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Preventive Justice: The Search for Principles
Markus D. Dubber*

Introduction

The search for principles of preventive justice is an undertaking that, at first glance, may appear too ambitious. Preventive justice has been said to encompass a wide range of legal doctrines and penal measures, substantive and procedural, legislative and executive, from reckless endangerment and dangerous driving on one end, through possession offenses in particular and inchoate liability in general, to ASBOs, control orders, to a whole panoply of investigatory “law enforcement” techniques (detecting, collecting, processing data of various sorts) and eventually to the “preventive state” itself. A truly daunting task, finding a set of principles that would tidy up this wide and varied lot.

Yet at second glance, the quest for principle may not be ambitious enough. I don’t mean a limitation to substantive criminal law, though that would be somewhat surprising since preventive justice works in primarily procedural ways, or the exclusion of judicial state action from the inquiry. I mean not the scope of the search, but its depth. The search for principles of preventive justice is unlikely to succeed, or rather is misguided, if it is regarded as a process of selection, presumably among some principles of justice (or prevention?), which for some reason have not been applied, or have been applied with insufficient vigor, to a range of state actions labeled “preventive justice” measures. In this view, preventive justice is the exception to some rule and the task is to bring the exception back in line, to rope in the new rogue penalty of prevention, to reestablish the rule of law, and so on.

What is at stake, however, I will suggest in this paper, is not merely the principledness of preventive justice, but the principledness of penal justice as a whole, not the legitimation of the preventive state, but of the penal state. The search for principles of preventive justice is not a matter of application, or even of extension, but one of legitimatory archaeology, an inquiry into the foundations of the modern penal state and therefore the legitimacy of state punishment in a modern liberal democracy.1 The problem with preventive justice, on this view, is

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not that some or all of the measures of “preventive justice” suffer from a justice deficit (leaving aside the question of their preventive success), but that the justice of the penal state itself has received insufficient attention. The problem with the preventive justice is not that preventive justice is unprincipled, but that the principles of penal justice remain obscure.

What is needed is not an application of some list of acknowledged “principles” or rather (often Latinate) expressions (mens rea, actus reus, perhaps, or, in the procedural realm, the golden and silver threads of the presumption of innocence and the burden of proof beyond a reasonable doubt or, of course, nulla poena sine lege or other variations on this theme), but a legal-political genealogy, a theoretical dig in other words, into the foundations of the modern state’s penal power. What is needed, in the end, is a critical analysis not of preventive justice, but of penal justice itself.

On this account, the phenomenon of “preventive justice” is not some disease in need of a cure, a deviation in need of correction, but a symptom of a more fundamental condition: the absence of a comprehensive legitimation of state punishment, the absence of principle, not the absence of principles of preventive justice. The state of the contemporary penal state in this light reflects the absence of principled constraints on penal power. Iron principles like mens rea and so on were neither bent, nor broken. Unrooted in the foundations of state power in a liberal democracy, and instead merely retained from an aprincipled conception of penalty, these phrases have no more bite in the preventive state of the twenty-first century than they did in the preventive state of the seventeenth. Lacking are not principles for the new preventive state, but for the liberal penal state of yesterday, today, and tomorrow.

To the extent the search for principles of preventive justice proceeds from the assumption of the existence of fundamental principles of penal justice it raises important questions about the enterprise of legal scholarship, and even of law reform. For this manner of proceeding in fact may prove counterproductive, if the aim of the exercise is to subject any form of penal state governance to principled constraint rather than the extension of ungrounded, anachronistic, malleable, and—perhaps, but for our purposes not necessarily—obfuscating maxims and threads of various kinds. A critical analysis of the legitimacy of exercises of state penal power, in other words, should seek to replace or at the very least to radically reinterpret and reroot “principles” such as mens rea, rather than aim to extend them, in their at best neglectful meekness and pointlessness.²

Here Wolfgang Naucke’s distinction between criminal law as the law of the fight against crime (Verbrechensbekämpfungsrecht), on one hand, and as the law of

limitations on the fight against crime (*Verbrechensbekämpfungsbegrenzungsrecht*), on the other, comes to mind.3 *(A similar, more colorful and pithier, distinction is that between green-light and red-light conceptions of administrative law.4) An insufficiently radical, i.e., foundational, critique of a given penal regime risks abandoning the critical function of criminal law scholarship by hardening the regime’s veneer of legitimacy, rather than continuously threatening to scratch it, never mind to peel it away. The difference between a green-light and a red-light conception of criminal law scholarship, and of its subject, may be the difference between eliminating exceptions to the rule of principledness of a given penal regime and questioning the underlying rule.

This is not to deny the need to face the realities of penal power, nor to deny that “positive law” has a role in legal theory, and not only in the business of law reform. It is instead to insist on the selection of the appropriate mode and depth of scrutiny, not merely its scope, or rather its width. The search for principles, as a foundational inquiry, cannot limit itself to the rounding up of exercises of state penal power found to be more or less objectionable, or at least novel or unfamiliar, the better to corral them within pre-existing pens of principle. In this search, the principles are set, the task is set, and the success of the venture depends only on the vigilance and diligence of the person who sets out to find insufficiently principled practices and assign them to their proper principle or principles.

This mode of inquiry, unlimited in scope but limited in depth, wide but shallow, may fall short along both dimensions of critical analysis. It may prove insufficient as a matter of analysis insofar as it is content to enumerate existing doctrines and practices, with a positive and presentist bias, rather than considering them in their systematic and historical context. Even if the resulting list of offending doctrines and practices were complete, or at least representative (though this would be difficult to determine given the acontextual approach), the analysis may remain flat, by matching doctrines and practices to principles, if the latter are not rooted in a comprehensive account of penal justice and are simply treated as rules exceptions from which are impermissible, or at least require explanation. Unless the connection to “justice” is clarified, and the principles are established as principles of justice, deviation from the principles does not create a justice deficit.

Principled analysis should be pursued both horizontally and vertically, with the vertical search for principle not being content to connect one rule with another more basic one, but continuing to push deeper to unearth more fundamental layers of principle, which eventually connect to the principles of constitutional law, perhaps, and ultimately and most crucially to the legitimacy of state power. Identifying a principle, or at least an old law saw, like *actus non facit reum nisi mens

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sit rea or, in German law, the Rechtsgutsprinzip or Schuldprinzip, or, less clearly, the “fundamental principle” of “moral voluntariness” in Canadian criminal law,\(^5\) without inquiring into its legitimatory foundation is insufficient already at the level of analysis. Simply noting that a given doctrine or practice does, or does not, comply with some principle or other, mens rea, say, or nullum crimen sine lege, is an instance of incomplete analysis that fails to set the stage for the move from analysis to critique, by failing to identify, or even to seek, applicable principles and therefore also failing to note their absence. In critical analysis, the analysis is only a means to the end of critique. Shallow—exclusively horizontal—analysis may help to perpetuate a penal regime that appears to be subject to principle, with occasional exceptions, yet is unrooted in the fundamental commitments of a liberal democratic state (or whatever form political power might take).

Wherever analysis ends, and critique starts, the objective of critical analysis of law is to test law against its inherent and distinctive claim to legitimacy. I would argue that law’s claim to legitimacy is already distinctive of it as a mode governance, in contrast to police, which lays no claim to legitimacy, and is in this sense alegitate. Even if legitimation in general is not distinctive of the concept and project of modern law—in a state under the rule of law, the Rechtsstaat—then, I suggest, the recognition of personal autonomy, or self-government, as the legitimatory Grundnorm is. But whatever principle emerges as the lynchpin of legitimacy, it is that principle against which the system, or at least a collection, of doctrines and practices is measured, ultimately and perhaps indirectly through various intermediary principles. This legitimacy critique is impossible with an incomplete or haphazard analysis of the positive law, as doctrine and as practice, and in context.

That contextual analysis, I believe, would include an inquiry into the mode of governance reflected in the doctrine or practice in question. If one accepts, as I do, that law is but one mode of governance, which can only be grasped, and was posited, in contrast to another mode of governance, call it police (or regulation, administration, management, in more recent lingo), and that modes of governance differ in, among other things, their concern for, or at least conception of, legitimacy as well as in their rationales (or logics, or even governmentalities), then the critique of a given doctrine or practice would be impossible without a contextual analysis of this sort. Arguably, the very notion of critique, and not merely critique in terms of legitimacy, is distinctive of the realm of law, rather than police, though of course this would depend on one’s view of the distinction between these ideal types of governance.\(^6\)

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In what follows, I will sketch a critical analysis of doctrines and practices commonly identified—and identified in particular by Ashworth and Zedner—as instances of “preventive justice.” Part I, the bulk of the paper, will present the analysis, and part II critique. In Part I, after rehearsing briefly the distinction between law and police as alternative modes of governance best viewed in contradistinction to one another, I will argue preventive justice is neither new, nor different, being instead a long familiar instance of penal police. Part II moves from analysis to critique, considering briefly various criticisms of “preventive justice” raised, or implied, and concluding that they miss the mark, either because they are inapposite (from the perspective of police) or unfounded (from the perspective of law).

I. Analysis

“Preventive justice” is not new, nor is it different. The search for principles of preventive justice thus points not in new directions, but in old directions, backward rather than, or at least as much as, forward. It is characteristic of the general ahistoricity of criminal law scholarship, not only but perhaps especially in common law countries that doctrines and practices are not regarded in their historical context.

This ahistoricity is both odd and troubling. It is odd because the common law otherwise is closely associated with gradual development over time, or at least from judicial decision to decision, as the ever-extending chain of precedents connects the present, and the future, to a mythical past. This common lawyer’s history, however, is strangely ahistorical, as the common law progresses on its own terms and even by its own logic, autonomous and thus free from (improper) influences of policy, politics, and other historical context, driven instead by an eternal, and peculiarly English, common sense (mainly, if not exclusively, of members of the judiciary). The ahistoricity of the common law of precedent is troubling insofar as it reflects a Whiggish trust in progression, as common sense unfolds itself more completely over time, occasional refoldings in the form of eventually overruled decisions, notwithstanding.

Given this ahistorical attitude, an objectionable doctrine or practice may appear new and—shifting the comparison from the historical to the contemporary—different. The novel must be brought in line with the traditional, if not the historical; it must be reconciled with precedent and its time honored “principles.” Given the ever advanced state of criminal law, an objectionable doctrine or practice may also appear different, when compared to other contemporary doctrines and practices, and must be rendered consistent with them. The source of the objection is thus not

illegitimacy, or injustice, so much as inconsistency, or difference. The connection between the norm and justice, however, remains unexamined. The norm’s very existence—its historical resilience, or pedigree—is its claim to attention.

The common law’s ahistoricity may be odd, and troubling, but it is not unique. German law, too, is ahistorical, but in a different sense, and for different reasons. German law, unlike English law, is openly ahistorical. There is nothing odd about the ahistoricity of German law because it does not regard itself as historically rooted, not even in a mythical-mystical past whose mist obscures the its origins. English law is a chain of precedents ever more closely approximating common sense; German law is a science ever more closely approximating truth. To inquire into a doctrine or practice’s historical context is pointless—either because it hasn’t changed or because, if it has changed, it has been replaced by a more correct one. Inquiries into history in German law are as relevant to it as inquiries into the history of science are to physics. (When the history of a supposed principle—such as the *nullum crimen* principle—is investigated, it may well turn out that the principle enjoys far less universal acceptance than one would expect in a scientific system.) Neither system, one truth-based and the other persistence-based, inquires into the legitimacy of its correct or time-honored doctrines and practices.

A. Police

A historical approach reveals that doctrines and practices commonly grouped under the heading “preventive justice” are neither new nor different. They are, misleadingly labeled, instances of the exercise of the longstanding, if not ancient, patriarchal power of police. Penal police is not an ancient or at least premodern artifact of a mode of governance overcome by the enlightened invention of a state under the rule of law specifically defined against it. Instead, English penalty today remains firmly rooted in a policial conception of crime as the violation of the sovereign (macro or royal) householder’s peace.

There is thus a danger, in studies of purportedly new phenomena like the war on terror, the “security agenda against terrorism,” or the preventive state, to present their subject as a deviation from a norm of principledness, or at least relative principledness, and perhaps even, for added emphasis, as a paradigm shift, a suggestion possibly bolstered by references to the (now already not-so) new sociological phenomenon of “the risk society” described by Ulrich Beck. It is useful,

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however, to investigate not only the perceived impropriety of recent state action, but also the principledness of the norm from which they are said to deviate. It may be misleading, for instance, within the context of the distinction between law and police as modes of governance, to characterize developments as the move from one ideal type to the other, most commonly—in the critical literature—from a surprisingly unexamined state of law to a state of police ("policification" (Verpolizeilichung)), whether that transition is portrayed as an exception to the norm or not.9

At any rate, from this perspective, the focus on prevention turns out to be a bit of a red herring, no less than the pursuit of preventive justice. Prevention is not unique to police. Law, as the mode of governance rooted in the manifestation of the capacity for autonomy of persons as such, is not inconsistent with prevention; there is no reason why the law state should not seek to prevent violations of personal autonomy, and instead interfere only after the violation has occurred. What distinguishes the police state from the law state is not the timing of its actions, but its aim: to protect the sovereign’s peace in one case, and to manifest the autonomy of persons in the other. This is not to say that the law state would not recognize constraints on its power to interfere with the autonomy of the person thought to pose a threat to another’s autonomy that would be foreign to the police state. The point is merely that there is nothing objectionable about prevention from the perspective of law and that prevention therefore is not unique to police.10

The proper focus—or perhaps the proper level—of the inquiry into instances of "preventive justice" thus is the mode of governance they reflect, not their preventive aspect. (The focus on "justice" is misleading for another, more obvious, reason: Since justice is unique to law, and foreign to police, the search for instances of preventive justice, strictly speaking, is bound to produce incomplete results, even if one leaves aside, or disputes, the centrality of the policial conception of penalty in England.)

A focus on police, rather than on prevention (on the basic mode of governance, rather than a particular means)—and therefore on the police state, not the preventive state (or, in the German literature, the Polizeistaat rather than the Präventionsstaat11)—supplies the inquiry not only with the appropriate depth, but also with the necessary scope. As a comprehensive mode of state governance, police

9 This shift from one mode of penal governance to another is to be distinguished from policification in the more specific sense of an expansion of the competence of the police as an institution, and of the jurisdiction of police vis-à-vis the jurisdiction of regular courts, as described for instance in the legal historiography of Nazi Germany. See, e.g., Andreas Schwegel, Der Polizeibegriff im NS-Staat: Polizeirecht, juristische Publizistik und Judikative 1931-1944, at 125 (Tübingen: Mohr Siebeck 2005).
10 See infra.
is not limited to either substantive or procedural norms, nor to one branch—or aspect—of government rather than another. Police manifests itself in procedural and substantive norms alike, and in fact challenges the distinction between the two, at least functionally, if not formally, as for instance in the case of possession offensive, which can be seen as street sweeping tools or gateway offenses that in their ubiquity and ease of detection and proof are well suited for the investigation, identification and elimination of human dangers, and therefore as performing a function once (and still) performed by vagrancy offenses since the fourteenth century.12

Similarly, all branches of government exercise the power to police. The very notion of a separation of powers, and the assignment of a given governmental power to one branch or other, is foreign to police as a mode of governance. The power to police is the modern manifestation of the householder's power over his householder, transferred from the micro household of the traditional family (Kleinfamilie) to the macro household of the state, and from the personal sovereign of the householder to the abstract sovereign of the state, or the people (or the public, the Volk, the nation, etc). From the perspective of the police power, the various powers, or tasks, of government all spring from the same source of sovereignty; there is no need for a strict separation of powers, unless recommended by prudence, nor is there a point in then balancing these powers, should they have been separated. All state officials exercise powers delegated to them by the sovereign and all are charged with the maintenance of the household’s peace. Here it is useful to recall that police, as a condition, is the modern version of the deep rooted notion of peace, or mund, or grid. To police a territory meant to pacify it, to bring it into a well-ordered state, a state of “good police.” Police thus was both the end and the means (including the institutional means, in the still familiar sense of police department, or police officer). The commonwealth, or commonweal, in this conception, was both the household as a group and its status, both the common and its weal(th).

This conception of the state’s authority—and indeed obligation, if ultimately discretionary—to protect the peace of its constituents, is apparent in the conception of members of the executive, notably police officers but also public prosecutors (or commonwealth or district or state attorneys), as “peace officers.”13 It also underlies the legislative conception, and form, of accusations of criminal conduct as offenses against, or disturbances of, the king’s (or, the state’s, or some other sovereign’s) peace, both in general and in the case of particular offenses.14

But exercise of the police power is not limited to the executive and the legislative branches, or tasks, of government. The judiciary, too, retains the power to maintain the peace, a fundamental power that becomes more clearly visible in a number of contexts. Consider, for instance, the judiciary’s comprehensive and inherent power of contempt, which gives judges the discretionary and indefinable authority to take appropriate measures to keep their court’s peace, directly by maintaining decorum in their presence and indirectly by disciplining those disrespecting their authority in defiance of their orders.15

Recall also the residual power to recognize new common law misdemeanors to protect “the public police or economy,” and “to cope with novel situations not comprehended or contemplated by the legislators”16:

The landmark case in this Commonwealth [Pennsylvania] which announces the principle of preserving common law offenses is Commonwealth v. McHale, 97 Pa. 397 [1881]. After analyzing and determining that common law crimes are preserved, Mr. Justice Paxton, at page 408, asks the question, "What is a common law offense?"

"The highest authority upon this point is Blackstone. In chap. 13, of vol. 4, of [his Commentaries on the Laws of England (1769)] it is thus defined: The last species of offenses which especially affect the Commonwealth are those against the public police or economy. By the public police and economy 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 behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations."17

Courts, it is true, have recently tended to refrain from invoking this instance of the power to police, which is not to say, however, that they do not retain the power, except in jurisdictions where the legislature explicitly barred the recognition of new common law offenses.18 Most frequently, courts regard the failure to create new common law offenses as an instance of prudent self-constraint, perhaps combined with the acknowledgment that today’s legislatures are far less likely, in the exercise of their police power, to have left gaps in the statutory protection of the public police, than in the past, not to mention the sheer accumulation of criminal statutes

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15 For an extended discussion, and judicial defense, of the uncodified and non-statutory judicial power of contempt, see United Nurses of Alberta v. Alberta, [1992] 1 S.C.R. 901.
18 Or rather declares that all criminal offenses be statutory, at least going forward. See, e.g., Model Penal Code § 1.05.
over centuries. Notably, no constitutional objection to the judicial crafting of new common law offenses has been successful.

At any rate, focusing on the question of common law misdemeanors obscures the more fundamental issue of the courts’ contribution to the exercise of the sovereign police power, as necessary. Whether this occurs through the creation of new offenses or the flexible interpretation of existing offenses, including statutory offenses, makes little difference in the end. Whether Shaw v. Director of Public Prosecutions is read as a case about new common law offenses or about the expansive interpretation of the existing offense of conspiracy, it remains a case about the House of Lords’ insistence on retaining the office of custos morum and, as such, to maintain the public’s bonos mores—where moral health is merely one aspect of the public’s police (or welfare).

It is perhaps unusual to see judges as wielding the power to police. Ordinarily, it is thought that policing is done by others, notably the executive at the more or less substantive guidance of the legislature, with judges standing on the other side of the police/law divide. Judges, we are told again and again (also by judges), particularly in the common law world, are the guarantors of the “rule of law” who keep tabs on the otherwise borderless (“arbitrary”) discretion of other state officials. A common version of this account, particularly relevant to the present project, places the judiciary in the role of transforming police into law (apart from continuously policing the law limits on remnants of the police state lurking in other branches of government), or rather police science (and police power) into administrative law (and in particular “police law” (Polizeirecht), in Germany). In Britain, the courts’ power to legalize the police state was long underrecognized and –theorized, with rule of law protagonists like A.V. Dicey and his early twentieth followers instead either denying the existence of a regulatory state in Britain (as opposed to in France), or, conceding the possibility of its existence, dismissing it as obviously incompatible with the rule of law, by which they meant rule of law policed by regular British judges (as opposed to higher level bureaucrats sitting on specialized tribunals as in France).

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21 The history of public law in England here parallels that of administrative law. This is not surprising since both presuppose the recognition of a state, rather than a community of right thinking free born Englishmen whose interactions at most require the occasional refresher dose of common sense in the form of the judgment of a common law judge. See Martin Loughlin, Foundations of Private Law (2010); The Idea of Private Law (2003). Public law, like administrative law, can be seen as a more or less legalized, and domesticated, conception of the totality of manifestations of the police power of the state. In Germany, the university where the first lecture on police law was held (1754-55), in Altdorf, had been the site of the first lecture on public law 150 years before, at a time when public law was struggling for acceptance in a curriculum devoted to private law. See Johann Christian Pauly, Die Entstehung des Polizeirechts als wissenschaftliche Disziplin: Ein Beitrag zur Wissenschaftsgeschichte des öffentlichen Rechts 9, 128 (Frankfurt am Main: Klostermann 2000). On the Roman policial roots of the modern conception of public law, see
In Germany, by contrast, not only was the existence of a police state acknowledged, but also was praised as an advancement in government in the hands of such progressive princes as Friedrich I., at least until the enlightenment’s comprehensive critique of everything, including politics, generated the idea of the law state (Rechtsstaat) in contradistinction to, and as a direct critique of, the police state (Polizeistaat). It is noteworthy that, even in a “civil law” country such as Germany, the transformation of police science into administrative law, as the formal legalization of police, is universally attributed to a court judgment: the so-called Kreuzberg decision of the Prussian Supreme Administrative Court of 1882. Without going into unnecessary, if interesting, detail, the Kreuzberg decision invalidated an order promulgated by the Berlin central police that imposed height restrictions on buildings near the Kreuzberg War Memorial, so as not to obstruct the view of the memorial. The court reasoned that the general police power was limited to protect the public from danger and did not extend to regulations to advance “aesthetic interests.” Although the decision did not object to aesthetic regulation under a specific statute, it nonetheless has been hailed as the triumph of the rule of law over the police power ever since (even though the court ostensibly did nothing more than apply a statutory definition of the police power from the Prussian Allgemeines Landrecht of 1794, which however had lain dormant ever since). The Kreuzberg judgment is thought to mark the beginning of modern German administrative law and of modern German police law in particular, a branch of law that bears its commitment to legalizing the police power on its sleeve and stands for the commitment to subject all instances of state action, including state action by police officials (and other administrative officials), to norms consistent with the rule of law, set out in codes of police law.

The Kreuzberg judgment is noteworthy not only because it illustrates the role of the judiciary as rule of law agent even in a civil law country, ordinarily associated with statutory, legislative, norms—leaving aside the limited usefulness of the civil law-common law distinction—but also because the project of “police law” itself, or

23 German police law, unlike criminal law, is state law, rather than federal law, resulting in a diversity of approaches to the legalization of police conduct—to prevent and abate danger—quite surprising in a legal system otherwise committed to consistency and uniformity. Incidentally, investigatory activities of the police after the suspected commission of an offense are covered by the—federal—Code of Criminal Procedure, not state codes of police law. What would appear to be obvious difficulties of distinguishing one activity from the other do not seem to have attracted much attention in the German literature, or jurisprudence, with one subject being considered a species of administrative law and the other a species of criminal law, and neither of which receiving a great deal of scholarly attention, in sharp contrast to substantive criminal law. For a discussion of the distinction in the context of the propriety, and supervision, of undercover investigation, see Jacqueline E. Ross, “Tradeoffs in Undercover Investigations: A Comparative Perspective,” 69 U. Chi. L. Rev. 1501 (2002).
for that matter of “administrative law,” resembles the project of “preventive justice” by resolving the tension between police and law, prudence and justice, heteronomy and autonomy, through classificatory—and, in the case of the former two, through legislative, codificatory, or at least dogmatic—fiat, through the invention and then attachment of an oxymoronic doctrinal label, less aspirational than obfuscatory, as if the addition of the word “law” (or “justice”) to some state action, or even an entire mode of state governance, could bring that action, or mode of governance, under the rule of law. One wonders, for instance, whether word order is significant. Would “legal administration,” or “law police,” or “just prevention” have the same legitimating effect, or would now law or justice have been brought to the heel of police (or prevention)?

According to an interesting recent study, the origins of the subject “police law” (Polizeirecht) can be traced back to the publication of a treatise on the subject in 1757, by Johann Heumann, which not surprisingly, given the year of publication, made no attempt to legalize police, but instead can be seen as an offshoot of the long established study of police science, one that focused on, and catalogued, the ever increasing number of police statutes and ordinances. At the time, ius politiae tellingly referred to both police law (i.e., the collection of norms) and police power (i.e., the sovereign power generating the norms). The notion that police law might concern itself also with the limits of the police power, rather than merely describing the vastness of its manifestations, is said not to have made even a passing appearance until roughly half a century later, in Günther Heinrich von Berg’s multi-volume police law treatise published in 1799-1809.

It is worth noting that the provision in the Prussian Allgemeines Landrecht of 1794, § 10 II 17, traditionally celebrated in Germany as the triumph of the law state over the police state, had been in place for several years before the publication of von Berg’s treatise, ostensibly laying the foundation (however timid) for police law as the law of the law state’s limits on the police power. In fact, it now is widely accepted that the Kreuzberg judgment of the Prussian Supreme Administrative Court, from 1882, despite its insistence that it was merely applying precepts of police law in place since the adoption of § 10 II 17 ALR, in fact lifted that provision out of oblivion. Only recently has it been argued that the provision in question was not meant to place any limits on the police power of the Prussian state (which, after

25 Johann Christian Pauly, Die Entstehung des Polizeirechts als wissenschaftliche Disziplin: Ein Beitrag zur Wissenschaftsgeschichte des öffentlichen Rechts (Frankfurt am Main: Klostermann 2000)
27 “The police’s office is to take the necessary measures to maintain public tranquility, safety, and order, and to prevent dangers to the public or its individual members.”
all, at the time was governed by an absolute monarch), but merely served to differentiate between the jurisdiction of the police and criminal courts.28

At any rate, the Kreuzberg decision of the Supreme Administrative Court, which is also often said to mark the beginning of modern German administrative law—administrative law having by that time replaced police law as the comprehensive legal discipline of the modern state—turns out, upon closer inspection, to have been quite narrow, in not challenging the state’s authority to regulate aesthetics in the name of the police power, but instead merely requiring specific legislative authorization for aesthetic police and, in the end, has itself been said to have had little impact on the state’s exercise of its still essentially unlimited police power, so that in 1896, a commentator could remark that the old Prussian police state was alive and well.29 The true starting point of German police law, then, has been located in the passage of the Prussian Police Administration Law of 1931, which was presented as modeled on § 10 II 17 ALR: “The police agencies shall, consistent with applicable laws, take those measures that are necessary in their discretion in light of their duties, to protect the community or the individual from dangers threatening public safety or order” (§ 14 I PVG).30

The 1931 statute, and this provision, remained in force and was applied, and interpreted in light of Nazi ideology, notably by its main drafter, who had been President of the Prussian Supreme Administrative Court (Bill Drews) since 1921, throughout the Nazi period, which began only two years after its passage. After 1945, the provision served as the model for all current German (state) police laws.

In other words, the project of German “police law” was launched not once, not twice, but five or six times, depending on who does the counting (1757, 1794, 1799-1809, 1882, 1931, post-1945), each beginning, in retrospect, emerging as a merely descriptive effort, lacking the critical bite that one might associate with the attachment of the label “law” (or “justice”) to a new, or not so new, field of juristic inquiry; police law, at every juncture, and despite its name, turned out to be more police than law, if not all police, and no law, despite the intimate involvement of the judiciary, most importantly the central figure of German police law and administrative law in what tends to be regarded as its formative phase, Drews, who after a distinguished career in the Prussian bureaucracy served as the President of the Prussian Supreme Administrative Court until 1937.

This is not the place to explore (once more!) the role of judicial review, of the place of the judiciary in the system of government. The point is simply that judges’ reputation as controllers, rather than wielders, of the power to police is at best incomplete. Judicial intervention is not only about controlling the power to police,

28 Schweigel 25.
29 Naas 133.
but also about determining who, how, and when to exercise it. As the House of Lords in Shaw makes clear, and as many other courts have stressed, courts may be in a better position to ensure “due regulation and domestic order” than the legislature, if not the executive, because they can take advantage of the "flexibility" of the common law as a sort of policing vanguard unconstrained by the cumbersome formalities of legislative governing (ironically echoing arguments often made by administrators to avoid judicial oversight, or the constraints of “hard law” as opposed to the "soft law" of self-made, and -monitored regulations, directives, missives, guidelines, best practices, and so on31). At the very least, courts may insist on making significant contributions to the state’s policing effort against a backdrop of legislative norms, because they can employ their interpretive skills to adjust legislatively generated offense definitions as needed (as, for instance, in the U.S. Supreme Court’s federal mail fraud jurisprudence, with the Court molding the meaning of fraud to keep pace with the ever fertile criminal imagination32).

Again, in a police regime, the distinction between different branches of government is no more significant than the distinctions between different aspects of governing the household, a singular sovereign task that is the householder’s, and the householder’s alone, though these tasks may be delegated to others (originally his wife, then a fiscal overseer—the oikonomikos in the narrow sense, as distinct from the householder who retained ultimate authority as the despotēs, and so on33). These distinctions are functional and matters of prudence, not of justice, and to the extent that officials may be encouraged to keep checks and balances amongst themselves, this is a matter of good government, not of right, of police, not of law. (Consider here Lon Fuller’s discussion of the usefulness of the various aspects of the “principle of legality”—apart from mandatory compliance with these aspects—in corporate management.34)

In a police regime, then, no branch of government controls any other. For that reason, ascribing this control function to the judiciary makes no more sense than ascribing it to any other branch. In the realm of law, in a Rechtsstaat, subject to the principle of legality, or lawness, it may well be that the separation of powers, a prerequisite for the notion of one power controlling another, is a matter of justice; at least, it would make sense to argue that it is, given the system’s commitment to justice, which distinguishes it—among other things—from a state of police. In a law state, however, no branch can claim a monopoly on legality, as all state action, no matter under what heading and performed by whom, is subject to the rule of law. In a familiar argument,35 then, the insistence on judicial enforcement of the rule may

33 Singer 45, 51.
35 E.g., Edward S. Corwin, Court over Constitution (1938) (departmentalist vs. juristic conception of constitutional interpretation).
be counterproductive as other branches will feel less constrained by considerations of legitimacy, may even trust in the impossibility of judicial review of every state action every day, and certainly can rely on the delay between enactment of a norm or initiation of a practice and judicial review (absent an injunction or a reference mechanism not requiring a case or controversy), during which the norm or practice would remain in force. (It even has been argued that the celebration of judicial review, particularly by a high court—and perhaps even a specialized court of constitutional review, as for instance in Germany—can be seen as a transference of household status from the unitary sovereign to the high court as the final instance of control.36)

B. Peace and Police

Besides the recognition of common law offenses and the flexible reading of criminal statutes, another significant instance of judicial police power, and one particularly relevant in the present context, is the power of justices of the peace to issue bonds for keeping the peace or for good behavior, which Blackstone discusses, with eminent pride and great emphasis, in Chapter 18 of Book IV of the Commentaries:

WE are now arrived at the fifth general branch or head, under which I proposed to consider the subject of this book of our commentarie [Book the Fourth: of Public Wrongs]; viz. the means of preventing the commission of crimes and misdemeanors. And really it is an honour, and almost a singular one, of our English laws, that they furnish a title of this sort: since preventive justice is upon every principle, of reason, of humanity, and of sound policy, preferable in all respects to punishing justice; the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

THIS preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour.37

Blackstone evidently attaches great importance to these measures of “preventive justice,” not merely because he regards them as “almost a singular [honour] of our English laws” (though he cites Beccaria in support of the preferability of preventive justice), but also because they occupy a central place in that part of the Laws of England that pertain to “public wrongs.” They represent a comprehensive conception of penal justice: “preventive justice,” which is not an exception to the

norm of “punishing justice,” but an alternative, and in fact a preferable one. Then, Blackstone goes even further, remarking that prevention, not expiation, or some other backward-looking consideration, is the ultimate end of “all human punishments”:

And indeed, if we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past: since ... all punishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example: all of which conduce to one and the same end, of preventing future crimes, whether that be effected by amendment, disability, or example. But the caution, which we speak of at present, is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man’s imprudence in giving just ground of apprehension.  

In other words, not only is preventive justice preferable to punishing justice, but ultimately even punishing justice (divine punishment excluded) is preventive itself.

These passages are remarkable for several reasons. First, and most immediate, they suggest that the pursuit of “preventive justice” is nothing new, but was familiar to Blackstone, so familiar in fact, that he traces it back at least to the 11th c. (Edward the Confessor’s “fidejussiores de pace et legalitate tuenda,” commonly translated as “sureties to keep the peace and good behavior”) if not the frankpledge—originally frith-borh, or “peace pledge” (frith, like the German Friede, being derived from the Old English friðu)—he attributes to King Alfred (9th c.). The point here is not to suggest either that Blackstone’s legal history is to be trusted, or that the Saxon frith-borh is any more similar to an 18th c. justice of the peace’s peace bond than, say, the Saxon frith is to the “king’s peace,” but at the very least to intimate that the concept of “preventive justice” has enjoyed a sufficiently long history, and has occupied a sufficiently central place in that history, to warrant close scrutiny of the suggestion that it represents a new direction for 21st c. penalty.

In general, the longstanding concern for preventive measures may itself reflect the centrality of the concept of peace in English governance; not prevention in general, but prevention of breaches of the peace in particular, in this light, may appear so crucially important precisely because the maintenance of the peace was not merely one concern among many, but the single most important aim of government, in fact, its raison d’être. In Pollock and Maitland’s telling, the history of English law emerges as a history of the maintenance of peace, or rather of peace,

[38 Id.]
since, as they pointed out, “every householder has his peace,”39 and the history of English government is also the assertion of one householder’s power over another, and therefore also over his household, resulting in the gradual incorporation of micro households into the macro household of the king through a process of centralization and, literally, pacification.40

We will soon return to the crucial, and fascinating, question of the notion of peace and its connection to the power to police. For now, it is important to recognize that Blackstone’s conception of the peace bond points not only backward, to King Alfred, but also forward, and outward, beyond the borders of English penalty. Within English law, the connections between the age old power of justices of the peace to require sureties of peace and good behavior and more recent (and perhaps already themselves outdated) policing tools like the Anti-Social Behavior Order (ASBO) and various, more specific, control orders (which stand to peace bonds, and to a lesser extent ASBOs, like possession offenses to vagrancy statutes) are obvious, and perhaps not particularly interesting.

It might be more fruitful to see the “preventive justice” scheme described by Blackstone in the context of other comprehensive systems of penal police. One might be tempted, looking forward from Blackstone, to think that the English conception of preventive justice has changed significantly over the past two hundred years or so. That would not appear to be the case, however. When Glanville Williams, for instance, turned his attention to the subject of preventive justice, in an article entitled “Preventive Justice and the Rule of Law,”41 he remained within the conception of penalty recorded by Blackstone—the paradigmatic offense is an offense against the king’s peace. So when Williams expressed some concern about the notion of requiring sureties to keep the peace, he did not challenge this longstanding viewpoint, but invoked it: it was precisely the fact that “[e]very crime is a breach of the royal peace” which threatened to expand the scope of a peace bond beyond acceptable limits (whatever they might be). Instead, Williams declared—without argument, unless a reference to “civil liberty” counts as an argument—that “the notion of crimes involving a breach of the peace is a specific one,” and further announced—also without argument—that crimes involving a breach of the peace were limited to crimes posing danger of violence to a person.42

40 See Frederick Pollock, The King’s Peace in the Middle Ages, 13 Harv. L. Rev. 177 (1900). The concept of peace also plays a crucial, if still understudied, role in American legal history. But see Laura Edwards’ masterful archival study of local governance in the pre-Civil War South, Laura F. Edwards, The People and Their Peace Legal Culture and the Transformation of Inequality in the Post-Revolutionary South (Chapel Hill: UNC Press 2009); see also Christopher L. Tomlins, “Republican Law” (forthcoming 2012).
41 16 Modern L. Rev. 417 (1953).
42 It is worth noting here that German criminal law retains two distinct offenses of breach of the peace—breach of the land peace and breach of the house peace. Both offenses, interestingly, are categorized under “offenses against public order.” Breach of the house peace (occasionally
The limitation in terms of the personhood of the victim, and the nature of the violation, or at least threatened violation, may well be sensible, and may accord with a view of law rooted in the concept of the person as endowed with the capacity for autonomy; without more, however, this limitation appears as an unmotivated external ad hoc addendum fundamentally inconsistent with the conception of penalty it purports to govern.

To take another example, from across the Atlantic, Roscoe Pound too had a comprehensive vision of preventive justice, though one not rooted in the protection of the royal peace, but—this being America—of its successor in the (not so) New Republic, the public peace or public welfare. Pound and his fellow progressives, echoing similar developments on the Continent (notably that of Franz v. Liszt and his followers, but also in Italy and in France). In a late essay, published in 1946 (and reprinted in 1964), Pound lays out a system of “individualized justice,” which includes the now familiar trio of measures of “preventive justice:” deter, rehabilitate, incapacitate. This program of peno-correctional treatment exerted enormous influence over penal policy—if not penal practice—for the better part of the twentieth century and underlay not only correctional policy but even broad criminal codification efforts such as the American Model Penal Code. The career of treatmentism is an important topic, and deserves closer attention, but for present purposes it is enough to recognize its essential similarity to the traditional English model of penalty represented by Blackstone and Williams. The individualized justice Pound had in mind referred only to the offender, not the victim, only to the punishment, not to the crime. The object of penal treatment was to protect public welfare, i.e., public or social interests, not to protect the rights, or interests, of individuals as such. Note Pound’s definition of justice as “the regime of adjustment of relations and ordering of conduct through a politically organized society to the end of maintaining the inner order of that society.” In other words, Pound defines justice as police. Individualized justice thus simply becomes the choice of preventive measures appropriately targeted to the specific type and degree of social dangerousness exhibited by a given, individual, offender or, preferably, potential offender. The prototype for this type of individualized justice was the juvenile court. The progressive program calls for the expansion of the juvenile justice model (informal diagnosis and treatment of delinquency, rather than punishment based on formal ascription of criminal liability) and thus rests on the infantilization of criminal offenders (also reflected in regimes of prison management that first

misleadingly, but revealingly, translated as burglary) is defined as, among other things, “penetrating the pacified (befriedete) possession of another” (“Wer ... in das befriedete Besitztum eines anderen... eindringt...”). StGB § 123; see also StGB § 124 (aggravated breach of the house peace).

deprive inmates of all means of autonomy or mere self-sufficiency and then render them dependent on the distribution of “privileges” by the prison authority).

Pound’s progressive program—despite his protestations to the contrary, and the insistence on the novelty of progressive proposals, specifically as compared to what Pound calls, in this essay, the “methods of administering justice which we inherited from England”—recalls Blackstone’s view of preventive justice in several ways. As already noted, both preventive justice schemes are order maintenance, or peace keeping, regimes, and differ only in the sovereign whose peace is at stake, the king in one case, the amorphous public (or “the social”) in the other.

But the connection is more specific, and interesting, still: Pound’s preventive means of order maintenance are Blackstone’s. Recall that Blackstone, some two centuries earlier, rattled off the by then already well known penological triteca of “preventing future crimes”: “by amendment, disability, or example.”46 What is more, this preventive trinity goes back much farther than, say, Beccaria, but can already be found in the 17th c. literature on police, most notably in the discussion, and introduction, of labor as a “police punishment.” For instance, the alternative punishment of galley service in Germany—which regularly supplied Venice in particular with penal rowers for its fleet—was said to be reserved for offenders with rehabilitative potential. Similarly, public labor (opus publicum) was imposed in 17th c. Germany, as an alternative to incarceration, on corrigible vagrants, i.e., the ungoverned, but not ungovernable, lordless men not under the power of a micro householder, who not surprisingly had been the paradigmatic target of household-centered order maintenance regimes since at least the 14th c.47 Finally, 17th c. “houses of correction” (Zuchthäuser) sought, literally, to discipline the disorderly and disobedient, a group that potentially included the entire class of the governed; as a Munich Zuchthaus put it, simply, in the late 17th c., it was meant for “in sum, anyone who does not do that which is appropriate” (in Summa ein jeder der nit thut, was sich gebührt).48

Second, Blackstone’s remarks about “preventive justice” point out that prevention is not limited to ex ante measures of incapacitation or deterrence, but also motivates the infliction of ex post punishment. This can be seen as once again pointing up the significance of the peace, and particularly the king’s peace, the maintenance of which is the aim of all penal measures, ex ante or ex post. Once the peace is disturbed, the offense already has manifested itself and the king’s (as any householder’s) authority already has been challenged, his ability to keep the peace questioned. It is no accident, in this light, that the paradigmatic inchoate offense is high treason, an offense against the authority of the king in any form (including, for

46 See supra.
instance, counterfeiting his coin, a serious offense the prevention of which triggered one of the first, if not the first, use of possessory liability in an English criminal statute, which in its most offensive form, regicide (along with the death of the queen and the royal heir), was penalized at the stage of “compassing” or “imagining.”

So all penal justice is preventive because the interest at stake is important, too important to await its violation. But, again, this connection is not unique to policial governance. For the same reason, as Ashworth and Zedner point out, ex ante prevention is preferable to ex post punishment in a law state, grounded in the conception of the person as a being endowed with, and with nothing more, the capacity for autonomy, or self-government. Blackstone’s police state is a preventive state, but that is not to say that a law state could not be a preventive state in the same sense, and for the same reason, but in pursuit of a radically, and designedly, different aim: the protection of the governed’s personhood, rather than the maintenance of the governor’s peace.

C. Discretion

It may also be worth emphasizing the significance of discretion in all forms of policial governance centered around the maintenance of a sovereign’s peace. The use of preventive justice here is associated with both the whether, and the how, of state interference. The sovereign, acting through his (or later, its) representative interprets indicia of offensiveness (or dangerousness) that, by definition, come (at least partially, even in the presence of a “criminal record”) in a form other than the official and formal ascription of criminal liability. Preventive justice, by its nature, is also a guessing game, an inexact science of attempting to predict the future (an attempt notoriously likely to fail). But, more important, even if the official has found sufficient indicia of offensiveness he nonetheless may exercise his discretion not to interfere. And even if he chooses to interfere, he will have at his disposal a wide range of possible measures, from a more or less informal warning to peace bonds to restrictions on movement, monitoring devices, institutionalization, and incarceration.

Punitive, or punishing, justice may, by contrast, be seen as constraining the sovereign’s discretion on whether and how to interfere. The notion of an obligation to punish, however, would have been foreign to Blackstone; the sovereign holds the unquestionable power to pardon, or amerce, as even homicide se defendendo is regarded as merely excused, requiring a royal pardon, on the ground that to deprive

49 Treason Act 1351, 25 Edw. III St. 5 c. 2; on the persistence of the paradigm defined by the Treason Act, even in American penalty, see Dubber, “The State as Victim: Treason and the Paradox of American Criminal Law,” in Offences Against the State (Mordechai Kretnitner & Khalid Ghanayim, eds. forthcoming 2011).

her majesty of any of his subjects gives offense, which the sovereign may, in his wisdom and at his pleasure, choose to overlook. There is, and can be, no imperative, categorical or not, in penal police. There is, and can be, no Legalitätsprinzip—literally legality principle, though usually imperfectly translated as principle of compulsory prosecution to avoid confusion with the “legality principle,” which is generally taken to be the English version of the nullum crimen sine lege principle.

There are imperatives, but only imperatives of obedience or execution. So, the justice of the peace can be ordered to issue a peace bond “by a mandatory writ, called a supplicavit, issuing out of the court of king’s bench or chancery; which will compel the justice to act as a ministerial and not as a judicial officer,” reminding him, in other words, of his status as a minister of the king, to whom the sovereign has delegated certain, but only certain, powers. In a policial regime, the courts, as any other branch of government, merely exercise an aspect of the sovereign power, most fundamentally the power to police, i.e., to maintain the peace of the household.

There are only two limits on the sovereign’s power to maintain the peace, one internal, one external, both marginal. The external limit reflects the distinction between temporal and divine punishment, and power in general. Divine punishment is punishing justice, not preventive justice. Vengeance is mine, says the Lord, and it is He who punishes sinners, though of course once again tempered by mercy. To punish for the sake of punishing, rather than preventing, thus may disturb the distinction between temporal and divine power, and my reflect the temporal ruler’s attempt to assume divine powers, an act as ultra vires as that of the ministerial official who oversteps the bounds of his delegated jurisdiction. Divine limits there may be on the temporal sovereign’s police power. Temporal limits, however, there are none, except in the extreme, catastrophic case of utter incompetence, manifest unfitness to govern.

This is the second, internal, limit on the sovereign’s pacific power. Only God can punish for vengeance because only His heart is pure, without a trace of the malice that dooms the temporal sovereign, who in the act of punishing justice is driven by his malignant heart to inflict pointless pain on the perceived source of the offense against him and thereby punishes not to maintain the peace, but to manifest his lack of control over himself. This loss of control, however, marks him as essentially unsuited for governing in a system built on the radical distinction between those who possess the capacity for autonomy and those who do not, between the rulers and the ruled, the governors and the governed. Whether the theoretically disqualifying cruelty of the ruler who is a slave to his passions, of course, in fact amounts to a limit on the ruler’s power, is another question. The king’s common

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52 See supra.
53 Dubber, Police Power, 39-41.
law recognized, on paper, constraints on the disciplinary means used by local lords, with the royal courts at least being authorized to interfere in cases of extreme violence, against life or limb of one of his men, as an apparently pointless act of cruelty that not only did nothing to maintain the peace but also deprived the king of at least part of one of his human resources. Those who rid the household of a manifestly incompetent tyrant committed an act of petit treason—so-called after the Treason Act 1351, which gave the lords a definition of treason, but also introduced the distinction between a broadly defined high treason against the king and everyone in his micro household, including officials in various royal household departments, and more narrowly defined petit treason, against all other lords. The king himself, of course, was even less likely to face the limits of his malice, with only God to judge him, short of a violent overthrow of his rule.

Finally, note Blackstone’s passing, but telling, remark that preventive justice measures are “not meant as any degree of punishment, unless perhaps for a man’s imprudence in giving just ground of apprehension.” Recall that he had previously, in ch. 13, defined the “public police and economy” as “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 neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations.” Preventive justice measures, in other words, are police measures twice over: first, by preventing future offenses against the king’s peace, and, second, by disciplining those who already have disturbed the “domestic(!) order of the kingdom,” i.e., the peace of the kingdom qua household, having failed by their imprudence “to conform their behavior to the rules of propriety, good neighborhood and good manners,” and have not been “decent, industrious and inoffensive in their respective stations.” Blackstone’s “preventive justice” measures are police measures, but not because they are preventive, but because they aim to maintain the “public police and economy.”

D. Economy

Here it is worth clarifying the meaning, and significance, of the term “economy” in its connection with police. Economy is used, like police, in its traditional sense, of household government—from the Greek oikos and nomos. The power to police is the power to govern the state as a householder governs his household, rooted in the power of the oikonomos over his oikos and of the paterfamilias over his familia, a power that has been traced throughout English history, as “the germ existing in every Teutonic household,” from the common free man (ceorl) to the king.55 This is not place, nor am I the person, to inquire more deeply into the political (pre-)history of economics, another fascinating, though neglected, topic. Aristotle and Plato appeared to share a general approach to the question of economics—considering it

a matter of prudence, rather than of justice, a realm of guidelines and manuals, rather than of principles and treatises, and generally showing little enthusiasm for the subject, at least compared to matters of (public) politics or (individual) ethics, as a subject of private concern that was perhaps most significant as setting the prerequisite for the householder’s participation in the public discourse about matters of common concern. While Aristotle treats economics at the beginning of his Politics, he wastes little time on the subject and clearly considers the discussion preliminary to the treatment of politics, or ethics in the sphere of public life. In fact, Aristotle takes care to draw a distinction between economics and politics, contrary to Plato who in his dialogue Politikos insists—perhaps provocatively so—on the similarities between the two.56

Little has changed even when it comes to the relationship, and tension, between economics and politics, which in the wake of the enlightenment was recast as that between police and law, without however retaining the distinction between private and public life, and the concomitant one between economics and politics, that structured the Athenian debate. Police and law are both categories of public life, as modes of state governance, thus highlighting, and escalating, the tension between the two, by eliminating the option of confining each to a different sphere of ethical life.

The distinction between private and public life was crucial for the pre-enlightenment interrelation between economy and politics since autonomy in one was the prerequisite for autonomy in the other. Only the householder had the capacity for autonomy in the private sphere, and therefore also in the public sphere.57 While the household, including its human and non-human constituent resources, lacked the requisite capacity for autonomy, and therefore was marked for heteronomy, for the status of governed, the householder was the “other” who governed the unselfgovernable and then stepped into the public sphere—the agora, the forum, the thing—to enter into discourse with fellow householders, his peers, to conduct the public business of the day. Whereas hierarchy and heteronomy characterized economy, equality and autonomy was the hallmark of politics. While orders, backed by the threat of force, including physical force, moved the household, persuasion aided by rhetoric drove the government of the city. Economy was unequal other-government, politics equal self-government.

This division of spheres broke down over time with the development and expansion of macro households, and the expansion of one householder’s peace at the expense of other householders’ peace which were redefined as non-originary delegated forms of sovereignty, or rather jurisdiction, the borders of which were in turn policed by the macro householder and his officials according to a new common

law, i.e., a royal law applicable to all, including to other householders who once held court themselves in exercise of their own inherent seigniorial jurisdiction. The erosion of the public sphere as a locus of autonomy thus went hand-in-hand with the expansion of the once distinctly private mode of governance into matters of state, with the king or prince assuming the power to maintain the peace of his realm.

Blackstone’s association of police and economy, i.e., the conception of the power to police as the power of the macro householder, reflected a conception of governance that also had long been familiar on the continent (and even in Scotland, as Adam Smith’s early Glasgow lectures on “juris prudence” make clear58) and underlies, for instance, Rousseau’s roughly contemporaneous definition of political economy in Diderot’s Encyclopédie of economie ou oeconomie, which “meant originally only the wise and legitimate [sage & légitime] government of the house for the common good of the whole family,” but “was then extended to the government of that great family, the State.”59 On the continent, a police science had developed since the 17th c., whose practitioners attempted to rationalize the prince’s exercise of his police power. This science, which was particularly active and productive in France and Germany—though it also found enthusiasts elsewhere, including across the Channel, most notably Patrick Colquhoun, founder of the Thames River Police in the early 19th c.—itself appears as a modern version of an advisory literature for householders, familiar at least since Xenophon’s Oikonomikos (ca. 370 BC), devoted to the “art” (and science) of householdership,60 which also included the German Hausväterliteratur (which only later, in the 19c., devolved from a familial government manual to instructions for proper housekeeping, parallel to a radical privatization and feminization of the micro family),61 the slave manuals of the pre-Civil War American South,62 and—as a sign of the expansion of household governance from the micro to the macro household, from a “domestic” art to a “royal art”63 (or science)64—Macchiavelli’s Prince.65

58 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 Adam Smith, Lectures on Jurisprudence 396 (R.L. Meed et al. eds. 1978); see generally Dubber, Police Power 63-65.
60 Singer 47.
63 Singer 52.
64 Singer 31, see also 44.
65 Blackstone’s conception of police governance also bears an obvious relation to the patriarchalist tradition in English political thought, associated with Filmer and generally thought, rightly or wrongly, to have been terminated by Locke. That connection, however, is less clear than might appear at first glance, partly due to Filmer’s focus on the divine, and therefore unique, origins of
E. Prevention

Here it may be appropriate briefly to comment on the connection between prevention and police, emphasized by Beccaria, Bentham, and a string of other utilitarians in their wake, including Colquhoun, the Scotsman in London who produced a steady stream of police scientific tracts of which A Treatise on the Police of the Metropolis (1797) is merely the best known. Since Colquhoun today is considered through the narrow, backward looking, lens of the contemporary concept of police as an institution, rather than as a comprehensive program of governance, it is useful to recall the scope of Colquhoun’s police ambitions, as represented by his treatises on, among other things police, poor police, education police, the police of the micro household, and, eventually, the macro household, a sort of Wealth of Nations for the British Empire. At any rate, Colquhoun, through this anachronistically narrow prism, today is generally regarded as the architect of “preventive police” in England, as opposed to investigatory police institutions like the Bow Street Runners (the same slippery distinction that to this day structures the doctrine of police law, Polizeirecht, in Germany).

Recall that Blackstone cites Beccaria for the proposition that preventive justice is preferable to punishing justice (and that England, as luck would have it, boasts the most extensive, if not the only, system of preventive justice, which he then proceeds to describe). It is no surprise that Beccaria champions (ex ante) prevention over (ex post) punishment, insofar as the former inflicts less pain for greater, or certainly no less, benefit. It is also no surprise that Bentham echoes this sentiment, along with other utilitarians like Colquhoun and John Fielding, the magistrate who ran the Bow Street Runners (and declared that “[i]t is much better to prevent even one man from being a rogue than apprehending and bringing forty to justice,” even though his constables were engaged in the investigation of crime, rather than its prevention). As one might expect, Bentham was not content merely to repeat Beccaria’s views and recommendations, but tried to systematize them, in this case

absolute monarchy, rather than the connection, and therefore also similarity, between the king’s macro householdship and traditional household governance.

Some decades later, an essay by Edwin Chadwick in the inaugural issue of the London Review, entitled “Preventive Police,” attracted the attention of prominent utilitarians, including Bentham and the Mills. Edwin Chadwick, “Preventive Police,” 1 London Review 252-308 (1829). While the essay today also is read as part of English “police history,” i.e., the institutional history of police forces in England, Chadwick went on to produce an impressive and wide ranging body of police science work of his own, notably in the area of public health, broadly construed. See the very interesting condensed version of his publications, along with an intellectual biography, published by Benjamin Richardson, with the intriguing title The Health of Nations. Benjamin Ward Richardson, The Health of Nations: A Review of the Works of Edwin Chadwick, with a Biographical Dissertation (2 vols.) (London: Longmans, Green & Co. 1887).

by drawing a distinction between police and justice, in terms of that between prevention and punishment:

It is difficult to draw the line which separates these two branches of administration [police and justice]. Their functions have the same object—that of maintaining the internal peace of the state. Justice regards in particular offences already committed; her power does not display itself till after the discovery of some act hostile to the security of the citizens. Police applies itself to the prevention both of offences and calamities; its expediens are, not punishments, but precautions; it foresees evils, and provides against wants.68

Police and justice are merely different tools (ex ante, and ex post) for the maintenance of domestic peace. Prevention, then, is associated with police only by definition, to distinguish police from (retrospective) justice. Not even in Bentham, therefore, is prevention associated with police in the broader sense invoked by, for instance, Blackstone—as a distinct mode of governance distinguished not by its means, but by its end: the maintenance of the householder’s peace. In this light, Bentham’s distinction between police and justice becomes irrelevant; in other words, there is only peace and therefore only police—even “justice” is a tool of better police. (Bentham presumably would have thought a project of preventive justice to be oxymoronic, given that justice to him was, by definition, retrospective.)

As soon as police and justice are regarded as alternative tools for the achievement of some aim, say the maintenance of peace (in the police state, broadly conceived), and—ultimately, for the utilitarian—utility, or the greatest happiness for the greatest number; there is no reason why some other aim—say, the protection of the personhood of subject-objects in a modern liberal state—might not be substituted. Prevention, thus, once again would turn out to be distinctive of neither police, nor of law.

II. Critique

The modern conception of law as rooted in the idea of the person as capable of self-government in all spheres of life—ethics, economy, and politics—was radically inconsistent with a conception of state government as householdership, i.e., as an instance of the householder’s power to manage the resources of his household, where the householder is the only person capable of autonomy and therefore also of heteronomy of those fit only to be governed, not to govern (themselves or others), and where there is no categorical—and at best a prudential—distinction between the objects of government that constitute the household, including all human and nonhuman resources, free and unfree, animate and inanimate, as an instance of “the

power to govern men and things”\(^{69}\) that encompasses the “activities of management, or administration, applied to persons and goods belonging to an oikos.”\(^{70}\) Heteronomy, from the autonomy-grounded perspective of law after the enlightenment, is prima facie illegitimate. Arguably, in a modern Rechtsstaat the micro household cannot survive as a locus of government; instead, it becomes a locus of love and mutual support, where remnants of power are disregarded, exceptional disciplinary excesses at the margins, or ordinary instances of parental (even recognized in legal doctrine in the form of justification, or lawfulness, defenses, modeled uneasily on the justification of acts of public authority\(^{71}\)) discipline notwithstanding.\(^{72}\)

But the enlightenment did not challenge merely, or even primarily, traditional household governance in the micro household, the Kleinfamilie. The expansion of economic mode of governance from the private personal realm to the public political sphere, from the oikos to the agora meant, among other things, the elimination of the province of autonomy under the long-standing dualism of private heteronomy and public autonomy. The police power of the macro household leaves no room for the autonomy even of micro householders, who by virtue of their householder status at one time were entitled to participate in public government of equals by equals. While the political reforms and revolution of the long 19\(^{\text{th}}\) c. may thus be interpreted as an insistence by the burgeoning class of bourgeois micro householders to (re)claim their seat at the table of self-government, they were cast in the language of personhood and the capacity for and therefore the right to self-government qua person, not qua householder, thus encompassing within their critical scope all instances of heteronomy, public and private alike.

The distinction between law and police is therefore stark and fundamental. This is no surprise given the development of the modern, autonomy-based, conception of law as part of the critical enterprise of the enlightenment, turned against, in this case, the deeply rooted taken-for-granted conception of government as the maintenance of peace. The ideal of the law state was defined against the reality of the police state. The critique that generated the ideal of the law state was radical, in the literal sense. It went at the roots of the conception of government, at the mode of governance, and the self-conception of the state. It required a paradigm shift, a move from one ideal type to another, from prudence to justice, from discretion to duty, from arbitrariness to principledness, from guideline to norm, from competence to legitimacy, from prudence to justice, from police to law. The enlightenment critique did not subject the police state to a legitimacy critique; it


\(^{70}\) Singer 30; Brunner 35-39.

\(^{71}\) See, e.g., Canadian Foundation for Children, Youth and the Law v. Canada, [2004] 1 S.C.R. 76.

\(^{72}\) Brunnner 40-41.
subjected the state to a legitimacy critique, which began with radically reconceiving the state.

The application of legal norms to a police regime is pointless, because the legitimacy of a police regime is not at stake. The application of police guidelines to a legal order is not pointless, by contrast, because prudence is not incompatible with justice, but may be complementary to it and police guidelines are by their nature discretionary so that violating, or simply ignoring, them is of no consequence, except perhaps for the governability of the political community in question. Discussions about good policy in a law state are perfectly appropriate; discussions of legitimacy in a police state do not compute. The preventive state, however, is precisely that, a police state, or rather it is objectionable precisely insofar as it is just that.

This is ultimately what is at stake in the search for “principles” of “preventive justice.” Within the realm of police, there is no “principle,” and there is no “justice” (unless, of course, one simply defines justice as police, with Bentham and Pound). There may be maxims, guidelines, standards, recommendations, counsel, advice, and so on. But there is no “principle,” if by principle we mean something like a norm that requires compliance because of its normative significance, i.e., in politics (as opposed to in morality, or ethics), because of its legitimatory significance.

The apparent paradox between the pursuit of security, on one hand, and the infringement of individual rights, on the other, which is said to characterize the “preventive state” or the present regime of “preventive justice” resolves itself once the preventive state is seen as a police state, i.e., a state that pursues not the security of individual persons but of itself, or more precisely that seeks to maintain the sovereign’s peace, be that sovereign a personified householder (the royal peace) or its abstract depersonified alternative (the public peace). The notion of individual rights is foreign to the police state; the victim in penal police is not the individual, the harm not to the individual’s rights, nor the wrong the disrespect of one person’s (or for that matter, citizen’s) rights by another; nor is the offender in penal police the individual, whose rights deserve respect even in the adjudication of her alleged disrespect of another’s. The offense in penal police involves an individual rights bearer neither as offender, nor as victim. The offense in penal police involves a disturber of the peace and a holder of that peace.

Disturber (Störer), it turns out, is the concept German police law settled on, in an attempt, however halfhearted, to distinguish the police offender from the criminal offender in the early 20th c. Interestingly, the conception of the addressee of police directives attracted very little attention in the police law literature, in sharp contrast to the prerequisites for criminal liability, which was very much on the minds of German criminal law scholars, at a time when many of the core elements for the analysis of criminal liability in German criminal law were put in place. The Störer was relevant as the “cause (Urheber) of a state contrary to police (polizeiwidrig),” not for an act, nor for an intentional (or, for that matter, negligent, even civilly negligent) act, with no requirement that he recognized his behavior as “contrary to
police.”73 In other words, policial liability was entirely a matter of absolute, or strict, liability, an unadulterated form of result liability, the result in question being a disorderly state (contrary to police in the broad, traditional sense: a state of poor police). The question of whether a particular individual qualified as a disturber apparently was thought to be purely a question of causation, of picking the appropriate disturber out of any number of human causes of disturbance who might present themselves in a particular situation.

In other words, the human, or personal, quality of the disturber was inconsequential. Police law concerned itself with the identification and abatement of causes of a state of poor police, preferably before they manifested themselves in an actual disturbance of the peace. Police, after all, served—and still serves—to prevent dangers of any kind—natural, manmade, human, animal, dead, alive—and in this sense is essentially ahuman. Not only its conception of offenderhood is ahuman, so is its conception of victimhood: a general state of disorder, a breach of the peace, a disturbance. In this sense, a police offense is a pure status offense: it abates a status of disturbance or, in the language of the common law, a nuisance, an “annoyance.” The police offender is the thing that is abated, a nuisance, defined by Blackstone as the original police offense, i.e., an offense “against the public order and oeconomical regimen of the state.”74 Human nuisances are abated alongside non-human ones, the prostitute along with the house of prostitution, and the possessor along with the contraband and the building in which it is found.75

From the perspective of police, there is nothing objectionable about the failure to distinguish human and nonhuman objects of state power. “Principles” such as the requirement of fault, mens rea, actus reus, or personal responsibility, the Schuldprinzip, or for that matter the Legalitätsprinzip, of German criminal law, or nullum crimen sine lege (the “legality principle”) and its various permutations, or the various precious metallic threads of the common law (presumption of innocence, proof beyond a reasonable doubt) have no purchase in the realm of police, nor do less tangible considerations such as concerns about the “inappropriate” or “troubling” expansion of the scope of criminal liability (through the recognition of double inchoacy, for instance, such as liability of attempted attempts, or attempted

73 Stefan Naas, Die Entstehung des Preußischen Polizeiverwaltungsgesetzes von 1931, 150, 310 (Tübingen: Mohr Siebeck 2003); see also Andreas Schwengel, Der Polizeibegriff im NS-Staat: Polizeirecht, juristische Publizistik und Judikative 1931-1944, 30 n.27 (Tübingen: Mohr Siebeck 2005).


75 For a recent example, see City of New York vs. B250 Holding LLC, Harlems Shop Mart, Inc., Bandar A. Kaid, The Land and Building Known as 250 Bradhurst Avenue, Tax Block 2047, Tax Lot 44, County of New York, City and State of New York, the New York Liquor Authority, “John Doe” and “Jane Doe,” 32 Misc. 3d 1202A, 2011 N.Y. Misc. LEXIS 3030 (Sup. Ct. N.Y., N.Y Cty 2011) (interpreting N.Y. City Administrative Code § 7-703(g), declaring a public nuisance “[a]ny building, erection or place, including one- or two-family dwellings, wherein, within the period of one year ..., there have occurred three or more violations of any of the provisions of article 220, 221, or 225 of the penal law [incl., e.g., possession of drugs or drug paraphernalia].”
offenses that "sound in" attempt, or attempted possession, or even possession itself, as a clear example of the imposition of criminal liability for "pre-preparatory" conduct, despite the rule that attempt liability begin only once "preparation" has blossomed into "attempt"), nor references to the need to respect the autonomy, or the agency, of offenders (or victims, for that matter) or to "the rule of law" (recall Williams’ ad hoc reinterpretation of breaches of the peace as violent offenses against the person) or, without more, to the impropriety of acts by state officials that are "ultra vires," i.e., beyond the authority delegated to them.76 ("Without more," because the policing of subordinates by, for instance, monitoring their compliance with the conditions of their delegated authority, is compatible with a police regime. The same applies, as previously mentioned, to aspects of the so-called "legality principle," which—as Fuller suggested—may be prudent also from a police perspective.)

These principles can gain no traction not only because of their substance, but also because of their form. Police governance remains unconstrained not only by principles of law, and of legitimacy, but by principles of any kind. From the start, norms of police governance were framed as advice, to the oikonomikos, the Hausvater, the prince. Those aspects of the legality principle that might appeal to the police governor seeking better compliance—by for instance telling his subordinates what he wants before disciplining them for their failure to give him what he wants—are subject to his discretion, with respect to their definition, their interpretation, and their applicability in a particular case but also with respect to their adoption or their application in fact (assuming they are found to be applicable). The police governor, for instance, may decide to discipline his subordinate for failing to comply with his wishes even in the absence of a prior, clear, executable, publicized, order, if—for instance—he decides it is prudent to encourage his subordinates in general, or this one in particular, to anticipate (and carry out) his wishes without him having to enunciate them and, perhaps, even before he had formed the wish in the first place. (The German term for this is vorauseilender Gehorsam, or anticipatory obedience.) At the same time, the police governor would be free not to discipline a subordinate despite the governor’s compliance with the policial analogue to the various aspects of the legality principle.77

There is one other, possibly related, characteristic of police governance—besides the substantive and formal ones already mentioned—that deserves mention, if only because it can be traced through the entire history of the subject. Again and again, from Aristotle to Adam Smith, it is described as tedious and unworthy of the attention of any number of persons with presumably more exciting and more important things to think and write about. Critique of police governance,

77 This discretion not to act is the focus of the German Legalitätsprinzip. See also 2 Kenneth Culp Davis, Administrative Law 216-35 (2d ed. 1979).
in other words, may be impossible, given its legitimate and discretionary character; but even serious thought, or considered advice, is difficult to come by because it is concerned with such trifle matters. The lack of interest in police governance of course may reflect the pointlessness of advising someone who is free to ignore it, but it is also consistent with the insignificance of its objects. The art, or science, of police, the genre of good housekeeping advice, concerns itself with every household resource, from crops to bees to bread to honey, horses, dogs, cats, sons, slaves, soil, wind, with cleanliness, orderliness, and so on. Unlike modern law, or ancient politics, which deals with persons, or citizens, and therefore rests on the identity of subject and object of government, and—at least in the case of citizens—is concerned with the highest status being there is, one that matches the status of the governor. As beneath the attention of sovereigns—and those who advise them—alike, matters of police have not attracted the same sort of scrutiny, even on their own—prudential—terms, as have matters of law. In the penal realm, nuisance control—human or non-human—is itself a nuisance.

Along with its objects, police governance in general, and penal police governance in particular, thus, is suffering from neglect—malign or not. Even internally, on its own terms, however vague, flexible, advisory, discretionary, suggestive rather than critical, penal police *qua* police would benefit from commentary and prudential guidance, not to mention the attention of a police science.

The search for principles of preventive justice, however, is not concerned, it is fair to assume, with the testing the effectiveness of policing measures or counseling the sovereign on how to improve the police—and the policing—of his household. This is a complicated task, one that requires establishing principles of justice, and of penal justice in particular, and then applying them to the use of preventive measures. It may appear at times as though the task instead is simply one of application, rather than of genealogy of foundational principles of legitimacy. We already have drawn into question the underlying assumption that there is a body of principle out there that governs ordinary, or traditional, or non-preventive penalty which might be extended to new, innovative, genre busting measures of prevention, rather than of punishment.

Conclusion

In closing, I want to draw attention to a particular variant of this approach: It is often said that legislatures (but presumably also officials in other branches of government) seek to evade principled (perhaps constitutional) constraints on their exercises of their penal power by classifying them as something other than punishment. The United States Supreme Court, for instance, has developed a fairly

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79 There still is a police science, which, however, as one might expect, is generally limited to the study of "police work," i.e., the activities of the police in its narrow, institutional, sense.
detailed taxonomy on the classification of penal measures as punishment or not-punishment (where punishment is thought to trigger certain constitutional constraints, such as the prohibition of cruel and unusual and retroactive punishments). It is of course true that protections that attach only to one category of penal measure but not another lack bite if the state is free to categorize a given measure one way or the other.80 This question has arisen recently with respect to various purportedly non-punitive measures such as indefinite preventive detention, registration, or community notification or supervision regimes of certain (sexual, dangerous) offenders. But the evaded principles need not be constitutional, as measures such as the ASBO and, more broadly yet, possession offenses illustrate, which are difficult to reconcile with traditional common law “principles” such as fault, mens rea, and actus reus.81

This variant of the extension approach to the search for principles of preventive justice also assumes the existence of a body of principle that could be applied to measures of preventive justice once they are properly classified, the evasion having been exposed, and the supposed exception brought within the rule. Instead, the approach outlined here suggests regarding these measures not as not-law, or not-punishment, or hors catégorie, i.e., as nameless deviations designed to evade the only available account of penalty (namely the penal law one, or the penal punishment one, where punishment is a proxy for law), but positively as manifestations of the penal police power of the state. Rather than documenting the ways in which they violate principles of law, and proceeding to a legal critique, it may be more fruitful to begin by analyzing them in light of the distinction between law and police as basic modes of governance and then to subject them to critique, or at least to discussion, in light of the applicable considerations, maxims of police in one case, principles of law in the other.

Under the approach proposed here, it may turn out that what appears to be the exception is in fact the rule, that what appears to be new is in fact old, and that the task at hand is one not merely of application—and perhaps adaptation, of weaving a third, bronze thread, rather than spinning out the existing golden and silver ones—but one of fundamental reconsideration of penalty in general, as a system of penal justice.

80 Clearly it should also be troubling that a state would seek to free itself from basic constitutional constraints through categorical fiat; it would presumably be less troubling the other way around, i.e., if a state categorized a given measure so as to submit itself to these constraints.
81 For a critical analysis of possession offenses along these lines, see Dubber, “Policing Possession.”