms (and not merely in their imposition and enforcement), than the locus criminis.

C. Passive Personality

While the active personality principle focuses on the offender, the passive personality principle on the victim. In a policial light, passive personality reflects the householder’s authority to protect the household resources under his power.

54 StGB s 211.
An offense against a member of his household is a violation of his peace, personally rather than geographically defined.

From the perspective of law, passive personality highlights the state’s obligation to manifest and protect the autonomy of all of its constituents, including not only persons labeled 'offenders' but also those labeled 'victims.' In fact, from the perspective of law, it is the autonomous violation of one person by another that grounds the state’s power to punish. As a person, the victim—just like the offender—has the right to be subject only to penal norms that she can regard as her own, in the sense that she had the opportunity to generate, impose, and enforce them, always in a way that is compatible with the offender's personhood, i.e., his capacity for self-government.

D. Protection

The protective principle, from the perspective of police, reflects a sovereign-centered conception of penalty. The sovereign is the ultimate victim of criminal offense. In this light the protective principle appears as a more direct, and generalized, version of the passive personality principle. The passive personality principle, from the perspective of police, captures only one way of offending the sovereign, by committing an offense involving one of his human household resources. The protective principle instead covers offenses directly against the ultimate victim of crime in penal police, the sovereign, i.e., offenses that are directly, rather than indirectly, public insofar as they offend the household as a whole, rather than one, or some, of its members.

An account of the protective principle from the perspective of law is less straightforward since it applies to direct offenses against the state, without even an intermediate offense against a specific person. Instead, the justification of the protective principle will turn on the legitimacy of public offenses themselves, which must be connected ultimately to the autonomy of individual persons. A common attempt to meet this legitimatory challenge is to frame public offenses as offenses against the fundamental conditions for the protection of individual autonomy. So, the German Penal Code applies the protective principle, for instance, to the offense of high treason, defined as 'undertak[ing], by force or through threat of force, to undermine the continued existence of the Federal Republic of Germany; or to change the constitutional order based on the Basic Law of the Federal Republic of Germany.'\(^{55}\)

E. Universality

Universality, a norm that applies jurisdiction to offenses committed no matter by whom, against whom, or where, is the jurisdictional principle apparently least

\(^{55}\)StGB ss 5, 81.
compatible with a policial account of penality. The sovereign, after all, is central to penal police as paradigmatic (in fact, as the sole) victim and as the (sole, monopolistic) wielder of discretionary (original, as opposed to delegated) penal power. The sovereign cannot easily figure into a policial account of universality as victim, nor as disciplinarian. In fact, he appears initially as an absence; the universality principle, from a policial perspective, covers the treatment of the lordless man, the peaceless, the outlaw, the hostis humani generis, the enemy of all mankind, who is—or is treated as if he were—outside the peace of any particular sovereign, and therefore both outside his protection and outside his discipline.

The peaceless, either having removed himself from the peace of his sovereign or having been expelled from that peace, is then subjected to the jurisdiction of a given sovereign according to a more or less formal inter-sovereign understanding, under which each sovereign is authorized, and perhaps even obligated, to incapacitate the outlaw threat before it manifests itself elsewhere. Universality thus would be a maxim of convenience, or of indirect (self-)protection, rather than a separate ground of jurisdiction. In the end, universality in penal police may well be reducible to the other norms of jurisdiction, and therefore ultimately to the sovereign householder’s discretionary authority to maintain his household’s police as he sees fit, even through the elimination of remote threats and, if necessary, through coordination with other sovereigns (without ascribing to sovereigns the sort of fraternal sentiments invoked in pronouncements such as ‘[i]n a shrinking world, we are all our brother’s keepers.’). Without a universal sovereign, and a universal household, no immediately universal penal police action is conceptually possible.

Universality instead would seem to fit more comfortably with a law-centered conception of penality, as the basic account of crime in penal law initially makes no reference to the location of the offense, the status of the persons constituting it (‘offender’ and ‘victim’), or the offense’s direct effect on the state. Crime instead is an interpersonal relation or event, with one person autonomously violating another’s autonomy. Nonetheless, the imposition and enforcement of the penal norms of a particular sovereign must also be consistent with the capacity for autonomy. Without any link between the offense, the offender, or the victim to the sovereign asserting jurisdiction, some other evidence of the offender’s consent to the jurisdiction, or perhaps to the generation of a sufficiently similar norm in some other penal normative community, would be required.

Perhaps universality, then, is best viewed as reflecting the abstract, personal aspect of crime in a penal law regime. Now some (most notoriously Hegel, and contemporary Hegelians, like Alan Brudner and Pawlik) have argued that crime is not only an interpersonal event, and the offender is not only a person, but also a

56 This is hardly news. Critics of international criminal law have long puzzled over the possibility of its apparent sovereignlessness.
57 Libman v The Queen [1985] 2 SCR 178 ¶ 77.
subject and a citizen (in Pawlik's formulation), or to put it differently, that crime is not only a moral relation, but also a legal one, and more specifically a public—as opposed to a private—legal one involving the state. Autonomy as the lynchpin of modern law, from this perspective, would require critical analysis not only in light of the offender’s personal—or moral—autonomy, but also his autonomy as a member of a particular political and legal community. In that event, the universality principle may not be sufficient to establish the legitimacy of extending the penal norms of a particular state to a particular crime (and therefore a particular offender \textit{qua} citizen). Of course, regarding a jurisdictional principle from the perspective of law merely permits its critical analysis; whether it survives that critical analysis is—and must be—an open question.

\section*{Conclusion}

In the end, the norms of criminal jurisdiction do not add up to much, no matter how one looks at them. No one would mistake the potpourri of jurisdictional norms for the result of an extended inquiry into the science of penal police. From the perspective of law, they can be—with some squeezing—fit into an autonomy-based account of penalty. The imperfect fit of norms and legitimatory foundation is not unusual; noteworthy instead is the lack of attention to the legitimatory inquiry in general. One could imagine, as in other basic matters of criminal law, various schools of thought—and even of doctrine—emerging over time, each jockeying for a position of dominance in the pursuit of a common project. Instead, the question of jurisdiction has generated little scholarly interest as a matter of criminal law.

Instead, one finds an ever evolving (and revolving) collection of norms that are adopted, abandoned, reaffirmed, supplemented, limited, abandoned once more, and then generally ignored, or treated as inevitable or at least as serviceable enough. From a policical perspective, this is hardly surprising. Notwithstanding the attempts by various authors of manuals of good housekeeping throughout the history of Western sovereignty, some with grander police-scientific ambitions than others, the practice of penal police remains essentially discretionary, flexible, opportunistic, and pragmatic at best, arbitrary and (more or less) malignly neglectful, at worst.

As a matter of penal law, however, the 'law' of criminal jurisdiction hardly even manages to supply the exercise of penal power with a veneer of legitimacy. (To pick an example from another corner of criminal law: it is as if no one bothered to dress up vagrancy as possession.\textsuperscript{59}) Instead of developing a penal law account of jurisdiction, in light of some conception of the legitimation of penal power through law, the discourse—such as it was—went straight to international law, or rather an alegal conception of international law as intersovereign relations, a realm where householders meet over tea to coordinate the disposal of human nuisances. To the extent that the law of jurisdiction is treated as a matter of criminal law at all, it is

regarded as a secondary and essentially administrative question of bureaucratic competence, subject to adjustment as necessary or at least prudent, without consideration of the underlying power to generate and apply the norms to a particular person in the first place, i.e., of the who and the how, rather than the whether.