

Victimhood and Personhood

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I. Introduction

According to a now familiar story, criminal law at some point paid close attention to the victim, then forgot it, and more recently rediscovered it. Even as lawyers'—or more precisely law professors', or victims' rights' advocates'—history, this is not a particularly illuminating account. Apart from the usual problem of parochial universality, which leaves unasked and therefore unanswered the question which criminal law (English, German, “American”) is meant to have done this noticing, forgetting, and remembering, one is left wondering just when, not to mention why, “the criminal law” had these changes of heart about the victim. Never mind also what it might mean for a system of criminal law—or perhaps its institutions or (all?) those performing various functions within these institutions—to notice, forget, remember anything or anyone, not to mention an abstract concept, “the victim.” These surely are unfair quibbles that could be addressed at any attempt at legal history beyond social history, antiquarianism, or “doctrinal history.” I instead want to focus attention on the object of all of this attention, or lack thereof, from the criminal law: the victim.

If the rediscovery of the victim is to mean anything, it cannot mean the rediscovery of any victim, but of a specific type of victim, namely the victim as person. Even so, talk of rediscovery remains misleading. The criminal law could not have rediscovered the victim *unmodified* because it had never forgotten the victim. At the same time, the criminal law could not have rediscovered the victim *as person* because it had never noticed it before. The history of criminal law is not one of the victim drifting in and out of its institutional consciousness, but of the evolution of the concept of victimhood or, perhaps, more precisely, of the continued struggle of two competing and fundamentally inconsistent concepts of victimhood: the person and the state. These concepts of victimhood themselves reflect two modes of governance that are both irreconcilable and complementary: law and police.

In this light, the so-called rediscovery of the victim emerges as the assertion of the priority of one concept of victimhood over another, of victimhood as personhood over victimhood as statehood, and therefore of law over police, right over welfare, autonomy over heteronomy. To the extent there ever was a discovery of the victim as person, it occurred in the enlightenment as only one implication, in the political realm, of the more fundamental discovery—or, if you prefer, invention—of the concept of autonomy as the defining attribute of personhood.¹ This is not to deny, of course, that the concept of autonomy may not have been implicit in certain seventeenth century notions of the rights of Englishmen and the like. The point is that only with Rousseau and, more fundamentally, systematically, and programmatically, with Kant does the concept of personal autonomy assume its position as the bedrock of moral and political theory. From then on, in the political realm, the concept of autonomy grounds, structures, and limits the state's power over its subjects, including importantly the power to threaten and exact punishment. Autonomy becomes the foundational concept of the *Rechtsstaat* (not merely the “rule of law,” but the manifestation of right in the state, the Right State) as the object of state power is reconceptualized as its subject and all legitimate power is autonomous, all legitimate government is self-government.

II. Persons, Autonomy, Law

The discovery of autonomy as the hallmark of personhood (and subjecthood) implied a radical reconceptualization of law, which is now regarded as the state's mode of governance with respect to persons, i.e., of autonomous subject-objects. Autonomy, at least since classical Athens, was recognized as the mode of governance appropriate for subject-objects. The subject-object of autonomous government in public was the householder who in private exercised discretionary dominion over his household, from the Athenian *oikonomikos* to the Roman *paterfamilias*, and from the medieval lord to the English peer.

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¹ Schneewind, *The Invention of Autonomy*.

Amongst themselves, acting upon and with each other as equals mutually identified, householders used not violence but persuasion, not the whip but rhetoric.

Autonomy, however, was not universal. To the contrary, the autonomy of some depended on the heteronomy of others. The householder was autonomous only insofar as he exercised heteronomy over his household. Objects of government fell into two kinds—those capable of self-government and those incapable of self-government. The capacity of autonomy, or self-government, manifested itself through government *of* another in the private sphere of the household, just as the incapacity of self-government was evidenced by one's government *by* another. Whatever marked one as capable of public autonomy, and private heteronomy, be it character, high birth, divine intervention, brute force, this capacity was not only nonuniversal, but rare, the exception, rather than the rule, and as such a mark of distinction. The farther away the exercise of heteronomy was removed from its acquisition, through some form of domination and humiliation, and the more routinized the institution of patriarchal household governance became, the more the fact, or status, of (private) householdership emerged as a presumption of the capacity of (public) autonomy. At least in theory, that presumption could be rebutted through conduct utterly inconsistent with the possession of the requisite capacity for autonomy, where that capacity was understood as a form of self-control or self-discipline. With the evolution of a macro householder, or royal sovereign, who extended his household to incorporate all lesser households and ruled as a householder of householders, the micro householder could be relieved of his disciplinary authority, and of his householder status, when the discipline of his household revealed a lack of self-discipline, a baseness inconsistent with his elevated status, including discipline betraying a malignant heart and the wanton deprivation of life or limb. (Within the royal macro household, the micro householder functioned as an overseer whose authority is delegated from the central householder; the micro householder himself thus is a member of the macro household, as are the members of his micro household.)

At any rate, the enlightenment treated autonomy no longer as an exceptional attribute or a delegated status but as an attribute of personhood shared by all persons as such. A person now is a person insofar as he or she is capable of self-government. This capacity for autonomy gives rise to dignity, which is no longer a social, but a moral, concept.² Persons thus understood deserve respect. Previously the actually autonomous deserved respect because of their superior status manifested by the exercise of heteronomous power over inferiors; now autonomy as a capacity deserves respect, not as a character trait, or the actual exercise of this capacity, and not over others, but over one's self. Self-discipline, even divorced from other-discipline, is desirable and worthy of admiration and emulation, but it differs from autonomy as the capacity to govern oneself.³

The capacity for autonomy has two components. *Self*-government is impossible without the capacity to form a coherent and conception of one's self as distinct from others over time. The Anglo-American philosophical literature on autonomy has devoted a great deal of attention to the question of authenticity, applied primarily not to the self itself but to its actions, which may or may not be autonomous—authentic—insofar as they manifest “first-order” desires that do or do not conform to—or are “identified with”—“second-order” desires. This discussion has little relevance to inquiries into the capacity of autonomy, though it might be useful in determining whether a particular action qualifies as an exercise of that capacity, however defined, provided obvious difficulties such as that of infinite regress can be addressed.⁴

The capacity for a conception of the self, i.e., of personal identity, as attracted less attention in moral philosophy than the authenticity of action measured in terms of the identification of lower-order desires with higher-order, and more authentic, ones. The question of identity formation has been left to moral psychology, where Piaget and Kohlberg gave accounts of the infant's gradual recognition of him- or herself as distinct from the mother, with the attendant recognition of distinct desires and the possibility of conflict.

² For a stimulating discussion of the relationship between social, or civic, and moral, or personal, dignity in the context of Kant's puzzling views on (male) dueling and (female) infanticide of illegitimate offspring, see Mika LaVaque-Manty, “Dueling for Equality: Masculine Honor and the Modern Politics of Dignity,” 34 *Political Theory* 715 (2006). Kant, in LaVaque-Manty's reading, regards dueling and infanticide as imperfect gender specific assertions of equal personhood, rather than of superior social status.

³ On the distinction between autocracy and autonomy in Kant, see Anne Baxley, “Autocracy and Autonomy,” 94 *Kant-Studien* 1 (2003).

⁴ See John Christman, “Introduction,” in *The Inner Citadel* 11 (John Christman, ed., 1989).

As laid out by Rawls in his work on the sense of justice—notably in *A Theory of Justice*⁵—the development of what he calls the two moral powers, and particularly of the capacity for a sense of justice that ensures the stability of a community committed to principles consistent with the moral constraints of the original position, is a story of the struggle to overcome the separation of the infant’s self from the mother—and then from others—in various social contexts of potential identification with other group members, from the family to the sports team to the state and, perhaps, beyond, in a progression that loosely tracks the manifestation of the idea of freedom in Hegel’s *Philosophy of Right*.⁶

Self-government requires the capacity to generate (or at least to recognize), appreciate, and apply behavioral norms (cognitive capacity). Moreover, it requires the capacity to shape one’s behavior in accordance with these norms (volitional capacity). As a moral capacity, the capacity for autonomy also requires the capacity to appreciate the concept of a universalizable norm, or at least a norm that governs not only my behavior, but also that of others (so that the norm may be generalizable, if not universalizable). This capacity is not the capacity for benevolence or fellow-feeling. It is a formal capacity to grasp the moral project as a system of norms governing the coexistence of equal autonomous persons. To be legitimate, whatever norms govern this community of persons must be acceptable to each member in the sense that he or she must be able to recognize the generation and application of the norms as an exercise of his or her capacity for self-government. The legitimation of a norm therefore presupposes the capacity to understand and apply it. This formal capacity can be seen as a capacity for empathy, in that it requires the capacity to identify with other persons as such (i.e., as individuals with a capacity for autonomy). This capacity for moral identification presupposes the capacity to assume the moral point of view, which abstracts from all morally irrelevant characteristics of the person whose action is under scrutiny.⁷

The critical idea of personhood as based on, and only on, the capacity for autonomy drew into question the very foundation of morality and of politics by transforming the moral project from an inquiry into propriety within a more or less broadly defined conventional context to an inquiry into the nature of morality itself and the principles that govern all persons as such, rather than as members of one empirical community or another or as occupants of one position or another within that community.

In this sense, the object of state power was removed from the political realm. The person as possessed of the capacity for autonomy might be many things, occupy many roles in many social contexts (from the family, to civil organizations, to the state), but it always also was a moral person in the abstract sense of morality (in Kant’s kingdom of ends, the community of persons as such, in Hegel’s realm of Abstract Right). At its core, personhood was beyond the disposition of the state (or other social and political institutions).

The new personhood implied a shift from the realm of privileges to that of rights. It marks the origin of the concept of human right (leaving aside for the moment the conventional limitation to *human* persons, which is simply a convenient shorthand for the concept of personal right, which attaches to every being capable of autonomy, human or not). Humans may have privileges, as may persons. But there can be no rightless person, though there is nothing oxymoronic about a person without privileges. The distinction between right and privilege is often ignored; if it is noted, it is dismissed as insignificant.⁸ Clearly, as with any distinction, that between privilege and right is subject to manipulation and exploitation for rhetorical gain. But to notice that, say, the United States Supreme Court employs a distinction in an outcome determinative way that obscures, rather than highlights, the “true” principle or rationale or prejudice driving a given decision (say in the context of procedural due process, where the distinction, or some close approximation to it, continues to rear its ugly head, to the dismay of commentators who call for transparency in constitutional decisionmaking), cannot be to disqualify the distinction from all attempts to put it to illuminating use, particularly in a different (historical) context.⁹

⁵ Chapter 8; see also John Rawls, “The Sense of Justice,” 72 *Philosophical Review* 281 (1963).

⁶ See Sibyl A. Schwarzenbach, “Rawls, Hegel, and Communitarianism,” 19 *Political Theory* 539 (1991).

⁷ See Dubber, *The Sense of Justice: Empathy in Law and Punishment* (2006).

⁸ See Akhil Amar, *The Bill of Rights* 176 (1998); Akhil Amar, “The Bill of Rights and the Fourteenth Amendment,” 101 *Yale Law Journal* 1193, 1220-22 (1992). Hohfeld devoted a great deal of attention to the distinction, though he drew it in a different way. Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” 23 *Yale Law Journal* 16 (1913).

⁹ See William W. van Alstyne, “The Demise of the Right-Privilege Distinction in Constitutional Law,” 81 *Harvard Law Review* 1439 (1968); Rodney A. Smolla, “The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much,” 35 *Stan. L. Rev.* 69 (1982).

Privileges, then, are bestowed, granted, given, sold, absolutely, qualifiedly, incompletely. Rights, by contrast, are recognized. Privileges can be suspended, revoked, rescinded.¹⁰ Rights, by contrast, are violated, infringed, even trampled. Privileges are enforced, perhaps even honored. Rights, by contrast, are vindicated. A privilege is a franchise, an entitlement, a license, an immunity.¹¹ A privilege can be surrendered, lost, given up. A right can be not exercised, can be not invoked, but it cannot be forfeit (though its exercise may be restricted). A privilege is an external benefit, a permission, a sign of distinction. A right is an internal good, an attribute, a capacity, a power. Privileges are a matter of mercy; rights are a matter of right.

Privilege may provide the holder—the grantee—with immunity, i.e., with protection against certain forms of interference. Rights likewise provide protection, but they are not a special dispensation granted by a superior power (the prerogative). Privileges are inherently unequal; there can be no universal privilege, no equal privileges for all. A privilege is, with Maitland and Pollock, an exceptionality, an exception to the rule.¹² Rights are the norm, no matter how incompatible their exercise may turn out to be.

In this new realm of equal persons endowed with rights, rather than of unequal human resources, privileged or not, any action the state might take against or upon the person had to respect that person as such, i.e., as a being with the capacity of autonomy. The object of governance was thus transformed from a member of the household whose welfare may affect the welfare of the household in varying degrees (depending on the householder's dedication to welfare maximization in general, and his assessment of the object's relative significance to the household's welfare in particular) to a person whose capacity for self-government extends not only to his or her actions, but also to the state assessment of, and response to, these actions. State government, in other words, was itself subject to the exercise of the capacity for self-government of its objects. The objects of state government were now also its subjects. Personal autonomy implied not only moral autonomy but also political autonomy.

State government no longer stood in contrast, and literally against, its objects' self-government, but became an extension of personal autonomy. The function of state government was no longer the manifestation of a distinct sovereignty through the use of household resources, human and non-human, but to enable and to facilitate the manifestation of the personhood of each of its objects, as political persons or citizens. Government was “of the people, by the people, for the people,” in Lincoln's later phrase. (This is the kernel of truth in the potentially misleading remark that “the people are sovereign,” provided people are understood not as a separate entity, magically imbued with sovereignty, distinct from the persons who constitute it, but as a collection or system of coexistence and collaboration of persons.) If to be a person was to have the capacity for self-government, to live as a person meant to exercise that capacity to the fullest possible extent. The “pursuit of happiness” was about more than pleasure; it was the person's autonomous pursuit of his or her happiness, not the discretionary provision of welfare by the sovereign insofar as an individual's welfare affected the welfare of the macro (or some micro) household. Happiness was to construct a life plan and to live one's life accordingly, to choose one's life as much as to live it.

In this political project, law played a central role. For law emerged as the mode of governance vis-à-vis the person, rather than an apersonal resource. Law set the framework within which each person-citizen could autonomously pursue his or her happiness, i.e., manifest his or her personhood, in a community of equal person-citizens, each of whom are engaged in the same project of personhood. Law addressed the person as person and in this way ensured that the state always also addressed its objects as moral subjects, no matter what other labels (or types of personhood) they might acquire (citizen, official, laborer, victim, offender, judge).

This broad critical conception of law as a personal mode of state governance thus called for a interpersonal reconception of criminal law. Crime was an interpersonal event in two, related, senses. It involved two persons, one labeled “offender,” and the other “victim.” The first person, “offender,” acted upon the second, “victim.” The victim's personhood was not merely incidental to the event of crime.¹³

¹⁰ The classic case here is the privilege of habeas corpus, which is by its nature revocable, though is treated, celebrated, and fiercely defended as though it were a (human) right.

¹¹ Privilege is sometimes confused with prerogative. But prerogative is what bestows privilege. The householder, then, does not have a privilege, he has the prerogative, unless of course he is a micro householder whose authority derives from the macro householder's prerogative.

¹² 2 The History of English Law 640.

¹³ See Tatjana Hörnle, “Die Rolle des Opfers in der Straftheorie und im materiellen Strafrecht,” 2006 Juristenzeitung 950.

Crime, as opposed to other events that might call for the exercise of the state's law power in one form or another, involved an act that, as a manifestation of one person's personhood, denied the personhood of its object. Crime, in other words, was an interpersonal event in fact, but not in meaning.¹⁴ The "offender" acted as if the "victim" was not a person; the offender's act of "crime" treated the victim as a nonperson upon which the offender could assert his or her personhood, as upon a thing. It treated an interpersonal event as a unipersonal event. It treated the victim as nonpersonal, and therefore beyond the scope of law, as a resource (natural or not) to be used, rather than as a person to be respected.

The discovery of the victim as person thus was only one half of the discovery of the person in criminal law as a whole. As an interpersonal event, crime involved two persons, victim and offender. The discovery of the victim also was the discovery of the offender.

III. Household, Heteronomy, Police

The implementation of this new personal conception of criminal law required in all aspects of penal law, from the definition of criminality (substantive criminal law), to the imposition of the norms of criminality (criminal procedure), to the infliction of sanctions for the violation of these norms (*Vollzugsrecht*) remains incomplete. In the United States, criminal law traditionally has been and continues to be regarded as one, and not a particularly troublesome, manifestation of the state's discretionary and essentially indefinable "police power."¹⁵ The very notion of a police power, however, derives from the very age-old mode of heteronomous household governance that the enlightenment's personal critique exposed as fundamentally illegitimate. Criminal law, in other words, in the United States remains a central feature of the *Polizeistaat*, not the *Rechtsstaat*.¹⁶ To what extent the idea of personal law has found expression in the criminal law systems in other Western countries is an open question. But there can be little doubt that the fundamental challenge of punishment in a free society was framed as such, especially during the late eighteenth and early nineteenth centuries (Beccaria, Bentham, Voltaire, Kant, P.J.A. Feuerbach, Hegel, etc.) during the period of the most intense enlightenment critique of morality and politics, and that attempts have been made since to address it in theory and, though less aggressively, in law reform proposals, if not in legislative practice.¹⁷ The mere framing of a critique of criminal law practice in

¹⁴ Philip Pettit similarly remarks that crime communicates the offender's belief in his or her *dominium* over the victim; punishment shows this belief to be false by vindicating the victim's dominion. Philip Pettit, "Republican Theory and Criminal Punishment," 9 *Utilitas* 59, 68 (1997). See also Hegel, *Philosophy of Right* § 99. Pettit distinguishes (private) *dominium* from (public) *imperium*, which I would regard as patriarchal power in the micro and macro household, respectively. For a recent critical discussion of the distinction, see Patchen Markell, "The Insufficiency of Non-Domination," 36 *Political Theory* 9, 24-26 (2008). Note that Roscoe Pound traced the modern state's power to punish to the Roman magistrate's *imperium*, which he defined as "power to command the citizen to the end of preserving order in time of peace and discipline in time of war." Roscoe Pound, "Introduction," in Francis Bowes Sayre, *A Selection of Cases on Criminal Law* xxix, xxxiii (1927).

¹⁵ See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 2.10 (2d ed. 1986); Clarence E. Laylin & Alonzo H. Tuttle, "Due Process and Punishment," 20 *Mich. L. Rev.* 614, 622 (1922); *Sutton v. New Jersey*, 244 U.S. 258 (1917). On the defining indefinability of the police power in U.S. constitutional discourse, see Dubber, *The Police Power* 81-138.

¹⁶ It is no surprise then that the account of victimhood in a system of penal law outlined in this paper is not a comprehensive account of victimhood in U.S. penal law (or for that matter, in any other existing penal law system). Similarly, one would expect that the account of victimhood in a penal police system would more closely match existing U.S. penal institutions, norms, and practices.

¹⁷ The failure of the closest approximation to a critical reassessment of crime and punishment in the United States, Thomas Jefferson's draft of a Virginia "Bill for Proportioning Crimes and Punishments" of 1778, is discussed in 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* 115 (Markus D. Dubber & Lindsay Farmer eds., Stanford University Press 2007).

terms of its *Verpolizeilichung* suggests that the challenge of criminal law *as law* is recognized, even if it is not met.¹⁸

Framing the challenge of personal criminal law in terms of the distinction between law and police, *Recht* and *Polizei*, is both useful and possibly misleading. It is useful because it adds an important dimension to theoretical inquiries into criminal law, as an alternative to apolitical moral theorizing about the nature of culpability or the matching of criminal law doctrines with predetermined “theories of punishment.” The enlightenment discovery of personhood drew into question the legitimacy of state action in general, and of state coercion in particular, and of state punishment most acutely. The challenge of punishment in a free society, then, was how the state’s interfering with the autonomy of persons could be legitimate given that it existed to protect that very autonomy. It was easy enough to portray state punishment as, to quote Richard Nixon in 1968, “involv[ing] the first civil right of every American, the right to be protected in his home, business and person from domestic violence.”¹⁹ But the legitimacy of state punishment could not rest on the autonomy of “victims” alone, even if every person is regarded as a potential victim. To be legitimate, state punishment must prove itself consistent with the autonomy of all persons, including those labeled “offenders” to reflect their role in the interpersonal event that is crime, once again recognizing that every person is a potential “offender.”²⁰

The distinction between law and police, as modes of state governance, locates the challenge of legitimating state punishment at the proper level of inquiry, as part of the fundamental critique of state power generally. It also places the challenge of legitimating state punishment in the proper historical context. This challenge is not new, nor is it ancient. It is the same challenge today that it was in the late eighteenth century, or whenever the discovery of modern personhood is thought to have occurred. Moreover, it is a challenge that—at least in the United States—has not been fully comprehended, nor fully addressed. At the same time, it radically differs from previous inquiries into the rationale for punishment. It is not simply another chapter in the neverending saga of *quia peccatum vs. ne peccetur*, or for that matter of the common law vs. Roman law vs. canon law, or even natural law; the enlightenment radically reinvented personhood and, as a result, the nature of harm, and criminal harm in particular, the nature of crime, the nature of law, and ultimately the nature of the state and government. The challenge of legitimating state punishment is two centuries old, but not older.

In enlightenment thought, law is an essentially critical concept. It is not merely descriptive of a state of affairs, institution, or a form of state norm. It becomes a normative concept that critiques the existing order of things. And one way of capturing this order, the enormity of state power in operation, is by constructing the notion of police in contradistinction to that of law. The distinction between law and police, then, is misleading insofar as it wrenched from its specific historical context. Law meant, among other things, critique of police; the concept of *Rechtsstaat* was consciously designed to expose and to combat, and eventually to overcome, the state of affairs described as *Polizeistaat*. (In fact, at least in some strands of American early constitutional discourse, the rhetorical tables were turned, and the concept of police—with connotations of local self-government, of all things—critically deployed against that of law—associated with disembodied, and therefore suspicious, rule according to abstract norms.²¹ This confusion about the distinction between police and law may help account for the failure to grasp the full extent of the impossibility of legitimating punishment as an exercise of the “police power.”)

Law and police, in other words, should not be taken as ontological, but as historically situated concepts that are best viewed as distinct, but related. Law was defined in contrast to police, for a specific critical purpose and with a specific normative edge. For that reason it is misleading to assign law (or “liberalism”) and police to different historical periods, with one replacing the other, as Whiggish versions of the history of the modern *Rechtsstaat*—or for that matter certain readings of Foucault’s remarks on

¹⁸ See Wolfgang Naucke, “Vom Vordringen des Polizeigedankens im Recht, d.i.: vom Ende der Metaphysik im Recht,” in *Recht, Gericht, Genossenschaft und Policey: Studien zu Grundbegriffen der germanistischen Rechtshistorie 177* (Gerhard Dilcher & Bernhard Diestelkamp, eds., 1986).

¹⁹ Nixon’s Acceptance of the Republican Party Nomination for President, August 8, 1968.

²⁰ Jefferson hints at recognizing this challenge in the preamble to his proportionality bill, but then fails to address it in the bill, which instead quotes extensively from Anglo-Saxon dooms. Dubber *supra*.

²¹ See Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (1993).

governmentality—would suggest.²² The discovery of modern law, in contrast to modern police, opened up a critical view of state power, but law did not supersede police anymore than justice superseded welfare as a paradigm of state government.²³ The challenge of modern state government is not the replacement of the *Polizeistaat* with the *Rechtsstaat*, but the conscious integration of the two, without the having recourse to misleading and perhaps mollifying, if not outright deceptive, moves such as relabeling the *Polizeistaat* the *Wohlfahrtsstaat* or declaring the triumph of the *Rechtsstaat* over the *Polizeistaat*. Police is not a distinct and completed stage in the history of governance, but persists as a mode governance alongside and in tension with law.

By the late eighteenth century, police, or political economy, had emerged as the quasi-patriarchal mode of state governance. In exercising his power to police, the sovereign governed his realm as a householder governed his household. The governor of police is the paterfamilias (dominus in Rome, oikonomos in Athens), the governed his household (domus, oikos). 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 public government was politics, its form of government autonomy. Police (Policey, 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.

Police as a mode of governance is ordinarily associated with continental Europe. Closer inspection reveals, however, that notwithstanding frequent categorical denials by Anglo-American writers eager to distance themselves from what they perceived as oppressive continental (and notably French) techniques of government, police also played a central role in theories and practices of government in the so-called “common law” world. The most influential Anglo-American definition of police appeared in Blackstone’s celebrated Commentaries on the Laws of England, which in 1769 explicitly derived the power to police from the king’s status as “father” of his people, and “pater-familias of the nation”:

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.²⁴

The similarity between Blackstone’s definition of police and Rousseau’s roughly contemporaneous definition of political economy in Diderot and d’Alembert’s Encyclopédie is remarkable:

THE word Economy, or OEconomy, is derived from oikos, a house, and nomos, law, and meant originally only the wise and legitimate government of the house for the common good of the whole family. The meaning of the term was then extended to the government of that great family, the State. To distinguish these two senses of the word, the latter is called general or political economy, and the former domestic or particular economy.²⁵

In the United States, where the foundational significance of Blackstone’s Commentaries was matched only by that of the Bible, the Blackstonian definition of police retained its influence until well into the nineteenth century, when the concept of police fell from general view and eventually was largely confined to apparently disparate niches of American legal doctrine, including the constitutional law of “regulatory takings” (based on the police power, rather than the power of eminent domain), the distinction between (federal) legislation grounded in the power to regulate commerce and (state) legislation framed as an

²² See Mariana Valverde, “Police, Sovereignty, and Law: Foucaultian Reflections,” in *Police and the Liberal State* (Dubber & Valverde, eds., forthcoming Stanford 2008) (citing Paolo Napoli, *Naissance de la Police Moderne* (Paris: La Decouverte, 2004)).

²³ Cf. Alan Brudner’s insistence on a distinction between an agency paradigm and a welfare paradigm, each with its proper realm in criminal law. Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* ch. 5 (1995) (“Agency and Welfare in the Penal Law”), available online at <http://ark.cdlib.org/ark:/13030/ft896nb5j9/>.

²⁴ 4 William Blackstone, *Commentaries on the Laws of England* 127, 162, 176 (1769).

²⁵ *A Discourse on Political Economy*, in *A Discourse on Political Economy and The Social Contract* (C.J. Betts, ed., 1994) (1755).

exercise of the power to police, and the doctrine of extrastatutory judicially recognized “common law misdemeanors” conceptualized as offenses against “public police and economy.”²⁶

In Anglo-American legal and political discourse, the need to draw the distinction between police and law at the appropriate, fundamental, level of governance faded along with the concept of police itself. Once administrative law had come into its own as a legal discipline, the concept of police vanished. More generally, the legalization of the police power state rendered the study of police irrelevant. American police treatises became treatises on administrative law. The last great American police theorist, Ernst Freund, in the early twentieth century became the first great administrative law theorist.

Something similar appears to have occurred in continental Europe, as police science gave way to administrative law and, at least according to conventional historiography, the *Polizeistaat* transformed itself into the *Rechtsstaat*. Still, the broad distinction between police and law today survives in European legal and political discourse. Most obviously, the contrast between *Polizeistaat* and *Rechtsstaat* continues to be employed as a rhetorical—and analytic—device; relatedly, though less centrally, the concept of *Verpolizeilichung* (or policification) has been coined to capture, and to critique, developments in modern penal policy (including, for instance, the perceived growth of regulatory offenses, the expansion of anticipatory, strict, and corporate liability, and the spread of informal processes).²⁷ Consider also the doctrinal construct of *Polizeirecht*, a field unknown to U.S. law that nonetheless reflects the tension—or, if you prefer, division of labor—between federal and state power in the United States.²⁸

V. The Victim as State and Person

Given this distinction between law and police, two distinct models of criminal law—or more comprehensively, penal law—emerge. On the one hand is the Police Model, which regards crime as an *offense*, and more specifically as an offense against the sovereign. Yet more specifically, it is an offense against the sovereign’s peace. Criminal offenses in England, as well as in many Commonwealth countries, are framed in practice (though not necessarily in theory) as disturbances of the king’s (or queen’s) peace. This peace, however, is grounded in the ancient householder’s peace (or *mund*) its breach in whatever form—through entering with a sword, destroying his crop, maiming his servant, trespassing on his land—amounted to an affront to the householder’s authority. In the United States, criminal offenses remain violations of the sovereign’s peace, the only difference being that sovereignty has been moved from the king to “the people,” an amorphous concept that has come to be variously identified with the state (both as a constituent of the United States and, less explicitly, as the state as abstract institution of governmental power), “the government,” as well as its constituent “branches,” most notably the executive, but also the legislature, and even the judiciary (which continues to hold the power of contempt).

Note that the Police Model is far more specific about the taker of offense (“victim”), than about the offense giver (“offender”). It matters little who or what gives offense to the sovereign. What matters instead is that offense was not only given, but more importantly still that it was taken. For only if the sovereign in fact takes offense will he respond in some form or another to assert his authority, and to protect his *mund*. The penal police regime is essentially discretionary; the householder-sovereign has virtually unlimited discretion in assessing the need for action, and the quality and quantity of any action that he deems appropriate, not merely in penal discipline but in all matters of government. Whatever limitations, or rather guidelines, he decides to adopt and to adhere to, are entirely self-imposed and self-enforced. As the sovereign, he always has the option to ignore acts that might be construed, or even intended, as an offense to his sovereignty.

In this light, the essential unconstrained discretionary power of the U.S. prosecutor, as a delegated executor of the sovereign’s authority, is entirely consistent with a penal police regime. In this regime, the *Legalitätsprinzip*, or principle of compulsory prosecution, is as out of place as any other meaningful constraint on the power of the sovereign to exercise, or not to exercise, his discretionary penal authority. This executive discretion continues beyond the decisions whether—and how—to investigate, arrest, charge, to the decisions whether—and how—to convict (given that in a plea system, the prosecutor, not the jury or the judge, imposes penal norms on particular defendants), to sentence (with discounts for self-abasing

²⁶ Dubber, Police Power.

²⁷ Naucke.

²⁸ Bodo Pieroth, Bernhard Schlink, & Michael Kniesel, *Polizei- und Ordnungsrecht*, 6th ed. (Munich: Beck, 2004).

behavior that affirms the sovereign's superior power), and eventually, through the executive pardon, whether—and how—to inflict the sanction pleaded to and imposed (through pardons, commutations, and remissions).²⁹ Punishment in a penal police regime is discretionary discipline, the amercement in medieval law, which conditioned the sovereign's mercy on the payment of a fine.

Far from requiring rediscovery, the victim, then, sits at the very center of the Police Model and defines and controls its every feature. Penal harm is defined as a particular offense against the victim; the paradigmatic harm is disrespect of the sovereign's authority. There is, therefore, only one victim—the sovereign. Harm, or offense, done to others, including inanimate things, flora and fauna, are relevant only insofar as they constitute offense to the victim; all constituents of the household, human and other, are but extensions of the householder—they are relevant only insofar as they are under the householder's peace and count as the householder's resources. Every crime is a disobedience offense.

Just as important, the nature and occurrence of penal harm is determined by the victim, both in general—by defining norms, which may or may not be publicized—and in particular—by assessing the presence of harm in a given case. The sovereign is not only the ultimate victim, but also the ultimate judge of victimhood. To the extent a delegate of sovereign power is subject to guidelines in his exercise of the discretion delegated to him, these guidelines seek to ensure consistency between the official's actions and the sovereign's discretion.³⁰ They are internal to the penal police regime, rather than external constraints imposed by some principle or set of principles that frame the sovereign's interaction with his subjects, either as "victims" or as "offenders."

One might be tempted to call this conception of victimhood in a penal police regime subjective. It is subjective in the sense that both the norm and the fact of victimization are assessed by the victim and is therefore beyond the reach of objective norms (and criticism in their light). But this characterization can be misleading if it is thought to imply the presence of a victim-subject. The ancient householder might make subjective judgments about the necessity and propriety of discipline. Already the early modern macro householder, however, has so greatly expanded his household that he has delegated a great deal of his disciplinary power to officials (and even to micro householders) who assess the offensiveness of behavior in his stead. Eventually, with the transfer of sovereign power to "the people" or, more accurately, the state, the sovereign became desubjectified, though it is important to keep in mind that the "headless" state manifests its sovereignty, now exclusively, in those officials who represent it. It is as though, with the abandonment of the personal sovereign (at least in modern democracies), sovereignty survives only in its delegated form, without the source of delegation. At any rate, state officials, and notably the members of the state's executive branch, now personify sovereignty, transforming any challenge to their authority into an affront to the sovereignty of the state itself, which may trigger the ad hoc use of traditional measures of patriarchal discipline designed to put the "offender" in his or her place, ranging from verbal humiliation to corporal punishment (with or without the use of instruments such as batons, flashlights, tasers) and short-term imprisonment (in vehicles, police stations, jails).

Given that the victim of the penal police regime is the sovereign, it may also be misleading to speak of harm at all, unless the experience of taking offense is classified as harm. For sovereignty itself is beyond harm insofar as it is not a matter of degree, but an absolute property. It is the threat of harm to sovereignty that is dispelled or deterred by a disciplinary response. An actual violation of sovereignty would mean the end of sovereignty, as in a successful act of treason (grand or petit). The destruction of sovereignty is irreversible and therefore to be avoided by any measure necessary. Hence even imagining the king's death may trigger the sovereign's disciplinary sanction as a form of treason. The definition of treason in the Treason Act 1351 in this way captures the sovereign's view of indicia of a treasonous disposition, even if they fall short of action. (Treason originally was the ultimate act of *felonia*, the breach of the bond of loyalty between lord and man.) In this way, it makes plain a more basic feature of the penal police regime:

²⁹ On the variety of federal pardons in the contemporary United States, see George Lardner, "Begging Bush's Pardon," N.Y. Times, Feb. 4, 2008.

³⁰ For an illustrative exploration of the hodgepodge of the internal memoranda, guidelines, manuals, and ethical norms pertaining to prosecutorial discretion, see Amie N. Ely, "Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to 'Seek Justice,'" 90 Cornell L. Rev 237 (2004). Whether the federal sentencing "guidelines" are an internal instrument for policing official—i.e., judicial—discretion in line with sovereign command, see, e.g., Ashcroft's infamous "blacklist" memorandum of July 28, 2003, or a collection, however haphazard, of external legal norms is a nice question.

from the point of view of the sovereign victim, there is no reason to limit its disciplinary authority to external acts. To the extent that the preservation of sovereignty calls for penal discipline for an intention that has not manifested itself in an act, then the sovereign will see no reason to refrain from inflicting that discipline. It may well prove prudent to limit penal discipline to offensive acts, but no principle precludes offensive thoughts from triggering a necessary disciplinary intervention. Likewise, no principle precludes any act from being taken as giving offense; physical violence against the sovereign, or contemptuous speech might well qualify as offensive, but so might a silent refusal to show proper deference. Similarly, in certain contexts, an entirely nonintentional, and even nonnegligent, act might call for a disciplinary response if it is perceived by others as an offense against the sovereignty of the householder or simply because members of the household need reminding that any violation of a householder's order may be interpreted as an act of disobedience and, as an affront to the sovereign, result in disciplinary action.

The penal police regime turns on the radical distinction between victim and offender. The victim in a penal police regime can never be an offender for the simple reason that the victim is the sovereign who cannot offend himself. Everyone other than the householder is a potential offender. No one other than the householder is a potential victim.

By contrast, the Law Model is based on the radical identity of victim and offender. Crime is an interpersonal event; every potential offender is a potential victim, and vice versa, as every person is a potential offender and potential victim alike. The paradigmatic victim of the Penal Law Model is the person, a being defined by its capacity for self-government. Crime is not an offense against sovereignty by the governed against the governor, but a violation of one person's autonomy by another person. There is much truth in Gustav Radbruch's observation that criminal law is rooted in household discipline, whereas international law derives from the relations among householders.³¹ One might further differentiate between the origins of penal police and penal law. Penal police retains the essential hierarchical and discretionary features of householder discipline, which is transferred and abstracted from the micro household of the family to the macro household of the state governed by an apersonal sovereign. The critical penal law of the enlightenment, by contrast, can be seen in part as an attempt to domesticate international law, by personalizing penal law. Penal law, under this view, deals with relations among equals, with both the offender and the victim being regarded also as persons. Nonetheless, the distinction between punished and punisher remains even in penal law as law, for it is the state's superior power of law that imposes and inflicts penal sanctions. (In this sense, the domestication of international law is limited, provided we regard international law as Radbruch did, as governing the relations among equals without the oversight of a superior power.) And yet, the legitimacy of this exercise of power itself derives from the personhood of its object; legitimate punishment under a penal law regime is ultimately self-punishment. In punishment, the state respects and affirms the offender's personhood by treating him in accordance with his capacity for autonomy.³²

In penal law, the state is not the paradigmatic victim. Instead, the state's function is limited to safeguarding and manifesting the autonomy of its constituent persons, all of whom are potential victims and offenders alike. Penal law turns on the personal identity of victim and offender. Penal police, by contrast, rests on the apersonal identity of victim and punisher. In penal law, the state governs the interpersonal relationship between victim and offender and in this sense stands apart from both. At the same time, since legitimate government is self-government, the state's authority in the final analysis merely reflects the victim's and the offender's capacity for autonomy, their personhood. In penal police, victim and punisher are abstractly identical in that the state is both paradigmatic victim and penal authority; penal discipline safeguards and manifests the very sovereign authority it exercises. Penal discipline, therefore, highlights the essential distinction between householder-victim and household-offender.

The fundamental distinction between state and offender is only one instance of the broader distinction between householder and household. To the extent that penal police labels individual household resources, human or not, as "victims" they function only as proxies for the ultimate victim, the state-householder. The state is victimized through any event that gives offense to its sovereignty, from the violation of any state

³¹ Gustav Radbruch, "Der Ursprung des Strafrechts aus dem Stande der Unfreien," in *Elegantiae Juris Criminalis: Vierzehn Studien zur Geschichte des Strafrechts* (2d ed. 1950); see also Roscoe Pound, "Introduction," in Francis Bowes Sayre, *A Selection of Cases on Criminal Law* xxix, xxxiii (1927) ("the authority of the State to punish is derived historically from the authority of the head of a patriarchal household," among other things, including "magisterial discipline").

³² See Dubber, *The Right to Be Punished*, *Law & History Review*.

order (which disrespects its superior authority) to the direct diminution of a human or fiscal or natural resource (through physical violence against life or limb, for instance). The distinction between the state-householder and the proxy victim (in the sense of a diminished resource) is the same as that between the state-householder and the offender: as household constituents, both “victim” and offender are the object of the state’s authority.

As I have argued elsewhere, this proxy victim lies at the heart of the so-called victims’ rights movement in the United States.³³ The pursuit of the victims’ rights agenda has been a centerpiece of the war on crime, which has been fought primarily with victimless crimes, most notably a cadre of (actual and constructive) possession offenses with a host of presumptions, both pointing to, and emanating from, the status of possession.³⁴ While public attention has been focused on proxy victims, notably the paradigmatic female child homicide and sexual assault victim, the state has pursued its war on victimless crimes without the interference of individual victims, who are regarded as nuisances who interfere with the smooth operation of the discretionary penal police process.

Nonetheless, the victims’ rights movement also harbors, in a corner beyond the public limelight, the kernel of a conception of personal victimhood and interpersonal crime. Stripped of the rhetoric of the war on crime, from the zero-sum pursuit of victims’ rights at the expense of offenders’ rights, and from the equation of greater victims’ rights with harsher punishment for offenders, the victims’ rights project—particularly in countries other than the United States—regards the victim as a person against whom another person has committed a serious crime. This basic concept of victimhood underlies the fledgling law of victim compensation, which in general regards a compensable victim as “an innocent person who suffers personal physical injury as a direct result of a crime.”³⁵ This is not the place to provide a detailed account of victim compensation law; suffice it to say that the inquiry into victim compensability in victim compensation law parallels the inquiry into offender punishability in criminal law. Victim compensation law regards the interpersonal event of crime from the victim’s perspective; criminal law regards the interpersonal event of crime from the offender’s perspective. Both inquiries proceed independently of one another; each considers the legal implications of a given event for the persons who constitute it, one labeled “victim” and the other “offender.”

The point here is not to suggest that victim compensation should take the place of offender punishment, or vice versa. It is rather that the victims’ rights project, despite its (ab)use in the war on crime, draws on a view of victimhood and crime, and therefore also of offenderhood, that is consistent with a regime of penal law rather than of penal police. From the perspective of penal law, crime is an interpersonal event in the specific sense that one person violates the personhood of another. While victim compensation may be limited to crimes of physical violence, there is no reason why crime should not include other, non-physical, forms of personhood violations. It is true that only (serious) crimes of physical violence may deprive the victim of her capacity for autonomy (think of murder and assaults that deprive the victim of the requisite cognitive and volitional capacities). But acts that compromise the victim’s ability to exercise that capacity in a particular instance, including most (lesser) crimes of physical violence and offenses against property and other aspects of personal autonomy (e.g., privacy, thought, speech, labor, sex), may also amount to violations of the victim’s autonomy-based personhood.

In penal law, the means of interference—physical or otherwise—are less significant than the act’s effect on the victim’s autonomy-based personhood. Here the penal law could be said to operate with a version, or reinterpretation, of the harm principle; an act is criminal only if it threatens or inflicts harm on another person, provided that harm is understood as a violation of the victim’s personhood.³⁶ Since

³³ Dubber, *Victims in the War on Crime* (2002).

³⁴ Dubber, “The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process,” in *Defining Crimes: Essays on the Criminal Law’s Special Part* 91 (R.A. Duff & Stuart Green eds., 2005); “Policing Possession: The War on Crime and the End of Criminal Law,” 91 *Journal of Criminal Law & Criminology* 829 (2002).

³⁵ *Victims in the War on Crime* 235

³⁶ Cf. Arthur Ripstein, “Beyond the Harm Principle,” 34 *Philosophy & Public Affairs* 215 (2006) (Kantian reinterpretation of harm principle as “sovereignty” principle); Meir Dan-Cohen, “Defending Dignity,” in *Harmful Thoughts: Essays on Law, Self, and Morality* 150 (2002) (“dignity” principle); David Richards, “Human Rights and the Moral Foundations of Substantive Criminal Law,” 13 *Ga. L. Rev.* 1395 (1979) (“autonomy” principle).

personhood is defined in terms of the capacity for autonomy, a violation of the victim's personhood requires interference with the capacity for autonomy or its exercise.

The criminal violation of the victim's personhood is more than a mere apersonal interference. After all, a falling tree branch or a snake can compromise, or even destroy, a person's capacity for autonomy. Crime requires not only a personal victim, but also a personal offender. In crime, the offender-person treats the victim-person as a nonperson and affirms his or her personhood by denying the victim's. The offender treats the victim as a mere means in a specific sense, not simply as a thing, but as a nonperson, incapable of autonomy. In crime, the offender subjects the victim to his or her heteronomy, by literally dominating the victim, i.e., by treating the victim as the dominus would his domus or, in other words, as an object of police, rather than as a subject of law.³⁷ Nixon's reference to the right to be protected from "domestic violence," noted previously, now appears in a new light, for crime is always a form of domestic violence in the sense that in it the offender domesticates the victim, treating her as a resource for the exercise of his sovereignty.³⁸

In penal police, punishment is essentially hierarchical and crime egalitarian. In penal law, it is the other way around: crime is essentially hierarchical and punishment egalitarian. The paradigmatic victim in penal police takes offense because an inferior, a member of the household, has acted out of place by challenging the householder sovereignty. Penal discipline reasserts the householder's (victim-punisher's) superiority over its object. By contrast, a crime under penal law denies the personal identity of offender and victim and instead brings the victim under the offender's heteronomy. Punishment in turn manifests that identity by affirming the victim's personhood and respecting the offender's personhood at the same time. Penal police reasserts heteronomous sovereignty; penal law reaffirms autonomous personhood.

The victimhood in rape may serve as an illustration of the personal harm of crime under penal law. Carolyn Shafer and Marilyn Frye have characterized rape as an "attack upon [the victim's] personhood itself," manifesting "the ultimate disrespect" through "the exercise of the power of consent over another person."³⁹ In rape, the offender "is not merely diverting her resources or using her property to further ends other than hers, he is using *her* in furtherance of ends other than hers."⁴⁰ They conclude:

Rape is an act which belies consent, and it is often an act actually intended to communicate the fact of disrespect. Whether it is the rapist's intention or not, being raped conveys for the woman the message that she is a being without respect, that she is not a person.⁴¹

While the gendered nature of sexual violence distinguishes rape, and other sexual offenses, the insight into the criminal violation of personhood applies to crime in general. All crime, to a greater or lesser degree, involves the denial of, rather than merely an interference with, personhood. The irrelevance of consent of the rape victim reflects the denial of her capacity of autonomy, i.e., of her personhood. The consent of objects of police is irrelevant in general; the propriety of police discipline does not turn on its object's consent. In crime, the offender-person treats the victim-person as an object of police, whose consent is irrelevant as such. Rape, once again, is distinctive insofar as it reflects the misogynistic belief that all women as such are objects of police and incapable of autonomy, and therefore of consent.

³⁷ Cf. Philip Pettit, "Republican Theory and Criminal Punishment," 9 *Utilitas* 59 (1997) (crime threatens, and punishment maximizes, "dominion"); George P. Fletcher, "Blackmail: The Paradigmatic Crime," 141 *University of Pennsylvania Law Review* 1617, 1635 (1993) (crime as the offender's domination of the victim; punishment as the state's domination of the offender by "reducing his capacity to exercise power over others and symbolically lowering his status").

³⁸ See Pettit 67-68.

³⁹ Carolyn M. Shafer & Marilyn Frye, "Rape and Respect," in *Feminism and Philosophy* 333, 340 (Mary Vetterling-Braggin, Frederick A. Elliston, & Jane English, eds. 1977). The authors define person in terms of the capacity for autonomy. *Id.* 336-37 ("the sort of creature that is capable of identifying its own interests, choosing a fairly wide range of more or less complex goals for itself, and engaging in communication about and pursuit of those interests and goals"). See also Lynne Henderson, "What Makes Rape a Crime," 3 *Berkeley Women's Law Journal* 193, 226 (1988) (rape "completely den[ies victim's] personhood").

⁴⁰ Shafer & Frye, 341.

⁴¹ 342.

Note the analogy between crime in a law regime and punishment in a police regime.⁴² In both cases, a person as legal subject is treated as an object of police whose consent is irrelevant, and more specifically unnecessary for the legitimation of the heteronomous act in question (crime or punishment). From the perspective of law, any “justification” (in the case of person crime) or “legitimation” (in the case of state punishment) for this act of interference with the victim’s (in the case of crime) or the convict’s (in the case of punishment) autonomy, however, must be consistent with the victim’s or the convict’s autonomy itself, i.e., through consent broadly construed (explicit or constructive).⁴³ Otherwise, the act of crime or of punishment is “unlawful” in the sense of violating its object’s right as a personal subject of law.

So, for instance, a general justification of consent has no place in a penal police regime both because the individual proxy victim is an object of police, rather than a subject of law, and because he or she cannot waive the sovereign-victim’s interest in its sovereignty. Crime, in a penal police regime, does not affect individual interests. It affects public interests only, which ultimately are reducible to the interests of the sovereign-public. Public interests (i.e., ultimately the public peace) are not at the disposal of individuals.

In a system of penal law, by contrast, the capacity to consent, as a manifestation of the capacity for autonomy (including, but not limited to, sexual autonomy⁴⁴) plays an important role, both in the analysis of criminality and victimhood (see above) and as a “defense” (be it as the negation of an offense element or as a general justification).

VI. Conclusion

Rather than repeating, albeit in condensed form, what already has been said, I will close by placing the previous remarks on the personal concept of victimhood in the context of other recent accounts of victimhood in the Anglo-American literature that are, or at least could be seen as, sympathetic to the approach set out in this paper.⁴⁵ Meir Dan-Cohen recently has argued that the venerable harm principle be replaced with a dignity principle.⁴⁶ Now both penal police and penal law can be seen as defending the victim’s dignity and by demanding respect for the victim in the face of disrespect. The dignity of the penal

⁴² On the formal similarity of crime and punishment, see Dubber, “Criminal Police and Criminal Law in the *Rechtsstaat*,” in *Police and the Liberal State* (Dubber & Valverde, eds., forthcoming Stanford 2008) (criminal code/menacing, wiretapping/eavesdropping, entrapment /solicitation, conspiracy, search/trespass, assault, arrest/battery, seizure/larceny, drug sting/drug possession, indictment, conviction/defamation, imprisonment/false imprisonment, execution/murder); see already Karl Binding, “Das Problem der Strafe in der heutigen Wissenschaft,” in *1 Strafrechtliche und strafprozessuale Abhandlungen: Strafrecht 61*, 82 (Munich & Leipzig 1915) (1877).

⁴³ Autonomy is the ultimate touchstone, not consent. Constructive consent here refers not only to consent as a separate bar against liability in the absence of an explicit expression of consent, but also more generally to other “defenses,” including self-defense, necessity, and legal (public) authority. In all cases, the person whose autonomy is compromised as a result of “justified” conduct must be taken to have generally consented to actions taken to safeguard autonomy, even where in the particular exceptional case they satisfy the definition of an offense and interfere with his or her autonomy, much as the object of state punishment must be taken to have consented to his or her punishment.

⁴⁴ See Stephen J. Schulhofer, “Taxing Sexual Autonomy Seriously: Rape Law and Beyond,” *11 Law and Philosophy* 35 (1992), and *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (1998). Although Schulhofer does not pursue this project, his account of sex offenses as violations of sexual autonomy could be expanded to violations of personal autonomy in general. See *Unwanted Sex* 101 (sexual autonomy as one of the “fundamental entitlements the law grants to us as free and independent beings,” including “entitlements to life, to physical safety, to our property, and to our labor”), 111 (“core concept of the person, long protected by the common law”), 113 (sexual autonomy as one of the “core interests of a free person”).

⁴⁵ I’m limiting myself to recent Anglo-American scholarship, and U.S. scholarship, in particular, because, as I argue above, it traditionally has paid little, if any, attention to the challenge of punishment in a free society. The literature, recent and particularly not-so-recent, on this topic in other countries is vast. For a recent (English-language) example, see Hanno Kaiser’s review of Michael Pawlik’s *Person, Subjekt, Bürger* (2004), “The Three Dimensions of Freedom, Crime, and Punishment,” *9 Buff. Crim. L. Rev.* 691 (2006).

⁴⁶ Dan-Cohen, “Defending Dignity.”

police is the social dignity of status, one that the inferior (household resource) owes the superior (householder). By contrast, the dignity of penal law is the moral dignity of personhood, one that all persons owe one another.

Arthur Ripstein's view of crime as an offense against the victim's sovereignty similarly straddles the distinction between penal police and penal law.⁴⁷ As noted previously, offense to sovereignty is the paradigmatic crime in a regime that regards the sovereign householder as the paradigmatic victim of all crime and penal discipline as (re)asserting that the sovereignty that took offense. If, however, one reframes sovereignty as a distinctly personal characteristic, shared by all persons as such, then reinterpreting the harm principle as a sovereignty principle is not inconsistent with the penal law model.

Both Dan-Cohen's dignity principle and Ripstein's sovereignty principle capture important facets of victimhood that may or may be implicit in the harm as introduced by Mill and detailed by Joel Feinberg. While they both appear preferable to the harm principle for this reason, they may not be sufficiently tailored to the narrow conception of the victim as person that, I argue, undergirds penal law as law.

In the Anglo-American literature, David Richards's unjustly neglected early work on the significance of autonomy in both the general and the special part of U.S. criminal law might be fruitfully incorporated into a personal penal law of offenderhood and victimhood.⁴⁸ While Richards has focused more on the illegitimacy of punishing a person's exercise of his or her capacity for autonomy, rather than on the nature of crime and punishment more generally, his account certainly leaves room for a personal account of not only of offenderhood, but of victimhood as well.

Philip Pettit's suggestive phenomenology of victimhood as dominion denied may prove useful even outside its immediate role in his "republican" theory of crime and punishment.⁴⁹ Pettit sets punishment the task of vindicating the victim's dominion without denying the offender's; replacing "dominion" with "personhood" or "autonomy" in this formulation would capture the challenge of punishment in a free society, as I see it, though admittedly at the cost of leaving the realm of republican political theory which, in Pettit's version, regards dominion (or non-domination) as its central and distinguishing feature.⁵⁰ Leaving aside the merits of Pettit's particular political theory, he is surely correct in regarding the question of crime and punishment as a problem (also) of political theory in the first place, even if he may be said to pay insufficient attention to the characteristics of law as a distinct mode of state action.⁵¹ In this way, Pettit's theory of crime and punishment contributes to the same project that animates the present, and far less ambitious, account of victimhood as personhood: to formulate and, if possible, to resolve the paradox of legitimate punishment in the modern liberal state.

⁴⁷ Arthur Ripstein, "Beyond the Harm Principle," 34 *Philosophy & Public Affairs* 215 (2006).

⁴⁸ David Richards, "Human Rights and the Moral Foundations of Substantive Criminal Law," 13 *Ga. L. Rev.* 1395 (1979).

⁴⁹ Pettit.

⁵⁰ It is less clear whether George Fletcher's suggestive remarks on crime as domination, or subordination, see "Blackmail," "Domination in Wrongdoing," 76 *B.U. L. Rev.* 347 (1996), are sympathetic to the account of penal law set out in this paper. Unlike Pettit, for instance, who stresses that punishment may not deny the offender's right to non-domination even as it disproves his or her belief that the victim possesses the same right, Fletcher appears to regard punishment as subjecting the offender to the same domination that he or she brought to bear on the victim. "Blackmail" 1635, "Domination" 353-54.

⁵¹ For a recent attempt to outline a political theory of crime and punishment consistent with the basic tenets of Rawls's general political philosophy, see Corey Brettschneider, "The Rights of the Guilty: Punishment and Political Legitimacy," 35 *Political Theory* 175 (2007); see also Sharon Dolovich, "Legitimate Punishment in Liberal Democracy," 7 *Buff. Crim. L. Rev.* 307 (2004).