

Paradigms of Penal Law

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The critical analysis of law thrives on context. Placing, in our case, criminal law within some context or other facilitates both analysis and critique, by elucidating the cluster of norms, practices, and institutions under investigation (thereby facilitating analysis) and by taking up vantage points from which the newly illuminated object of inquiry can be assessed (in this way making critique possible). The present handbook illustrates a great many contexts that might frame critical analysis of criminal law, including comparison across and within legal systems (external and internal comparative law), as well as any number of “interdisciplinary” approaches, including those from the perspectives of history, political theory, criminology, sociology, economics, literature, technology, critical race theory, and feminist studies.

This chapter places criminal law in a different context, not through doctrinal comparison or by adjusting one’s disciplinary point of view, but by locating it within the conception and actuality of state power, with the aim of facilitating its critical analysis as an exercise of the state’s penal power, i.e., as state penal action. The discussion will begin conventionally enough (in 1.), by considering criminal law’s place within the familiar distinction between public law and private law (though, even here, the classification is less obvious than one might expect).¹

Things will get more interesting, however, when the analysis digs deeper—or reaches higher, depending on one’s standpoint—to place law within an account of state action in general (in 2.). At this point, it will prove useful to distinguish law from another mode of state governance: police. Law and police here are treated as the modern manifestations of two long-familiar modes of governance, autonomy and heteronomy, that can be traced back at least to the (public) government of the *polis* and the (private) government of the *oikos* in classical Athens, respectively.

After briefly exploring the distinction between law and police, and autonomy and heteronomy, we will move on (in 3.) to illustrate its operation in the realm of state penal action, by pointing out some of its manifestations in the fundamentally different yet, at the same time, intimately connected paradigms of penal law and penal police. We will also place the distinction between penal law and penal police within the broader context of the long-standing project of drawing paradigmatic distinctions within the penal sphere, as illustrated, for instance, by Herbert Packer’s distinction between the due process and the crime control model of the “criminal process” and Günther Jakobs’s between citizen and enemy criminal law.

Throughout this chapter, it is important to keep the point of the conceptual exercise in mind: not to categorize for its own sake, but to facilitate critical analysis. Placing criminal law within the context of state action permits its critical analysis as an exercise of the state’s law power. What’s more, it reveals the critical analysis of penal law itself as part of a comprehensive critique of state power in the penal realm, which also encompasses penal police. The dualistic conception of state penal action explored here, in other words, is derivative and contextual, rather than originary and independent: it is an example of the applied critical analysis of state action, rather than the study of criminal law in isolation. It is one way of locating penal law, of putting it in its place.

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¹ See also Alon Harel’s chapter in this Handbook.

1. Private and Public Law

The most immediate, and obvious, attempt to find penal law's place within the complex of state action would be to locate it among types of law, in particular the familiar (if decreasingly significant) distinction between public and private law. It is generally taken for granted that criminal law is a species of public law. Upon closer inspection, however, this classification is more contested than meets the eye. In Germany, for instance, while it is simply assumed that criminal law is a part of public law, in fact law faculties have traditionally distinguished between departments of (and chairs in) criminal law and public law, and there is surprisingly little overlap between the scholarly agendas of both fields. This has begun to change recently, with the ascent of constitutional law (and the Federal Constitutional Court), but the relationship between the two disciplines remains uneasy and, at any rate, has remained just that, an interdisciplinary relationship: the gap may have narrowed, but the distinction remains. The assumption appears to be that criminal law must be public law because it clearly isn't private law and, at any rate, involves the state in some, oddly ill-specified, way. At the same time, however, criminal law scholars may be wary of overemphasizing the centrality of the state's role in criminal law for fear of abandoning what is often portrayed as a deep-seated commitment to an individualistic—or "personal"—conception of criminal law and criminal victimhood—i.e., of crime and criminal harm—in particular. The *Rechtsgut* principle, for instance, is often interpreted to require some ultimate grounding in the rights (or, more mysteriously, the dignity) of the person.² These personal rights may be aggregated into communal—or public—rights or interests, but the recognition of a separate state interest (and therefore of the state as "victim"), which might help account for the public law nature of criminal law, is another matter.

Like German law, French law treats the classification of criminal law as public or private as obvious. Unlike in Germany, however, in France criminal law clearly is *private* law, not public law. This is so for the simple, procedural, reason that criminal law cases fall within the jurisdiction of the Cour de cassation (rather than the Conseil d'État), with criminal courts disposing of both criminal and civil aspects of a case in the same proceeding.³ Matters involving the state are instead handled by the administrative courts, rather than the "judicial courts"; the "Court" of Appeals sits atop the hierarchy of the latter, the "Council" of "State" hears final appeals from the former.

In Germany and France, then, the question whether criminal law is public law or private has an obvious answer: "public law" in Germany, and "private law" in France. In England, the question does not have an obvious answer; in fact, the question may have no answer at all because it implies that there is a distinction between public and private to begin with. That distinction, however, and in particular the recognition of something called "public law," historically was regarded as distinctly un-English, and—what's more—as distinctly French. The very notion of special courts, or a body of law adjudicated in these courts (or rather councils) was thought to fly in the face of the English notion of rule of law, under which all Englishmen, state official as well as private citizen, were subject to the same ("common") law adjudicated by the same court. All law, in this view epitomized by Dicey's celebration of a quintessentially English "rule of law," was private law.⁴ Public law was an oxymoron, which reflected the French failure to comprehend the very nature of law, and more specifically the fundamental confusion between the power hierarchies typical of an oppressive

² See, e.g., Markus D. Dubber, 'Theories of Crime and Punishment in German Criminal Law,' (2005) 53 *AJCL* 680; Tatjana Hörnle's chapter in this Handbook.

³ Michel Troper, 'La distinction droit public-droit privé et la structure de l'ordre juridique,' in *Pour une théorie juridique de l'Etat* (1994), 183.

⁴ See A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (2nd ed. 1886), 174.

regime and the utterly egalitarian English conception of government, reflected in a common (private) law.

In England, the underlying quaint notion of the stateless realm of peace through law (courts) has more recently given way to the recognition of the existence of a powerful (and long-established) central state administration beyond the actions of individual constables having to defend themselves against a tort action before a common law judge. Even so the question of the conception of criminal law as a species of public or private law has received little attention. Public law scholars, at any rate, concern themselves with matters of constitutional and administrative law—much like in Germany—and leave crime to the criminal lawyers.⁵

Blackstone, as is well known, spoke of crimes as “public wrongs,” though this observation was not meant to add anything to—not to mention, challenge—the long-standing conception of crime as a violation of “the king’s peace.”⁶ Here “public” was that which concerned the king on account of his duty—and his power—to protect his peace, just as any householder would protect the peace of his household, however modest, throughout early English legal and political history.⁷ The king’s household was merely larger than the others’, encompassing the entire realm and all lesser, micro, households within it. Private wrongs could be left to the king’s subjects to sort out amongst themselves, with the aid of one of his royal (common law) courts. Public wrongs were public insofar as they concerned the king, threatening his authority and, more specifically, his authority to keep the peace within his kingdom.

Not surprisingly, this conception of crime as “public wrong” made little sense to Blackstone’s most acerbic critic, Bentham. Bentham instead saw the criminal law as generally “adjectival,” or supplemental: it dealt with wrongs, i.e., with violations of rights “presumed to be already defined in another department of the law,” as the broadly Benthamite early 19th-century English Criminal Law Commissioners put it.⁸ But this presumption was not irrebuttable: even if criminal law concerned itself primarily with violations of rights defined elsewhere, there was no reason why this should be so. Nothing hung on the characterization of criminal law as adjectival; as a result, that characterization attracted little attention, and certainly no more attention than our question of the classification of criminal law as an instance of either private law or public law.

In the United States, too, the question of whether criminal law is private law or public law remained largely unresolved, and even unaddressed, and for a similar reason: that the underlying distinction between private law and public law either was pointless or, if it had a point, had nothing to do with criminal law. Despite the supposed laissez-faire conception of the nightwatchman state in the Early American Republic (which recently has been challenged⁹), there was no denying that American government exercised considerable power in its creation of an entirely new regime and system of state power. The Americans of the Revolutionary Generation may have been eager to deny the existence of a strong national state; they had no similar qualms about the existence, and the breadth and depth of state power in general, and at the state level in particular. And there was never any doubt that the power to punish was an essential aspect of this comprehensive power of

⁵ See, e.g., Martin Loughlin, *The Idea of Public Law* (2003).

⁶ See, e.g., Simon Stern, ‘Blackstone’s Criminal Law: Common-Law Harmonization and Legislative Reform’, in Markus D. Dubber (ed.), *Foundational Texts in Modern Criminal Law* (forthcoming 2014).

⁷ Pollock & Maitland, *The History of English Law Before the Time of Edward I*, vol. 1 (2nd edn. 1898), 454.

⁸ See generally Lindsay Farmer, ‘Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45’, (2000) 18 *L. & Hist. Rev.* 397.

⁹ William J. Novak, *The People’s Welfare: Law & Regulation in Nineteenth-Century America* (1996).

sovereignty. The conception of the sovereign's penal power thus survived the American Revolution unchanged, even as the sovereign changed from the king to "the people."¹⁰

As Horwitz has argued, that distinction between private law and public law arose only later, as an attempt to carve out a sphere of "private" legal relations beyond, or beneath, the reach of state control.¹¹ In this realm, of "private law," commercial actors were free to go about their business, including their business of building a massive national economy, on the basis of market transactions that provided both stability and flexibility, as appropriate. Public law, by contrast, dealt with affairs of state and, given the general irrelevance of these affairs to commercial dealings, attracted little attention, except at the very margins, where its norms might interfere with the operation of the market (and its actors, including corporations). To American eyes, public law may not have been quintessentially French, but it was nonetheless a nuisance and thus to be abated as much as possible.

Even against the backdrop of this distinction between private law and public law, however, the classification of criminal law attracted little attention. Public law here was the exercise of state power to regulate business or, through the courts, to place constitutional limits on corporate—or more generally private—commercial activity. Public law, in this intellectual milieu, was commercial regulation and, perhaps, constitutional law, on the margins. It was not criminal law.

Criminal law, instead, continued its unchallenged existence as a self-evident component of state sovereignty. More precisely, the state's penal power in the United States remained essentially unchanged, not only during the Revolutionary Period of supposedly fundamental reassessment of the very nature of government but also during the later creation and consolidation of an American economy with the help of a distinction between private law and public law. It is not surprising, then, that the conception of the state's penal power would remain unaffected by the sustained attack on the distinction between private law and public law beginning in the early twentieth century, and leading to its virtual disappearance from legal discourse by the second half of that century (along with, incidentally, the project of legal science). Since then, standing nineteenth century English jurisprudence on its head, all law in America is public law, the very notion of "private" law having been reduced to a quaint anachronism, revealing anyone invoking it as lacking a sophisticated appreciation of the nature of all law as backed by state institutions, state officials, and state power.¹² Either way, the distinction between public law and private becomes pointless: law is either one or the other, but not both. But if the distinction between public law and private is pointless in English and American jurisprudence, for diametrically opposed reasons, what is the point of classifying criminal law as one rather than the other?

At this point, it might be useful to turn to what is generally acknowledged (including by those who regard the distinction as a foreign transplant¹³) as the origin of the distinction between private and public law—or at least as its first statement, or more precisely, the first attempt at a statement—in the beginning of Justinian's Digest.¹⁴ There, Ulpian distinguishes between private law (*ius privatum*) and public law (*ius publicum*) as follows: "*Publicum ius est, quod ad statum rei*

¹⁰ See generally Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

¹¹ Mortin J. Horwitz, 'The History of the Public/Private Distinction', (1982) 130 *U. Pa. L. Rev.* 1423.

¹² John C.P. Goldberg, 'Pragmatism and Private Law', (2011) 125 *Harv. L. Rev.* 1640, 1641.

¹³ John Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (1996).

¹⁴ Dig 1.1.1.2 (Ulpian); Inst 1.1.1.4.

Romanae spectat, privatum, quod ad singulorum utilitatem,” i.e., public law concerns “the government of the Roman empire” and private law “the welfare of individuals.” Public law, then, is further differentiated into three parts: “Publicum ius in sacris, in sacerdotibus, in magistratibus consistit,” i.e., public law deals with sacred rites, priests, and public officers [magistrates]. Having drawn this distinction between public and private, and illustrating the scope and variety of public law, the Digest then proceeds to ignore public law and instead focuses on private law, in great detail.

This first, and still foundational, formulation of the distinction between the realms of public and private law is significant for several reasons. For one, it exemplifies, and presages, the later tendency to draw a distinction among types of law only to then privilege one type over another to such an extreme extent as to undercut the distinction, or rather to reframe it as a distinction between (true, real) law and something else. More specifically, the type of law that is revealed as insignificant, if not as insufficiently legal, concerns the exercise of state power in its various institutional and normative manifestations. As Loughlin puts it, public law is “a set of practices concerned with the establishment, maintenance and regulation of the activity of governing the state ... the nature of [which] can be grasped only once that activity has been conceptualised as constituting an autonomous sphere; the political realm.”¹⁵ “Public law,” then, gestures at a mode and realm of state action beyond private law, and thus, in the end, given the virtual coincidence of private law with law unmodified, beyond law itself. Public law, in the Roman sense, is about the state as state, and ultimately, about the manifestation of sovereignty.

Now, Roman *criminal* law, to the limited extent it figures into the traditional conception of Roman law, reflects the distinction between public law and private law. Like law in general, Roman criminal law is primarily a matter of private law, rather than of public law. While the distinction between delicta privata and delicta publica, private and public delicts, remains fairly obscure, it is clear enough that, in the conception of Roman law, the former far outweigh the latter. When it comes to differentiating one from the other in light of the broader distinction between private and public law—as opposed to in the vague terms of some distinction between “private” and “public”—public criminal law then would deal with those delicts that concern the state, and more specifically, the state as sovereign. Private criminal law instead dealt with conflicts among individuals that did not threaten, or at least directly implicate, the state’s sovereign authority. There is no doubt, for instance, that *laesae majestatis* is a matter of public criminal law; in fact, it can be regarded as the paradigmatic public crime.

Regarding Roman criminal law, as public law, in this way, opens up a wider historical and conceptual spectrum that allows us to locate Roman criminal law within a genealogical context that extends in both directions, backward and forward in time. For, as Mommsen, the author of the still definitive and by far the most detailed study of Roman criminal law, concluded, the state’s power to punish ultimately derived from the power of the householder to discipline his household, which in turn is only one, if arguably the sharpest, aspect of the householder’s authority over his household.¹⁶ The power of the Roman *paterfamilias*, in this account, exemplifies the householder’s power over his household, which can be traced throughout the history of Western political thought

¹⁵ Martin Loughlin, ‘Theory and Values in Public Law: An Interpretation’, [2005] *Public Law* 48, 58.

¹⁶ Theodor Mommsen, *Römisches Strafrecht* (1899), 16–17.

and practice, going back at least as far as classical Athens and—less obviously—reaching into contemporary governance.¹⁷

In Athens, household governance was distinguished categorically from city government. Within the private realm of the household (*oikos*), the householder held essentially unlimited authority over every aspect, or constituent, of *his* household. Household governance was radically heteronomous: the governing of the household by the householder, of the governed by the governor. Only the householder was capable of governing; his household, by contrast, was only capable of being governed. The household included all the household resources at the householder's disposal, and under the householder's authority, from human resources (wife, (minor) sons, (unmarried) daughters, slaves) to nonhuman and inanimate ones (flora and fauna, natural resources, movables and immovables).

By contrast, within the public realm of the city (*polis*), governance was radically autonomous. Householders now appeared as citizens, and exercised their distinctive capacity for government to govern themselves. Whereas authority backed by superior force was the coin of the realm of governing the household, city government required persuasion through rhetoric. In the household, only one person was capable of government; in the city, everyone was. The household required other-government, of the household by the householder; the city required self-government, of the householder-citizen by the householder-citizen.

The householder's authority over his household was discretionary, flexible, and beyond outside scrutiny. *Oikonomia* was treated as an art, or perhaps a science, characterized by general guidelines of prudence, collected in manuals of good housekeeping addressed to the householder, who was free to consult or ignore them as he saw fit (Xenophon's *Oikonomikos* is an early example). By contrast, public government was, in principle, structured and constrained by rules co-generated and -applied by the householder-citizens comprising the public sphere, who could be assumed to jealously guard their (elite and distinctive) capacity for autonomy against interference through non-consensual exercises of city-state power. Household governance was the realm of prudence; it lay beyond the realm of justice, which was characteristic of, and limited to, city-state governance. The householder thus may be imprudent or unwise, inartful or inexperienced, but his action cannot be unjust.

Punishment, too, differed categorically in the household and among citizens. Within the household, household constituents were subject to the authority of the householder, including the power to discipline if, when, how, and for what he deemed appropriate, with few if any constraints on the quality or quantity of disciplinary measures. Punishment of citizens by citizens, and of householders by householders, by contrast, involved a comparably elaborate process of indirect self-judgment through judgment by fellow citizens whom the accuses—or his legal representative—had the opportunity to sway through the use of the same rhetorical tools that were necessary to conduct the business of city (self-)government in general. Inter-citizen punishment within the public realm of the city-state government also placed limits on the quantity and, most important, the quality of punishment; corporal punishment, which was associated with intra-household discipline of the governed by the governor was considered inappropriate for citizens. Justice demanded no less. Prudence, in the household, does not demand anything; it may at best counsel restraint insofar as it might further whatever prudential aim the householder decided to

¹⁷ See, e.g., Gustav Radbruch, 'Der Ursprung des Strafrechts aus dem Stande der Unfreien', in *Elegantiae Juris Criminalis: Vierzehn Studien zur Geschichte des Strafrechts* (2nd edn., 1950) 1 (English translation and discussion in *Foundational Texts in Modern Criminal Law*, above).

set himself, including maximizing the welfare of the household. (So depriving a slave of life or limb may be imprudent insofar as it deprives the household of a human resource.)

Much more could be said about the conception of punishment within the dichotomy between *oikos* and *agora* in Athens, but let us widen the focus back from criminal law as public law to public law in general and shift it back from Athens to Rome. Roman public law now marks the mode and realm of the power of the Roman imperial state that reflects the conception of the state as sovereign-householder. Note that by the time of Justinian, in the 6th c., the dichotomy between private heteronomy and public autonomy has collapsed. Justinian is the *paterfamilias* of the Roman state, the *pater patriae*. The model, and mode, of household governance has been expanded from the *oikos*, or the *familia*, to the city-state and, in the case of imperial Rome, the Roman empire. At the same time, note that “law” has appeared as a central all-encompassing category. The Digest does not differentiate among realms of governance: private households and the public city-state; it distinguishes between types of law: private law and public law. Now public, however, no longer refers to the realm of autonomy, where citizens interact govern themselves, and each other, through the shared exercise of their capacity for autonomy. Instead, the “public” in Roman public law is the “private” in Greek political and economic thought and practice, publicized; public law concerns the authority of the state, while private law deals with conflicts among state household constituents resolved by state courts as (supposedly) objective arbiters.

Once the connection between public law and household governance is made explicit, the virtual absence of public law from Justinian’s Digest is no longer a surprise. A public law that deals with sacred rites, priests, and state officials, in other words, with affairs of state broadly speaking, falls within what Loughlin calls the “political realm,” a sphere of state sovereignty subject at best to counsels of prudence, rather than a system of rules applied by state courts and backed by state force. “Public law” consists of flexible guidelines of state management for the sovereign emperor-householder and his delegates. Private law is the system of rules that constrains and thereby also makes predictable, reliable, enforceable, and possible interaction among household members.

Note also, however, that at this point, both public and private law remain species of law. Private law may get all the intention in the Digest, but public law is not denied legal status. The conception of law is (still) wide, and thin, enough to accommodate both types of law, no matter how mutually inconsistent their underlying conceptions of governance might be. In the end, especially in an imperial bureaucracy such as Rome’s at the time of Justinian, even the multitude of inter-individual conflicts falls squarely within the *oeconomic* conception of state power, as expanded household governance. The resolution of private disputes by the householder is simply one way in which the macro household of the state integrates lesser (micro) households; just as the *paterfamilias* might adjudicate disputes among members of his *familia*—as an exercise of private jurisdiction—so the *pater patriae* resolves disputes among the members of his public *familia*, the Roman empire. His courts spread peace through the land—his peace through his land, the *pax Romana*—just as the *paterfamilias* maintained, and defended, the peace of his private *familia*.

Going forward, rather than backward to Athens, it is not difficult to find other instances of this gradual publicization of private household governance through the expansion of one householder’s peace at the expense of others’ and the eventual integration of micro households into a single macro household that encompassed the entire realm. Pollock traced this development in England through the gradual expansion of the “King’s peace” through his “common law” and his “common law courts” that displaced local law, and the patchwork of medieval local jurisdictions, as England moved from feudalism to a centralized government under a single sovereign, a single law, and a

single peace.¹⁸ Crimes remained violations of the householder's peace, and offenses against his sovereignty; the paradigmatic offense remained that of treason, in the 14th century (finally) "defined" as including imagining the death of the king (high, or grand, treason) or, in the case of lesser householders, rather more narrowly as the actual killing of the householder by a human member of his household (petit treason).¹⁹

Radbruch traced a similar development in the history of German criminal law (following Binding).²⁰ Pollock focused on the history of English constitutional law, with obvious—though still underappreciated—implications for the history of English criminal law, which arguably remains committed to the conception of crime as offense against the King's peace.²¹ Radbruch, as a criminal law scholar, instead took up the history of (German) criminal law directly and traced it to the householder's discipline of household members, and serfs (or rather the unfree) in particular. Radbruch's account is both more and less interesting than Pollock's for our present purposes; while it deals with criminal law explicitly, it fails to place it within the evolution of the general conception of state governance that is the subject of Pollock's study and of the preceding discussion. Radbruch puts particular emphasis on the eventual expansion of dishonorable punishments, notably corporal punishments (as mentioned above in the discussion of Greek penalty), from household members to citizens, i.e., from the unfree to the free, or yet more pointedly, from the household to the erstwhile householder, who eventually found himself reduced to the status of the object of penal power as his once sovereign household was overtaken by the royal householder's macro household.

Putting it most broadly, both Pollock and Radbruch trace the dominance of heteronomy as a mode of governance since the fall of the Roman Republic, which we may take as the fading of autonomy as an alternative, co-equal, paradigm of power. In classical Athens, heteronomy and autonomy were mutually incompatible and yet interconnected: the autonomy of city-state government presupposed the heteronomy of household government insofar as participation as a citizen in the former presupposed the status of householder in the latter. With the expansion of the householder model through the expansion of the imperial household to encompass the entire *patria*, the realm of once public government disappeared, and the ideal of autonomy with it. Pollock and Radbruch's accounts chart the continuation of this hegemony of heteronomy in England and German after the collapse of the Roman Empire.

Both Pollock and Radbruch, though once again Radbruch more explicitly than Pollock, also emphasize the continued significance of this household- and peace-based conception of state power in general, and state penal power in particular. But it is important to recognize why this emphasis is necessary, and important, and even critical (in both senses of the word): because there was a moment when that hegemony was challenged and even, according to many, broken and then, moreover, replaced with its direct opposite: the hegemony of autonomy. This is the moment of the enlightenment.

Radbruch's argument that criminal law today (or, in his case, in the mid-twentieth century) continues to bear traces of its origins in household discipline is provocative precisely because, according to the conventional story, *modern criminal law* marks a radical departure from what

¹⁸ Frederick Pollock, 'The King's Peace', (1885) 1 *LQR* 37

¹⁹ Treason Act 1351, 25 Edw. 3 stat. 5 c. 2.

²⁰ Radbruch, *supra*; see also Mireille Hildebrandt, 'Origins of the Criminal Law: Punitive Interventions Before Sovereignty', in *Foundational Texts in Modern Criminal Law*, *supra*, at ____.

²¹ On this point, see Markus D. Dubber, 'Preventive Justice: The Quest for Principle', in Andrew Ashworth & Lucia Zedner (eds.), *Prevention and the Limits of the Criminal Law* (2013), 47.

came before, just as radical—and in the exact same sense—as that marked by the creation of the *modern state*. As this account would have it, the enlightenment launched the modern state project with the invention of the ideal of the state under the rule of law, the *Rechtsstaat*. Modern criminal law simply is one aspect of the modern law state; it is the manifestation of the *Rechtsstaat* ideal in the penal realm. The *Rechtsstaat*, however, is simply the reassertion of autonomy as a mode of public governance after centuries, if not millennia, of the hegemony of heteronomy in the public realm. The law state (*Rechtsstaat*), more specifically, is the radical rejection of the police state (*Polizeistaat*), which in the seventeenth and eighteenth centuries had systematized, expanded, and implemented the patriarchal conception of state power with the help of the new discipline of “police science,” itself a refinement of the *oeconomic* advice literature (*Hausväterliteratur*) going back to the *Oikonomikos* of Xenophon. The enlightened *Rechtsstaat*, in other words, sought nothing less than to turn the hegemony of heteronomy upside down, and into a hegemony of autonomy. That autonomy, however, also is itself radically transformed, from a marker of distinction (identifying those few capable of governing, rather than of merely being governed) in ancient Greece, to a universal (or at least far more common) capacity shared by all person as such. Autonomy remains the marker of personhood; but personhood is now a characteristic of all moral beings, not merely a status conferred upon those entitled to participate in political and legal discourse (*sui iuris*, standing), rather than indirectly as someone else’s man (or woman, as the case may be: *feme covert*).

Radbruch’s observation about patriarchal remnants in contemporary criminal law thus suggests that the enlightened project is at least incomplete. It may further suggest, perhaps more interestingly, that this project is ultimately misguided insofar as heteronomy and autonomy may—and perhaps even ought to—remain incompatible yet complementary fundamental modes of governance in a comprehensive critical analysis of state action, and of state penal action in particular.

2. Law and Police

In the juxtaposition of the law state vis-à-vis the police state, the enlightenment critique of patriarchal governance uses law as a critical concept: law is superior to police, and therefore the law state is superior to the police state. Law no longer functioned as a vague term that could encompass, for instance, private law and public law in the sense of Justinian’s Digest, including state enforced norms governing the interaction of individuals but also internal guidelines for the operation of the state apparatus; law now became associated with justice and right, and with the rights of individuals also, and crucially, against the state and not only against other individuals. The reference to law now signaled a novel demand for legitimation of state action, and of state penal action in particular, as consistent with the rights of the person, and ultimately, with each person’s capacity for autonomy.

The call for a law state was synonymous with the call for the legitimation of state power, in theory and in practice, in norm and in application. Law, thus, was not merely superior to police; law was legitimate, and police was not. The law state acknowledged and addressed the challenge of its legitimacy; the police state did neither. The law state both sought and achieved justice; the police state did neither. The police instead sought peace, welfare, efficiency, prudence; at best, the police state was a manifestation of benevolent patriarchy, a well-ordered state where the sovereign uses his unconstrained discretion to maximize the welfare of his human resources, perhaps even fashioning himself as Public Servant Number One (as did Friedrich II. in Prussia).

A conception of “public law”—like the one underlying the distinction between public and private law in the Digest—as affairs of state or as state administration, i.e., the internal management of the state apparatus according to unpublished norms shielded from legitimacy critique in definition and compliance, was no longer compatible with the critical conception of “law.” In fact, developing a new conception of public law that complied with the demands of legitimation in terms of justice, and in particular was consistent with the newly discovered autonomy of the person, proved difficult, especially when it came to the criminal law. PJA Feuerbach developed a vaguely Kantian account of criminal law around the idea of crime as a violation of personal right.²² That idea, however, bore little resemblance to criminal law in fact, as Birnbaum, among others, pointed out.²³ Even Feuerbach’s own Bavarian Criminal Code (1813) was more notable for implementing his theory of general—as opposed to specific—prevention, which some—including, for instance, Hegel—in fact regarded as inconsistent with the recognition of its addressees as persons capable of autonomy, rather than as dogs controlled through the threat of violence.²⁴

Feuerbach acknowledged that the criminal law at the time encompassed a great many offenses that did not amount to a violation of personal right, no matter how far that notion might be stretched. Rather than removing these offenses—including certain offenses against morals or religion—from the reach of state power altogether, however, Feuerbach reclassified them, from criminal offenses to “police offenses.”²⁵ This distinction between right (or law) violations (*Rechtsverbrechen*) and police violations presaged a common attempt to resolve the tension between law and police even after the supposed triumph of the law state over the police state; the law state could tolerate police offenses not as an alternative paradigm of crime but as a lesser type of offense subject to less intrusive state interference (often the deprivation of liberty in the form of imprisonment²⁶).

More recently the so-called *Rechtsgut* principle has become associated with the effort to construct a criminal law *qua* law, i.e., a criminal law compatible with the critical requirements of the law state. According to the *Rechtsgut* principle, criminal law legitimately concerns itself with violation of *Rechtsgüter* (legal goods), and nothing else.²⁷ But, as has been shown time and time again the idea of *Rechtsgut* was introduced at the turn of the twentieth century by a radical positivist, Karl Binding, who grounded the state’s penal power in the state’s “right to obedience of the law” and saw the purpose of its exercise as “the inmate’s subjugation under the power of law for the sake of maintaining the authority of the laws violated.”²⁸ Ironically, the origins of the *Rechtsgut* principle is traced to the previously mentioned article by Birnbaum attacking Feuerbach’s personal right account of criminal law for its failure to make room for crimes that do not violate a person’s right: Feuerbach’s non-criminal police violations.

²² PJA Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (1801) (English translation and discussion in *Foundational Texts in Modern Criminal Law*, above).

²³ Johann Michael Franz Birnbaum, ‘Ueber das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens, mit besonderer Rücksicht auf den Begriff der Ehrenkränkung’, [1834] *Archiv des Criminalrechts, Neue Folge* 149 (English translation and discussion in *Foundational Texts in Modern Criminal Law*, above).

²⁴ GWF Hegel, *Grundlinien der Philosophie des Rechts* (1821), § 99 (Zusatz).

²⁵ Hugo Hälschner, *Das gemeine deutsche Strafrecht* vol. 2 (1884), 10-11.

²⁶ See, e.g., Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (2009) (focusing on Canadian criminal law).

²⁷ Hörnle chapter

²⁸ K Binding, *Die Normen und ihre Übertretung* vol. 1 (2nd ed 1890), 340.

Birnbaum's 1834 article in fact amounted to a prolonged plea for a conception of criminal law not in terms of *rights*, personal or otherwise, but in terms of *goods*, which were considered by the state as worthy of protection. It is in fact difficult not to read this text as an attempt to divert Feuerbach's critical project into a positivistic account of criminal law that is content to remark that in fact the state continues to exercise its penal power from a police, rather than a law, perspective, despite efforts by theorists like Feuerbach to develop a "philosophy" of criminal law that bears little resemblance to the reality of state penal power as exercised in doctrinal fact. Law has completely lost its critical edge when, some decades later, Binding merged the two opposing concepts of right and good into the concept of *Rechtsgut*—literally "right good."

A similar resolution of the radical critical conflict between law and police can be seen in the development of the field of "police law" (*Polizeirecht*), which combines both sides of the critical divide created by the enlightenment insistence on the legitimation of state power. Here then was a field of law that, in its very name, combined the two fundamental modes of governance posited as essentially incompatible in the struggle of the law state against the police state. In the launch of a project of police law, as in the previously mentioned development of so-called police offenses (as distinct from right offenses), one can see an acknowledgment of the continued viability of police as a mode of governance despite the claim that the police state gave way to the law state. The challenge of replacing illegitimate police with legitimate law was transformed into the apparently more modest one of retaining but taming police by means of external control through law, both in the form of legislative norms (as opposed to executive missives) and of judicial supervision ("judicial review"). Rule of law had turned into rule of police by law.

Eventually, the obviously oxymoronic police law morphed into the less obviously oxymoronic project of administrative law. Administrative law, as paradigmatic public law, ever since has been defined by the tension between law and police that it has internalized, and obscured; this is the tension between (the law of) administration and administrative law, between green-light and red-light administrative law, between facilitative and evaluative administrative law, between the totality of norms and practices of state administration and legal constraints on them, between the many and varied everyday actions of myriad administrative officials and the occasional actions of judicial officials second-guessing them on the margins, and between the Roman law conception of *public* law as concerning the affairs of state and the enlightenment's conception of public *law* as one manifestation of the state's duty to legitimize its actions against the citizen-persons who constitute it.

The difficulty—if not the impossibility—of developing an account of public law *qua* law has spawned other avoidance strategies besides the resolution by taxonomical fiat, i.e., by the naming of a field of law that, on its face, reconciles the factual and normative aspects of public law (police law, administrative law). Take, for instance, the lack of interest in matters of public law among the contributors to the most important jurisprudential project of the nineteenth century in Germany: historical jurisprudence. Savigny's school of historical jurisprudence originally focused exclusively on Roman law, and on the study of Roman law sources in particular. As we saw, however, Roman law was essentially private law. As a result, the bulk of German legal thought in the first post-enlightenment century followed the Roman practice of essentially treating law as synonymous with private law. Public law was treated, much as the Romans had done, as a matter not of law but of administration, management, politics, and policy.

Across the Channel, particularly in the second half of the nineteenth century, a similar development occurred, without however having anything to do with Roman law. In England, too, the bulk of jurisprudential attention was devoted to private law. Recall that Bentham and his

English followers saw criminal law as adjectival, i.e., as the threat of state force backing up private law norms, and that Dicey, a little later on, saw public law as inconsistent with the very idea of rule of law; all law was private law simply because there was no other type of law, at least in England. Public law, by contrast, was an oppressive statist French invention incompatible with the egalitarian spirit of the English common law (despite the fact that the common law was *royal* law). We can now see that Dicey conceived of public law in terms of Justinian's Digest, as an internal state affair, as administration rather than as law. In other words, public law, to Dicey, was a matter of police, not of law. It is no accident that a century earlier, the concept of "police" was dismissed by English commentators for the same reason: that it was an alien, French, mode of governance inconsistent with the inborn rights of Englishmen and the myth of a stateless government that largely stayed out of the way of the common exercise of common sense in all things, including legal disputes.²⁹ (Note that the intervening French Revolution—with its call for liberty, equality, and fraternity—did not affect English perceptions of typically "French" attitudes toward law and government in the eighteenth and nineteenth century.)

Now, to attribute the English tendency to equate law with private law to an avoidance strategy may be misleading insofar as this tendency predates the enlightenment moment, at least in continental Europe or, more controversially, in North America. It would have been difficult for the English to attempt to avoid a fundamental critique of the police state (or public law) in the name of law since they denied the existence of an English police state (or public law) to begin with. There was no legitimacy challenge to avoid. The question of the relationship between enlightenment ideas and English political history is too complex, and tangential, for current purposes. Suffice it to speculate that the insistence on the absence of public law, and of police, served, if not to avoid a recognized legitimacy challenge, then to obscure and to deny a legitimacy crisis in the first place.

The United States of the Early Republic falls somewhere between Germany and England: while it did recognize the need to radically critique the legitimacy of the existing mode of state power—in fact, the very mode that the English found beyond challenge—the scope of the challenge was drastically narrowed to exclude the exercises of state power most in need of critical analysis. Unlike English jurisprudence, American law had no trouble acknowledging the existence of police as a fundamental mode of governance. From the beginning of the Early Republic, the concept of "police power" took on central significance as a comprehensive, flexible, and discretionary mode of government defined only by its indefinability: "the power of sovereignty, the power to govern men and things within the limits of its dominion,"³⁰ where dominion—as opposed to "jurisdiction"—should be taken quite literally as the spatial limits of the sovereign-state household, with the "men and things" constituting the household's human and non-human resources. Despite the *laissez-faire* myth of nineteenth-century American government, Americans of the Founding Generation were busy governing men and things within their new dominion, with the help of the conveniently all-encompassing and malleable police power.

Now a system of government that leans heavily on an all-encompassing, flexible, discretionary, and—in a word—patriarchal state power called the "police power" can hardly be said to radically replace police with law as the fundamental mode of governance. This may raise difficult question for the American Revolutionary project as a whole, and its connection to the enlightenment enterprise; we will leave these more general concerns aside for our purposes and instead focus on the state's penal power. It has long been assumed, generally without elaboration, that the state's

²⁹ See, 'police (n.)', in *Oxford English Dictionary* ("from an aversion to the French and something under the name of police being already established in Scotland, English prejudice will not soon be reconciled to it").

³⁰ *License Cases*, 46 US (5 How.) 504, 583 (1847).

penal power in the United States is an aspect of its police power. In this conception, the state's penal power serves to manifest the state's sovereignty, with the paradigm of crime being an offense against the state's sovereignty.³¹

As an object of the police power, however, an offender is regarded as among the "men and things within the limits of [the sovereign's] dominion," instead of as a right-bearing person with the distinctive capacity for autonomy. Within the realm of police, rather than of law, the offender is not considered as an equal citizen entitled to justice; instead, he falls within the realm of prudence, at best, under the discretionary power of the state-householder. He is a resource to be managed, and disciplined if, and as, necessary, or appropriate, within the discretion of the sovereign (as still illustrated by the wide charging discretion enjoyed by prosecutors in an informal penal process dominated by plea bargaining). In fact, the prisoner came to be regarded as a rightless "slave of the state",³² and when, after the Civil War, the Thirteenth Amendment abolished slavery and involuntary servitude, it retained an exception for "punishment for crime whereof the party shall have been duly convicted." Offenders, in other words, were not part of the American political project; they did not benefit from the critique of political institutions of state power because they were not political subjects, but merely objects of government. Along with women, slaves, and the unpropertied, they lacked that supposedly universal capacity for autonomy that drove the revolutionary rhetoric of "taxation without representation."

In this way, the state's penal power remained untouched, and unchallenged, by the American Revolution. The conception of penal power as the manifestation of the sovereign's power to maintain the peace of his state household, the "King's peace," survived the comprehensive rethinking of state power largely unchanged, the only difference being a transfer of sovereignty from the king to "the people," i.e., the political community of citizens, which pointedly and plainly did not include the offender. American penalty thus remained a pacification project, with the sovereign as the subject and the offender as the object to be pacified (or rendered harmless).

3. The Dual Penal State and Other Penal Dualisms

In the remainder of this chapter, let us further narrow our focus to take a closer look at the continued significance of the distinction between law and police in the critical analysis of state penal power and its exercise as state penal action. We will also place the resulting account of a "dual penal state" within the context of the broader project of distinguishing between paradigms of penalty.

The core idea of the conception of contemporary penalty as a dual penal state is the continued coexistence of two mutually incompatible yet inseparable comprehensive paradigms of state penal power, penal law and penal police.³³ These penal paradigms, or ideal types, in turn are

³¹ As a result, the federal constitutions' double jeopardy (*ne bis in idem*) protection against double punishment for a single offense has been held not to apply to two prosecutions for the same physical act insofar as it violates two states' criminal norms and, in this way, amounts to two "offenses": one against each state sovereign ("dual sovereignty exception"). *Heath v. Alabama*, 474 U.S. 82, 88 (1985) ("common-law conception of crime as an offense against the sovereignty of the government" and violation of the sovereign's "peace and dignity").

³² *Ruffin v. Commonwealth*, 62 Va. 790 (1871).

³³ Ernst Fraenkel's account of the "dual state" (*Doppelstaat*) under National Socialism differentiated between the normative state (*Normenstaat*, norm state) and the prerogative state (*Maßnahmenstaat*, measure state). In effect, it was a dualistic account of Nazi administrative law that traced what Fraenkel saw as the expansion

manifestations of a fundamental, and long-standing, tension between two modes of governance, heteronomy and autonomy, which can be traced back at least to the governance of the (private) household and of the (public) city-state in classical Athens, respectively.

Let us take a brief look at some of the features of this dualistic framework. As was mentioned at the outset, the purpose of this taxonomic exercise is to facilitate the critical analysis of state action, in this case of state penal action. The classification of a given state action makes critique possible because different modes of state action may be subject to different critical norms. From the perspective of law—in particular the modern concept of law as grounded in the principle of personal autonomy—the legitimacy of a state action may be scrutinized in light of its compliance with the fundamental norm of autonomy. From the perspective of police—for instance, the patriarchal conception of police laid out in the discussion above—the legitimacy of state action arguably would not be at issue in first place, insofar as police governance is unconcerned with the legitimation of state power given that it regards the objects of governance as household resources essentially incapable of autonomy. To critique a policial state action as unjust is beside the point since, from the perspective of police, justice is an irrelevant consideration. If police seeks anything, it might be prudence, or efficiency, or welfare, but not justice, and certainly not justice in the modern sense of respect for the dignity of persons with the capacity for autonomy. At the same time, to critique state action as an exercise of the law power, i.e., from the perspective of law, as insufficiently wise or benevolent or efficient is inappropriate for the same reason: it is beside the point.

Here it might be useful to think of police and law as *genres* of state action, and of penal police and penal law as subgenres. Genre classification in literary theory serves the purpose of determining the appropriate critical vocabulary (among other things). A novel, for instance, would be subjected to different aesthetic norms than a short story. Likewise, within the genre of the novel, a subgenre such as that of the “realistic” novel should not be critiqued in terms of criteria more properly applied to another subgenre, such as, for instance, that of the “experimental” novel.³⁴ In fact, thinking of police and law, and penal police and penal law, in terms of genre, rather than other more familiar—if not necessarily more illuminating—terms such as mode, paradigm, or ideal type, may also shed light on the relationship between the two concepts under investigation, with the help of Alistair Fowler’s concept of “antigenre.”³⁵ An anti-genre relates to a genre much like law relates to police in this sense: modern law as an anti-genre of state action emerged as a radical response to police, the orthodox genre of state action at the time. Modern law did not seek to develop, or refine, or improve the police state, but to replace it with a comprehensive and fundamentally different model of the state, the law state. The law state thus was both intimately and necessarily connected to the police state, both historically and conceptually, while at the same time violently denying that connection to the point of revolution.

The concept of *ideal type*, which is often invoked in this context (Jakobs’s distinction between “citizen criminal law” and “enemy criminal law” comes to mind), can also be useful, particularly if one keeps in mind what work it was meant to do in Weber’s project. The juxtaposition of ideal types, to Weber, facilitated historical and comparative analysis, notably at a high level of generality that made constant reference to detailed points of similarity or difference, continuity or disruption, impractical. Ideal types, through explicit and conscious creation of abstract concepts with features

of the prerogative state at the expense of the normative state. In the end, the normative state was limited to the regulation of commercial activities required to maintain the domestic economy.

³⁴ See David Lodge, ‘The Novelist at the Crossroads’, (1969) 11 *Critical Quarterly* 105.

³⁵ Alastair Fowler, *Kinds of Literature: An Introduction to the Theory of Genres and Modes* (1982), 175.

that manifest themselves if in no particular phenomenon then in a recognizable cluster of phenomena, may perform a task similar to that of genres: even if they have no critical function themselves (although this is of course debatable), they may make critique possible. Similarly, police and law are ideal types in the sense that they can be seen as contrasting clusters (or “clouds”) of concepts, practices, and—borrowing from Foucault here—governmentalities, that add up to a comprehensive framework for critical analysis.

Thinking of police and law as *paradigms* may be helpful by highlighting the crucial historical aspect of the critical analysis they facilitate. The relationship between police and law is historical in at least two senses. Their interrelation and –connection fits into a yet broader historical context insofar as they reflect the interplay between heteronomy and autonomy as fundamental modes of governance since classical Athens. Moreover, the positing of the modern ideal of law marked a particular historical moment: the radical critique of the long-standing hegemony of heteronomy manifested in the all-encompassing police state of the seventeenth and early eighteenth centuries. Still, talk of paradigm change may also be misleading if it suggests that the relation between law and police is one of succession, one taking the place of the other, rather than both coexisting, with alternating yet always imperfect hegemonies of one over the other.

In this respect, the present account of the concept of police differs from Foucault’s, at least insofar as Foucault’s notion of police reflects its patriarchal character but regards it as a specific genealogical moment, which gives way to other governmentalities.³⁶ This is not to say that the transition from police to, say, “neoliberal” (self-)governance cannot be seen as a way of capturing what has here been described as the radical juxtaposition of modern law and police. Nor is it to suggest that Foucault would have considered the inquiry into police as a merely antiquarian exercise, with no contemporary analytic salience; the point of genealogical inquiry, after all, was to find history in the present, to reveal continuity in the face of apparent discontinuity.

The historical aspect of the distinction between police and law is therefore both essential, rather than incidental, and possibly misleading. Its significance becomes clear if it is placed next to the comparative dimension of critical analysis in terms of police and law. Like historical analysis, comparative analysis operates to open up a critical perspective on the object of analysis. The above discussion of developments in Germany, England, and the United States was meant to point out both that the contrast between law and police must be seen within a specific historical and systemic (“domestic” or “oeconomical”) context. At the same time, however, apparent systemic singularity should go no less unchallenged than apparent historical continuity. In other words, the specificity of each historical-systemic account should not obscure opportunities to explore continuities and similarities that emerge from within a broader, more abstract, framework (defined, for instance, by Weberian ideal types).

Focusing on the specific topic at hand, the critical analysis of modern state penal action within the framework of the “dual penal state” attempts to develop a comprehensive historical-comparative account of state penalty from the perspectives of police and law as modes of modern state governance rooted in the distinction between heteronomy and autonomy. This distinction was once associated with the distinction between private and public government. This division of labor—or rather of governance—has faded away with the expansion of heteronomous household governance into the public sphere, particularly after the collapse of the Roman Republic. The enlightenment critique of state action sought to replace the police (heteronomous) state with the

³⁶ See, e.g., Michel Foucault, *Omnes et Singulatim: Towards a Criticism of ‘Political Reason’* (Tanner Lectures in Human Values) (1979)

law (autonomous) state, rather than merely recovering the old division of governance, once again limiting heteronomy to the private sphere of, say, household government. The unit of government was to be the person, no longer the household resource. This radical shift, this turning upside down (or right side up), of the traditional hegemony of heteronomy, in fact, led to tensions within the remnants of private government, as micro householders found their disciplinary authority challenged. (This trend continues to this day, as illustrated, for instance, by the struggle to retain, yet restrain, parental disciplinary power through the use of state penal power.³⁷)

As a comprehensive dualistic account of penal action, the dual state approach resembles Herbert Packer's account of the "criminal process" based on the distinction between the due process model and the crime control model. Packer's ambition is comprehensive in two senses: Despite Packer's particular interest in the criminal process, in *The Limits of the Criminal Sanction* (1968), he addresses state penal action in its entirety—from the definition of penal norms and the conditions of liability for, and the consequences of, their violation (substantive criminal law), to their imposition in the criminal process narrowly speaking (criminal procedure), to the infliction of threatened sanctions for their violation (prison law, corrections law). Clearly, any critical analysis of criminal law with even modest contextual ambitions cannot limit itself to any one of the components of the penal process. Nonetheless, this remains common practice today, though different systems privilege different aspects of penal action; civil law countries (and Germany in particular) tend to focus on substantive criminal law, and common law countries (and the U.S. in particular) on procedural criminal law. The infliction of sanctions—i.e., punishment itself—attracts the least attention in both systems. The present handbook makes some effort at comprehensiveness, even if its consideration of criminal procedure and prison law is fairly limited.

More interesting, Packer's account is also comprehensive in the sense that it considers the criminal process as a whole from the perspective of the due process and crime control models, rather than confining each model to some aspect, or aspects, of the process. Roughly, the due process model pursues justice, seeks formal and fair procedures defined by clear and specific rules that meaningfully limit the discretion of state officials, and proceeds from a presumption of innocence. The paradigm of the due process model is the jury trial. The crime control model, by contrast, pursues the repression of criminal conduct, with the help of informal procedures governed by broad and flexible standards that grant significant discretion to state officials to efficiently identify and process offenders, and operates with a presumption of guilt. The paradigm of the crime control model is plea bargaining.

Packer's treatment of substantive criminal law is rather more pedestrian: it follows the conventional practice of framing the discussion as a choice between retributivism and utilitarianism, and then goes on to propose a conventional compromise position (similar to the sort of limited retributivism previously endorsed by Rawls and HLA—and Henry—Hart). Packer showed little interest in trying to integrate his accounts of substantive and procedural criminal law or, more specifically, to relate his distinction between the crime control and due process models in criminal procedure to that between utilitarian and retributive accounts of punishment in substantive criminal law. It would not be difficult to read Packer's distinction between the due process and the criminal control models as illustrating the broader distinction between law and police that frames critical analysis of the dual penal state.

Packer's account, thus, may be comprehensive—at least within the scope of criminal procedure—but it is not contextual in a broader sense. While it does consider the criminal process

³⁷ See, e.g., *Canadian Foundation for Children, Youth and the Law v. Canada* [2004] 1 S.C.R. 76.

narrowly speaking within the context of the criminal process broadly speaking, it does not take the additional step of locating the latter within an account of state power, nor within a wider historical or comparative context.

Günther Jakobs's distinction between citizen and enemy criminal law, like Packer's distinction between the due process and the crime control model, focuses on only one aspect of state penal action. Packer focuses on procedure, Jakobs on substantive criminal law, each reflecting the respective biases of American and German criminal law scholarship. Like Packer, Jakobs also does not seek a comparative perspective. Jakobs does show greater interest in historical context, primarily to note the distinction between citizens and enemies, insiders and outsiders, to earlier writers associated with the liberal tradition, including notably Rousseau and Fichte. The distinction between citizen and enemy criminal law, according to Jakobs, turns on the classification of offenders; citizens are subject to citizen criminal law, and enemies to enemy criminal law. Citizens are treated as persons; enemies as human threats. They differ in that a citizen is "a person who acts according to loyalty to law"; an enemy is not, and does not. Without this all-important loyalty, the enemy cannot "provide sufficient cognitive guarantee for conduct as a person." To prevent enemies from violating citizens' "right to security," they must be incapacitated.³⁸

Jakobs has been widely criticized, particularly for the normative implications of his account, some of which he has made explicit. At the same time, many of those who have taken umbrage at Jakobs's explicit—and what they take to be the implicit—endorsement of particular forms of "illiberal" state penal action, have either conceded or left unchallenged the potential of the distinction between citizen and enemy criminal law as a tool of critical analysis (particularly in the face of a ubiquitous rhetoric of "combatting," or waging "war," on crime). The distinction, in fact, can claim roots not only in liberal legal and political theory (some of which Jakobs mentions), but also in legal history (see, for instance, Heinrich Brunner's influential account of punishments as aspects of outlawry³⁹) and sociology (see, for instance, George Herbert Mead's brilliant "The Psychology of Punitive Justice"⁴⁰).

Conclusion

Modern legal science—if it is no longer to busy itself with charting the heaven of juristic concepts, divining the ontological essence of law, or properly labeling doctrinal specimens—might profitably dedicate itself to the critical analysis of state action *qua* modern law. This critical analysis requires—after a preliminary investigation into the normative requirements that modern law (in the "law state") places upon state action—a contextual analysis of the particular state action in question. The dual penal state framework of critical analysis in terms of the distinction between penal police and penal law discussed in this chapter illustrates how a modern science of criminal law might proceed.

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Further Readings:

³⁸ Günther Jakobs, 'Bürgerstrafrecht und Feindstrafrecht', (2004) 5 *HRR-Strafrecht* 88, 91, 93, 94.

³⁹ Heinrich Brunner, 'Abspaltungen der Friedlosigkeit,' in *Forschungen zur Geschichte des deutschen und französischen Rechtes* (1894), 444.

⁴⁰ (1918) 23 *American Journal of Sociology* 577.

1. Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (2009)
2. Markus D. Dubber, *The Policar Power: Patriarchy and the Foundations of American Government* (2005)
3. P.J.A. Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (1st edn., 1801) (English translation and discussion in Markus D. Dubber (ed.), *Foundational Texts in Modern Criminal Law* (forthcoming 2014))
4. Alastair Fowler, *Kinds of Literature: An Introduction to the Theory of Genres and Modes* (1982)
5. Michel Foucault, *Omnes et Singulatim: Towards a Criticism of 'Political Reason'* (Tanner Lectures in Human Values) (1979)
6. Ernst Fraenkel, *The Dual State* (1941)
7. James Goldschmidt, *Das Verwaltungsstrafrecht* (1902) (discussed in chapter __ of this volume)
8. Günther Jakobs, 'Zur Theorie des Feindstrafrechts', in Henning Rosenau & Sanyun Kim (eds.), *Straftheorie und Strafgerechtigkeit* (2010) 167 (English translation and discussion in *Foundational Texts*, supra)
9. George Herbert Mead, 'The Psychology of Punitive Justice', (1918) 23 *American Journal of Sociology* 577
10. Herbert L. Packer, *Limits of the Criminal Sanction* (1968)
11. Frederick Pollock, 'The King's Peace', (1885) 1 *Law Quarterly Review* 37
12. Gustav Radbruch, 'Der Ursprung des Strafrechts aus dem Stande der Unfreien', in *Elegantiae Juris Criminalis: Vierzehn Studien zur Geschichte des Strafrechts* (2d ed., 1950) 1 (English translation and discussion in *Foundational Texts in Modern Criminal Law*, supra)
13. Max Weber, *On the Methodology of the Social Sciences* (Edward A. Shils & Henry A. Finch trans. & eds., 1949)