Regulatory and Legal Aspects of Penality

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The distinction between law and regulation has proved elusive. As “regulatory studies” has come into its own as a field of inquiry to parallel that of “legal studies” or just plain law, pursued by “regulationists” rather than jurisprudes (or just plain lawyers), the question occasionally arises not just what regulation is, but also how regulation differs from law. Naturally, one approach is to claim one concept as subordinate to the other, so that either all regulation is law or that all law is regulation or, to put it differently, that regulation is simply one form of law or vice versa. Jurisprudes tend to be less anxious about the relationship of their subject to regulation than their regulationist colleagues, perhaps owing to the considerably longer history of inquiries into law. Regulationists not only tend to be more concerned about the distinction of their subject from that of law, but also—and this isn’t any more surprising—are more likely to consider law a subspecies of regulation than the other way around. Not only is regulation distinct from law; it is superior to it. The distinction between regulation and law then quickly turns to an inquiry into the place of law within the larger regulatory framework and the discovery that law not only is part of some broader regulatory scheme but a considerably smaller part than one might have thought, given the attention lavished on law over the past millennia.

Regulationists spend a good deal of time trying to get a handle on their subject, though of course they still have quite a bit of work left to do before they can approach the volume of musings about the nature of law. There is a refreshing variety of definitions of regulation, ranging from, for instance, “improving the efficiency of the economy by correcting specific forms of market failure such as monopoly, imperfect information, and negative externalities”1 at the narrower end of the spectrum to “the intentional activity of attempting to control, order or influence the behavior of others”2 or, broader still, “influencing the flow of events,”3 or somewhere in between, “sustained and focused control exercised by a public agency over activities that are socially valued.”4 It would be futile, not to mention tedious, to enumerate the myriad definitions of regulation that have been proposed.5 At the same time, it would be presumptuous to join the debate about what regulation is or is not, or ought or ought not to be. As a non-regulationist, I am not concerned with carving out a disciplinary niche or creating a scholarly identity, or with setting a regulationist research agenda. As a lawyer, I am interested in the definition of regulation primarily insofar as it is thought to relate in some way to the definition of law. This is not so because lawyers are only interested in law, and regulationists only interested in regulation. To the contrary, I suspect that the definition of regulation and the definition of law are not two distinct questions, but rather are two aspects of a single inquiry. That single inquiry is the inquiry into the nature and limits of (state) power.

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5 For a recent attempt at tabulating definitions, see Black, “Critical Reflections.”
I regard the distinction between regulation and law as a fairly recent—and unfortunately largely ahistorical—manifestation of a broader distinction between two modes of governance, police and law, the roots of which can be traced back to the origins of the conceptualization of governance in ancient Greece in terms of economic heteronomy within the private sphere of the household and policial autonomy within the public sphere of the agora. The modern concept of law is the manifestation of the Enlightenment’s discovery of the autonomous person as the moral subject-object in the political sphere. As such, the modern concept of law was defined in explicit contrdistinction to the concept of police, which some two centuries before had emerged as the scientized and bureaucratized and in this sense modernized form of economic household governance of the princely state.\(^6\)

Thinking about what regulation is therefore also means thinking about what law is. At the same time, thinking ahistorically and afunctionally about regulation is no more appropriate than thinking ahistorically and afunctionally about law. It occasionally appears, even in the regulation literature, as though regulation were an artificial and therefore flexible concept, whereas law has some definite meaning, or essence, that could be discovered with diligence and some luck. Instead, I prefer to think about law as a historically contingent concept that is not only no less contingent than is regulation, but contingent in precisely the same way for the simple reason that law without regulation makes no more sense than regulation does without law. This point becomes clear as soon as one recognizes regulation as a recent attempt to capture police as a basic mode of governance. For law was defined against police, with not only far reaching theoretical implications but with very palpable effects in the history of mankind, given that the modern concept of law forms a crucial part of the Enlightenment’s comprehensive critique of traditional alegitimate practices and institutions.

There is an uninteresting sense, then, in which “regulation” is more of a label than is “law,” insofar as regulation can be seen as the label for police, which is the proper counterpart, historically and conceptually, for law, as the central modes of governance that were defined, and have remained, in tension with one another. A recent thoughtful contributor to the regulation definition debate, Julia Black, reminded herself and her fellow regulationists that they should focus on the question of which concept “lies underneath” the regulation label. That concept is police. Of course, police itself can be seen as a historically contingent label for a yet more basic mode of governance with yet more distant (and, presumably, therefore deeper) roots, household governance or more fundamental still, heteronomy. Likewise, law is but a recent label for political governance in the public forum (literally) or, in Athens, the agora, which was based on self-government, or autonomy, of equal subject-objects.

Exploring the contrast between regulation and law therefore is useful from the perspective of legal studies, and not merely for the regulationist’s purpose of defining her subject matter, because it places inquiries into law within a new (and, I think, the appropriate or at least a fruitful) context, theoretically and historically. Regulationists are quite right that the study of law ought not to be pursued (exclusively) in isolation from other modes of governance, though they would hardly be the first to make this point. Regulation studies might benefit from an exploration of the deeper distinction between regulation and law not merely, and not even primarily, by helping to define its disciplinary turf (and I suppose justifying its existence and continued spread throughout universities and research institutes around the world) but more importantly by illuminating the very context that regulationists find lacking in the study of law. For all its talk of interdisciplinarity, globalism, and

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the general breadth and flexibility of its methods, subjects, and objectives, regulation studies has yet to develop a compelling account either of its place within the theory of state power in particular, never mind of power in general, or of its place within the history, or if you prefer the genealogy, of (state) government. Too much attention has been paid to efforts to distinguish the regulationist enterprise from the “traditional” inquiry into law and legality, at the expense of carving out with any precision the ideas and practices that “lie[] underneath,” theoretically and historically, of regulation, whatever that is said to be. A conceptual-historical exploration of the distinction between police and law may help to supply this missing foundation and context.

Having reframed and deepened the distinction between regulation and law as that between police and law as manifestations of the foundational distinction between familial heteronomy and political autonomy, it might be helpful to explore the distinction as it plays out in the state’s penal power. Punishment, or the penal process more generally, recommends itself as a locus for investigating the distinction between regulation/police and law for several reasons. Criminal law is often cited as paradigmatic law in the regulation literature for its supposed emphasis on rules and a hierarchical “command-and-control” structure, as some influential accounts of regulation exclude the penal process from the realm of regulation altogether (at least insofar as crimes do not count as “activities that are socially valued”\(^7\) and their disposition cannot be redirected toward goals such as building community and enriching democracy.\(^8\)) At the same time, the power to punish is said to derive from the state’s power to police, i.e., to maintain and maximize the public welfare in all of its aspects.\(^9\) Criminal law itself recognizes a host of so-called “regulatory” (or “police”) offenses and uneasily accommodates regulatory “measures” of human dangers, while theoretical writings about criminal law traditionally have treated criminal law doctrine as applied moral theory, without sufficient regard to the political nature of punishment as an exercise of state power, to the point that criminal law’s supposed moral system obscured its identity as a system of law.

I. Regulation and Law

A quick look at some of the distinctions between regulation and law that the regulatory literature has drawn or, more often, implied suggests confusion not only about the concept of regulation but also about the concept of law. Law appears in the regulatory literature not only, and not even primarily, as the explicit other against which regulation defines itself. More commonly, law simply appears in passing, as glimpses of legality in attempts to capture if not the nature of regulation, then the distinction among types of regulation.

One distinction that recurs frequently in discussions of the distinction between regulation and law is that between private and public, or rather between “private law” and “public regulation.” Little time is spent on the vexing question of the distinction between private and public in the abstract, presumably because regulationists are no more eager to appear mired in formalist orthodoxy than their jurisprudential colleagues. The private/public distinction, after all, has been the subject first of criticism and then of sustained ridicule for the better part of a century, beginning with the American Legal Realists, whose ideas, or more precisely whose scathing critiques, have

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\(^8\) Some regulationists have suggested that “restorative justice” can serve these broader goals, and therefore is a proper subject for regulatory studies. Parker & Braithwaite, “Regulation.”

shaped American jurisprudential thought since the early twentieth century, steadily and successfully resisting the label of orthodoxy they assigned to their jurisprudential predecessors). The very attempt to draw the distinction has drawn charges of reactionary anti-democratic self-interest.\(^\text{10}\) Given the progressive, forward-thinking, if not outright communitarian outlook common among regulationists, it is perhaps not surprising that one is hard pressed to find an endorsement of the private/public distinction in the regulatory literature. If anything, the literature appears to be eager to transcend the distinction and at least some regulationist projects explicitly highlight the public aspects of apparently private law, most notably in the provocative work of Hugh Collins on regulatory aspects of contract law,\(^\text{11}\) which itself spawned an intriguing broader project of regarding other bodies of legal doctrine from a regulatory perspective.\(^\text{12}\)

But if the distinction between public and private is, if not outright devious, at least not particularly helpful, provided it can be drawn at all, then it can hardly serve as the basis for distinguishing law from regulation. Obviously the difficulties inherent in the public/private distinction in general cannot be evaded simply by contrasting “private law” with “public regulation.” The idea seems to be that there is something “private” about law, rather than that regulation is to be contrasted with “private law” as opposed to with “public law.” But the every existence of a category of “public law” is inconsistent with this attempt at differentiation between law and regulation in general. And yet the image of “law” that appears in the regulatory literature often is one of private law, and the law of contract in particular, which appears to be regarded as a system of rules governing the interaction of individuals exercising their free will independent of a larger social or political context of any kind. Occasionally, one also finds references to formalist theories of tort law, which stress the autonomy and internal logic of tort law doctrine.\(^\text{13}\) But surely, these are not the only, and arguably not even the predominant, conceptions of contract or tort law. In fact, even within the confines of contract law or tort law doctrine and theory themselves, it would not be difficult to discover the very private/public distinction that the regulation literature assumes accounts for the distinction between law and regulation.

Drawing the distinction between regulation and many, perhaps most, conceptions of private law, rather than the conception of private law held up by regulationists as representative of law as private, may be difficult. More problematic still is drawing the distinction between public law and regulation. While many have challenged the distinction between regulation and public law, few have challenged the existence of public law. Recent work in jurisprudence, i.e., work in jurisprudence since the early twentieth century, has tended to point up the public aspects of apparently private law, to the point of suggesting that public law is all-encompassing and private law but an anachronistic cover for the protection of private property interests from public control. The one exception here seems to be a long influential strain in English jurisprudence, which denied the existence—or at the very least the desirability—of public law, if only in England, because it was thought incompatible with a peculiarly English commitment to an idea of “common law,” understood as a uniform set of legal principles that applied to private and public actors alike. It seems unlikely that, and ironic if, regulationists should endorse this view, inevitably traced to A.V. Dicey, which is subject to various criticisms, including that its celebration of common law as the

\(^\text{10}\) Morton J. Horwitz, “The History of the Public/Private Distinction,” University of Pennsylvania Law Review 130 (1982): 1423, 1427-28 (“It is not only a symptom of the unraveling of all sense of community, but also a relapse into a predatory and vicious conception of politics.”).


\(^\text{12}\) See Regulating Law.

\(^\text{13}\) Ernest Weinrib’s work is often cited as an illustration. See his The Idea of Private Law (Cambridge, Mass.: Harvard University Press, 1995).
embodiment of the rights of Englishmen, jealously guarded by common law judges, obscures the roots of the “common law” in the king’s effort to centralize power against a patchwork of local justice, meted out by inferior lords), that it proceeds from Dicey’s caricature of French administrative law, which functions as the public law straw man in his dismissal of the very project of public law, that it falsely, and narrowly, identifies public law with administrative law and mistakes the desirability of public law with the desirability of (a very specific set of nineteenth century French) public law institutions and of legal immunity for officials who populate these institutions.

The distinction between private law and public regulation, then, relies on a cramped, outdated, and parochial view of private law and public law (and, in fact, common law, about which more later on), one that has long since been challenged and, at least in the United States, abandoned in favor of a view that either jettisons the distinction between public law and private law as nonsensical, inherently reactionary if not anti-democratic, or at least unhelpful if only because private law is public in that it, for instance, fulfills public functions, is subject to public supervision, control, and manipulation, and is backed by public sanctions.

Perhaps regulation might be distinguished not from private law, but from law as private. Regulation as public would then be distinguished from law as public and private law as private. Apart from the difficulties of drawing the distinction between public and private in this context, this distinction would merely highlight the connection between public law and regulation.

Perhaps (public) regulation should be compared not with private law, but with public law. The public nature of public law, however, is anything but obvious; in fact, the definition of public law is no more settled than is the definition of private law. If one turns to the common sense notion that public law is state law, in the sense that the state is a party to a relationship or a dispute governed by it or in the sense that it concerns state actions and actors, then regulation is tethered to the state, which would preclude common attempts to broaden the regulatory inquiry in general (“influencing the flow of events”) and to “decenter” it in particular (to capture what is thought to be the distinctive feature of “the new regulatory state” and its “self-regulation” and “public-private partnerships”).

Perhaps public law and regulation are thought to be public in the sense that they both pursue the “public welfare” or “public interests” of some kind or another. While this view of the publicness of public law would not be without merit (depending on how one defines “public interests” in particular, as the interests of the public or as the public’s interest in persons), it does not in fact underlie the distinction that is ordinarily drawn between public law and private law, which focuses on state officials as the producers or objects of public law, rather than on its objective. At any rate, it would be inconsistent with another common attempt to differentiate between regulation and law on the ground that one is concerned with welfare (and interests), while the other is concerned with justice (and rights). So, once again, the distinction between regulation and law ends up simply tracking that between public law and private law, with no room to differentiate between regulation and public law. As we will see, however, the distinction between justice and welfare plays an important role in the distinction between law and police. Once regulation is understood as a manifestation of, or simply a modern label for (at least some aspects of) police as a mode of governance, attempts to differentiate between regulation and law in light of the distinction between welfare and justice appear more promising.

14 Black, “Reflections.”
Yet broader than the distinction between justice and welfare is that between the *deontological* and *instrumental* approaches that are said to characterize law and regulation, respectively. Again, the claim that a prospective instrumentalist rationale is characteristic of regulation, while law is committed to a retrospective deontological view ignores the reality of a wide array of conceptions of law, not all of which (or even most of which) dismiss an instrumentalist method as disciplinarily inappropriate. Once again, much of American jurisprudence (academic and judicial) over the past century has been explicitly instrumentalist. To take an example from the area of criminal law, to which we will explore in greater detail below, the American Law Institute’s highly influential Model Penal and Correctional Code explicitly rejected a retributivist approach to criminal law as outdated and barbaric and instead crafted a comprehensive treatmentist system for the diagnosis and peno-correctional treatment through rehabilitation and, where appropriate, incapacitation of abnormally dangerous offenders. Committedly progressive regulatory studies once again operates with an oddly outdated view of law.

The concept of common law already has made an appearance in our discussion of the distinction between regulation and law in light of that between public and private (law). Here regulationists eager to define themselves against jurisprudes (or, perhaps more appropriately, legalists) sometimes appear to operate under Diceyan assumption that all common law is, by definition, private law. At any rate, the idea appears to be that law is *common law*, presumably understood in the sense of “case law” or judge-made law or the law of judicial precedent reaching back for centuries if not millennia through the history of English law, whereas regulation is *statute law*, or law (or perhaps simply norms) promulgated by the legislature (or perhaps the executive). This distinction, between common law and statute law, is as outdated and parochially English as other distinctions the regulation literature has invoked and has long been abandoned in the United States and, I suspect, today can no longer claim much influence, never mind dominance, even in English jurisprudence. The idea that only judge-made law is “real” law, whereas all other law is interstitial, even novel, may be appealing to English judges and may help account not only for the long-standing English resistance to codification but also for the limitation of that resistance to English law, as codification by English lawyers (preferably judges) in the colonies was preferable to the development of common law in dominions without a sufficient supply of English common-law making judges.

Limiting the production of law to the judiciary also implies a similarly narrow minded and long-since debunked view that judges do not produce regulation. Here, too, regarding regulation as police illuminates the distinction between regulation and law by placing it into a broader context; while the police power traditionally has been associated with the legislature, and by delegation the executive, the judiciary has wielded considerable police power of its own, illustrated most obviously by the power to recognize so-called common law (!) misdemeanors rooted in the power to police defined by Blackstone as the power to ensure that “the individuals of the state, like members of a well-governed family, . . . conform their general behaviour to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.”

16 In Germany, colonial subjects were thought to require a different sort of criminal code, one that placed greater emphasis on the deterrent function of criminal sanctions than on the commitment to the principle of personal responsibility thought to underlie the German Penal Code. See Wolfgang Nauke, “Deutsches Kolonialstrafrecht 1886-1918,” Rechtshistorisches Journal 7 (1988): 297.

For another illustration, see what has been called the “common law power to make an order to keep the peace vested in any judge or magistrate.” Regina v. Parks, 75 C.C.C. (3d) 287 (Can. S. Ct. 1992); see also Blackstone, supra, at 248
Finally, there are several distinctions between regulation and law that, oddly, also have been used to differentiate among various types of regulation in the event that the distinction between regulation and law is abandoned in favor of the view that law is but one type of regulation. Law is frequently associated, if not identified, with “hierarchical” “command-and-control”\(^{18}\) regulatory regimes which are contrasted with more “responsive (or reflexive)”\(^{19}\) regimes, a contrast that tends to be associated with the transition from the “welfare state” (and its old-style regulation) to the “new regulatory state,” which spends more time “steering” than it does “rowing.” Law (or “legalistic” regulation) is also said to be formal, and regulation (or at least “new” regulation) informal. Similarly, law is said to operate through rules, backed up by enforcement schemes and threats of sanction for noncompliance. Non-legalistic regulation, by contrast, works through “incentives,” and “by moral suasion, by shaming, and even by architecture.”\(^{20}\) In this context, law tends to be treated as synonymous no longer with private law (and contracts in particular), but with criminal law, a field of law that is generally cited as a, if not the, paradigmatic instance of public law. Apart from this notable shift of definitional contrast from contract law to criminal law, the regulation literature once again operates with a quite unsophisticated and outdated view of criminal law. Rather than vaguely Diceyan as in the case of the image of the common law, and vaguely Langdellian in the case of contract law, the regulationist view of criminal law appears to be vaguely Austonian, defined by sovereign commands directed at subjects under a general duty of obedience. Needless to say, this deeply hierarchical view of criminal law, though influential and descriptively illuminating, is not without significant alternatives, both in doctrine and particularly in the scholarly literature. The essential informality of the penal process, which relies heavily on official discretion at all levels, illustrated, for instance, by the widespread practice of plea bargaining, has been documented in great detail. Similarly, it has long been argued that criminal norms includes rules as well as standards, specific and narrowly defined commands as well as intentionally broad, even vague, proscriptions, specifically designed to render “law enforcement” more effective.\(^{21}\) An entire literature has sprung up describing, and critiquing, the privatization of important aspects of the penal process, from the prevention and investigation of offensive behavior to the infliction of punishment. The image of criminal law in the regulationist literature, then, is no less one-dimensional is that of contract law, tort law, common law, and law in general.

II. Regulation as Police

The difficulties faced by attempts in the regulationist literature to distinguish regulation from law and therefore regulatory studies from legal studies may hamper regulationist efforts at disciplinary self-definition. In this paper, I’m more interested in understanding the source of these difficulties and in extracting illuminating aspects of the proposed distinctions. The problem is, I believe, that comparing regulation with law so far has been comparing apples with oranges. The

\(^{18}\) Parker & Braithwaite, “Regulation,” 127; Black, “Reflections.”

\(^{19}\) Nicola Lacey, “Criminalization as Regulation: The Role of Criminal Law,” in Regulating Law 144, 148; Christine Parker, Colin Scott, Nicola Lacey, & John Braithwaite, “Introduction,” in Regulating Law 1, 11.

\(^{20}\) Parker & Braithwaite, “Regulation,” 119.

problem is not that defining regulation against law is inappropriate, theoretically or historically, once regulation is properly understood. The proper understanding of regulation, I suggest, is as a modern label for a long-familiar mode of governance, police. The proposed distinctions between regulation and law fall short not because they don’t capture important differences, but because the differences they capture distinguish law from police, not law from regulation. Law is a mode of governance; so is police. Regulation is an empty concept, an arbitrary label, unless it is tethered to the rich concept of police, which parallels and complements law since the Enlightenment. Police and law in turn are modern manifestations of the age-old distinction between spheres of heteronomy and autonomy, first theorized in Greek political thought as the distinction between private household governance and public state governance.

Greek political thought distinguished carefully between the hierarchical mode of governance appropriate for the household and the egalitarian mode of governance appropriate for the city-state. In private, the citizen governed his household with essentially limitless discretion, subject only to flexible standards of oeconomic prudence. Household governance rested on the radical distinction between householder (oikonomos) and household (oikos). Every constituent of the household, from humans to animals to inanimate objects to real property, formed part of the economic resource of the household, the commonwealth, the maintenance and maximization of which lay in the hands of the householder. In public, the citizen/householder appeared as equal among equals. Greek democracy, thus, was public autonomy, or self-government, of citizens by citizens whose public autonomous status corresponded with, and in fact derived from, their heteronomous government of the household in private. Whereas the household and all its constituents were as incapable of self-government, marked for other-government, only the householder possessed the capacity for self-government required for participation in the public sphere.

This dual system of private heteronomy and public autonomy persisted in Roman politics, with the paterfamilias replacing the oikonomos, the familia the oikos, and the forum the agora. As the republican ideal in Roman government faded, the familial mode of governance was extended or transplanted from the micro family to the macro family of the Roman imperial state, though at least in theory, the autonomy-based legitimation derived from the imperium’s foundation in the Roman people persisted even as the emperor assumed the title of pater patriae. On a smaller scale, military commanders and magistrates had gained quasi-patriarchal power. The assumption of state sovereignty, in general, in the face of republican self-government can be seen as a publicization of the private power of the paterfamilias. The family, in other words, was the model for heteronomous government and the transformation of the republic from autonomy to heteronomy also meant its transformation from a body of citizens who gather in the forum to debate the public issues of the day so that they might govern one another through the force of the better argument to a household whose members were the objects, but no longer the subjects, of government. In imperial Rome, then, the only householder who remained was the emperor, and the only family the Roman empire.

Already in Greek political thought, the distinction between the modes of governance appropriate for household and for state government, respectively, was contested. Plato was considerably less anxious than Aristotle to distinguish between state and household. Aristotle regarded the state as “made up of households” and even saw the household as the original political association, “the original seed of the polis,” leading him to begin his Politics with a treatment of

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household governance. Still, the mode of governing those who themselves governed their households differed; in public state government, the objects of government were themselves the subjects of government in their respective household. In the public sphere, they remained governors, now of themselves and their householder equals. To the extent that the state could be regarded as a household, and Plato thought it could, then it was subject to the same standards of good governance, of prudent oeconomy, that governed the micro family, on a grander scale.

After the collapse of the Roman republic, it appears that the idea of public self-government largely fell from view. Government meant heteronomous patriarchy on the basis of various models of familial governance, from every man’s micro family to the lords and their households and eventually the king and his royal household, the compartments of which evolved into branches and agencies of state government to the Christian church with its Pope and its inferior family-households (bishoprics, monasteries, etc.). In early modern Europe, the subject of government is the prince, who keeps wise counsel so that he may rule his subordinates prudently, if he so chooses. Machiavelli’s _Prince_ is the early modern analogue to Marcus Aurelius’s _Meditations_ and even earlier handbooks on oeconomics. It assumes a deeply heteronomous system of government, whose sovereign subject rules by limitless discretion according to norms he defines and adopts. The only limitation on his sovereignty, if it can be called that, is the extent of his sovereignty in space (territoriality) and time. In time, the sovereignty ends only with a catastrophic event, external (through war) or internal (treason or felony, literally the breach of fealty).

It’s no accident that modern liberal political thought, in Locke’s _First Treatise_, begins with a critique of patriarchalism, an attempt to (re)assert the ruler’s householder authority. As pater patriae (the “naturall Father to all his Lieges,” as James I. put it), the king remains radically distinct from, and superior to, the objects of government, much as the householder stands in relation to his household. Political equality does not mean equality—and certainly not identity—of governor and governed, of subject and object, but equality of objects. All members of the household are equal vis-à-vis the householder-king; they are equally unequal. Liberalism, then, is the attempt to revive a long dormant mode of governance, autonomy (of which consent is but one, procedural, manifestation), after centuries of heteronomous familial government in various guises.

By the time Locke publishes his _Two Treatises_, familial governance has begun a process of abstraction and scientization that, on the Continent, has transformed the prudential guidebook genre into a “science of police” (_Polizeiwissenschaft_), where police is understood broadly as the welfare of the commonwealth or, rather, of the state household. Police scientists produce exhaustive accounts of the myriad activities of government and, with the help of new analytic tools of measurement and prediction, they scrutinize the efficiency of various economic arrangements, calculate the proper ratio of imports and exports, the price of grain and milk, and ponder general techniques of good governance, administrative expertise, and bureaucratic performance. Police science, in other words, is the study of administration, that is to say, it is regulatory studies. The scope of police science is as wide as its subject, police, which encompasses every aspect of government, from water police to grain police, from forest police to health police, from education police to crime police, and so on.

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24 M.I. Finley, The Ancient Economy (Berkeley: University of California Press, 1973) 17-20 (discussing Xenophon’s _Oikonomikos_).
25 James I, The True Law of Free Monarchy, or the reciprocall and mutuall duty betwixt a free King and His naturall Subjects (1642) (1st ed. 1598) 4-5.
26 See Parker & Braithwaite, “Regulation,” 121.
While police science flourished in France, Germany, and elsewhere in continental Europe, the English were slow to warm to the idea of police as a mode of governance. The term “police” was taboo if only because it was associated with ostensibly oppressive French government. Adam Smith, steeped in the comprehensive project of critique and revision that was the Scottish Enlightenment and unhampered by such parochial prejudice, lectured in his early Glaswegian days on “Justice, Police, Revenue and Arms.” A few years later, Blackstone in his influential Commentaries notes that the king, the “father” of his people, and “paterfamilias of the nation,” maintains “the public police and oeconomy [, i.e.,] the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners.” (Recall that this passage spawns the common law misdemeanor doctrine.) At the turn of the century, Patrick Colquhoun is churning out a series of police treatises that rival continental police science in comprehensiveness of ambition. He called for the establishment of a national police system and wrote extensively on a wide variety of other police aspects, including, among others, river police, education police, as well as treatises on the police of the micro household, and, eventually, the macro household, a sort of Wealth of Nations for the British Empire. By 1829, the time was ripe in England, if not for the broad recognition of police as a mode of governance in theory, then for the establishment of that most French of police institutions in practice: a “Metropolitan Police Force” for London under then-Home Secretary Robert Peel. As in the case of codification, which was thought unnecessary, and certainly inappropriate, in the case of the English themselves but prudent when it came to governing (in fact, policing) the king’s dominions, a police force for Dublin had been established some forty years earlier (1786), which became the model, and the training ground, for colonial police throughout the British Empire. (Glasgow had put in place a police force as early as 1779.)

Smith, in the meantime, had turned his attention to a new inquiry, “political economy,” which is merely police science by another name and by other means. As Rousseau had pointed out in his Discourse on Political Economy (1755), “The word Economy, or Oeconomy, is derived from oikos, a house, and nomos, law, and meant originally only the wise and legitimate government of house for the common good of the whole family. The meaning of the term was then extended to the government of that great family, the State. To distinguish these two senses of the word, the latter is called general or political economy, and the former domestic or particular economy.”

29 Blackstone, Commentaries, vol. 4, 176.
30 “A treatise on the police of the metropolis” (1795).
31 “A treatise on the commerce and police of the river Thames” (1798).
32 “A new and appropriate system of education for the labouring people: . . . containing an exposition of the nature and importance of the design, as it respects the general interest of the community: with details, explanatory of the particular economy of the institution, and the methods prescribed for the purpose of securing and preserving a greater degree of moral rectitude, as a means of preventing criminal offences by habits of temperance, industry, subordination, and loyalty, among that useful class of the community, comprising the labouring people of England” (1806).
33 “Useful suggestions favourable to the comfort of the labouring people, and of decent housekeepers explaining how a small income may be made to go far in a family, so as to occasion a considerable saving in the article of bread” (1795).
34 “A treatise on the wealth, power, and resources of the British Empire” (1814).
The English attitude toward the very notion of police bears a striking resemblance to the English attitude, personified by Dicey later in the nineteenth century, toward the concept of public law in general, and administrative law in particular. As the concept of police some decades earlier, so too the concept of public law was derided as deeply un-English and distinctly French. Public law, like police, was attacked in principle, while in practice the English state went about the business of governing within certain, though vague and continuously evolving, limits, against the background of a much-celebrated body of English constitutional law that was not less, but more entrenched for the fact that it was not committed to paper. The rejection of administrative law in principle, as in the case of police, ultimately did not prevent, but merely postponed, its recognition in institutional form, as police forces in one case, and as administrative law courts and a body of administrative law doctrine in the other.

The similarity in the English attitudes toward police and public law is not surprising: administrative law is one of the modern remnants of (certain aspects of) the comprehensive police project, which splintered into various subprojects in the nineteenth century and today survives largely in the narrow institutionalized form of the police force, whose connection to the broader police project tends to be obscured by decades of institutional practice. If administrative law represents the attempt to cabin the exercise of police power within the (procedural) limits of law, then regulation, or regulatory studies, is concerned with (the study of) the exercise of police power without regard to these limits. (Depending on which view of administrative law one takes, the distinction between it and regulation is either more or less pronounced; the distinction is more obvious under what has been called the “green light” approach to administrative law, as facilitating regulation, than under the “red light” approach, which focuses on administrative law as a means to control and constrain regulation.)

The connection between regulation and police comes into focus more clearly when we shift attention from the obscuring English approach to the subject to countries less committed to denying the existence of police as basic mode of governance. In the United States, the police power played a central, and at least initially explicit, role in the establishment and expansion of state government. Not only the significance of the police power was acknowledged by legislatures, commentators, and courts alike, so was its breadth, depth, flexibility, discretionary nature, and essential connection to the very notion of sovereignty. The police power, or “the power to govern men and things,” it became commonplace to note, “is, and must be from its very nature, incapable of any very exact definition or limitation.” The police power, “the most essential, the most insistent, and always one of the least limitable of the powers of government,” encompasses “the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.” As such “[i]t extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property,” and underlies a vast expanse of legislation and regulation at all levels of national and local governance, including, notably, the power to punish.

38 License Cases, 46 U.S. 504, 583 (1847).
39 Slaughter-House Cases, 83 U.S. 36, 49 (1873).
41 Slaughter-House Cases, 83 U.S. 36, 49-50 (1873).
The police power was the sovereign’s power to govern the state so as to maintain or to maximize police, i.e., the public welfare in all of its aspects, including—particularly in the United States—its moral welfare, a concern that played a central role in the doctrine of common law misdemeanors, in which the courts assumed a police power of their own in the absence of legislative intervention. The police power was not only limitless in scope, and defined by its very indefinability, but also without meaningful (legal) restraint. As one early twentieth-century commentator pointed out, the police power functions as an “idiom of apologetics” in U.S. constitutional law. Attempts by courts—genuine or not—to cabin the police power were roundly rejected in the wake of the U.S. Supreme Court’s now infamous opinion in *Lochner v. New York*, striking down a New York state law limiting bakers’ work hours on the ground that “the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, sui juris),” rather than to protect the police of the public as a whole. The dissents in *Lochner* carried the day when, after sustained political and scholarly critique, the Supreme Court decided to (again) get out of the business of scrutinizing the exercise of the police power. The dissents’ point was straightforward: there are no constitutional limits on exercises of the police power. Justice Harlan, quoting a previous Supreme Court case, cautioned that “neither the [14th] Amendment—broad and comprehensive as it is—nor any other Amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people.” The states’ legislatures, Harlan argued, enjoyed unlimited discretion to exercise their police power, i.e., “their conceded power to guard the health and safety of their citizens by such regulations as they in their wisdom deem best.” Justice Holmes was more oblique, if also more memorable, quipping that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics” (cited as a prominent endorsement of laissez faire policies) and listing other exercises of the police power that the Supreme Court had affirmed.

Today, the police power has virtually disappeared from the face of American jurisprudence, both in the doctrine and in the scholarly literature. It has been relegated to certain pockets of constitutional law (for instance, in the doctrine of regulatory takings, originated by Holmes). The concept of police itself survives largely in the narrow sense of police force; references to “police science” that still appear in the field of “criminal justice” concern investigative and forensic techniques, and other matters related to the operation of police forces (in the pursuit of “law enforcement”).

The nineteenth-century tradition of police power treatises in the U.S. came to an end with its most ambitious achievement, Ernst Freund’s massive *The Police Power*, published in 1904.

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43 198 U.S. 45 (1905).
44 In other cases, Holmes was more explicit in his view that exercises of the police power were beyond constitutional scrutiny. For instance, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), he recognized a category of “regulatory taking” that, as an exercise of the police power, lacked the constitutional constraints of the takings clause. Five years later, in *Buck v. Bell*, 274 U.S. 200 (1927), Holmes upheld a Virginia forced sterilization statute that had been justified as an exercise of the police power, noting that “three generations of imbeciles are enough”; in the words of the Virginia Supreme Court, “[t]he purpose of the legislature was not to punish but to protect the class of socially inadequate citizens named therein from themselves, and to promote the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people of the state. . . . The right to enact such laws rests in the police power, . . . and the exercise of that power the Virginia Constitution provides shall never be abridged.” *Buck v. Bell*, 143 Va. 310, 318–19 (1925).
Freund instead turned to studies of Legislative Regulation,\textsuperscript{46} and Administrative Power over Persons and Property,\textsuperscript{47} transforming himself from the last and greatest American scholar of the police power into one of the first and most ambitious American scholars of administrative law. Administrative law, as the law governing the operation and production of the new and ever multiplying regulatory agencies, soon evolved into a sprawling legal discipline, with a distinct body of jurisprudence and the attendant scholarly literature and place in the curriculum of American law schools.

While administrative law focuses on the attempt to place some constraints, however marginal, on the activities of regulatory agencies, the main object of the study of the police power, the internal analysis of the activity of administration, and therefore ultimately of the exercise of state power, has fallen from view. The study of regulation (re)discovers this long neglected field of inquiry. Regulatory studies returns scholarly attention to the colorful and complex variety of governmental activities and institutions that once occupied the study of the police power, in the United States, and the science of police, in Europe. In Europe, a similar development occurred; while law faculties focused on the thin slice of administrative law that hovers on the edges of the mass of everyday administrative activity, the study of police science disappeared from university curricula and retreated into the less comprehensive and more pragmatic bureaucratic training programs where it originated before its transfer into universities in the 18th century.\textsuperscript{48} Curiously, Germany, though having replaced the last remnants of the comprehensive concept of police with administrative agencies (forest police, river police) by the mid-20th century, continues to recognize a doctrine of “police law,” a subcategory of administrative law that deals with the state’s authority, through its administrative agencies and police force, to prevent danger to public security or order, including but not limited to, the prevention of criminal offenses.\textsuperscript{49}

Once regulatory studies are viewed in the broader historical and theoretical context of the study of police as a mode of governance, regulationists’ attempts to define their subject matter against law appear in a new light. To fully appreciate regulation’s relation to law, and not merely to police, it helps to recall the origins, or rather the historical and theoretical context, of the modern concept of law. That concept was defined in explicit contradistinction to the concept of police, as it had developed by the late eighteenth century, evidenced, theoretically, in Rousseau’s definition of political economy and in Blackstone’s account of the public police and oeconomy, and practically in the applied police science of governments throughout Europe, notably in Prussia and France, but also in the smaller principalities scattered around the continent.\textsuperscript{50} It is against this ideal and reality of a “well-ordered police state” (\textit{Polizeistaat}) that the concept of law, and its attendant ideal of the law state (\textit{Rechtsstaat}), or the rule of law, must be understood.

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\textsuperscript{46} Legislative Regulation: A Study of the Ways and Means of Written Law (New York: Commonwealth Fund, 1932).
\textsuperscript{49} See, e.g., Niedersächsisches Gesetz über die öffentliche Sicherheit und Ordnung §§ 1(1), 2(1).
\end{flushright}
As early liberalism, exemplified by Locke, defined itself through a critique of patriarchalism, so the critical Enlightenment, exemplified by Kant, defined itself through a critique of police, the scientized and fully developed account of state government as government of the macro household. The Enlightenment challenged the very foundation of the police model: the radical distinction between governor and governed. Moral thought was grounded in a rich, yet abstract, concept of the person, who was entitled to dignity not by reason of superior status, but merely on account of a characteristic shared by all persons as such, the capacity for self-government, or autonomy. In the political realm, personal autonomy implied equal rights of all persons, including the right to govern themselves. The right to political autonomy was no longer reserved for householders and their modern analogues, and did not reflect a capacity for self- and other-government limited to a select few, but the universal capacity for autonomy of all persons as such. The dualism of private heteronomy and public autonomy was replaced by the right to public autonomy regardless of each person’s status as householder or household member in private life. In the public sphere, every person was equal, entitled to be persuaded rather than commanded, much like the Athenians in the agora and the Romans in the forum, with the crucial difference that the public sphere was open to everyone, including those who were governed, rather than governors, outside the affairs of state.

Law was the mode of governance appropriate for this new vision of the object of government as identical to its subject, endowed with the capacity for self-government, and no more. The ideal of the rule of law, and of the Rechtsstaat, simply was the ideal of a state governed by law thus understood, as a manifestation of the equal right to personal autonomy.

In light of this fundamental distinction between police and law, the distinction between regulation and law is not that between public regulation and private law, or even between public regulation and public law, but between two aspects of the study of police: one that focuses on the actual activity of administration as it occurs and evolves constantly in the complex system of government that is the modern state and the other that concentrates on the marginal procedural constraints that the rule of law attempts to place on the practice of regulation. In this light, it also makes sense that regulationists would consider their subject matter as far broader than that studied by jurispruders; the scope of (“red-light”) administrative law pales in comparison to that of the activities of all organs of government at all levels and, in the most expansive views of regulation, of anyone or anything else that might “influence the flow of events.”

The distinction between justice and welfare that regulationists draw between law and regulation similarly reflects on way of capturing the distinction between law and police. The idea here is that police is concerned with maintaining, or maximizing, the public welfare (a term that has often been used synonymously with police), where the public welfare is merely the welfare of the state considered as a macro household. Law, by contrast, is concerned with the manifestation of justice, where justice is understood as the recognition of dignity of each person as endowed with the universal capacity for autonomy. Law gives persons their due as persons; police is not concerned with persons, but with the welfare of the household. Similarly, it might be said that law is concerned with rights, whereas police considers interests, or rather the public interest, with each constituent’s interest being relevant insofar as it figures into the public interest. The distinction between deontological and instrumental approach can also be seen as related, if also as less significant, insofar as the manifestation of personal autonomy, as the characteristic feature of law, can be distinguished from a mode of governance that looks to identify means to the achievement of certain ends. Insofar as the distinction rides on that between a retrospective and a prospective, or a

The distinction between \textit{common law} and \textit{statutes} (or \textit{codes}), another candidate for the distinction between law and regulation, likewise has been said to track the distinction between law and police,\footnote{Noga Morag-Levine, “Common Law, Civil Law and the Administrative State: From Coke to \textit{Lochner},” 24 Constitutional Commentary 601 (2008).} though here as there the distinction seems to rest on, and to merely restate, certain assumptions regarding the respective roles of “law courts” and legislatures, and, by delegation, executive agencies. Law and police are no more neatly associated with one governmental branch than are law and regulation.

The distinction between \textit{formality} and \textit{informality} that is said to differentiate law from regulation reflects that between law and police insofar as law, in the negative sense of the rule of law, attempts to place constraints on the essentially discretionary exercise of police authority. That is not to say, of course, that a subject of police governance may not decide that it may be prudent to enunciate formal rules, and to put in place formal procedures. (It has been pointed out, for instance, that the IMF recommends the “rule of law” as a “good governance” item.\footnote{John Braithwaite \& Christine Parker, “Conclusion,” in \textit{Regulating Law} 269, 269.} In fact, while Julia Black is right to remind us that there is no “rule of regulation” that matches the rule of law, the exercise of police power may, in fact, come to resemble that of law power (e.g., prospectivity, specificity, publicity).\footnote{See Fuller on the similarities between the rule of law and guidelines of “managerial direction.” Lon L. Fuller, \textit{The Morality of Law} 207-17 (New Haven: Yale University Press, rev. ed., 1969). Fuller’s work on “economics,” i.e., “the science, theory, or study of good order and workable arrangements,” can be seen as an attempt to develop norms of “good” government that transcends the distinction between law and police.} Unlike the rule of law, however, the rule of regulation is itself not a rule, but entirely discretionary; the householder-governor is free to accept or reject it, as he is subject only to the rules he imposes upon himself.

Another, related, contrast between law’s \textit{rules} and regulation’s more flexible “steering” mechanisms, including “incentives,” “moral suasion,” and “shaming,”\footnote{Parker \& Braithwaite, “Regulation,” 119.} similarly captures a distinctive feature of police governance. Police governance, in this light, appears as creative and even experimental, in its unconstrained selection among myriad policing tools. By contrast, law appears as stale and narrow, limiting itself to those rules that manifest the autonomy of its subject-objects. The use of shaming, for instance, threatens to reduce, or simply to identify, its object (the shamed) as occupying an inferior status vis-à-vis its subject (the shamer).\footnote{Paul Garfinkel, “Conditions of Successful Degradation Ceremonies,” American Journal of Sociology 61 (1956): 420.} This is objectionable from the standpoint of law, because it not only concerns itself with an individual’s social status, rather than personhood, but reflects or effects the shamed’s inferiority, in violation of the principle of the equality of persons. Police governance is untroubled by these concerns; if shaming is effective in achieving whatever goal the police governor/householder deems prudent to pursue, then it is preferable to another tool that is less effective.

One common distinction between law as hierarchical “\textit{command-and-control}” governance and regulation as egalitarian partnering, does not reflect a contrast between law and police. In fact, this
distinction between law and regulation has it exactly backward. Recall that police, as the modern scientized manifestation of householder governance, is essentially hierarchical, pitting the autonomy-capable superior householder against the autonomy-incapable inferior household resource, human or not. Again, while it is certainly possible that police governance may choose to frame its regime as a partnership, or as “steering” rather than “rowing,” but that possibility itself derives from the householder’s virtually unlimited discretion, which assumes from the radical inequality of governor and governed.

In the end, the construction of the object of government and, therefore, also of its subject, emerges as one of the central points of distinction between law and police, and therefore regulation. Law concerns itself with persons. The defining mark of personhood is the capacity for self-government, or autonomy. In the political sphere, this means that the only legitimate form of government is self-government, which in turn implies the identity of the subject and object of government. The object of regulation, by contrast, tends to be not the individual, but the corporation or the enterprise, or more precisely corporations or enterprises in general. More generally, regulation as police governance does not regard, or address, its objects as persons in the sense of individuals endowed with the capacity for autonomy. It does not distinguish between individuals and corporations, and between “natural” persons and “legal” or “artificial” persons, simply because the paradigmatic target of police governance is the resource, whose naturalness or artificiality, humanness or aliveness, is relevant only insofar as these features might call for different strategies of resource management.

It is noteworthy in this context that recent regulatory studies often mention the effectiveness of “self-regulation,” which is preferred to outdated, crude, and legalistic “command-and-control” regimes. Self-regulation here may be usefully contrasted with self-government: while only a person is capable of self-government, as a manifestation of the bundle of rational capacities that make autonomy possible, corporations and other hierarchical groups can be incorporated into a centralized police regime much like the family, or inferior estates, were eventually integrated into the king’s macro household (through the grant of franchises, privileges, immunities, and the like); they can regulate themselves, i.e., their constituents, in the limited sense of serving as loci of delegated local police power.

Legitimacy also plays a fundamentally different role in law governance than it does in police governance, and therefore of regulation. Police is essentially alegitimate. Regulation similarly does not concern itself with legitimacy, but with effectiveness. As Black points out, regulation does not “invoke or lay claim to any mystique or even legitimacy.” Regulationists “do not expect regulation to be internally rational or consistent; it might be, more likely it will not. But no significance attaches to either conclusion….”

Legitimacy (or rationality, or consistency) is relevant only insofar as it affects effectiveness. And even then, it is not the regulator’s legitimacy that is at stake, but the regulatory object’s; so a corporation might regulate itself into compliance in order to maintain its “legitimacy” (more precisely, its reputation) among its peers or public partners.

III. Penal Regulation and Legality

57 Lacey, “Criminalization as Regulation,” 145; Parker & Braithwaite, “Regulation,” 130.
58 Already in Athens, the radical distinction between householder and any household constituent did not imply the imprudence of differentiating among the treatment of different household members according to their particular characteristics.
59 Black, “Reflections.”
60 Parker & Braithwaite, “Regulation,” 131.
Penalty well illustrates the distinction, but also the tension, between regulation and law, with penal regulation and penal law coexisting as alternative comprehensive accounts of a penal regime, rather than as complementary partial accounts of parts of that process. The coexistence of these accounts also raises the broad and somewhat abstract question of the relationship between regulation and law in a narrower, and perhaps more manageable, context. Given a police-based account of regulation and the explicit and historically as well as conceptually fundamental distinction between law and police, the question of the relationship between penal regulation and penal law cannot simply be resolved by treating one as a subcategory of the other. Penal law, then, is no more merely a form of penal regulation than vice versa. At the same time, as parallel comprehensive accounts of a penal regime, the relationship of penal regulation and penal law cannot be one of rule to exception, though it might turn out that certain aspects of an actual penal regime fit more comfortably with one model than with another. It may therefore turn out that, in a given positive penal regime, one model may be seen as predominant. For theoretical purposes, however, it might be best to regard regulation and law as to lenses through which a given penal regime can be viewed and analyzed.61

Separate from the empirical question of the prevalence of regulatory or legal aspects in a penal regime is the normative question of whether one aspect should predominate, perhaps even to the exclusion of the other. Insofar as normative inquiry concerns itself with the legitimacy of the exercise of state power, the regulatory lens on penality illuminates nothing for the simple reason that legitimacy in this sense is irrelevant to the regulatory project. Regulatory analysis, again, investigates effectiveness, not legitimacy. In this sense, it is entirely instrumental, and legitimacy is not an end the achievement of which it measures. If normative inquiry is understood in a broader sense of evaluation, and of compliance with norms of any kind, including those governing the choice of ends and the relationship between means and ends, penal regulation is of course subject to normative analysis; one regulatory tool can prove more effective than another with respect to an end that may be more suitable than another. The legitimacy of the means, and of the intermediate ends, would then derive from their connection to some ultimate end, say, “welfare,” that is taken to be the (only?) “legitimate” end of government that is thought not to require further legitimation. This end then tends to be taken to apply to all instances of government, including but not limited to state government. As many regulationists point out, unlike law, regulation is not only, or even primarily, a mode of state governance. To take an example from the penal realm, this form of astatal regulatory inquiry would not draw a fundamental distinction between parallel and complementary public and private penal processes, constituted by public and private providers of “security services,” ranging from the definition of offensive behavior (private offenses) by private entities (e.g., corporation, enterprises), to the prevention, investigation, and (preliminary) enforcement of both private and public offenses, to the imposition and “adjudication” of private offenses by private entities (internal review boards), and finally the execution of private sanctions (discipline, severance) and of public sanctions (in private “detention centers”). From the perspective of law, “public-private partnerships” in the penal realm would be scrutinized on legitimacy grounds to determine the extent to which they are consistent with the principle of personal autonomy. For instance, penal law might consider the legitimacy of delegating any or all penal tasks (from the definition of norms, to their imposition, to the infliction of sanctions for their violation) to a private for-profit enterprise that regards its object of control as an economic resource

for the maximization of the wealth of the enterprise, or rather its owners or shareholders. Note that, in this case, the group the welfare of which is to be maximized does not include the object of control, unlike in the case of household governance, where the welfare of the household constituent is relevant insofar, even if only insofar, as it affects the welfare of the household.

Regarding penality through the lens of regulation as police reveals not only obvious, explicit, regulatory features of all aspects of the penal process, including the host of definition of regulatory (or police) offenses, which include not only legislatively generated statutes but also penal regulations promulgated by executive agencies, the imposition of penal discipline in administrative tribunals, ranging from immigration courts to prison disciplinary boards to military “commissions,” and the infliction of penal control on sexual predators, terrorism suspects, and immigration detainees. More important, the penal process as a whole, rather than specific elements, emerges as a regulatory enterprise.

For instance, the often drawn distinction between “real” or “malum in se” and “regulatory” or “malum prohibitum” (or “police” or “public welfare”) offenses fades once central doctrines of the law of “real” crime are seen from a regulatory perspective. In a regime of penal regulation, mens rea is relevant not as a manifestation of the capacity for autonomy in the form of an intentional act, but as a regulatory control device: reinterpreted as an indicator of exceptional dangerousness, mens rea plays a role in the effective regulation of human threats to the public welfare (i.e., “police”). A hierarchy of mental states, or modes of culpability, is established to reflect a range of degrees of dangerousness, from the “highest” mental state, intent or purpose or willfulness or malice or depravity, to the “lowest,” criminal negligence. Strict liability does not indicate the absence of exceptional dangerousness, but merely acts as a placeholder for the exercise of discretion by the appropriate actor (police officer, prosecutor, judge, prison official, parole board, probation officer, etc.) to determine whether penal regulation is warranted (in whatever form, from a costly and shaming criminal case resulting in a fine to prolonged imprisonment in the case of possession offenses) because of the dangerousness of the actor or the act (or, in the case of possession offenses, the item over which the actor exercised dominion or control).

In general, the function of the doctrines of the general part of criminal law, setting out the conditions of criminal liability, as well as of the definitions of offenses in its special part (which is dispersed within penal codes, other statutes, and administrative regulations, at all levels of government, from federal to municipal), along with the norms of criminal procedure, is merely to guide and to facilitate the detection and disposition of human threats to the public welfare. To borrow a term from administrative law, penality as regulation is a “green-light” regime.

It is tempting, then, to suggest that penality as law appears as a “red-light” administrative regime. But penal law, as law, is not a subspecies of, or simply another name for, administration. While the rule of law places constraints on state power, it also structures, and may even demand, its exercise. So, for instance, while penal regulation is essentially discretionary, with all substantive and procedural norms serving as guidelines for the exercise of administrative discretion, penal law may require the invocation of penal sanctions if necessary to protect or manifest the equal personhood of a victim even if the offender no longer poses a threat to the public welfare, or

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62 Cf. Lacey, “Criminalization as Regulation.”
65 “Defenses” in such a regime operate as opportunities for rebutting the presumption of dangerousness that attaches upon a finding that an offense has been committed. The paradigmatic defense here is renunciation in cases of inchoate offense. See, e.g., Model Penal Code § 5.01(4); N.Y. Penal Law § 40.10.
prosecution would be ineffective for one reason or another. Penal law, in other words, structures and grounds the state’s power to punish not only by requiring that the objects of punishment be treated as persons capable of autonomy (even if they exercise that capacity through criminal conduct) but also by insisting that the objects of offense receive the same treatment. Punishment, in penal law, then is the reassertion of the personhood of the “victim” through punishment of the “offender” consistent with his personhood.