The Citizen in Penal Law

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The concept of citizenship can play a useful, though not necessarily a central, role in a descriptive account of penal practice. By contrast, it contributes nothing to a normative theory of criminal law, being either empty, as a proxy for personhood, or pernicious, as a proxy for insiderhood.

As a matter of positive law, citizenship is largely, if not entirely, irrelevant in all aspects of penal law—from substantive criminal law, which deals with the definition of criminal offenses and the ascription of criminal liability, to procedural criminal law, which is concerned with the imposition of the norms of substantive criminal law, and, finally, the law of punishment execution, which governs the infliction of sanctions attached to the violation of norms of substantive criminal law. Offenses are not defined in terms of the citizenship status of either the offender or the victim. Defenses do not take into account the citizenship status of the offender or the victim. Prescribed punishments have no regard to the citizenship status of the offender or the victim. Penal procedural rights, constitutional and otherwise, do not distinguish between citizens and non-citizens. And citizens serve prison sentences alongside non-citizens, pay the same fines as non-citizens, and are subject to the same probation and parole conditions as non-citizens.

There are some very few offenses that, by definition, apply only to citizens or non-citizens. So, for instance, only non-citizens can commit immigration offenses (as principals) and only citizens (or nationals) can commit crimes of state disloyalty, most importantly treason. Also, non-citizens are subject to different sanctions than citizens: they can be deported, i.e., stripped of the privilege to reside in the country of conviction. Let’s assume these sanctions qualify as punishment in fact, if not in form;¹ still, it’s noteworthy that, formally, they are classified as administrative sanctions based on the sovereign’s unlimited discretionary power to control entry into its territory or, to put it less spatially, to “define its political community.” Citizens may (no longer) be denaturalized (or expatriated) as punishment.² At the same time, (only) citizens, again by definition, can be denied the “privileges and immunities” of citizenship, as for instance in

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the temporary or permanent disenfranchisement of those convicted of felonies or “infamous crimes” (with felony historically being the original infamous crime: breach of the duty of fealty). Jurisdiction, in Anglo-American criminal law, is based on the territoriality principle, i.e., on the **locus criminis**, rather than on the offender’s, or the victim’s, citizenship (or for that matter the country or county of residency, visa status or duration, length of stay, or nationality). The citizenship (or nationality) of either the offender or the victim may in some exceptional cases establish what is known, tellingly, as “extraterritorial” jurisdiction (or venue, within a given jurisdiction).

If one shifts focus from the offender and the victim to those who define and impose norms, and inflict sanctions for their infringement, citizenship does come squarely into view. For state officials in all three branches of government must be citizens: legislators, judges, jurors (but not witnesses), bailiffs, prosecutors, public (but not private) defense attorneys, police officers, probation officers, prison guards, governors, and, yes, presidents (who hold the pardon power). As the U.S. Supreme Court held, in rejecting an equal protection challenge against a California law requiring that all “peace officers” (a huge category, including, in this case, probation officers) be citizens, “a state may limit the exercise of the sovereign’s coercive police powers over members of the community to citizens.”

Peace officers, according to the Court, “personify the state’s sovereign powers” because they “symbolize the political community’s control over . . . those who have been found to have violated the norms of social order.” More generally, the Court remarked that “the exclusion of aliens” is “a necessary consequence of the community’s process of political self-definition,” for the simple reason that “[a]liens are by definition those outside of this community.”

As a matter of positive law, then, citizenship, even if understood broadly as membership in “the political community,” is a prerequisite only for those who “personify the state’s sovereign power” in all aspects of the penal process, not for offenders or their victims. This conception of penality may be open to criticism insofar as it relies on a fundamental distinction between the subjects and objects of state power, and penal power in particular, which is inconsistent with the principle of autonomy, i.e., the very principle of “self-government” which it claims to manifest. But that criticism cannot be framed in terms of citizenship, for it is the concept of citizenship that is used to draw the contested distinction in the first place.

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3 On the distinction between suffrage as privilege and as right, see Judith Shklar, American Citizenship: The Quest for Inclusion 58 (1991). The phrase “privileges and immunities” is taken from the Comity Clause in article 4 of the U.S. Constitution (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); the phrase “privileges or immunities” appears in the Fourteenth Amendment (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”) The distinction between right and privilege in U.S. constitutional history remains largely unexplored. See, e.g., Akhil Amar, “The Bill of Rights and the Fourteenth Amendment,” 101 Yale L.J. 1193, 1220-22 (1992).


5 Id. at 447.

6 Id. at 440.

7 Id. at 439.
As has been pointed out many times before, citizenship here, as elsewhere, both identifies and differentiates. It defines the identity of insiders in distinction from the identity, or identities, of outsiders (who can either form a distinct political community or exist merely as stateless individuals, outlaws, etc.—think of the distinction between regular troops and partisans, for instance). The community of citizenship, it is generally implied rather than made explicit, is distinctive in that it is subject to the principle of self-governement. 8 Within the political community thus defined, all insiders enjoy the same “privileges and immunities” of citizenship (unless and until they are suspended, temporarily or permanently, as for instance, in the case of the disenfranchisement of those who committed *felonia* 9. Self-government, then, is self-government of citizens, by citizens, for citizens. Aliens may or may not belong to another political community that may or may not adhere to the principle of self-government, that is, they may or may not be citizens elsewhere. Their alien citizenship potential, however, is beside the point. The alien is, simply, “not a citizen.” 10

The definition of citizenship by distinction is nothing new. The citizen in ancient Greece or Rome was defined in contrast to other residents who were incapable of self-government as well as to non-residents who, as Barbarians, were likewise not only different, but distinctly inferior in the relevant sense—incapable of self-government, they were only capable of being objects of other-government, of being governed, rather than governing. Foreigners thus were the non-residential analogue to residential household members, as the objects of the only proper subjects of government, the citizen, who could govern himself as well as others less capable.

Contemporary accounts of citizenship similarly assume the citizen’s capacity for self-government, without necessarily denying that capacity to aliens (who may be citizens in their political community) or tying self-government in the public sphere to other-government in the private sphere (of the household, or the family). All citizens, with the exception of young children, adults with certain mental defects, and those convicted of “infamous crimes,” are said to possess the requisite capacity for self-government, and therefore for participation in the public sphere and membership in the “political community.” The poor, women, and racial minorities are no longer denied *de jure* the right to vote, for instance, because they lack the requisite capacity for self-government.

Still, it is worth noting that the poor, women, and racial minorities were not necessarily denied citizenship; they were simply denied one of the “privileges and immunities” of citizenship. In other words, citizenship is not necessarily a unitary or equal status. (Consider, for instance, the common distinction between “native-born” and “naturalized” citizens, not to mention that between citizens and “permanent residents.” 11) All citizens are alike in that they are not aliens, but they are not necessarily alike in other respects. “Second-class citizens,” for instance, enjoy a status that is distinct from, and in

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8 See, e.g., Minor v. Happersett, 88 U.S. 162, 166 (1875) (“citizen,” rather than “subject” or inhabitant, “has been considered better suited to the description of one living under a republican government”).

9 On *felonia* as the Uroffense, see below.

10 40 U.S.C. § 841(r): “‘Alien’ means any person who is not a citizen or national of the United States.”

11 The significance of the former distinction was felt not only by Mr. LaCoste, the “victim” in the case against Freddy Quimby, but also by Arnold Schwarzenegger, whose case has inspired calls to amend the U.S. constitution to drop the requirement that the president be a native-born citizen. The latter distinction, between citizens and “permanent residents,” i.e., one type of “resident alien,” has attracted attention in the Bush Administration’s war on terror. See below.
principle superior to, a (resident or non-resident) alien, but they may lack certain “civil rights” enjoyed by other citizens. There is, in other words, a difference between “citizenship” and “rights of citizenship,” so that one may lose the latter while retaining the former.\textsuperscript{12} Put another way, one has an unconditional right to retain one’s citizenship\textsuperscript{13} but not to retain the privileges and immunities of citizenship.\textsuperscript{14} Of course, the “conferral” of the status of citizen, through naturalization, is itself a privilege; only the native-born citizen has a right to the status (either through ius sanguinis or ius soli).

It is not helpful, at least for a normative theory, to rely on a definition of citizen as a non-alien, where the alien is defined as a non-citizen. One might, of course, develop richer accounts of alienship, the other, the enemy, and so on (Carl Schmitt and Giorgio Agamben come to mind, among many others, including Günther Jakobs, whose theory of enemy criminal law will be discussed in some detail below), which may have some explanatory power, at least as sociological models. Without a theory of the other and, perhaps of the necessary/permanent/essential struggle of the self with the other, or the friend with the foe, one would expect a rich account of the nature of citizenship. For instance, one might expect a normative theory of the connection between citizenship and self-government, a theory that captures the positive, affirmative side of citizenship rather than its negative, differentiating, and exclusionary aspect of non-alienship. Put another way, what is it about citizenship that establishes its “liberal” credentials, its (necessary? definitional?) connection to equality, liberty, and democracy?

The answer is, I think, personhood. Citizenship implies self-government insofar as, and only insofar as, citizenship implies personhood, where personhood in turn is defined as the capacity for autonomy. But if it is the citizen’s personhood that renders him capable of self-government and, therefore, entitled to self-government, then the concept of citizenship contributes nothing (valuable) to the account. It is true, historically, that citizenship has been associated with self-government. But that association was consistent with the prolonged denial of the right to self-government (either through a denial of citizenship or of its attendant privileges and immunities) to a great many persons whom we now, since the Enlightenment, regard as possessing the requisite capacity.\textsuperscript{15} Citizenship, in other words, is not a liberal concept, personhood is. The household member, the poor, the woman, the felon, the African American, deserves full civil rights as a person, not as a citizen. Self-government today is a human (or person) right, not a civil (or citizen) right that may or may not be enjoyed all persons.

In this account, citizenship is no more than a label, though perhaps a convenient one, that marks the manifestation of the personal right of autonomy in the political sphere. As a member of a political community, and more precisely of one type of political community, a state, the person is a citizen, or more specifically a state citizen.

\textsuperscript{12} Trop v. Dulles 90
\textsuperscript{13} At least since Afroyim v. Rusk, 387 U.S. 253 (1967)
\textsuperscript{14} See Richardson v. Ramirez, 418 U.S. 24 (1974); U.S. Const. Am. XIV (participation in rebellion, or other crime, as justification for disenfranchisement).
\textsuperscript{15} In fact, the very case—cited above (n. 8)—that highlighted the intimate connection between citizenship and republican government denied women citizens the right to vote. Minor v. Happersett, 88 U.S. 162 (1875).
(\textit{Staatsbürger}), much like she is a sister as a member of a family, or an executive vice president as a member of a corporation.\textsuperscript{16}

Now it may well be that one’s status as state citizen may—and perhaps even should—affect one’s rights and obligations in the realm of distributive justice (for instance, in the distribution of social services or one’s tax liability), but even there it is doubtful that citizenship status would be more than one among several relevant considerations (including residency, financial contribution, need, and so on). In the realm of penal justice, however, citizenship is of no significance. Neither as a matter of positive law, nor as a matter of normative theory, does the concept of citizenship play a role in an account of the nature of crime or of the penal process in general. A crime is not committed by a citizen, nor against a citizen. That it is defined, prosecuted, and adjudicated by citizens doesn’t transform it from an interpersonal into an intercitizenal event, though it does reflect the fact that the “political community” takes an interest in the matter. The reason for the state’s interest, however, has nothing to do with its being a political community, except, arguably, in the very few cases of crimes against the state, i.e., treason and its cognates. It is no accident that in these cases, the offender’s citizenship is significant: only a citizen can commit treason, as only a citizen can breach his duty of loyalty to the sovereign. (Whether, or at least how, these loyalty offenses are legitimate in a person-based system of criminal law is another matter.)

If we leave treason aside for the moment, crime is an interpersonal event, not an intercitizenal one. Crime is a public wrong, and in that sense is of interest to the “political community,” insofar as the offender and the victim are regarded as persons, with whom those who sit in judgment identify as persons (via their sense of justice, or capacity for empathy).\textsuperscript{17} Moreover, on this, person-based account, crime is the manifestation of the offender’s personhood at the expense of the victim’s. The state, whose reason for being is the protection and manifestation of the persons who constitute it (“the political community,” if you like), becomes engaged in the face of crime insofar as it is necessary to protect and manifest the personhood of both the victim (against impunity) and the offender (against vengeance).

Personhood, then, is a prerequisite not only for the judge (including all public officials participating in all aspects of the penal process, legislative, judicial, and executive), but also for offender and victim. (Rather than citizenship, which is required only for the judge, but not for the objects of her judgment). Crime is committed by a person, as such, against a person, as such, and judged by a person, as such. Punishment is the reaffirmation of the victim’s personhood in the face of the offender’s denial. Of course, one could simply substitute “citizenship” for “personhood” and “citizen” for “person,” but nothing would be gained as a result, or rather nothing that adds to the normative account of the penal process. Reframing the account in terms of citizenship instead adds the differentiating, exclusionary, and demeaning aspect of the concept of citizenship traced back to its decidedly pre-liberal roots in the oppressive dual state of

\textsuperscript{16} While the citizenship label is often limited to membership in a state, it is also used to refer to membership in a nation. See Note, “The Functionality of Citizenship,” 110 Harv. L. Rev. 1814 (1997) (distinguishing functional, or statal, and nonfunctional, or national, citizenship).

“republican” Athens and Rome, which tied autonomy in the public sphere to heteronomy in the private sphere (the household (oikos), the family (familia)).

If we turn to positive law, we find that crimes are defined in terms of personhood, either explicitly in specific offense definitions or, implicitly, in general principles of criminal liability, so that “whoever” refers to a person with the capacity for autonomy, that can manifest itself through an external intentional act. Those who lack that capacity, i.e., young children and certain individuals who suffer from a mental disease or defect are incapable of criminal liability in all cases; others, who are unable to exercise that capacity in a particular case, are excused from criminal liability in that case (e.g., duress, provocation, entrapment, superior orders).

Again with the exception of offenses of state disloyalty, offenses are not defined in terms of citizenship. The criminal law is not “a law for citizens and for visitors to the polity” but, like all law, a law for persons. Public wrongs are not “those that should concern all citizens, as wrongs, simply in virtue of their shared citizenship with the offender and with the victim”; what matters is the shared personhood of judge, offender, and victim. Defenses also do not consider the citizen status of offender, victim, or third parties. In self-defense, it makes no difference whether the self-defender or the unlawful attacker is a citizen of some political community, or of the same political community. An attack is no more or less unlawful because it was undertaken by a non-citizen, no matter which definition of unlawfulness one adopts. Other-defense is no more or less justifiable because the third-party object of the unlawful attack was a non-citizen. In fact, American criminal law once limited other-defense not to fellow citizens, or members of the same polity, but to household members. Even that limitation, however, has since been abandoned in favor of a rule that draws no distinction among those whom I am justified in defending against an unlawful attack; the defense of others now is an empathic form of self-defense (“use of force for the protection of other persons”), applying to any case in which I, placing myself in the position of the person attacked, would be justified in using force necessary to protect my person. Likewise, the defense of duress is not limited to threats against third-parties who are fellow citizens, either of the issuer or of the recipient of the threat. Again, while American criminal law once

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18 On the split personality of American political thought and practice, which affirmed citizenship for some in explicit contradistinction from the non-citizenship of others, see Shklar.
20 Another way of capturing this distinction is by differentiating between incapacity and inability excuses, see Markus D. Dubber, Criminal Law: Model Penal Code (2002), or between categorical and particularized excuses. The use of the concept of “exemption” may be inadvisable in this context, given its association in positive law with the concept of “immunity,” i.e., with status distinctions among persons of equal capacity. Consider, for instance, the “marital exemption” in the law of rape and the categorical “exemption” for state officials from the law of (weapons) possession. See Dubber, Victims 95-97, 103-04; see also People v. Desthers, 73 Misc. 2d 1085, 343 N.Y.S.2d 887 (N.Y Crim. Ct. New York City 1973) (applying “exemption” to police officer’s possession of a “dangerous instrument,” a blackjack, “with intent to use the same unlawfully against another”).
22 Id. at 141.
23 Perkins 1144-45.
24 MPC § 3.05.
25 See also StGB § 32(1).
limited third-party duress to threats against family members,\textsuperscript{26} that restriction has been abandoned in favor of a rule that applies the defense to threats against any person, provided the threat is sufficient to satisfy the core element of the defense, the inability to resist the coercion, under some reasonable person standard.\textsuperscript{27}

It makes no difference, positively or normatively, whether a non-citizen victimizes another non-citizen, or a citizen victimizes a fellow citizen, or a non-citizen a citizen, or a citizen a non-citizen because, once again, crimes are not violations of citizenhood (but of personhood). If citizenship mattered, one would think that the criminal law would not, and should not, concern itself with offenses against animals, who presumably are non-citizens so that citizens could not recognize a shared citizenship with the victim. Yet, Antony Duff argues that a criminal law for citizens “should also cover non-human beings with interests that merit the law’s protection: in particular, criminal laws protecting animals against abuse or maltreatment should be understood as protecting, not human interests, but the interests of those animals themselves.”\textsuperscript{28} If citizenship is a prerequisite for criminal victimhood, protecting animals as direct victims of crime would seem to imply that they count as citizens, which would mean that they would qualify for criminal offenderhood as well.

That is not to say that animals should qualify for criminal victimhood (or offenderhood), but merely that the reason they do, or do not, count as (direct) victims of crime has nothing to do with their citizenhood. The central question, instead, is whether they qualify for personhood, i.e., whether they possess the requisite bundle of capacities distinctive of personhood. I suspect that they do not, with the possible and very narrow exception of certain “great apes.”\textsuperscript{29} The central question is whether putative persons are capable of self-government, in the abstract sense of having the capacity—the tools—for self-government, rather than the ability to exercise that capacity—to use the tools—in a particular instance. (The latter interpretation would banish individuals under the control of others—traditionally, the poor, women, minorities—from personhood and from full and effective citizenhood.)

Citizenship appears, as a matter of positive law, to be no more of a prerequisite for offenderhood than for victimhood. The “defenses” of infancy and insanity bar the ascription of criminal liability to individuals on the ground, not that they lack citizenhood, but that they lack the requisite capacity for responsibility (autonomy) due to age, “mental disease or defect,” or some other reason (as in the case of extreme intoxication) (covered, in German criminal law, by the general term \textit{Unzurechnungsfähigkeit}). Of course, one might suggest that these individuals do not qualify for citizenhood in the first place (contrary to positive law), so that their ineligibility for offenderhood is no surprise. But in that event it would appear that they also would be ineligible for victimhood, which would not only conflict with positive law

\textsuperscript{26} See also StGB § 35.
\textsuperscript{27} Perkins 1061-62; MPC § 2.09(1) (“use of, or a threat to use, unlawful force against his person or the person of another”).
\textsuperscript{28} Duff 124
but presumably also would be considered undesirable by proponents of a citizen-based criminal law.

II.

Those who recently have proposed to regard criminal law through the lens of citizenship have focused on, or have found it necessary to address, a timely question: the classification and treatment of “terrorists” or, more simply and pointedly, of “terrorist Osama bin Laden.”

As an initial matter, it should be noted that the meaning of “terrorist” in the literature on citizen criminal law remains somewhat unclear. Perhaps, insofar as this literature is concerned with criminal law, the “terrorist” in question could be described as someone convicted of—though, more accurately, as someone suspected of, or perhaps prosecuted for—having engaged in acts that satisfy some definition of the crime of “terrorism,” the elements of which, however, are rarely, if ever, specified, presumably because they are not central to the analysis. The “terrorist” at issue, therefore, might be more appropriately described as a particular type of individual, rather than as someone who is—suspected of, prosecuted for, or—convicted of a particular act that falls under the definition of a particular crime.

Let us see, then, what difference citizenship makes in the classification of “terrorists.” Corey Brettschneider, for instance, has argued that “the theoretical punishment of terrorist Osama bin Laden” illustrates “why the punishment that criminals deserve qua persons is distinct from the punishment that is justifiable to them qua citizens.”

Punishing bin Laden qua person would mean “brutal, spontaneous, even bizarre retribution, perhaps at the hands of the victims of his attacks”; punishing him qua citizen would require “a fair trial for his crimes.” In Günther Jakobs’s telling, the case of the terrorists behind the September 11 attacks provides a telling example of “enemy criminal law” (Feindstrafrecht), which treats its object as a source of danger, in contrast to “citizen criminal law” (Bürgerstrafrecht), which regards its object as a person. Antony Duff is less certain about how to classify terrorists; in his view, “it is not clear that we should treat terrorists as members of, or as visitors to, the political communities that they attack—rather than as enemies with whom we are engaged in a war.” At any rate, he cautions that they “still claim our respect as our fellow human beings.”

The initial results are not encouraging. Brettschneider thinks the terrorist case illustrates the need for a citizenship-based theory of criminal law; Jakobs, instead takes the case of terrorists to illustrate the need for a criminal law for non-citizens; and Duff concludes that citizen criminal law does not resolve the question of how to classify terrorists one way or the other. Perhaps these different positions reflect differences in

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32 Brettschneider, 184
33 Jakobs.
34 Duff 15
35 Id.
conceptions of citizen criminal law. Certainly the fact that invoking the concept of citizenship cannot, by itself, generate a definitive answer to a question as difficult as the state’s, and in particular the criminal law’s, response to terrorist acts (or, rather terrorists) does not establish the uselessness of the concept.

Let us, then, take a closer look at each attempt to apply the concept of citizenship to the case of terrorism. Brettschneider’s analysis seems to turn significantly, if not primarily, on the citizenship of the judge, not on that of the offender (or of the victim). He uses the terrorist case to highlight the distinction between the “private person’s” presumed urge to punish (exemplified by John Kerry) and the “president of the United States” who has “to stand for the rule of law” (a part played by Howard Dean in a 2004 debate with Kerry in the Democratic presidential primary). According to Brettschneider, the private “apolitical” person is concerned with meting out punishment as moral desert, whereas the citizen—the (public?) political person—is concerned with something else (more?): justifying punishment to the offender. The concept of personal moral desert is limitless, informal, principleless (brutal, spontaneous, bizarre), whereas that of citizenal political desert is strictly constrained, formal, principled. This distinction is familiar from the literature on retributivism, which has long revolved around the question whether or not retributivism is vengeance rebranded and, even if it is, whether vengeance is unprincipled and unjustifiable. The urge to punish the terrorist, in fact, does not differ significantly from the urge to punish the reformer, now harmless murderer, a case used by Michael Moore to argue for, not against, the justifiability of retributive punishment and of “retributive emotions,” in particular. At any rate, the invocation of the concept of citizenship would add nothing to this debate, even if Brettschneider had set out in greater detail whose citizenship is at issue and, in particular, in what sense bin Laden qualified as a citizen.

The classification of the offender lies at the heart of Jakobs’s discussion of the terrorist case. His influential distinction between citizen criminal law and enemy criminal law, in fact, turns on the distinction between offenders as citizens and as enemies. To treat an offender as a citizen is to treat her as a person; to treat her as an enemy is to treat her as a danger source. The citizen is “a person who acts according to loyalty to law,” to treat an offender as a person is to treat her as someone who “provides sufficient cognitive guarantee for conduct as a person.” Enemy criminal law is not necessarily illegitimate. The state may, and in fact must, treat certain offenders as enemies, i.e., as non-persons, so as not to violate the “right to security” of persons. Terrorists are prime examples of enemies because they lack not only the requisite loyalty to law but also the interest in acting according to it. (Jakobs does not consider the possibility of conflicting legal loyalties.)

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37 The distinction has spawned a sizable literature, in Germany and in civil law countries where German criminal law theory retains considerable influence. See, e.g., Derecho penal de la exclusión, 2 vols., 2284 pp. (Cancio Meliá & Gómez-Jara Diez, eds., Buenos Aires/Madrid: BdF/Edisofer, 2006); Diritto penale del nemico: Un dibattito internazionale (Massimo Donini & Michele Papa eds., Milan: Giuffrè 2007).
38 91
39 94
40 93
Under Jakobs’s theory of citizen criminal law, then, the concept of citizenship makes all the difference in the terrorist case. In Jakobs’ view, the terrorist is the paradigmatic non-citizen; we need a concept of enemy criminal law precisely because the terrorist does not fit into the category of citizen criminal law.

Jakobs, in other words, reaches a conclusion diametrically opposed to Brettschneider’s. Brettschneider (apparently) views bin Laden as a citizen whose very citizenhood illustrates the need for a theory of citizen criminal law, rather than one of person criminal law, which could not legitimate punishing terrorists (or any other offender, for that matter). Citizen criminal law, to Brettschneider, highlights the identity of terrorists and other criminal offenders, all of whom have an “inalienable” right to have punishment justified to them as citizens. Jakobs, by contrast, uses the concept of citizen criminal law to illuminate the difference between—non-citizen—terrorists and other—citizen—offenders.

More interesting than the differences between Jakobs’s and Brettschneider’s position on the terrorist issue is the fundamental similarity in their approach. Although both say little about the concept of citizenship that motivates their account of citizen criminal law, their concept of citizenship turns more or less explicitly on the concept of personhood. Jakobs is very clear about the connection: he uses citizenship and personhood interchangeably. The citizen is simply the legal object regarded as a person. The enemy differs from the citizen in her lack of personhood. Enemy criminal law treats its object as a nonperson, a danger source. Invoking the concept of citizenship, thus, adds nothing to the analysis in terms of personhood.

Brettschneider, as we’ve seen, stresses the distinction between punishment qua person and punishment qua citizen. Yet at the same time he insists that he has in mind, following Rawls, “a moral ideal of citizenship that suggests a way of treating all persons subject to state control,” rather than “a legal ideal of citizenship defined by state claims about who is and who is not a full member of society.” While his account of personhood is intentionally underdeveloped (the “flesh-and-blood” person appears as “a value-neutral description of actual individuals”), it appears that his concept of the citizen is a moral ideal, rather than a legal category, precisely because it is rooted in the concept of the moral person. Rawls himself saw the central challenge of political theory as “[t]he way basic social institutions should be arranged if they are to conform to the freedom and equality of citizens as moral persons,” one of “the two basic model-conceptions of justice as fairness,” designed “to single out the essential aspects of our conception of ourselves as moral persons and of our relation to society as free and equal citizens.”

In this sense, then, Brettschneider’s citizen criminal law is at bottom—like Jakobs’s, only less explicitly—person criminal law. That Brettschneider insists on bin Laden’s citizenship, while Jakobs regards him as the paradigmatic non-citizen, reflects different accounts of personhood. To Rawls, and therefore to Brettschneider, personhood requires two “moral powers,” the capacity for a sense of justice (or empathy) and the capacity for

41 Brettschneider 197 n.27.
42 178.
43 178, 194.
44 The other being the well-ordered society.
a conception of the good. While the details of Rawls’s account of personhood are not important here, it is not difficult to see its connection to the Enlightenment’s familiar (Kantian, Rousseauian) abstract concept of the person as an individual endowed with the capacity for autonomy, or self-government. Under this view, individuals have moral, not social, dignity, as persons, not as citizens, and, again as persons, they deserve respect among equal persons. To say, with Kant, that the criminal law is a categorical imperative is to say that criminal law is person law, that crime is an attack on personhood and punishment its reaffirmation. Hegel makes the same point when he treats crime as a matter of Abstract Right, the most fundamental and abstract realm of political life where individuals are considered as persons. In punishment, the personhood of both the offender and the victim is reasserted in the face of the offender’s (internally inconsistent, non-universalizable, conceptually unstable, self-contradictory) attempt to negate the victim’s personhood, which in the end amounts to negating himself qua person given the relevant identity, as persons, of offender and victim.

The抽象ness, and breadth and generality, of this conception of personhood served a crucial critical purpose: to deny the relevance of traditional status distinctions that structured political life.\textsuperscript{46} Citizenship was among the social markers, and arguably the most important one, that did not survive Enlightenment critique. As Judith Shklar has pointed out, citizenship was central to the American political project precisely because it always remained a social characteristic, a key, and arguably the most important, indicator of social standing. To be a citizen always also meant not to be a non-citizen, which in the American context meant most importantly not to be a slave: “From the first [Americans] defined their standing as citizens very negatively, by distinguishing themselves from their inferiors, especially from slaves and occasionally from women.”\textsuperscript{47} Despite the rhetoric of equality that dominated the American Revolution at a time of wide disenfranchisement of slaves, women, and the poor, the connection between this conception of citizenship as social standing and the conception of citizenship “for members of a master-class who feel a real affinity for one another, and who can spend their time together discussing the great matters of policy,” which Shklar attributes to Aristotle, is plain:

\textbf{Only very few citizens can be said to be fit for such activities, or for the perfect education that is the true end of politics. This is a highly exclusive definition, for ideally only men who have the material means and personal breeding for leisure can achieve such citizenship. Women and slaves exist exclusively to serve them domestically.}\textsuperscript{48}

Shklar, in her account of citizenship as social standing, recognizes three other accounts of citizenship, “citizenship as nationality,” “citizenship as active participation,” and “ideal republican citizenship,” which are not the focus of her inquiry and, with the possible exception of the first, also are less relevant for our purposes (though the positive, if not realistic, connotations of the latter two may well help explain the attraction of a

\textsuperscript{47} Shklar, American Citizenship 15.
\textsuperscript{48} 29.
citizen-based account of criminal law to at least some of its proponents). While Shklar investigates “the exclusion of native-born Americans from citizenship,” citizenship as nationality and citizenship as standing share the central feature of definition by exclusion and superiority. Citizenship confers social standing whether it is based on one’s distinction from the alien non-citizen or from the “native-born” non-citizen. In fact, as the classes of disenfranchised “native-born Americans” gradually disappeared, de jure if not de facto, the role of the concept of citizenship as the source of a social standing through a sense of superiority vis-à-vis the alien non-citizen has become more important. Today, as women, blacks, and the poor, have the franchise, the paradigmatic non-citizen is no longer the slave (native-born or not), but the alien (notably the “illegal immigrant”).

Still, it is worth noting that the mere classification as citizen should not, at least in the United States, be confused with recognition as political equal. Citizenship, in other words, is not only consistent with, if not essentially connected with, inequality insofar as it presumes the distinction from the radically unequal, and inferior, non-citizen; citizenship considered by itself also has been consistent with inequality, as some holders of the elevated status of citizen have been more equal than others. The underlying idea here is that citizenship is a right in only one sense: certain individuals are entitled to citizenship by birth (based on *ius sanguinis* or *ius soli*). No one else has a right to citizenship. The bundle of rights associated with citizenship, often referred to somewhat loosely as “civil rights,” turn out not to be rights at all, but “privileges and immunities.” These rights qua citizen must be distinguished from other rights, such as constitutional rights (based on the constitution), human rights (based on one’s status as a human), or natural rights (possessed independently of state recognition or conferral) For our purposes, an inquiry into citizen criminal law or criminal law for individuals qua citizens, only rights qua citizen matter. Needless to say, there is no citizen right to “naturalization,” given that the citizen in waiting cannot have citizen rights: to her, the grant of citizenship itself is a privilege. Citizenship, regardless of its mode acquisition, is a bundle of privileges and immunities that, as such, are subject to sovereign discretion and revocation. So, for instance, American women learned in the late nineteenth century that their status as citizens did not imply the suffrage. As the U.S. Supreme Court explained in *Minor v. Happersett*, women were citizens because

> [e]ach one of the persons associated becomes a member of the nation formed by the association. He *[sic]* owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

> “Citizen” simply is the “title” given to such a person and “the relation he bears to the nation.” This title “convey[s] the idea of membership of a nation, and nothing more”; specifically, it does not convey suffrage, which neither the U.S. Constitution nor pre-constitutional practice included among “the privileges and immunities of citizens.” Since

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49 Duff, in particular, tends to invoke a vision of “the polity” composed of members who fit the image of citizenship as active participation, if not the ideal of republican citizenship, commonly citing university departments as examples of such polities, Duff 49, and portraying criminal responsibility as “just one dimension of civic responsibility.” Id. at 50.

50 88 U.S. 162 (1875).
citizenship did not imply suffrage, it took a constitutional amendment (the 19th amendment, in 1920), to extend to women the privilege to vote.

III.

The Supreme Court’s musings about the nature of citizenship in Minor is noteworthy not only because it points out the disjunction between citizenship and equality, which provides a useful corrective to the common presumption of the intimate connection between the two concepts even if one disregards that citizenship itself is defined in contradistinction to inferiors, non-citizens. It also highlights another important thread that runs through various conceptions of citizenship: the element of loyalty, or allegiance, which is brought out most clearly in Shklar’s conception of citizenship as nationality. The idea of mutual allegiance, or fealty, traces itself back at least to the medieval relationship between the lord and his serf (and ultimately to the relation between the householder and members of his household). Breach of the duty (and literally the oath) of fealty was felonia, which Maitland and Pollock regarded as the root of the modern concept of felony, if not of crime.\(^{51}\) Technically, both lord and serf could commit felonia, but the remedy for the lord’s failure to discharge his obligation of protection had significantly less bite than the remedy for the serf’s breach of allegiance (outlawry).

Treason, in this telling, is simply a type of felonia, if a particularly explicit and destructive one. Both represented breaches of the duty of allegiance, which differed only in the sovereign object of disloyalty: the king in the case of treason, and a lord in the case of felony. This distinction affected the division of the spoils of punishment for disloyalty, with the property of the traitor falling to the king (as the offended) and that of the felon to the lord (as offender). The Treason Act of 1351, which distinguished (high) treason, committed against the king, from (petit) treason, committed against a lesser lord, can be seen as a concession by the king to the lords, by defining treason, however broadly,\(^ {52}\) recognizing the existence of an offense of treason, however petit, against lords other than the “our lord the king,” and by providing that the property of the petit traitor fall to the local lord (who, however, would not be around to enjoy it, insofar as he was the paradigmatic victim of petit treason, defined as the governed’s slaying, and not merely imagining the death of, the lord-governor).

The citizen, then, is the modern equivalent to the serf, who owes allegiance not to the lord, but to the more amorphous modern sovereign, who (or which) owes her a duty of protection in return. In this light, the paradigmatic offense of citizen criminal law is treason or felony in the traditional general sense of a breach of the duty of loyalty. What is distinctive about citizen criminal law, then, derives from the status of the offender, rather than of the victim. As a citizen, the offender’s act becomes an offense against the sovereign; as a matter of citizen criminal law, crime is not an offense against a fellow person, or for that matter a fellow citizen, but an act of disloyalty. As Shklar puts it in the

\(^{51}\) Dubber, Police Power 19-24.

\(^{52}\) Notoriously including “imagining” the death of not only “our Lord, the King,” but also “of our Lady his [Wife] or of their eldest Son and Heir,” along with a long list of other offenses against “our Lord the King, and his Royal Majesty,” including but not limited to giving aid and comfort to the “King’s enemies.”
context of her discussion of Rousseau’s views on citizenship, “[t]he lawbreaking citizen is really a traitor.”

Brettschneider does not explicitly draw on this interpretation of citizen criminal law. Jakobs does, relying on what he sees as a long, and illustrious, tradition of distinguishing citizen criminal law from enemy criminal law, which features not only Rousseau, but also Fichte along with Hobbes and, oddly, Kant. Jakobs cites Rousseau’s general claim that a lawbreaker ceases to be a member of the state through his crime, which amounts to an act of war, or treason. As a result, the offender is punished not as citizen, but as enemy.

Fichte similarly regarded crime as a violation of the citizen contract (Bürgervertrag); the offender therefore loses “all his rights as citizen, and as human, and becomes completely rightless.” By showing herself incapable of making the rule of law the guiding principle of his actions, the offender reveals herself as unfit for legal status (Rechtsfähigkeit) and the community of rational beings. That could have been the end of it; but, considering that in Fichte’s view the state’s sole purpose consisted in protecting the security of its citizens, it may at its discretion offer the offender the opportunity to enter into another, subsidiary, arrangement—the expiation contract (Abüßungsvertrag)—under which the state could refrain from outlawing the offender, in exchange for expiation through punishment, provided the state thereby does not compromise its protective function. Outlawry, however, remains as the sanction for murderers and for those who proved themselves as incorrigible during their period of expiation. In that case, the offender “is declared a thing, an animal (ein Stück Vieh)” and, following the familiar treatment of outlaws, may be “slaughtered” by anyone without legal sanction. (That is not to say, Fichte adds, that killing an outlaw might not attract the same social disapproval, as opposed to legal liability, that may result from torturing animals for pleasure or killing them without reason.)

Fichte’s theory might seem fanciful, but it is worth noting that the central idea of regarding outlawry as the paradigmatic sanction also finds historical support in the work of Heinrich Brunner. Brunner portrayed all criminal sanctions as offshoots from outlawry (Abspaltungen der Friedlosigkeit), a state of “peacelessness” into which the offender had placed himself through his act. As an outlaw, i.e., an individual who was not under the protection (peace or mund) of another, the offender was literally at the mercy of others, including but not limited to the victim, who could do with him as they pleased, as illustrated by the summary execution of hand-having thieves, i.e., thieves caught red-handed. The permissibility of inflicting death did not imply the obligation to kill. In fact, the punitive response was entirely discretionary, with options ranging from the ultimate penalty to lesser penalties, which were permissible a fortiori, to abstention.

Brunner’s view, shared by Pollock and Maitland, can shed light on the continued disenfranchisement of felons. One might interpret this practice within the context of the general phenomenon of disenfranchisement. In this light, the disenfranchisement of felons reflects their incapacity to govern themselves, rather than be governed, which they

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53 35
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55 253
56 272
57 Heinrich Brunner, “Abspaltungen der Friedlosigkeit,” in Forschungen zur Geschichte des deutschen und französischen Rechtes 444 (1894).
58 See History of English Law, bk. II, at 461-62
were thought to share with others, notably slaves, women, and the poor. In this view, felons retained their citizenship status, but were denied one of the privileges and immunities of citizenship. Under Brunner’s account of the splintering of outlawry into lesser penalties, felons have committed the paradigmatic offense of disloyalty (felonia) and, as traitors, are expelled (or expelled themselves) from the sovereign’s protection. Rather than exercising his (or its) privilege to leave them to die at the hands of anyone anytime anywhere—the fate of the peaceless—the state may choose to deprive them only of some of the privileges of membership in the political community; instead of outright outlawry, felons only suffer “civil death.”

Jakobs sees himself as continuing Rousseau’s and Fichte’s project of distinguishing between citizen and enemy in principle, but prefers to reserve the enemy status for particular offenders, rather than attaching it to all offenders, both because the offender has a right to reintegration into society and because she has no right to remove herself from society on her own account, thus evading her duty of restitution.59 Jakobs find a more differentiated approach to the classification of citizens and enemies in the work of Hobbes and Kant. Hobbes, according to Jakobs, limits enemy status to traitors, who through their act of disloyalty remove themselves from the protection of the sovereign. More surprising, Jakobs cites a footnote in Perpetual Peace in support of the claim that Kant advocated treating as an enemy, rather than as a person, anyone who poses a “continuous threat” through his refusal to enter into a state of communal legality (gemeinschaflich-gesetzlichen Zustand).

For present purposes, it makes no difference whether or not Jakobs’s interpretation of Rousseau, Fichte, Hobbes, and Kant in particular is correct. Jakobs might well have cited others who drew similar distinctions at the time; Thomas Jefferson, for instance, in the preamble to his remarkably unambitious, yet unjustly neglected 1778 Virginia Bill for Proportioning Crimes and Punishments, which promised a system of criminal law “deduc[ed] from the purposes of society,” distinguished between an offender who, “committing an inferior injury, does not wholly forfeit the protection of his fellow citizens,” and those “whose existence is become inconsistent with the safety of their fellow citizens.” While the former “after suffering a punishment in proportion to his offence, is entitled to [his fellow citizens’] protection from all greater pain,” the latter, which include traitors and murderers, must be not punished, but “exterminate[d].”60

The point instead is to illustrate the nature as well as the depth of Jakobs’s distinction between citizen criminal law and enemy criminal law. Although he uses citizen and person interchangeably, suggesting alternately that the enemy lacks the capacity for citizenhood or for personhood, the enemy’s distinguishing feature, if there is one, appears to be his disloyalty. Even if an enemy offender can satisfy some abstract definition of personhood, he ought not to be treated as citizen because he lacks the requisite ability to “act according to loyalty to law.”61 As such, they are not subject to legal punishment, but to police regulation as human threats who “threaten to destroy the legal order,” rather

59 Jakobs 89.
61 91
than as “delinquent citizens, persons, who have made a mistake.” According to Jakobs, the terrorist is the paradigmatic object of enemy criminal law.

Note that, although most of the references to terrorism in Jakobs, as in other discussions of citizen criminal law, cite the “acts of September 11, 2001,” bin Laden, or Al Qaeda, the terrorist’s citizen status under positive law, or under some other concept of citizenship, appears to be irrelevant in Jakobs’s account. It appears, therefore, that, in Jakobs’s view of the distinction between citizen criminal law and enemy criminal law, the paradigmatic offense of enemy criminal law is disloyalty, including but not limited to the breach of the duty of loyalty, which presumably would apply only to citizens in the first place.

The duty of loyalty, and the attendant sanction for its breach, also lies at the heart of Michael Pawlik’s account of citizen criminal law. Pawlik does not make explicit reference to the classification of terrorists, or acts of terrorism, and is not primarily concerned with the distinction between “citizens” and “enemies.” His project is closer to Brettschneider’s (and Duff’s) than it is to Jakobs’s; he introduces the concept of citizenship as part of a comprehensive theory of criminal law, rather than as classificatory device. Unlike Jakobs, he is not concerned with the question of how to treat those who do not qualify as citizens, but rather with the preliminary question of the significance of citizenship in the legitimation of state punishment. “Person,” “subject,” and “citizen,” in Pawlik’s view, are different aspects of a single individual; citizenship and enmity, by contrast, are mutually exclusive: an individual is treated as either one or the other. Pawlik is interested in citizen criminal law exclusively, without considering, or even acknowledging the existence of, enemy criminal law.

As a theory of citizen criminal law, however, Pawlik’s resembles Jakobs’s in its emphasis on loyalty. Loosely tracking Hegel’s Philosophy of Right, Pawlik’s account proceeds from criminal law for persons, to criminal law for subjects, and eventually to criminal law for citizens. From the perspective of the person and of the subject (a particular manifestation of the abstract capacities of a person), crime is (merely) a private wrong. We need the perspective of the citizen to capture the public wrongness of crime. The assumption appears to be that citizen criminal law presumes both a citizen offender and a citizen victim, though the discussion focuses exclusively on the offender’s status. The distinctive feature of crime in the realm of citizenship, then, is the breach of loyalty, and punishment the reaffirmation of its significance. It is clear that this loyalty is not owed to individuals (as persons or subjects). But to whom, or what, is it owed? Candidates include “the community of law,” “the legal order,” “fellow citizens,” and “the project of a ‘peace through law.’”

Both Jakobs and Pawlik, then, appear to operate with a concept of citizenship that differs from personhood in only one respect: the citizen’s duty of loyalty. (Though, again,
Jakobs uses the two interchangeably; Pawlik places far more emphasis on the distinction between personhood and citizenhood than Jakobs does.) The nature of this loyalty remains troublingly indeterminate; most commonly, it is referred to as “loyalty to law” (Rechtstreue). The significance of this loyalty, however defined, becomes clear in Pawlik’s definition of crime (as a violation of loyalty) and Jakobs’s distinction between citizen and enemy criminal law (delinquents who have it are, as citizens, subject to citizen criminal law and those who do not are, as enemies, subject to enemy criminal law).

A view of criminal law that assigns pride of place to the concept of loyalty may be difficult to distinguish from a view of criminal law that regards treason as the paradigmatic offense or, more precisely, that regards the breach of loyalty characteristic of treason as a necessary ingredient of every crime, in fact as that feature which elevates a wrong to the level of a public wrong legitimately subject to state punishment. While it is unclear to whom, or what, loyalty is owed, it is clear that it is not owed to particular individuals, notably the immediate victim of the offense. As we’ve seen, loyalty is owed either to an abstract concept (law) or a social objective (peace through law) or to a form of social order (legal order) or a community of some form or another (fellow citizen, community of law). In the end, loyalty in this context is owed a sovereign, whoever or whatever that might be. According to standard U.S. constitutional ideology, the distinction between the political community (“the people”) and the sovereign has been discarded. As a result, “allegiance ... is ... due ... to the people, with whom the sovereign power is found.”69 This categorical denial of a sovereign apart from the people within his or its power does not affect the traditional mutuality of fealty: “Allegiance imports an obligation on the citizen or subject, the correlative right to which resides in the sovereign power.”70

The political and legal history of the United States illustrates that the definitional identification of “the people” and “the sovereign” has done little to alter the basic dynamic of the age-old relationship between sovereign and subject. The fundamental question remains who is sovereign and who is not, who governs and who is governed, except that now the question of sovereignty has been recast as a question of membership in “the people,” i.e., as a question of citizenship. That question, however, is as old as the problem of government itself. As Judith Shklar remarked, “[t]here is no notion more central in politics than citizenship, and non more variable in history, or contested in theory.”71 For this reason, a normative theory of criminal law—or for that matter even a descriptive account of penal practice—that places weight on the concept of citizenship would do well to define the operative concept of citizenship in some detail, with sensitivity to historical and contemporary meaning in a variety of relevant contexts, including positive law (notably criminal law, immigration law, and “national security” law), policy practice and rhetoric (beyond law as a form of state action), and various theoretical discourses (including, but not limited to, those which explicitly grapple with questions of citizenship72).

69 Afroyim v. Rusk, 387 U.S. 253, 260 (1967)
70 Afroyim 260.
71 Shklar 1.
At any rate, transferring, or even extending, the presumption of the capacity for autonomy, the mark of the governor, from a single individual who personified sovereignty (in at least one of his identities) to a group labeled “the people” or, more to the point, “citizens,” obscures the nature of the question and sharpens it at the same time, by abandoning the notion of the equality of all vis-à-vis the solitary sovereign and dramatically expanding the class of those thought to hold the requisite capacity for sovereignty, while at the same time denying it to those thought to be (still) unsuitable for membership.

The intimate connection between loyalty and sovereignty, and therefore the distinction between governor and governed, also suggests that the distinction between disloyalty and disobedience is difficult to maintain, insofar as disobedience may be interpreted as a sign of disloyalty. The mere failure to comply with norms generated by the sovereign therefore may be taken as an act of disloyalty and punishable as such. In Blackstone’s view, the sovereign undertook 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.” With sovereignty having been shifted—at least in ideology, if not in practice—to “the people,” it is no longer the king, but the people, who hold the power to enforce compliance to “the rules of propriety, good neighbourhood, and good manners.” In fact, if not in theory, this power—the power to police—of course is exercised not by the people but by state officials in all branches of government, who traditionally have found it difficult not to mistake their superior power as state officials for evidence of their superiority vis-à-vis the objects of their power, despite the ideology of the “public servant,” which suggests the exact opposite of actual power relationships in the every-day exercise of state power, and of the state’s penal power in particular.

IV.

Perhaps there is an alternative account of citizen criminal law that does not turn on the bond of mutual allegiance between sovereign and subject and regards treason, as the breach of the subject’s duty of allegiance, as the paradigmatic offense. Perhaps there is an account of citizen criminal law that avoids the pitfalls of the deployment of citizenship as an exclusionary and hierarchical concept throughout the history of political life and thought. Perhaps it is possible, for instance, to construct such an account as part of a larger project of what Duff calls “republican liberal communitarianism.”

The promise of any theory of citizen criminal law would draw from the concept of citizenship upon which it relies. Without an apparent grounding in positive law and in

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73 On disobedience offenses and, more generally, disobedience as criminal offense, see Dubber, Police Power 15, 20, 32, 43, 69, 76-77, 86, 126, 168, 172.
75 50 n.36
the face of overwhelming evidence of the pernicious influence of the rhetoric of citizenship, the burden of persuasion would seem to rest on the proponents of the view that citizenship does matter or, even if it does not, that it should matter in criminal law.

Clearly, citizenship retains great power as an analytic device even today. As has been pointed out many times before, much of contemporary criminal law can be understood as a war on crime pitting ordinary law-abiding citizens against enemies of the state of one form or another, be they (suspected) minority offenders, (suspected) incorrigible offenders, or (suspected) terrorists (or those suspected to have assisted them, however remotely). Jakobs’s distinction between citizen criminal law and enemy criminal law has resonated also because it reflected a distinction long familiar from public and private discourse; it is provocative because it transferred this analytic distinction into the realm of normative criminal law theory.\(^76\)

This transition from descriptive force to normative significance is troubling, not only for the obvious reasons, but more specifically because the descriptive purchase is not only limited in general, given the irrelevance of citizenship in positive criminal law, but limited specifically to the unsavory and critiqueworthy aspects of contemporary penalty. As a result, one might expect that a normative theory of criminal law would seek to eliminate, rather than to centralize, the discourse of citizenship.

We have already spent some time documenting the irrelevance of citizenship in the substantive criminal law. Let us take a quick look at its role in the law of criminal procedure, which is no more central. (This will require a brief excursion into somewhat tedious, but hopefully worthwhile, U.S. criminal procedure doctrine.) At trial, the citizenship of offender or victim is beside the point. In fact, while the state may limit the exercise of “the sovereign’s coercive police powers over members of the community to citizens,”\(^77\) the citizen police officer, prosecutors, judges, wardens, and jurors are explicitly prohibited from taking the citizenship of the offender or the victim into account, as for instance in jury instructions that point out the irrelevance of either the offender’s or the victim’s national origin as part of a laundry list of irrelevant characteristics that also includes race, color, religion, religious beliefs, or gender.\(^78\) Note, however, that the state is constitutionally permitted, but not required, to limit the exercise of penal power, including the judgment over guilt and innocence, to citizens. Consider, for instance, the institution of the mixed jury or jury de medietate linguae, brilliantly explored in Marianne Constable’s The Law of the Other,\(^79\) which in cases involving aliens was composed half of citizens and half of aliens.

Moreover, none of the statutory or constitutional trial rights of criminal suspects or defendants are limited to citizens. The apparent exception, the Fourth Amendment’s prohibition of unreasonable searches and seizures, is instructive. In a widely criticized decision, United States v. Verdugo-Urquidez, the U.S. Supreme Court held in 1990 that the Fourth Amendment does not cover extraterritorial searches of aliens.\(^80\) (The search occurred in Mexico after the defendant, a purported drug-lord, had been arrested in

\(^{76}\) See, e.g., Tatjana Hörnle, Deskriptive und normative Dimensionen des Begriffs “Feindstrafrecht,” 153 Goldhammer’s Archiv für Strafrecht 80 (2006).

\(^{77}\) Cabell v. Chavez-Salido, 454 U.S. 432; 444 (1982)

\(^{78}\) See, e.g., Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.13.


Mexico in connection with the torture-murder of a U.S. drug enforcement agent, and brought to the United States.) The Court, in this case typical of its overheated war-on-drugs jurisprudence (which, cumulatively, has been read as carving out a drug exception to constitutional criminal procedure), did not manage to enunciate a consistent rationale; it did stress what it considered a significant feature of the right in question: The violation of the Fourth Amendment’s prohibition of unreasonable searches and seizures, it pointed out, occurs at the moment of the search or seizure in question. As a result, the Fourth Amendment right was not a trial right. There was no question, however, that trial rights do not distinguish between citizens and non-citizens, the prime example being the comprehensive procedural protections of the Fifth Amendment, including the right to “due process of law,” the privilege against self-incrimination, and the prohibition against double jeopardy. For our purposes, it is worth noting that the Court placed considerable weight on the fact that non-trial rights, such as the Fourth Amendment’s prohibition of unreasonable searches and seizures, attached to “the people,” whereas trial rights, notably those enumerated in the Fifth Amendment, attached to the “person” (or the “accused,” in the Sixth Amendment—speedy trial, impartial jury, right to confront witnesses, etc.). “The people,” according to the Court, “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”81 The definition of “sufficient connection,” and therefore of “the people” and more specifically the relationship between citizenship and membership in the “national community,” remained unclear (once again). As Justice Brennan remarked in a forceful dissent:

At one point the majority hints that aliens are protected by the Fourth Amendment only when they come within the United States and develop “substantial connections” with our country. At other junctures, the Court suggests that an alien’s presence in the United States must be voluntary and that the alien must have “accepted some societal obligations.” At yet other points, the majority implies that respondent would be protected by the Fourth Amendment if the place searched were in the United States.82

Arguably, then, not even the war-on-drugs Court in Verdugo would have precluded alien suspects—and it must not be forgotten that trial rights attach to suspects and, formally, defendants, not to “offenders,” “criminals,” or even “terrorists”—from asserting Fourth Amendment rights in connection with searches within the territorial sovereignty of the United States. In other words, even Verdugo can be read as turning on the question of territoriality, rather than on the suspect’s citizenship (or people membership). At any rate, once again, even under the broadest possible interpretation of its holding, Verdugo does not question the insignificance of the offender’s citizenship for purposes of trial rights (where the trial, by assumption, takes place within the territory of the state in question).

The Brennan dissent more broadly rejects any attempt to differentiate between citizens and aliens in the realm of constitutional rights of criminal procedure. While,

81 Id. at 265-66; see also In re Terrorist Bombings of U.S. Embassies in East Africa (United States v. Odeh), 2008 U.S. App. LEXIS 24052, at *56-65 (2d. Cir., Nov. 24., 2008).
82 Verdugo at 282 (Brennan, J., dissenting).
under at least one reading, the majority in Verdugo is prepared to differentiate between aliens and citizens (in a broad sense similar to that used by Duff, which includes “visitors to the polity, to whom many of the rights of citizenship are extended”83), Brennan focuses not on the suspect’s perspective, but on the state’s. The suspect, in Brennan’s view, is the proper subject of procedural norms of U.S. criminal law simply by virtue of the fact the U.S. government has treated him as the proper subject of substantive norms of U.S. criminal law. In a formulation that echoes Brettschneider’s “moral ideal of citizenship that suggests a way of treating all persons subject to state control,” Brennan insists that a suspect is entitled to procedural rights because, as someone who “may well spend the rest of his life in a United States prison,” “[h]e has become, quite literally, the governed.”84 In other words, in the face of the state’s penal power, the distinction between the citizen (or members of “the people”)—the Fourth Amendment—and the “person”—the Fifth Amendment—is insignificant; the criminal suspect-defendant-convict-parolee-probationer holds rights qua person, not qua citizen.

Jurisdiction (i.e., the applicability of norms of substantive criminal law), too, is based on territoriality, i.e., the locus of the offense, not on the citizenship of the offender or the victim, with some provisions for “extraterritorial” jurisdiction in exceptional cases, most notably those involving violations of U.S. federal statutes criminalizing terrorism and related acts (active and passive personality).85 U.S. criminal law in this regard differs significantly from U.S. military criminal law, which applies “in all places” to members of the U.S. armed forces,86 and the criminal law of U.S. Indian tribes, which applies only to tribe members, and other Indians, for offenses committed on tribal land.87 German criminal law, too, relies primarily on the territoriality principle,88 but also recognizes active and passive personality criminal jurisdiction, for acts committed by or against German citizens abroad,89 as well as universal jurisdiction for certain crimes, ranging from genocide to disseminating pornography, regardless of the citizenship of offender or victim or the locus criminis.90

Citizenship did play a role in the recent attempt by the Bush Administration to deny inmates at Guantánamo Bay access to U.S. courts, and the privilege of federal habeas corpus in particular, by stripping U.S. Courts of jurisdiction to consider habeas petitions filed by alien enemy combatants.91 In the end, the U.S. Supreme Court, in a series of split and highly controversial decisions, rejected both the significance of citizenship and adopted a “functional approach” to the relevance of territorial sovereignty (in the case of habeas corpus, the locus of the alleged illegal incarceration, rather than of the alleged criminal act). In the most recent, and most significant, of these cases, Boumediene v. Bush, the Court explicitly rejected the Bush Administration’s argument that “noncitizens designated as enemy combatants and detained in territory located outside our Nation’s

83 Duff 14-15
84 Verdugo at 283-84 (Brennan, J., dissenting).
85 On various theories of criminal jurisdiction, see generally Markus D. Dubber & Mark Kelman, American Criminal Law: Cases, Statutes, and Comments ch. 2 (2005). The Proposed New Federal Criminal Code, which attempted to consolidate the fractured and haphazard treatment of federal criminal jurisdiction recognized extraterritorial jurisdiction only in cases of treason, offenses committed by a federal official, or in cases that were “outside the jurisdiction of any nation” and either the offender or the victim were U.S. nationals. Proposed New Federal Criminal Code §§ 201, 208.
86 Dubber & Kelman 158-60 (Uniform Code of Military Justice arts. 2 & 5).
87 Id. (Poarch Band of Creek Indians Code § 4-1-2).
88 StGB § 3.
89 Dubber & Kelman 158-60 (StGB § 7).
90 Id. at 169 (StGB § 6).
borders have no constitutional rights and no privilege of habeas corpus.”

Specifically, it struck down a jurisdiction-stripping provision in the Military Commissions Act (MCA) limited to non-citizens according to which “[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

The MCA in general applies to citizens and non-citizens alike. While only non-citizens are subject to trial before military commissions, the Act’s definition of “unlawful enemy combatants” does not distinguish between citizens and non-citizens, including those who did not engage in but “materially supported hostilities against the United States.” In response to the “acts of treacherous violence” on September 11, 2001, Congress authorized the U.S. President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Under this broad grant of authority, the U.S. government has indefinitely detained individuals designated by the President as enemy combatants, some of whom were U.S. citizens.

The Bush Administration’s war on terror, then, plaid the citizenship card at least twice, in each case with limited success: both in the distinction between the treatment of citizens and non-citizens with regard to habeas corpus and the “jurisdiction” of “military commissions” and, more broadly, in the distinction between citizens and enemy combatants, unlawful or not.

The habeas cases, in particular, are instructive not only because they highlight a nefarious use, and ultimately the irrelevance, of the distinction between citizen and alien in the area of jurisdiction; they also illustrate the insignificance of the distinction in the final, executionary, aspect of the penal process, which concerns not the definition of penal norms or their imposition, but the infliction of sanctions for their violation. If we disregard the distinction between detention before and after trial—which is a significant distinction for many purposes, but not the present one—the habeas cases, though in the face of vociferous dissent, clarify that the law of habeas corpus does not draw distinctions on the basis of the petitioner’s citizen status, even where the substantive issue at stake is the petitioner’s “enemy” status itself. Technically, a petition for a writ of habeas corpus seeks relief from illegal detention, whether the inmate is a citizen or not. That is not to

94 10 U.S.C. § 948d(a).
97 See, e.g., Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (en banc), cert. granted, 2008 U.S. LEXIS 8886 (indefinite military detention, since 2003, of lawful U.S. resident alien classified as enemy combatant). The U.S. citizens were detained in military prisons in the United States, rather than at Guantánamo. The Bush Administration sought to bar their access to U.S. courts, until the U.S. Supreme Court held, in 2004, that a U.S. citizen held in the United States—though arrested abroad for conduct abroad—is entitled, under the due process clause, to have a federal court review his classification as an enemy combatant. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
say that, once again, the Bush Administration did not draw a distinction in fact between citizen and non-citizen detainees, holding the former in U.S. military prisons and latter in the notorious Camp X-Ray at Guantánamo Bay beyond the norms of international, domestic, and military law. In general, outside the specific context of the so-called war on terror, the law of punishment execution does not differentiate between citizen and non-citizen offenders, except insofar as non-citizen offenders may be subject to deportation following their punishment. Everything else being equal, non-citizen and citizens convicted of murder, assault, drug possession or the crime of terrorism, for that matter, serve their time under identical conditions subject to identical administrative and legal norms, effective or not. Once more, this is not to say that these norms may not be applied in a discriminatory manner, with undue reference to the nationality, or national origin, of the person under penal control. But here, as elsewhere in the penal process, the failure to abstract from the person’s citizen status is thought to be undesirable in principle, if perhaps unavoidable in practice.

V.

The difficulties encountered by some of the Bush Administration’s measures in its so-called war on terrorism may suggest that there are those—notably including a majority of the U.S. Supreme Court—who share Brettschneider’s view that (suspected) “terrorists” are entitled to “a fair trial” in some sense. That entitlement, however, was not said to derive from the (suspected) offender’s citizen status, but to the contrary, was asserted in the face of persistent efforts by the Bush Administration to differentiate between citizen and alien, and between citizen and enemy. The case of non-citizen terrorists thus illustrates, if anything, not the relevance, but the irrelevance, of citizenship for a normative theory of criminal law. The reason why bin Laden deserves the same procedural protections (under “a commitment to the rule of law”) is not because he is a citizen (in some sense), but even though he is not one. Bin Laden has the same right to a fair trial, and for the same reason, as does a so-called “domestic terrorist” like Timothy McVeigh, an American citizen and army veteran, who was prosecuted, convicted, sentenced and executed after a federal criminal trial, despite frequent angry calls for exacting brutal vengeance by, or more frequently on behalf of, victims. (Note that Jakobs does not limit his category of enemy criminal law to “alien” terrorists, or for that matter to terrorists generally; he considers, for instance, preventive detention as a sanction of enemy criminal law.) Similarly, bin Laden deserves the same treatment as would any surviving “sleeper cell” participants in the September 11 attacks who lived in the United States for extended periods of time and therefore qualified if not as “citizens” then as “visitors to the polity, to whom many of the rights of citizenship are extended.” It makes no difference whether the (suspected, accused) offender falls under any substantive definition of citizen, no matter how technical, legal, moral, or political.

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99 Brettschneider 184.
100 Id.
101 Jakobs 92-94
102 Duff 14
Another, affirmative, way of putting this is to say that the only concept of citizenhood that can do normative work is one that renders it indistinguishable from the concept of personhood. Whatever distinguishes citizenhood from personhood renders it more useful as an analytic tool and less useful as a normative concept. Even the proponents of citizen criminal law can be read as acknowledging this point. Recall that Brettschneider rejects all narrower (“legal”) conceptions of citizenship in favor of “a moral ideal of citizenship that suggests a way of treating all persons subject to state control” and “the ideal of extending citizenship to all persons.” At the same time, he appears to regard personhood as a moral concept, as distinct from citizenship as a political one. Perhaps his insistence on citizen talk, rather than person talk, can simply be accommodated by regarding “citizen” as the person in the political realm, and citizen rights as manifestations in the political sphere of the person’s fundamental right to autonomy. Abandoning the distinction between citizenship and personhood would do away with the need for unnecessary roundabout constructions such as Brettschneider’s critique of capital punishment on the ground that the destruction of capital offenders’ person “violates their inalienable right to be treated as citizens” because “citizenship presupposes a person,” rather than straightforwardly on the ground that the punishment of death destroys the very personhood the state exists to protect.

Duff’s distinction between person and citizen rests on his concept of community. He appears at points ready to narrow that concept to the point of insignificance as, for instance, when he explains that the “idea of community” he has in mind is “a metaphysical idea of the sort that even liberal individualists must presuppose.” The publicness of wrongs clearly depends on the notion of identification. Without others beyond the immediate victim of an offense taking an interest in her suffering, an offense would remain a private affair (unless, of course, the community itself is posited as the victim, a position that Duff rejects). At the same time, without others taking an interest in the treatment of the suspect-defendant-convict, punishment would remain a private affair (leading to the possibility of unconstrained vengeance that concerns Brettschneider). But it is not clear why the relevant identification must be among citizens, unless citizenship is understood as a “metaphysical,” rather than a substantive, concept indistinguishable from personhood. Again, it appears as though Duff could generate his theory of criminal law from an account of personhood (in fact, on his account of personhood set out in Answering for Crime), which can (and in his account does) generate the prerequisites for criminal responsibility (offender-focus) as well as for criminalization (victim-focus). Duff’s resistance to a person-based account seems motivated by a desire to distance himself from the sort of “legal moralism” associated in the criminal law literature with Michael Moore and, in particular, with the view that all moral wrongs are criminal wrongs. A person-based approach to criminal law, however, is no more committed to legal moralism than is a citizen-based approach, unless one regards personhood as a moral, and citizenship as a political, or legal, concept, and then disregards the nature of law as a mode of state governance, and therefore as a political concept. A person-based approach to criminal law as law might, for instance, regard crime as the violation of one person’s personhood by another person, defining personhood in terms of the capacity for autonomy. Any account of criminal law must take into account not only the distinction between moral and legal norms, but also between law and other modes of state governance, and between criminal law and other forms of law. Such an account may face difficulties of its own, but it would not amount to legal moralism, obviating the need for the distinction between citizen and person Duff thinks is implied by the rejection of legal moralism.

Jakobs’s and Pawlik’s view of citizen criminal law is also compatible with a person-based approach to criminal law, provided one interprets the requisite loyalty as abstract interpersonal solidarity. “Loyalty to law,” then, would be interpreted in light of the modern concept of law as the state-backed manifestation of the autonomy of persons

103 197 n.27, 186.
104 192.
105 Duff 44.
106 See Duff 47, 51.
among persons, rather than to a particular set of legal norms, of a particular “community of law.” Jakobs’ account of enemy criminal law is more difficult to accommodate in a person-based approach to criminal law, at least insofar as he denies the personhood of its objects. (Of course, it would not fit a citizen-based approach to criminal law any better, insofar as he defines enemies as non-citizens.)

The distinction between citizen criminal law and enemy criminal law, however, is not for that reason unhelpful. Instead of treating it as a distinction among offenders (either citizen or enemy), it might be recast as a distinction between ideal types of a penal system, elements of which are reflected throughout the system. Depending on how one views the system, as concerned with the manifestation of right or with the detection, diagnosis, and eradication of human threats, different tools of analysis and critique might be appropriate. It is misleading, for instance, to insist, as Jakobs does, that both citizen criminal law and enemy criminal law are potentially legitimate. Without draining the concept of legitimacy of all substance, and confusing it with effectiveness or efficiency or, simply, success, however, it might be preferable to reserve legitimacy inquiries to one ideal type (citizen criminal law) and regarding the other (enemy criminal law) as essentially alegitimate. For similar reasons, it is questionable whether Jakobs’ insistence on classifying both ideal types as modes of law is consistent with the modern concept of law.107 Thus reframed, however, Jakobs’ distinction closely resembles that between penal police and penal law, which regards penalty within the broader context of the distinction between police and law as fundamental modes of state governance.108