

## Punishment Between Law and Police

Markus Dubber

Looking at state action through the lens of the police power may yield useful insights. For instance, police analysis may reveal, as I've argued elsewhere, that modern state government is rooted in the age-old practice of household government, the familiar trappings of principled rule, "good governance," and most notably "the rule of law" and its variants ("the principle of legality" comes to mind) notwithstanding.<sup>1</sup> Uncovering the patriarchal origins of state power is a worthwhile pursuit; it bears saying, even repeating, that the emperor still has no clothes, that state power at bottom today remains as naked as was the power of the Roman *paterfamilias*, and of the Athenian *oikonomikos* before him.

Much work remains to be done—the exposure of the patriarchal elements of modern state action has only begun. Even penal law,<sup>2</sup> one small part of the state's arsenal of punitive and quasi-punitive measures, where the deeply heteronomous, hierarchical, and discretionary nature of state power is more apparent than in many, and perhaps any, other forms of state action, still awaits detailed analysis from the standpoint of police.

This paper expands the scope of inquiry. It turns from charting the police apparatus, the inner workings of modern state government as (human) resource management, to inspecting its veneer of legitimacy.<sup>3</sup> It flips the hypocrisy of the modern state as police regime upside down, or rightside up, by taking its declarations of principle, its reach for legitimacy, at face value. It is part of a broader project that parallels and complements the Police Project and asks the simple question: What would state government look like if it were to conform to the principles that are said to legitimate it? Let's call this project the Law Project.

It's tempting to think of the Law Project as an inquiry into the ideal and of the Police Project as an inquiry into the actual. This would be misleading, however, since the Law Project is not limited to capturing the ideals invoked in legitimating rhetoric, but also considers actual state practices to see how they measure up against these ideals. Both the Police Project and the Law Project are instances of critical analysis, in that they combine investigation and description with critique. The Law Project is more critical than the Police Project for substantive, rather than formal, reasons. Law recognizes principles against which the legitimacy of state action can be measured. Police does not or, to put it more charitably and perhaps even more accurately, it resists the very sort of legitimacy inquiry that law invites. Police is not without rules and patterns that can be catalogued and refined in an art or even a science of police<sup>4</sup>; at bottom, however, police turns on the discretionary authority of the patriarch who, for all pragmatic purposes, is all-powerful. Police rules are pragmatic guidelines written by and for those wielding the power of police; their enforcement generates efficiency, "good governance," not legitimacy.

---

<sup>1</sup> See, e.g., Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

<sup>2</sup> "Penal law" refers to the norms governing the penal process as a whole, "criminal law," "criminal procedure," and "execution law," to those governing its constituent aspects.

<sup>3</sup> See Markus D. Dubber, "The Criminal Trial and the Legitimation of Punishment," in *The Trial on Trial* 85 (R.A. Duff et al. eds., 2004); "Toward a Constitutional Law of Crime and Punishment," 55 *Hastings Law Journal* 509 (2004).

<sup>4</sup> Cf. *The New Police Science: The Police Power in Domestic and International Governance* (Markus D. Dubber & Mariana Valverde, eds., 2006).

At the same time, the Law Project is no more exclusively critical than the Police Project is exclusively analytical. The legitimacy of practices cannot be assessed without first carefully analyzing them. Moreover, this analysis itself does not occur in a normative vacuum or in a perspectiveless world. In the Law Project, state practices are regarded from the standpoint of law, much as they are regarded from the standpoint of police in the Police Project. The very same practice, in fact, may well combine law aspects with police aspects and may even, as a whole, appear as a manifestation of police or law, depending on how it is viewed.

At any rate, this paper undertakes some parallel, and preliminary, inquiries into the penal process from the perspectives of police and law. The two inquiries are complementary in the sense that law means nothing without police. The concept of law is the enlightenment attempt to legitimate government by bringing it within principles derived from the discovery of the person as an autonomous—quite literally, self-governing—being. Law government was meant to replace police government. Instead of replacing police, law has for over two centuries fought for its place within a practice of government that has roots in times immemorial and that remains ingrained in the minds and habits of rulers of households and quasi-households even in societies with modern ideologies that assign the rule of law pride of place.

We will touch, if only briefly, on all three aspects of the penal process: “substantive criminal law,” which is taken to encompass rules and norms governing the definition and scope of criminal liability, which in turn are often labeled as the “general part” and “special part” of (substantive) criminal law; “procedural criminal law” (“criminal procedure”), which governs the imposition of norms of substantive criminal law in our courts; and “prison law” (“correction law,” “execution law”), which governs the infliction of sanctions for the violation of norms, including carceral and noncarceral measures.

### Punishment Theory as Political Theory

What, then, is the principle, or set of principles, against which the legitimacy of penal law is to be measured? Penal law covers norms that pertain to punishment, and more specifically to state punishment. Punishment being a form of state action, one would expect that theories of the state—“political theory” in Anglo-American parlance—might be a good place to start our search for principle.

Simply put punishment is one way in which the state—or rather certain individuals acting under the authority of “the state”—coerces its constituents. As a particularly intrusive and violent form of state coercion, punishment poses a particularly serious challenge to the legitimacy of state coercion in particular, and state action in general. If punishment can be justified, so can other, lesser, forms of coercive state action. If it cannot, what’s the point of justifying, say, taxation (with or without representation)? If we don’t know if it can, what’s the point of political theory?

Contemporary political theory, to the extent it concerns itself with the legitimacy of state action, has found it difficult enough to divine principles for the distribution of benefits. Theories of justice are, for the most part, theories of distributive justice, not of penal—or *retributive*—justice. Setting up the rules governing—or rather the rules governing the setting up of the rules governing—a “well-ordered society” has occupied

the minds of our best political philosophers, with no time left over for not-so-well-ordered societies that require a distinctly non-ideal theory. Once we know the rules, the attitude seems to be, we can worry about how to deal with their violation later on. Political theory is, by and large, *ideal* political theory.<sup>5</sup>

Let's get a sense of the norm first, our political theorists say, before we move on to consider deviations from it. This makes a lot of sense as a matter of convenience. It makes considerably less sense as a matter of theory. The state is about power. Punishment is power incarnate. Therefore, a theory of the state that doesn't deal with punishment isn't a theory of the state, but of a charitable organization.

It's certainly more pleasant to deal with questions of distributive justice. Distributive justice is about a good institution—the state—handing out good things to good people. Retributive justice is about the state doing bad things to bad people. Whether the state can remain good in doing bad, or right in doing wrong, is the question.

Plus, legitimating punishment isn't just dirty work; it's also not as easy one might think. In fact, punishment is *prima facie* *illegitimate*; in punishing its constituents, the state harms the very people it is supposed to protect, by interfering with the very rights it claims to guarantee, in the name of guaranteeing them. In this light, the “presumption of innocence”<sup>6</sup> appears as a general presumption of inviolability: the state has no right to harm those it is meant to protect. On the face of it, state punishment isn't just illegitimate, it's a crime—the statutory threat of punishment looks suspiciously like “menacing,”<sup>7</sup> wiretapping like “eavesdropping,”<sup>8</sup> entrapment like “solicitation” (or even “conspiracy”),<sup>9</sup> searching a suspect's house like “trespass,”<sup>10</sup> searching (or frisking) the suspect herself like “assault,”<sup>11</sup> arresting her like “battery,” seizing her property like “larceny,” a drug bust like “possession of narcotics” (with or without intent to distribute),<sup>12</sup> indicting—and convicting—a defendant like “defamation,”<sup>13</sup> imprisoning the convict like “false imprisonment,”<sup>14</sup> and executing her like “homicide” (“murder,”<sup>15</sup> to be precise).<sup>16</sup>

---

<sup>5</sup> See, e.g., John Rawls, *A Theory of Justice* (1971) (ideal political theory of well-ordered society); Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* xxxix (William Rehg trans. 1996) (criminal law not covered); but see now Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *Buff. Crim. L. Rev.* 307 (2004).

<sup>6</sup> See Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 *Buff. Crim. L. Rev.* 53, 55 (2000); see also Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 *Calif. L. Rev.* 335 pt. III (2000).

<sup>7</sup> See N.Y. Penal Law § 120.15 (menacing: “intentionally plac[ing] or attempt[ing] to place another person in fear of death, imminent serious physical injury or physical injury”).

<sup>8</sup> See *id.* § 250.05 (eavesdropping: “wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication”).

<sup>9</sup> See *id.* arts. 100, 105.

<sup>10</sup> See *id.* § 140.05 (trespass: “knowingly enter[ing] or remain[ing] unlawfully in or upon premises”).

<sup>11</sup> See *id.* art. 120.

<sup>12</sup> See *id.* arts. 220-21 (drugs), 265 (weapons).

<sup>13</sup> See N.H. Crim. Code § 644:11 (defamation: “purposely communicat[ing] to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule”).

<sup>14</sup> See *id.* § 633:3 (false imprisonment: “knowingly confin[ing] another unlawfully . . . so as to interfere substantially with his physical movement”).

<sup>15</sup> See N.Y. Penal Law § 125.25 (murder in the second degree: “[w]ith intent to cause the death of another person, . . . causing the death of such person”).

<sup>16</sup> That's why modern comprehensive criminal codes include a—little noticed—justification defense for “execution of public duty” or “law enforcement.” See, e.g., Model Penal Code §§ 3.03, 3.07; N.Y. Penal Law §§ 35.05, 35.30.

No matter how much political theorists might want to wish away the facts of state coercion and non-compliance, punishment and crime are here to stay. Perhaps one day we will all live justly together in a just society, without crime, without punishment, and perhaps without justice. (Marx, for one, apparently thought so.<sup>17</sup>) Until then, however, the task of political theory remains subjecting the state's claims to justice to a relentless legitimacy critique, regardless which variety of justice is at stake, dis- or retributive.

Legal theory, by contrast, has lavished considerable attention on the justification of punishment, or so it seems. Retributivists and consequentialists, deontologists and utilitarians have been plowing the field of so-called "punishment" theory for not years, not decades, but centuries. Unfortunately, punishment theory in the Anglo-American mode tends to disregard the fact that punishment is a form of *state* coercion. That's not to say that punishment in other contexts may not also be of interest to the legal theorist. For instance, we might wonder whether a parent has the right to "punish" (or least "discipline") her child. We might even think that the answer to that question may have something to do with the answer to our question, whether the state has a right to punish a constituent. Even so, the two questions would remain distinct, no matter how related their answers might be.

Moral theory too has shown considerable interest in the question of punishment. In fact, traditional (stateless) punishment theory is probably better thought of as an exercise in moral, rather than legal, theory. Certainly moral theorists should have something to say about punishment. It would be silly to deny that punishment has a moral aspect. The process of judgment in cases of punishment closely resembles that of moral judgment. The particular norms are different, to be sure, but the process of determining whether they have been violated is much the same (through empathic roletaking, by placing oneself in the shoes of the person subject to judgment<sup>18</sup>), as are the presuppositions for legal (not just penal legal) and moral accountability.<sup>19</sup>

And yet punishment is not *merely* a moral matter. Moral theorizing can make an important contribution to punishment theory, but it cannot exhaust the subject. Punishment, once again, is the infliction of violence in the name of the state according to the penal law. As such, it remains in the end a problem of state theory (or "political theory"). Penal law is the solution to the problem insofar as it legitimates what otherwise would be an absurd spectacle of the state harming precisely those whom it exists to protect. That effort at legitimation in turn must fail unless it remains within the confines of personhood unmodified (as opposed to legal or political personhood (citizenship)), which are ultimately set by moral theory.

In U.S. political history, lack of interest in critically analyzing the legitimacy of punishment has a long tradition, even a distinguished pedigree. In the Old World, Enlightenment thinkers such as Beccaria, Kant, Hegel, Voltaire, Bentham, and P.J.A. Feuerbach struggled to rationalize punishment in various ways and proposed penal law reforms with varying degrees of detail and success (ranging from Bentham's wildly fruitless efforts to Feuerbach's influential Bavarian Penal Code of 1813). In the New

---

<sup>17</sup> Karl Marx, German Ideology, in Marx's Concept of Man 197, 206 (Erich Fromm ed. 1966).

<sup>18</sup> See Markus D. Dubber, The Sense of Justice: Empathy in Law and Punishment (2006).

<sup>19</sup> Namely the bundle of capacities that constitute personhood. See *id.*

World, by contrast, the great rethinkers of political power known as the “Founding Fathers” showed very little interest in the subject.<sup>20</sup>

Thomas Jefferson was the exception to the rule. But even Jefferson did not go beyond drafting a Virginia bill for greater proportionality between crimes and punishments. Despite a suggestive preamble that promised “deduc[tion] from the purposes of society,” the bill in fact is largely content to invoke the authority of common law, and even Anglo-Saxon, statutes and commentators. We learn, for instance, that “the laws of Æthelstan and Canute,” a set of Anglo-Saxon dooms from the 10th and 11th centuries, punished counterfeiters with cutting off the hand “that he the foul [crime] with wrought,” and then displaying it “upon the mint-smithery.”<sup>21</sup> In the end, Jefferson’s bill is most notable as an “extraordinarily beautiful document,” a testament to his superior penmanship as he painstakingly produced two ornate copies of the manuscript. In the admiring words of Dumas Malone:

[Jefferson] attached notes in Anglo-Saxon characters, in Latin, old French, and English, attesting the meticulous carefulness of his procedure. [He] placed them in columns, parallel with the text, after the manner of his old law book, Coke upon Littleton; and, as in the work of the old master, they frequently encroach upon the text. The penmanship is beautifully clear, and no other document that Jefferson ever drew better exhibits his artistry as a literary draftsman.<sup>22</sup>

Jefferson, however, at least glimpsed the connection between government in general and punishment in particular. In the Declaration of Independence, he laid out the theory of legitimacy of the new American state in all too familiar terms that, duly secularized, still capture the core ideals of modern democratic government:

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

Just a little later, in the rather less familiar preamble to his criminal law bill, Jefferson set himself the task of applying this general state theory to the problem punishment, through which the state infringes the unalienable rights it exists to protect, in order to protect them:

Whereas it frequently happens that wicked and dissolute men, resigning themselves to the dominion of inordinate passions, commit violations on the lives, liberties, and property of others, and the secure enjoyment of these having principally induced men to enter into society, government would be defective in its principal purpose, were it not to restrain such criminal acts by inflicting due punishments on those who perpetrate them; but it appears at the same time equally deducible from the purposes of society, that a member thereof, committing an inferior injury, does not wholly forfeit the protection of his fellow citizens, but after suffering a punishment in proportion to his offence, is entitled to their protection from all greater pain . . . .<sup>23</sup>

---

<sup>20</sup> See generally Markus D. Dubber, “‘An Extraordinarily Beautiful Document’: Jefferson’s Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment,” in *Modern Histories of Crime and Punishment* (Markus D. Dubber & Lindsay Farmer eds., Stanford University Press, forthcoming 2007).

<sup>21</sup> Æthelstan was King of England from 924 to 939, Canute from 1016 to 1035.

<sup>22</sup> Dumas Malone, *Jefferson and His Time*, vol. 1, *Jefferson the Virginian* (Boston: Little, Brown, 1948), pp. 269-270.

<sup>23</sup> Thomas Jefferson, *A Bill for Proportioning Crimes and Punishments* § 1 (1778).

Here, then, is an answer to our initial question, what is the principle from which government is to draw its legitimacy? The consent of the governed. Why the consent of the governed? Because legitimate government is self-government, “of the people, by the people, for the people,” in Lincoln’s memorable phrase. The legitimacy of the state rests ultimately on the *autonomy* of its constituents, “the capacity of mankind for self-government,” as Madison puts it in the Federalist Papers.<sup>24</sup>

Autonomy, to this day, has retained its role as the core principle of legitimacy in what we now call liberal Western states.<sup>25</sup> Not surprisingly, given its significance and its very nature, autonomy also has remained much contested, with different schools of political thought and movements for political change developing and emphasizing different aspects of the concept, while downplaying others. All differences in approach aside, analyses and critiques of political legitimacy continue to be framed in terms of autonomy or its absence (heteronomy, or other-government).<sup>26</sup>

As a type of state action, penal law must derive its legitimacy from the same source as all other state action—autonomy.<sup>27</sup> Punishment therefore can be legitimate only as *self-punishment*.<sup>28</sup> Reconceiving the sharpest weapon of coercive government as a manifestation of autonomy, rather than an instrument of heteronomy is no small task. The notion of self-government in general was revolutionary enough, and putting it into practice has been notoriously difficult. But how could penal law, in the particular form of the notorious Bloody Code of late eighteenth century England, be rendered consistent with autonomy, the one and only principle of political legitimacy?

This question never received an answer in American legal and political discourse. American law never managed to come to terms with the obvious, and yet so counterintuitive, notion of self-punishment. The reason for this failure, or refusal, systematically to work out the ideal of autonomous punishment is this: offenders are not, and never have been, considered as constituents of the state so that punishment is not a problem of government at all, but a regulatory matter, an issue of, say, public health.<sup>29</sup> As a public health matter—perhaps even an epidemic—crime needs an epidemiology, not

---

<sup>24</sup> No. 39.

<sup>25</sup> See, most recently, the essay collections *Autonomy and the Challenges to Liberalism: New Essays* (John Christman & Joel Anderson, eds., 2005), and *Personal Autonomy: New Essays on Personal Autonomy and its Role in Contemporary Moral Philosophy* (James Stacey Taylor, ed., 2005); see also *Autonomy* (Special Issue), *Social Philosophy & Policy*, vol. 20:2 (2003).

<sup>26</sup> Even feminist theory, which launched perhaps the most notable attack against the concept of autonomy itself, rather than certain of its manifestations, more recently has turned toward an exploration of how the concept can be harnessed for feminist analysis and critique. See, e.g., *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Catriona Mackenzie and Natalie Stoljar, eds., 2000); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities*, 1 *Yale J.L. & Feminism* 7 (1989).

<sup>27</sup> On the continent, political thinkers as diverse as Beccaria and Hegel recognized the general need to derive the legitimacy of punishment from the consent of the punished. See, e.g., G.W.F. Hegel, *Philosophy of Right* Z 100 (1821) (discussing Beccaria). Beccaria’s work on punishment exerted considerable influence on Americans at the time, including Jefferson. See, e.g., Thomas Jefferson, *A Bill for Proportioning Crimes and Punishments* §§ iv, xii, xiii, xiv (1778); Thomas Jefferson, *Autobiography* (1821).

<sup>28</sup> See Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 *L. & Hist. Rev.* 113 (1998)

<sup>29</sup> See, e.g., Richard A. Posner & Tomas J. Philipson, *The Economic Epidemiology of Crime*, 39 *J. L. & Econ.* 405 (1996). That’s not to say that crime can’t be studied profitably as a matter of public health, just that treating it as such doesn’t help us legitimate punishment, the state’s response to crime through criminal law. In terms of the distinction between police and law, discussed below, economic analysis in particular can help us understand the reality of American punishment as a—badly run—police system, rather than as a system of law, or a “criminal justice system.”

a political or legal theory, and criminals, as disease carriers, need treatment (rehabilitative or incapacitative), not justice.

In other words, punishment has been treated as a matter of police, rather than of law.

### Police, Law, and Punishment

Penal law, on this view, is an oxymoron. Take the Federalist Papers, for example, the most comprehensive, and influential, treatment of the foundational principles of American government. The Federalists, it turns out, had a lot to say about a lot of things, but very little about punishment. They were happy to leave penal law to the states, more specifically to each state's power to regulate its "domestic police,"<sup>30</sup> i.e., its "internal order, improvement, and prosperity."<sup>31</sup> When they did claim punitive power for the United States, it was to "exact obedience,"<sup>32</sup> by punishing "disobedience to their resolutions"<sup>33</sup> and "the disorderly conduct of refractory or seditious individuals."<sup>34</sup> This power was necessary for the simple reason that "seditions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body."<sup>35</sup> Federal punishment power therefore was needed to contain the "contagion" of insurgency, once it had erupted, from "communicat[ing] itself."<sup>36</sup>

The distinction between law and police was familiar to Jefferson, but has since fallen into disuse. That's unfortunate because it brings into sharper relief the distinguishing feature of law as a mode of governance—autonomy. Penal law is law insofar as it is an instance of self-government, in this case of the offender. By surrendering the ideal of autonomy, penal police extracts itself from the grasp of legitimacy scrutiny. Police isn't necessarily illegitimate; it is essentially legitimate.

The distinction between law and police is worth reviving for purposes of critical analysis. For one thing, a theory of the law of crime and punishment needs not only a theory of crime and punishment, but also of law. And the concept of police forces us to place the analysis of penal law within the broader context of the analysis of law in general. Police, after all, is contrasted not only with punishment but also and, more fundamentally, with law. In the end, police and law are two modes of state governance; ultimately, penal law must find its place in an account of state government through law.

Once exhumed, the origins of police turn out to differ significantly from those of law, criminal or otherwise.<sup>37</sup> For police presumes the hierarchical relationship between the members of the household—human or not, animate or not—and its head. The governor of police is the *paterfamilias* (*dominus* in Rome, *oikonomos* in Athens), the governed *his* household (*domus*, *oikos*).<sup>38</sup> By contrast, the governor of law is the person, who—endowed with the capacity for autonomy—is the governed as well. The realm of household management was *economics*, its form of government *heteronomy*; the realm of

---

<sup>30</sup> No. 17 (Hamilton).

<sup>31</sup> No. 45 (Madison).

<sup>32</sup> No. 21 (Hamilton).

<sup>33</sup> *Id.*

<sup>34</sup> No. 16 (Hamilton).

<sup>35</sup> No. 28 (Hamilton).

<sup>36</sup> *Id.*

<sup>37</sup> For a slightly less canned version of this story, see Dubber, *The Police Power*, *supra*.

<sup>38</sup> Aristotle, *Politics* bk. I; David Herlihy, *Medieval Households* 2-3 (1985); Jean Jacques Rousseau, *A Discourse on Political Economy* (1755).

public government was *politics*, its form of government *autonomy*.<sup>39</sup> And *police* (Polizei, polizia) emerged in the early modern period as the science of state government as household management—or *political economy*—after consolidation of political power by the state, conceived as the macro household that incorporates all micro households.<sup>40</sup>

The most influential American definition of police appeared in Blackstone's *Commentaries*. Blackstone derived the power to police from the king's status as "father" of his people,<sup>41</sup> and "*pater-familias* of the nation".<sup>42</sup>

By the public police and oeconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.<sup>43</sup>

The Blackstonian concept of police dominated American police thought until the concept fell from general view in the late nineteenth century and was largely confined to various niches of American constitutional law, including the law of regulatory takings,<sup>44</sup> and commerce clause jurisprudence.<sup>45</sup> The need to draw the distinction between police and law at the appropriate, fundamental, level of governance disappeared with the concept of police itself. Once administrative *law* had come into its own as a *legal* discipline, the concept of police vanished. The purported legalization of the police state rendered the study of police irrelevant and transformed police science into an antiquarian pursuit. Police treatises became treatises (and casebooks) on administrative law. The last great police theorist, Ernst Freund, became the first great administrative law theorist. The last explicit attempt to distinguish law from police in general came in Freund's weighty police treatise, *The Police Power: Public Policy and Constitutional Rights* (1904), the culmination of the nineteenth century tradition of police power treatises.<sup>46</sup>

### Penal Police and Penal Law

---

<sup>39</sup> Aristotle, *Politics* bk. I.

<sup>40</sup> Adam Smith differentiated between "justice" and "police," the two fundamental aspects of "jurisprudence"—or "juris prudence," according to the student notes of his Edinburgh lectures on this subject. Adam Smith, *Juris Prudence or Notes from the Lectures on Justice, Police, Revenue, and Arms* delivered in the University of Glasgow by Adam Smith Professor of Moral Philosophy, in *Lectures on Jurisprudence* 396, 398 (R.L. Meed, D.D. Raphael, & P.G. Stein eds. Oxford 1978). The most significant—to his mind—component of police was "the opulence of a state," i.e., the wealth of a nation.

<sup>41</sup> 4 William Blackstone, *Commentaries on the Laws of England* 176 (1769).

<sup>42</sup> *Id.* at 127.

<sup>43</sup> *Id.* at 162.

<sup>44</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>45</sup> For some evidence of revived interest in the concept of police in legal and political theory, as well as in American legal history, see Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (1993); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996); Mark Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* (2000); Ron Levi & Mariana Valverde, "Knowledge on Tap: Police Science and 'Common Knowledge' in the Legal Regulation of Drunkenness," 26 *Law & Social Inquiry* 201 (2001); Dubber, *The Police Power*, *supra*; Christopher L. Tomlins, "Politics, Police, Past and Present: Larry Kramer's *The People Themselves*," 81 *Chicago-Kent Law Review* 1007 (2006); The New Police Science: *The Police Power in Domestic and International Governance* 107 (Markus D. Dubber & Mariana Valverde eds., 2006).

<sup>46</sup> See, e.g., Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (6th ed. 1890); Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States Considered From Both a Civil and Criminal Standpoint* (1886).

In the remainder of this paper, let's explore how the distinction between law and police might help us approach the problem of legitimacy in penal law. To get a clearer sense of what a legitimate system of penal law might look like, and to pursue the legitimating principle of autonomy through every facet of penal law (from definition to imposition and infliction), we'll compare two models of the penal process, the Law Model (or Autonomy Model) and the Police Model (or Heteronomy Model). Parallel analysis of these models promises both to bring the demands of autonomy into sharper focus and to connect an otherwise abstract inquiry into the autonomy credentials of diverse doctrines and practices to the penal process as it actually operates, and thereby to highlight those features of the process that fall short of the demands of legitimacy.<sup>47</sup>

Our preliminary inquiry will focus on American penal law. Limiting one's legitimacy inquiry to a particular legal system doesn't imply that international comparative analysis might not yield useful insights or that the results of this inquiry may not also prove relevant to similar inquiries focused on other penal law systems (which may or may not coincide with national borders). To the extent, but only to the extent, that two penal systems recognize similar principles of legitimacy, the legitimacy inquiry in one can inform that in the other. So insofar as modern democratic societies all recognize autonomy as the fundamental touchstone of legitimacy, an examination of the legitimacy of American penal law, for instance, may shed light on an examination of the legitimacy of German penal law and vice versa (assuming both qualify as modern democratic societies). Similarly, international comparative analysis among penal systems that are similar in the relevant sense may unearth doctrines at various levels of generality in another penal system that, by design or not, manifest the principle of autonomy.<sup>48</sup>

### *Penal Police*

To this day, the penal power of the state in American legal discourse remains rooted in its police power; in fact, the power to punish remains one of the core characteristics—if not the essence—of the power to police. As the police power is essential to—and often synonymous with—sovereignty, so the power to threaten and inflict punitive pain is the indispensable, most visible, and most dramatic manifestation of the state's quasi-patriarchal power to police. In federalist dogma, the states must have the power to police because without it they would cease to exist as sovereign patriarchs; endowed with the power to police, however, they also must wield the power to punish. By contrast, the independent sovereignty of the federal government vis-à-vis the states must be studiously denied; under no circumstances may the federal government claim the power to police or, by extension, the power to punish for the sake of keeping the police.<sup>49</sup>

It's no surprise, then, that U.S. penal practice can be seen as a manifestation of police power, a system for the disposition of disobedients and threats to the public welfare (as

---

<sup>47</sup> For another exercise in domestic comparative law, see Markus D. Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* pt. II (2002), which sets out a parallel analysis punishability and compensability from the perspectives of criminal law and victim compensation law, respectively. On the project of internal, as opposed to international, comparative law, see Markus D. Dubber, "Criminal Law in Comparative Context," 56 *J. Legal Educ.* 433 (forthcoming 2007) (symposium on Transnational Perspectives).

<sup>48</sup> For a far more ambitious comparative project of international criminal theory, see George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, International* (forthcoming 2007); see also Markus D. Dubber, *Legitimizing Penal Law*, \_\_ *Cardozo L. Rev.* \_\_ (2007) (symposium on *The Grammar of Criminal Law*).

<sup>49</sup> See Markus D. Dubber, *The Police Power: Patriarchy and the Foundation of American Government* 86-87 (2005).

defined by the state) that is not governed by principles of legitimacy, but shaped and reshaped by constantly shifting guidelines of expedience that do little to constrain the unbridled discretion at its core.<sup>50</sup> The paradigmatic crime in the Police Model of penalty is offense against the state: crime manifests disobedience of a state command and therefore constitutes an offense against the state's sovereignty.<sup>51</sup> Punishment manifests the state's superior power over the offender and reasserts its sovereignty. As a manifestation of sovereignty, punishment is entirely discretionary, as is its quantity and quality. The state is not obligated to pursue offenses, nor to punish them, nor to punish them in a particular manner. It is up to the state to determine whether, and how, to respond to a challenge of its sovereignty.

Under the Police Model, the penal process pays little attention to the principle of legality (*nulla poena sine lege*).<sup>52</sup> The offender is not entitled to notice as a matter of right; instead, the state may decide that it is more expedient to communicate its commands, or at least certain of its commands, in such a way as to maximize compliance. Many of its ever-multiplying commands, however, remain hidden from public view; the publicity requirement has become meaningless. The point of a command is not merely to produce compliance, but also to provide the state with a discretionary tool for obedience enforcement that it may decide to employ or to refrain from employing in its mercy, as the situation (and the offender's need for degradation) dictates.

Doctrines of the general part of criminal law, such as *actus reus* and *mens rea*, do not stand in the way of the Police Model's disciplinary program. Criminal liability is not limited to affirmative acts, but just as readily encompasses omissions simply because disobedience can manifest itself actively and passively. In fact, all criminal offenses can be seen as omissions—failures to comply with state commands that subjects are duty-bound to obey because of their status as household members rather than householder, as the governed rather than governor, the punished rather than punisher.

The ubiquitous and surprisingly potent possession offenses, which have succeeded vagrancy as the mass policing tool of choice, are prototypical police offenses; they openly criminalize non-acts in defiance of the *actus reus* requirement. They also often do away with the *mens rea* requirement or dilute it to the point of irrelevance through common use of presumptions designed to circumvent whatever mens rea requirements remain formally in place.<sup>53</sup>

---

<sup>50</sup> See generally Markus D. Dubber, "The New Police Science and the Police Power Model of the Criminal Process," in *The New Police Science: The Police Power in Domestic and International Governance* 107 (Markus D. Dubber & Mariana Valverde eds., 2006). On the relation between police penalty and the "war on crime," see also Markus D. Dubber, *Victims in the War on Crime* pt. I (2002).

<sup>51</sup> This feature distinguishes the Police Model from Herbert Packer's Crime Control Model. Whereas Packer's Due Process Model sought fairness and truth, his Crime Control Model was concerned with the efficient suppression of crime. The Crime Control Model however, still assumed that the paradigmatic victim of a criminal offense is a person. The paradigmatic offenses were homicide, rape, robbery, and burglary, each conceptualized as an (intentional) act of interference with the rights or interests of another person. To prevent this interference, or at least to minimize its occurrence, the Crime Control Model sought to put in place an efficient system of case disposition. The Due Process Model operated with the same notion of crime, even though it emphasized bringing the perpetrators of these crimes to justice, rather than eradicating crime.

<sup>52</sup> See Dan M. Kahan, "Three Conceptions of Federal Criminal-Lawmaking," 1 *Buff. Crim. L. Rev.* 5 (1997) (specificity); Dan M. Kahan, "Lenity and Federal Common Law Crimes," 1994 *Sup. Ct. Rev.* 345 (lenity); Dan M. Kahan, "Some Realism About Retroactive Criminal Lawmaking," 2 *Roger Williams L. Rev.* 95 (1997) (prospectivity); *United States v. Casson*, 434 F.2d 415 (D.C. Cir. 1970) (publicity).

<sup>53</sup> See Markus D. Dubber, "Policing Possession: The War on Crime and the End of Criminal Law," 91 *Journal of Criminal Law & Criminology* 829 (2002).

Strict liability offenses—including so-called “police offenses”—are commonplace. So are presumptions, rebuttable and irrebuttable (as in the case of felony murder), to circumvent mens rea requirements that remain. In the corporate context, strict liability combines with respondeat superior to generate criminal liability from supervisory position. With actus reus and mens rea serving as malleable guideposts, corporate criminal liability raises no doctrinal eyebrows.

Mens rea in the Police Model serves as a marker of dangerousness, or offensiveness. The “higher” the mens rea, the more offensive the offender, and the more in need of penal discipline—ascending from the clueless, but not necessarily riskless, “negligent” offender to the increasingly brazen “reckless” offender (who is willing to take the chance that he might give offense), to the “knowing” offender (who expects to give offense without aiming to do so), and eventually to the “purposeful” or “intentional” offensegiver (who sets out specifically to offend).<sup>54</sup>

In its program to eliminate threats, the Police Model takes an expansive view of inchoate crimes (attempt, conspiracy, facilitation, solicitation) and pre-inchoate crimes (such as possession). Victimless and status offenses join inchoate and pre-inchoate offenses as tools in the detection and control of the offensive; victims and offenders alike are marginalized in a state-run and -focused penal process that regards them as sources of inefficiency. The pursuit of victims’ rights is cynically abused to protect the true victim of the Police Model, the state. Offenses against individual victims are significant only insofar as they represent an offense against the state’s authority.<sup>55</sup>

The Police Model’s criminal process is informal and defined by the discretion of state officials. Criminal trials are a rarity; the process is dominated by the executive, with a meek judiciary providing few, if any, principled checks (or balances) and instead contributing to the common project of threat elimination. Discounts are available for those (putative) offenders who do not interfere with their expeditious disposition; those who “accept responsibility”<sup>56</sup> or provide “substantial assistance”<sup>57</sup> (by confessing, by providing evidence against others, or even by convincing others to “cooperate”<sup>58</sup>) to the state official who has assumed the task of their penal discipline may—but need not—receive mercy (“amerced” in the language of medieval law).

Penal discipline eliminates threats through incapacitation and humiliation. Imprisonment is the paradigmatic, and ultimately patriarchal, sanction;<sup>59</sup> offenders are integrated into penal institutions ranging from the benevolent (minimum security prisons) to the malevolent (special housing unit) all of which can be seen as households of various kinds and levels of complexity, ranging from the family (with the warden as father) to the military (with the warden as superior officer), the slave plantation (with the warden as head of the plantation), and the factory (with the warden as factory owner) or, most commonly, the warehouse (with the warden as warehouse manager overseeing the warehouse’s ahuman stock). Fines are irrelevant, except insofar as they can effectively eliminate corporate offenders. As sanctions for individuals, fines are insufficiently

---

<sup>54</sup> See Tomas J. Philipson and Richard A. Posner, “The Economic Epidemiology of Crime,” 39 *J. Law & Econ.* 405 (1996).

<sup>55</sup> See Markus D. Dubber, *Victims in the War on Crime: The Use and Abuse of Victims’ Rights* (2002).

<sup>56</sup> U.S.S.G. § 3E1.1.

<sup>57</sup> U.S.S.G. § 5K1.1.

<sup>58</sup> See *United States v. Prokos*, 441 F. Supp. 2d 887 (N.D. Ill. 2006) (“vicarious third-party cooperation agreement”).

<sup>59</sup> See Mark E. Kann, *Prisons, and Patriarchy: Liberty and Power in the Early American Republic* (2005)

humiliating; they fail to put offenders in their (inferior) place vis-à-vis the state. Shaming sanctions, by contrast, communicate the proper degrading message and may be acceptable as a more efficient means to manifest the state's sovereignty.

### *Penal Law*

A theory of legitimacy of punishment must provide more than an abstract “rationale of punishment”; it must generate specific institutions, norms, rules, doctrines that ensure the legitimacy of every aspect of the practice of state punishment. The theory of punishment must be more than a theory of the scope of criminal liability; it must justify more than the mere threat of punishment for this or that conduct and must concern itself with more than the legislative *definition* of criminal offenses and the conditions of punishability. It must be a theory not only of substantive criminal law, that is, but also of procedural criminal law, and of the law of punishment execution as well (what the Germans call *Strafvollzugsrecht*<sup>60</sup>).

Meeting “the challenge of [punishment] in a free society”<sup>61</sup> requires testing the legitimacy of the *imposition* of (legislatively defined) penal norms in our court rooms, court building hallways, and prosecutors’ offices, through prosecutors, judges, and (in the rarest of cases) juries. Most important, legitimating punishment means legitimating the *infliction* of punishment in carceral settings (in prisons, on gurneys, in gas chambers, on death rows, in Special Housing Units, “boot camps”) and noncarceral ones (parole and probation supervision, collateral penalties, forfeiture, fines, compensation, restitution, fees) alike. In sum, the legitimacy of penal law as a whole, encompassing all of its aspects—definition, imposition, infliction—is at stake.

Under the Law Model of the penal process, the state punishes to manifest the autonomy of one constituent (temporarily labeled “victim”) through the use of sanctions that themselves must manifest the autonomy of another constituent (temporarily labeled “offender”) in all aspects of this use, including its threat, its imposition, and its infliction. Punishment manifests the autonomy of V and O alike.<sup>62</sup> Crime manifests O’s autonomy at the expense of V’s. Regardless of whether crime actually, or only apparently, manifests O’s autonomy and actually, or only apparently, violates V’s, punishment sets out to reaffirm the autonomy of V and O alike.

If one grounds crime and punishment in autonomy—a concept that resonates in the moral as well as in the political realm and thus bridges the artificial divide between

---

<sup>60</sup> For an early call for the legalization of punishment infliction in Germany, see Berthold Freudenthal, “Die staatsrechtliche Stellung des Gefangenen,” 1955 *Zeitschrift für Strafvollzug & Straffälligenhilfe* 157 (originally published in 1910).

<sup>61</sup> Cf. *The Challenge of Crime in a Free Society: A Report by the President’s Commission on Law Enforcement and Administration of Justice* (1967).

<sup>62</sup> Dignity and autonomy (and personhood) are closely related—persons have dignity insofar as they possess the capacity for autonomy (as opposed to some other, social, status). Grounding one’s account of penal law in autonomy is preferable, however, because autonomy is the more basic concept and is both less vague and broader and as a result is flexible enough to carry an account that encompasses substantive and procedural aspects of state penalty. But see Meir Dan-Cohen, “Defending Dignity,” in *Harmful Thoughts: Essays on Law, Self, and Morality* 150 (2002); see also Yoram Shachar, “Offenses against the Soul” (Nov. 2006). In the American context, dignity also does not enjoy the recognition it does in other constitutional systems, or—for that matter—in international (human rights) law. For an attempt to work out an American constitutional account of criminal law in terms of an autonomy-based concept of dignity, see Markus D. Dubber, “Toward a Constitutional Law of Crime and Punishment,” 55 *Hastings L.J.* 509 (2004).

punishment theory as we know it and punishment theory as we need it—the outlines of an autonomist system of penal law emerge.

Penal law is concerned with “the autonomy of the person” in two senses: It serves to protect the autonomy of potential victims and to vindicate the autonomy of actual victims through the threat, imposition, and infliction of punishment. At the same time, it seeks to safeguard the autonomy of potential and actual offenders by respecting their capacity for self-determination as objects of the threat, imposition, and infliction of punishment.

*Criminal Law.* In substantive criminal law, the principle of autonomy informs both the general principles of criminal liability applicable to all offenses (the general part of criminal law) and the specific criminal offenses that define the scope of criminal law (the special part). For instance, in the general part the principle of autonomy supports a general requirement of *mens rea* (or criminal intent), as the manifestation of the offender’s capacity for autonomy, rather than the offender’s malice or dangerousness: An act committed without awareness does not amount to an exercise of the actor’s capacity for autonomy, even if it happens to interfere with the autonomy of another.<sup>63</sup>

The *actus reus* requirement likewise no longer rests on shaky evidentiary ground, as a symptom of *mens rea*.<sup>64</sup> Instead it stands on its own, deriving its strength from the commitment to respecting the offender’s capacity for autonomy; punishing for *mens rea*—understood in its traditional sense of meanness, or *contemptus*—alone, with *actus reus* as mere evidence, is illegitimate. The act is not merely an outward manifestation of malice or whatever other characteristic is said to trigger punishability (dangerousness, evil). It instead signals the offender’s external exercise of her capacity for autonomy, without which interference with another’s autonomy is impossible. Act in this sense is a uniquely personal event, as the exercise of the uniquely personal capacity of self-determination.<sup>65</sup> Criminal liability thus cannot extend to “involuntary acts,” nor to nonpersonal acts, including “corporate” or “group” criminality<sup>66</sup>—assuming we cannot conceive of corporations and groups as persons in the relevant sense.<sup>67</sup>

Likewise to punish someone for a status, rather than an act, is to treat her as less than a person. It is to treat her as a thing, a nonhuman animal, or a natural phenomenon, each of which is incapable of acting in the sense of engaging in voluntary behavior. Only in the case of a person is there a sharp line between status and act, between being and doing, as only the person can choose to act independently of—and inconsistently with—her status. A “felon,” for instance, may decide to refrain from criminal activity, just as a “vagrant” may decide to settle down.<sup>68</sup> To the extent that an individual is incapable of

---

<sup>63</sup> This would militate against criminal liability for so-called strict liability and negligence crimes alike. On the longstanding attempt, in American and German doctrine, to differentiate between (real) crimes and regulatory (police) offenses, see Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* 75-77, 147-153 (2005); cf. Alan Brudner, “Imprisonment and Strict Liability,” 40 *U. Tor. L.J.* 738 (1990).

<sup>64</sup> See 4 William Blackstone, *Commentaries on the Laws of England* 164 (1769) (actus reus as evidence of “depravity of the will”).

<sup>65</sup> The capacity for intentional action, the centerpiece of the influential German theory of finalism (*finale Handlungslehre*), may be seen as but one aspect of the more fundamental capacity for autonomy.

<sup>66</sup> This is (still) the German position, though it is not articulated in quite this way.

<sup>67</sup> Whether we can *define* corporation in that way is another question. See N.Y. Penal Law 10.00(7) (“‘Person’ means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.”).

<sup>68</sup> The label of felon carries strong normative connotations. Felony (or felonía) is deeply rooted in the hierarchical relations characteristic of household government. See Dubber, *The Police Power*, *supra*, ch. 1.

acting against her status (as, for instance, a drug addict), her capacity for autonomy may have been compromised to such an extent as to preclude her punishability as a person.

The law of defenses can similarly be conceptualized in light of the principle of autonomy. In general, defenses are no longer discretionary, and gratuitous, exercises of sovereign mercy. They are instead based—in the case of justifications—on the recognition of the putative offender as a person capable of choosing rightly, as well as wrongly, and—in the case of excuses—on the insight that a person incapable of choosing rightly, or of acting on a right choice, is precluded from exercising her capacity for autonomy or, in the event of “insanity,” lacked certain critical aspects of that capacity.<sup>69</sup>

The defense of self-defense provides an illustration. Under the Police Model of criminal law, self-defense is a type of discretionary pardon. So in Blackstone’s common law, any homicide was an offense against the sovereign, “for depriving him of a subject;” it was only right and proper, then, that homicide in self-defense be considered “excusable” (and therefore—at best—pardonable), rather than “justifiable” (and therefore not unlawful to begin with and thus in no need of a pardon).<sup>70</sup> Under the Law Model of criminal law, by contrast, self-defense is based on an assertion of right, not a plea for mercy. In defending myself against another’s oppressive rightless attack, I am asserting my autonomy as a person in the face of its impending violation, thus obviating the need for the state to *reassert* my personhood after the fact.

The *special part* of criminal law is defined and constrained by the autonomy of potential offenders and victims alike. To comply with the principle of autonomy, the special part of criminal law is limited to protecting aspects of potential victims’ autonomy. The most serious offenses target the victim’s capacity for autonomy (e.g., murder and serious assaults); others affect the victim’s exercise of her autonomy in general (e.g., less serious assaults, menacing) or in particular contexts (e.g., property offenses, offenses against sexual autonomy, coercion). The punishment of conduct that does not diminish the autonomy of personal victims is illegitimate. (Here, the Law Model suggests a reinterpretation of Mill’s broad harm principle as limiting state punishment to conduct that harms another person’s autonomy, rather than in some other, unspecified, way.) At the same time, not every autonomous interference with the autonomy of another requires punishment. Insofar as the victim’s autonomy can be vindicated without the drastic interference with the offender’s autonomy characteristic of penal sanctions, other legal responses should be explored, including the law of victim compensation, which is the victim-focused mirror image of the law of offender punishment.<sup>71</sup>

*Criminal Procedure.* Regarding criminal procedure from the perspective of autonomy, one takes note of various familiar participatory rights, or rights of *active* autonomy, such as the rights to question witnesses, to present evidence, to testify, to participate in “selecting” the judges of one’s guilt or innocence (the “fact finders”), and so on.<sup>72</sup> Then there are the rights of *passive* autonomy, which preserve one’s freedom *not*

---

<sup>69</sup> Cf. Alan Brudner, “Insane Automatism: A Proposal for Reform,” 45 McGill L.J. 65 (2000).

<sup>70</sup> See 4 William Blackstone, Commentaries on the Laws of England 177-88 (1769).

<sup>71</sup> See Markus D. Dubber, Victims in the War on Crime: The Use and Abuse of Victims’ Rights pt. II (2002) (setting out parallels between analysis of compensability in victim compensation law and of punishability in penal law).

<sup>72</sup> See Markus D. Dubber, “The Criminal Trial and the Legitimation of Punishment,” in The Trial on Trial 85 (R.A. Duff et al. eds., 2004). There is surprisingly little non-constitutional theorizing about the criminal process, narrowly

to participate in the proceedings against oneself (often referred to as instances of a “right of privacy”), including the inversions of the participatory rights just mentioned, most notably the right *not* to testify (or otherwise to incriminate oneself).

Perhaps most interesting, the principle of autonomy provides a new rationale for lay participation in the criminal process, as a form of *indirect* or *constructive* self-judgment. The jury under this conception would, through a process of empathic identification, judge the defendant as she would judge herself from the standpoint of justice.<sup>73</sup>

The emphasis in procedural criminal law clearly rests on protecting the *defendant’s* right to autonomy, which is continually threatened in a process that all too easily, and all too often, operates as a mechanism for the disposal of human nuisances, rather than for the fair judgment of fellow persons—a police process that I have investigated previously.<sup>74</sup> Still, here too care must be taken to respect the (passive and active) autonomy of *victims* (potential victims, to be precise): since the penal law in its entirety serves to safeguard their autonomy; it would be counterproductive if it turned out that criminal procedure law regularly disregarded the very autonomy the substantive criminal law is meant to protect.<sup>75</sup>

*Execution Law.* Last but by no means least, the principle of autonomy must be applied to the final aspect of penal law, the law of punishment execution, or prison law. This aspect of penal law is the least theorized of the three<sup>76</sup>; yet it is also the most intrusive. It is the aspect of penal law most in need of legitimation; yet it is also the most difficult to legitimate. How, after all, can the infliction of punitive pain be consistent with the autonomy of the punished?

The principle of autonomy informs not only the question of *whether* certain punishments (in quality and quantity) are legitimate *per se*, but also that of *how* they can be legitimately applied. It might be argued, for instance, that capital punishment—as the intentional and permanent destruction of the offender’s entire being, including her capacity for autonomy—is so patently inconsistent with the law’s function of preserving and respecting the autonomy of persons as to be illegitimate *per se*, particularly if it is inflicted in part because of the offender’s perceived inability to exercise her capacity for autonomy in a manner consistent with the autonomy of others. Capital punishment thus would be illegitimate both because it treats the offender as a nonperson and because it deprives her of whatever personhood she might be able to (re)claim.

Imprisonment’s origins in household discipline (along with the more common use of physical chastisement) may not, without more, render it illegitimate *per se*. Its actual

---

speaking, not only in the Anglo-American tradition, but in civil law systems as well. A comparative perspective therefore yields surprisingly few insights in this area.

<sup>73</sup> See Markus D. Dubber, *The Sense of Justice: Empathy in Law and Punishment* ch. 5 (2006).

<sup>74</sup> Markus D. Dubber, “Policing Possession: The War on Crime and the End of Criminal Law,” 91 *Journal of Criminal Law & Criminology* 829 (2002).

<sup>75</sup> See Markus D. Dubber, *Victims in the War on Crime: The Use and Abuse of Victims’ Rights* pt. II (2002).

<sup>76</sup> For an exception, see John Kleinig, “The Hardness of Hard Treatment,” in *Fundamentals of Sentencing Theory* 273 (Andrew Ashworth & Martin Wasik, eds., 1998); see also Richard G. Singer, “Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons,” 21 *Buff. L. Rev.* 669 (1972) (constitutional law); Peter Scharf & Joseph Hickey, “Thomas Mott Osborne and The Limits Of Democratic Prison Reform,” 57 *Prison Journal* 3 (1977) (moral education). Here an international comparative analysis may prove more fruitful than in the area of criminal procedure, as the doctrine of (non-constitutional) execution law, if not the theory, is further developed in some civil law countries. See, e.g., James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (2003); Liora Lazarus, *Contrasting Prisoners’ Rights: A Comparative Examination of Germany and England* (2004).

infliction, however, which traditionally has followed a household or quasi-household model (the warden as father, slave owner, factory supervisor, military superior), raises serious concerns from the perspective of the principle of autonomy. Many aspects of modern prison management, including the warehousing of inmates, the failure to provide basic means of subsistence combined with the denial of opportunities for self-support implicit in the very notion of total carceral isolation, the commission of, and acquiescence in, physical and psychological abuse by guards and fellow inmates, and the wholesale disenfranchisement of offenders during and after their confinement,<sup>77</sup> are inconsistent with the view of offenders as persons equipped with a capacity for autonomy.

### Conclusion

As our brief parallel analysis of some basic features of the penal process from the perspectives of police and law has shown, the principle of autonomy can be traced throughout the penal process. Legitimizing penal law as law would require a far more comprehensive, and compelling, autonomy-based account of state penalty. Whether such a full account of punishment as self-punishment is possible remains to be seen.

---

<sup>77</sup> A useful overview from a non-US perspective is Heather Lardy, "Prisoner Disenfranchisement: Constitutional Rights and Wrongs," 2002 Public Law 524.