

Criminal Police in the *Rechtsstaat*

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Introduction

Modern state government, despite the trappings of principled rule, good governance, and most notably, the rule of law and its variants (the principle of legality comes to mind), bears a genetic resemblance to the ancient practice of household government.¹ The patriarchal origins of state power need to be exposed; it's worth pointing out that the emperor still has no clothes, that state power at bottom today is as naked as was the power of the *pater familias* and the *oikonomikos* before him.

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

This chapter, however, takes a different tack. It turns from charting the police apparatus, the inner workings of modern state government as patriarchal power, to studying its veneer of legitimacy.² It flips the hypocrisy of the modern state as police regime upside down, or right side up, by taking its declarations of principle, its reach for legitimacy, at face value. It is part of a project that parallels and complements the police project and asks the simple question, What would state government look like if it were to conform to the principles that are said to legitimate it? Let's call this project the law project for now.

It's tempting to think of the law project as an inquiry into the ideal and of the police project as an inquiry into the actual. This would be misleading, however, since the law project is not limited to capturing the ideals invoked in legitimating rhetoric but also considers actual state practice to see how they measure up against these ideals. Both the police project and the law project are instances of critical analysis, in that they combine investigation and

description with critique. The law project is more critical than the police project for substantive, rather than formal, reasons. Law recognizes principles against which the legitimacy of state action can be measured. Police does not—or to put it more charitably and perhaps even more accurately, it resists the very sort of legitimacy inquiry that law invites. Police is not without rules and patterns that can be catalogued and refined in an art or even a science of police; at bottom, however, police turns on the discretionary authority of a patriarch who, for all pragmatic purposes, is all-powerful. Police rules are pragmatic guidelines written by and for those wielding the power of police; their enforcement generates efficiency, good governance, not legitimacy.

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

This chapter, then, investigates substantive criminal law, one aspect of the state practice of criminal law, from the standpoint of law, with particular focus on that practice in the contemporary United States. This inquiry complements earlier analyses of that practice from the standpoint of police. The two inquiries are complementary in the sense that law means nothing without police. The concept of law is the Enlightenment attempt to legitimate government by bringing it within principles derived from the discovery of the person as an autonomous—quite literally, self-governing—being. Law government was meant to replace police government. Instead of replacing police, law has for over two hundred years fought for its place within a practice of government that has roots in times immemorial and that remains ingrained in the minds and habits of rulers of micro and macro households and quasi households even in societies with modern ideologies that assign the rule of law pride of place.

Substantive criminal law here is taken to encompass rules and norms governing the definition and scope of criminal liability, which in turn are often labeled as the “general part” and “special part” of (substantive) criminal law. Other aspects of the state practice of criminal law—including procedural criminal law (criminal procedure) and prison law (correction law, execution law) will be addressed only insofar as they touch on our discussion of substantive criminal law. Cutting up the punishment pie in

this way serves only analytic purposes; it also follows general (largely un-reflected) convention in the legal literature.

Punishment Theory as State Theory

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

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

Contemporary political theory, to the extent it concerns itself with the legitimacy of state action at all, has found it difficult enough to divine principles for the distribution of benefits. Theories of justice are theories of distributive justice, not of penal—or *retributive*—justice. Setting up the rules governing—or rather, the rules governing the setting up of the rules governing—a well-ordered society has occupied the minds of our best political philosophers, with no time left over for not-so-well-ordered societies that require a distinctly nonideal theory. Once we know the rules, the attitude seems to be, we can worry about how to deal with their violation later on. Political theory is, by and large, *ideal* political theory.³

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

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

In addition, legitimating punishment isn't just dirty work, it's also hard. To put it bluntly, punishment is *prima facie* illegitimate. In punishing its constituents, the state harms the very people it is supposed to protect, by interfering with the very rights it claims to guarantee, in the name of guaranteeing them.

The deeper significance of the "presumption of innocence"⁴ is a general presumption of inviolability: the state has no right to harm those it is meant to protect. On the face of it, state punishment isn't just illegitimate, it's a crime—the statutory threat of punishment looks suspiciously like "menacing,"⁵ wiretapping like "eavesdropping,"⁶ entrapment like "solicitation" (or even "conspiracy"),⁷ searching a suspect's house like "trespass,"⁸ searching (or frisking) the suspect herself like "assault,"⁹ arresting her like "battery," seizing her property like "larceny," a drug bust like "possession of narcotics" (with or without intent to distribute),¹⁰ indicting—and convicting—a defendant like "defamation,"¹¹ imprisoning the convict like "false imprisonment,"¹² and executing her like "homicide" ("murder,"¹³ to be precise).

No matter how much political theorists might want to wish away the facts of state coercion and noncompliance, punishment and crime are here to stay. Perhaps one day we will all live justly together in a just society, without crime, without punishment, and perhaps without justice. (Marx, for one, apparently thought so.¹⁴) Until then, however, the task of political theory remains one of subjecting the state's claims to justice to a relentless legitimacy critique, regardless which variety of justice is at stake, distributive or retributive.

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

Moral theory too has shown some interest in the question of punishment. In fact, traditional punishment theory is probably better thought of as an exercise in moral, rather than legal, theory. Certainly, moral theorists should have something to say about punishment. It would be silly to deny that punishment has a moral aspect. The process of judgment in cases of punishment

closely resembles that of moral judgment. The particular norms are different, to be sure, but the process of determining whether they have been violated is much the same (through empathic role taking, by placing oneself in the shoes of the person subject to judgment¹⁵), as are the presuppositions for legal (not just criminal law) and moral accountability.¹⁶

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

In U.S. political history, lack of interest in legitimation of punishment has a long tradition. In the Old World, Enlightenment thinkers such as Beccaria, Kant, Hegel, Voltaire, Bentham, and P. J. A. Feuerbach struggled to rationalize punishment in various ways and proposed criminal law reforms with varying degrees of detail and success (ranging from Bentham's wildly fruitless efforts to Feuerbach's influential Bavarian Penal Code of 1813). In the New World, by contrast, the rethinkers of political power, known collectively as the Founding Fathers, showed very little interest in the subject. Thomas Jefferson was the exception to the rule. But even Jefferson did not go beyond drafting a Virginia bill for greater proportionality between crimes and punishments.¹⁷ Despite a suggestive preamble that promised "deduc[tion] from the purposes of society," the bill in fact is largely content to invoke the authority of common law—and even Anglo-Saxon—statutes and commentators. We learn, for instance, that "the laws of Æthelstan and Canute," a set of Anglo-Saxon dooms from the tenth and eleventh centuries, punished counterfeiters with cutting off the hand "that he the foul [crime] with wrought," and then displaying it "upon the mint-smithery."¹⁸

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

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among

these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

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

Whereas it frequently happens that wicked and dissolute men, resigning themselves to the dominion of inordinate passions, commit violations on the lives, liberties, and property of others, and the secure enjoyment of these having principally induced men to enter into society, government would be defective in its principal purpose, were it not to restrain such criminal acts by inflicting due punishments on those who perpetrate them; but it appears at the same time equally deducible from the purposes of society, that a member thereof, committing an inferior injury, does not wholly forfeit the protection of his fellow citizens, but after suffering a punishment in proportion to his offence, is entitled to their protection from all greater pain.¹⁹

Now what is the principle from which government drew its legitimacy? The consent of the governed. Why the consent of the governed? Because legitimate government is self-government, “of the people, by the people, for the people,” in Lincoln’s memorable phrase. The legitimacy of the state rests ultimately on the *autonomy* of its constituents, “the capacity of mankind for self-government,” as Madison puts it in the *Federalist Papers*.²⁰

As a type of state action, criminal law must derive its legitimacy from the same source as all other state action.²¹ Punishment therefore can be legitimate only as *self-punishment*. Reconceiving the sharpest weapon of oppressive government as a manifestation of autonomy, rather than an instrument of heteronomy, is no small task. The notion of self-government in general was revolutionary enough, and putting it into practice has been notoriously difficult. But how could the criminal law, in the particular form of the notorious Bloody Code of late eighteenth-century Britain, be rendered consistent with autonomy, the one and only principle of political legitimacy?

This question never received an answer. American law never managed to come to terms with the obvious, and yet so counterintuitive, notion of self-punishment. The reason for this failure, or refusal, systematically to work out the ideal of autonomous punishment is this: offenders are not considered as constituents of the state, and punishment therefore is not a problem of

government at all but a simple issue of public health.²² In other words, punishment is a matter of police, rather than of law.

Police and Law

Criminal law, on this view, is an oxymoron. Take the Federalist Papers, for example, surely the most comprehensive, and influential, treatment of the principles of American government. The Federalists, it turns out, had a lot to say about a lot of things but very little about punishment. They were happy to leave criminal law to the states, more specifically to each state's power to regulate its "domestic police,"²³ that is, its "internal order, improvement, and prosperity."²⁴ When they did claim punitive power for the United States, it was only to "exact obedience,"²⁵ by punishing "disobedience to their resolutions"²⁶ and "the disorderly conduct of refractory or seditious individuals."²⁷ This power was necessary for the simple reason that "seditions and insurrections are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body."²⁸ Federal punishment power therefore was needed to contain the "contagion" of insurgency, once it had erupted, from "communicat[ing] itself."²⁹

The distinction between law and police was familiar to Jefferson, but has largely been forgotten. That's unfortunate because it brings out the distinguishing feature of law as a mode of governance—autonomy. Criminal law is law insofar as it is an instance of self-government, in this case of the offender. Otherwise it is a matter of heteronomy, of some people imposing their will on others. And by surrendering the ideal of autonomy, criminal police also surrenders the claim to a moral foundation, thereby extracting itself from the grasp of legitimacy scrutiny. Police isn't necessarily illegitimate; it is essentially a legitimate.

The distinction between law and police is worth reviving for purposes of critical analysis. For one thing, a theory of the law of crime and punishment needs not only a theory of crime and punishment but also of law. And the concept of police forces us to expand our focus from criminal law to law in general. Police, after all, is contrasted not only with punishment but also with law. By recovering the concept of police in its original form and scope, we see that the subordinate distinction between policing and punishing emerged only after the police concept had been contracted from the king's governance of his realm as the *pater patriae* to the mere prevention of harm. Where policing once pertained generally to the management of the commonwealth, it eventually came to be seen as a protocriminal law, which expanded penal sanctions from the infliction of personal harm to the threat of public

inconvenience. So closely associated became penal police with criminal law that the distinction eventually disappeared.

Once exhumed, the origins of police turn out to differ dramatically from those of law, criminal or otherwise. For police presumes the hierarchical relationship between the members of the household—human or not, animate or not—and its head. The governor of police is the *pater familias* (*dominus* in Rome, *oikonomos* in Athens), the governed *his* household (*domus*, *oikos*).³⁰ By contrast, the governor of law is the moral person, who is the governed as well. The science of household management was *economics*; the science of state government, *politics*.³¹ And *police* simply was the science of state government as household management—or *political economy*.³²

The most influential American definition of police appeared in Blackstone's *Commentaries*. Blackstone derived the power to police from the king's status as "father" of his people,³³ and "*pater-familias* of the nation."³⁴

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.³⁵

The Blackstonian concept of police dominated American police thought until the concept fell from general view in the late nineteenth century and was largely confined to various niches of American constitutional law, including the law of regulatory takings and commerce clause jurisprudence.³⁶ In the academic literature, traces of the distinction between police and law can be seen in First Amendment theory,³⁷ in Fuller's distinction between "managerial direction" and "law,"³⁸ in Hayek's vision of law as a "rule of just conduct,"³⁹ and in Herbert Packer's distinction between two models of the criminal process, "managerial" Crime Control and Due Process.⁴⁰

The need to draw the distinction between police and law at the appropriate, fundamental, level of governance, however, disappeared with the concept of police itself. Once administrative *law* had come into its own as a *legal* discipline, the concept of police vanished. The purported legalization of the police state rendered the study of police irrelevant and transformed police science into an antiquarian pursuit. Police treatises became treatises (and casebooks) on administrative law. The last great police theorist, Ernst Freund, became the first great administrative law theorist. The last explicit attempt to distinguish law from police in general came in Freund's weighty police treatise, the culmination of the nineteenth-century tradition of police power treatises.⁴¹

Police and Punishment

Jefferson, who in 1779 set up a chair of Law and Police at the College of William and Mary,⁴² went some way toward recognizing criminal law as a problem of *law*, rather than police. In the preamble to his criminal reform bill, he spoke of an offender as a “member” of “society” who need “not wholly forfeit the protection of his fellow citizens.” But it’s only the offender “committing an inferior injury” who remains within the realm of government and therefore of law; others, “whose existence is become inconsistent with the safety of their fellow citizens,” are “exterminate[d],” even if only as “the last melancholy resource.”⁴³ For the latter group, which includes traitors and murderers, punishment is not a matter of government but a matter of disposal. Literally *outlawed* beyond the community of the governed, these sources of danger must be disposed of, with or without their consent.

As imprisonment became the sanction of choice in the nineteenth century, objects of punishment—as inmates—were subjected to the discipline of their keeper—the warden. Prisons were quasi-familial institutions. They were run like families and laid out like military barracks. In the end, it mattered little which inferior position in the quasi-familial hierarchy the prisoner assumed, as child, military subordinate, “slave of the state,”⁴⁴ or all three.

The introduction of imprisonment as the paradigmatic punishment thus meant the transformation of all objects of punishment into objects of police.⁴⁵ To be punished meant to be policed. Modern imprisonment infantilized inmates by depriving them of all means of self-support. Isolated from the outside world, the inmate could not exist without the warden’s assistance. Even if he had been a legal subject before, in prison he became an object of police.

The challenge facing any attempt to legitimate punishment in a modern democratic state is to render the punishment of a particular person consistent with the fundamental principle of legitimacy, autonomy. This challenge, once it is realized in its full scope, cannot be met by reclassifying persons as police objects. Denying the object of punishment the capacity for autonomy does not legitimate her punishment; it redefines her punishment as discipline and thus denies the need for legitimation in the first place.

The answer to the question of who is entitled to respect for her autonomy and thus to a legitimation of the infliction of punitive pain at the hands of the very state that exists to safeguard her autonomy is clear, and it has been clear at least since the Declaration of Independence, which declared in simple terms “that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.”

The “unalienable” rights that the state both protects and infringes through punishment, in other words, are rights of “all men,” that is, they are human rights. And the only way the state—or for that matter anyone else—may interfere with these rights is by the consent of those who possess them, unalienably. Or to put it more accurately, the state is categorically prohibited from interfering with the human rights of the men who “instituted” it “to secure these rights.” At the same time, the state enjoys certain “just powers” to perform its function, if necessary through coercion. These coercive powers include the power to tax and the power to punish, both of which deprive men of the “lives, liberties, and property” they formed the state to protect. This deprivation doesn’t amount to an interference with the governed’s “unalienable” rights as a person if and only if she consents to it.

The experience of being deprived of “lives, liberties, and property” without their consent was very real to the Founding Fathers of the American republic. They knew very well what it was like to be treated as an object, but not as the subject, of government, as the governed, without being the governor. The famous preamble of the Declaration of Independence, after all, was just that, a preamble to a long list of grievances against “the present King of Great Britain.” Among these were not only “imposing taxes on us without our consent” but also “depriving us in many cases, of the benefits of trial by jury,” “transporting us beyond seas to be tried for pretended offenses,” and even “declaring us out of his protection and waging war against us.”

In other words, the British king treated Americans as objects of regulation, rather than as subjects of law. They had been declared outlaws, removed from the realm of law into that of war. They had no say in the making of coercive state measures. That’s the problem with establishing taxes “without our consent.” It wasn’t that they objected to being taxed, that is, to being deprived of their property; they objected to being taxed *without their consent*.⁴⁶

But they had not only no say in the making of coercive state measures but no voice in their application either. Being transported to England meant being tried not by their peers but by Englishmen. But the whole point of the jury trial was to have the verdict rendered by representatives of the community of the accused. The jury verdict thus was an indirect self-judgment, a judgment if not by the accused himself then at least by his peers, that is, by those connected to him through a bond of mutual identification.⁴⁷ The jury wasn’t just a voice of any community, but a voice of the community *of the accused*. This identification, however, was rendered impossible in a trial before a jury of nonpeers, hostile nonpeers to boot. In that case, the jury trial became a farce and rendered the application of penal norms more, rather than less, oppressive as the accused now faced not only the judge but also the jury.

At first sight, it might seem odd that Jefferson would group a complaint about taxation without consent, or the more familiar “taxation without representation,” with a complaint about jury trials in England. The connection becomes clear, however, as soon as one realizes that taxation and punishment are but two ways in which the state deprives its constituents of the very goods—properties, Locke would say—it’s supposed to protect. More fundamentally, both point up violations of the right to consent, one at the stage of making law, the other at the stage of applying it, that is, legislative and adjudicatory consent. In sum, state action—punishment or taxation—is legitimate only insofar as it is consistent with the principle of autonomy.

Substantive Criminal Law

In this, the final, section, let us briefly consider some central features of the norms of substantive criminal law in light of the principle of autonomy.

The concept of autonomy can be seen as underlying much of the criminal law’s general part, which lays out the general principles of criminal liability.⁴⁸ Criminal liability attaches to persons capable of autonomy. Conversely, anyone without that capacity is not punishable—including the criminally insane and children. The capacity for autonomy is a necessary precondition for criminal liability, but it’s not sufficient. To be punished, rather than merely punishable, a person must have actually exercised her capacity for autonomy in committing the crime. The voluntary act requirement ensures that punishment attaches only to actual manifestations of one’s capacity for autonomy.⁴⁹

To account for the act requirement, rather than the *voluntary* act requirement, we need to expand our focus from the offender’s to the victim’s autonomy. If it is correct that the state addresses the objects of its governance through law as persons, that is, as possessing a capacity for autonomy, then victims in the criminal law must be conceived of as persons as well. In fact, we might think of crime as a particular kind of interaction between two persons, both capable of autonomy. In this light, crime appears as a particular type of interference with one person’s autonomy (the victim) by another (the offender); more specifically, it is one person’s autonomous assault on the autonomy of another. The offender manifests her autonomy at the expense of the victim’s. In her criminal act, she removes the victim’s self from the position of control and replaces it with her own. In some cases, this act of interpersonal violation results in the permanent destruction of the victim’s capacity for autonomy, through death or catastrophic brain injury. In others, it affects the victim’s ability to exercise that capacity to a greater or lesser degree. Criminal

law is the state's response to crime through punishment, designed to reaffirm the autonomy of the former without denying the autonomy of the latter.

It is the victim's right of autonomy that the offender has violated, or at least has done her best to violate.⁵⁰ The law's function is to protect that autonomy from serious interference. The *criminal* law helps the state discharge that function through deterrence and, if necessary, through punishment—that is, through the threat, imposition, and infliction of punishment, the various aspects of the criminal process that correspond to increasing levels of coercion. In this sense, one might say that the victim has a right to *have* the offender punished, provided that no other measures to vindicate her autonomy, such as through the law of compensation, are available.⁵¹ Analogously, the offender can be said to have the right to *be* punished, insofar as treating her as an ahuman source of danger denies her the “dignity and respect” she “deserves,” not as a victim or an offender but as a person.⁵² In the criminal law, the state vindicates both rights, thereby doing its job of manifesting and protecting the autonomy of all of its constituents.

Now, if crime is one person's autonomous violation of the autonomy of another, such a violation will be impossible without an external act. The offender's act is the manifestation of her autonomy through the subjugation of the victim—the offender acts out her capacity for autonomy through heteronomy over the victim.⁵³ We need more than an act requirement; we need a voluntary act requirement, because otherwise this interference with the external world, however harmful to others it might be in a broad sense, is not a manifestation of the actor's autonomy.⁵⁴

After *actus reus*, let's briefly consider *mens rea*, the other offense element of classical American criminal law. Without intent, the offender's act is not sufficiently directed at the denial—and even the destruction—of the victim's autonomy to qualify as a crime, that is, an *assault* on the victim as a person. It is for this reason, I think, that the criminal law has treated the punishment of negligent crimes with embarrassed silence—and has generally limited negligence liability to the infliction of serious harm (specifically death).⁵⁵ The victim of a negligent crime cannot be considered the *object* of the offender's act, against whom the crime was committed.⁵⁶ A person harmed as a result of a negligent crime is not victimized, or at least is victimized in a fundamentally different sense than is the victim of an intentional crime.

Negligent and intentional crimes share several features. Negligent crimes may end up severely compromising a person's autonomy, even to the point of destroying her autonomy altogether (as in the case of negligent homicide). They also are committed by a person, rather than a dog or a tree, and thereby

satisfy another aspect of the definition of crime as the assault by one person on the autonomy of another.

But negligent crimes differ from intentional ones in that they do not represent an attempt by one person to subjugate, or objectify, another. They may interfere with a person's autonomy, but they do not do so for the greater glory of another. The victim of a negligent crime will suffer harm, even serious harm, to her ability to exercise her capacity for autonomy but not the indignity of having been treated as the means to another person's self-aggrandizement, taken in its strict sense, that is, as the expansion of the offender's self to engulf the victim as a mere appendage.

It is this personal assault on her personhood that entitles the crime victim to victims' rights, in particular the right to have the offender punished. The offender's punishment is nothing but the dramatic reaffirmation of the victim's autonomy after the offender's criminal attempt to deny that autonomy for the sake of her own. And a crucial aspect of that reaffirmation is putting the offender in her place, among the community of persons, alongside the victim. The victim's personhood therefore is reaffirmed by exposing the offender's attempt to deny it as unsuccessful and in fact futile. Punishment communicates to the offender, the victim, and the onlooker that the offender did not succeed, and could never have succeeded, in reducing the victim to a nonperson. The offender at best can *treat* the victim as a nonperson; she cannot transform him into one.

This process of autonomy affirmation does not, and cannot, take place in negligent crimes. Since negligent crimes are not crimes in this sense, their victims are not victims of crime. There are "objects" of negligent crimes, as there are "objects" of torts, only in the general, formal, sense of *object* as that person who suffers the harm described in the definition of the negligent crime or tort. Only in this, formal, sense can one define victim as "the person who is the object of a crime *or tort*,"⁵⁷ provided one keeps in mind the fundamental, substantive, distinction between victims of crime and of tort (or negligent "crime").

So much for the notion of an offense. Autonomy also figures prominently in the system of defenses. Justifications respect a particular act of self-government by the putative offender who considers the fundamental norms of her political community and applies them to a particular case, even in the face of previous attempts to codify these norms.⁵⁸ The law of justification treats her choice, made under the extraordinary circumstances of an emergency, as an act of direct immediate self-government that deserves legal recognition even when it conflicts with prior acts of indirect self-government taken by others (the legislators) on her behalf. (In this sense, justification

defenses fulfill a function similar to jury nullification, condensed into one person's deliberation.)

Similarly, the defense of consent can be seen as insulating punishable conduct from criminal liability on the ground that it doesn't interfere with the autonomy of the consenting "victim."⁵⁹ By consenting, the apparent victim rebuts the presumption of victimhood. He indicates that another's act that facially satisfies the elements of a crime does no harm to his autonomy in fact. In the light of consent, an apparent act of heteronomy is revealed as an act of autonomy.

Consent is the main doctrinal category in the law of punishment that functions as a placeholder for considerations of the victim's personhood, that is, his capacity for autonomy. American criminal law has yet to fully appreciate the central significance of the consent defense. That defense stands as a constant reminder that criminal law is about persons first. Consent as a reflection of the criminal law's basis in personal autonomy is less a defense than a general limitation, less an exception than the rule. Consent deprives the criminal process of its legitimacy, of its reason for being. It finds its broadest recognition in the Model Penal Code. According to the Code, consent is a defense if nonconsent is an element of the offense charged or if it "precludes the infliction of the harm or evil sought to be prevented by the law defining the offense."⁶⁰ That harm, however, is always the interference with the victim's autonomy. That interference is absent in the presence of consent.

One therefore would expect consent to be a defense to, or nonconsent an implicit element of, every offense. It isn't, not even in the Model Code. The Code instead preserves the traditional, and traditionally ill-supported, exception for serious bodily harm.

Attempts to justify exceptions to a general consent defense tend to consist of general references to the unique nature of criminal law. Criminal law, so it is said, is not about individual victims but about the state (or the king).⁶¹ Insofar as this view of the criminal law as police reflects a hierarchical political community, it is as we've seen, inconsistent with the ideal of equal personhood that underlies not only the political theory of American government in particular but also of Enlightenment moral and political theory in general. Moreover, it proves too much. If it is correct that the state is the victim of every crime, then consent should be a defense to none.

A failure to recognize consent as a defense in the law of punishment amounts to a violation of the *prima facie* victim's fundamental right to autonomy. It also violates the apparent *offender's* right to autonomy, assuming her facially criminal conduct manifested an agreement between her and the apparent victim (as opposed to merely carrying out the "victim's" orders, say).

Punishing the apparent offender therefore would do nothing to vindicate autonomy. On the contrary, it would deny the autonomy of offender and victim alike.

As to excuses, if crime is the autonomous violation of another person's autonomy, then the lack of the capacity for autonomy or the inability to exercise that capacity will bar criminal liability. This accounts for the incapacity excuses—insanity and infancy—as well as the inability excuses—duress, entrapment, intoxication, superior orders, provocation.

Autonomy shapes not only the general part of criminal law but also its special part, which deals with specific offenses, as opposed to general principles of liability. Here it's, once again, the victim's autonomy that matters. The scope of criminal law is defined by the state's authority to protect the autonomy, or personhood, of its constituents.⁶² The German Penal Code, for example, makes the significance of autonomy explicit by classifying various crimes as crimes against autonomy.⁶³

Autonomy, in other words, determines the nature of criminal harm—as well as the nature of criminal conduct. In this respect, it puts meat on the bones of Mill's "harm" principle, which recently has been rediscovered—by commentators and courts alike—as a stand-in for *criminal* harm.⁶⁴ Not all harm is criminal harm. Criminal harm is limited to autonomy harm. The criminal law protects different qualities and quantities of autonomy harm. One might, for instance, draw a qualitative distinction between harm to the capacity for autonomy and harm to the ability to exercise that capacity. Among harms to the capacity for autonomy, another line might be drawn between harm that amounts to a destruction of the capacity and harm that merely compromises it. Certain offenses permanently deprive the victim of her personhood. These include homicide and certain types of assault that eliminate the victim's capacity to govern herself, that is, to generate and to recognize norms as her own and to follow them in her conduct—assaults, in other words, that transform the victim into someone who, if charged with an offense, would be entitled to an insanity defense. The law further distinguishes homicide from these depersonalizing assaults, presumably on the ground that only the former definitively works a permanent destruction of personhood—no matter how reliable the predictions of medical science might be regarding the extent and the curability of a particular condition short of death.

Among harms to the ability to exercise one's capacity for autonomy, one might draw quantitative distinctions based on the centrality and permanence of the autonomy harm.⁶⁵ These distinctions, being merely quantitative, don't generate hard and fast rules. But we might conclude that, in general, physical health is more significant to the exercise of one's capacity for autonomy than psychological health, though psychological harm may of course also be

debilitating. In the end, the distinction between physical and psychological harm may not be particularly useful. Regardless of their relative seriousness—understood as the degree of interference with the ability to exercise one’s capacity for autonomy—it might still be useful to retain analytic distinctions among various aspects of autonomy that the criminal law, in its special part, sets out to protect and to manifest.

This focus on harm to autonomy draws into question a significant portion, and probably the bulk (no one can know for sure), of what goes under the name of modern criminal law. If autonomy is the legitimating principle of law, then the legitimacy of a particular exercise of law power turns on its proximity to autonomy. Most suspect are public welfare offenses, and police offenses generally speaking, which set out to extinguish threats—or police anything or anyone offensive—to, rather than actual violations of, well, public welfare and police rather than to particular groups or to individual persons, never mind their autonomy. The legitimacy of these offenses is suspect for two reasons: first, because they are not concerned with the protection or manifestation of personal autonomy but instead with some other interest, and second, because they are not concerned with autonomous violations of these interests but with offenses or threats to them, regardless of the personhood of the source of these offenses or threats. In other words, the legitimacy of police offenses is suspect because they treat neither victims nor offenders as persons capable of autonomy—they are both victimless and offenderless at the same time. In the final analysis, these offenses police threats to the authority of the state. They are pure disobedience offenses.

Possession offenses are suspect in this sense.⁶⁶ They punish the relation between an object and its possessor, often without regard to the possessor’s awareness of the particular nature of the object, solely on the ground that this relation has been declared “unlawful” by the state. (That’s why justification defenses, which assert the lawfulness of facially criminal conduct are irrelevant in possession cases.⁶⁷) They do not, in other words, punish a person for manifesting her autonomy—they are, in short, offenderless. There is likewise no connection to the autonomy of another person, the victim—they’re victimless as well. The interference with another’s autonomy requires an act of some sort—that’s why we have the act requirement. Possession, however, isn’t an act of any kind, autonomy limiting or affirming. Use at least has the potential of causing harm, or good. Possession, however, is twice removed from use; it is an inchoate, inchoate offense.

To see the remoteness of possession as a threat to some interest or right, one might distinguish between two types of possession offenses, *simple* possession and possession with intent, or *compound* possession. Simple possession itself can, but need not, require proof of actual or constructive awareness—that

you knew or should have known that you possessed the object in question. If it doesn't, it's a strict liability offense. Possession with intent is by definition not a strict liability offense, since it requires proof of intent.

It may be helpful to view the varieties of possession along a continuum from dangerousness at the one end to its manifestation at the other. At the end of pure dangerousness is simple possession. Here we are farthest removed from the harm that the use of the object may cause. And in the strict liability variety of simple possession, the inference from the dangerousness of the item possessed to its possessor is most tenuous—since she by definition is not even aware of her possession. Next is compound possession, which still inflicts no harm since the possession itself is harmless, but at least we have the intent to use the item possessed in a way that may or may not be harmful. Moving further along the continuum we encounter the *preparation* to use the item possessed in some particular way. This preparation, as distinct from an attempt, is not criminalized.

Next comes the *attempt* to use the object possessed, which is a preparation that has almost, but not quite, borne fruit. And eventually, there is the use of the possessed item. In the case of drugs, that use may come in the form of a sale, as in the popular and often severely punished offense of possession with intent to distribute. Of course, the distribution itself is also entirely harmless. It's another kind of use, which may or may not follow the distribution, that renders drugs harmful, namely, their consumption. But the harmfulness of the use is not an element of a compound possession offense criminalizing possession with intent to distribute. There is no offense of possession with intent to consume.⁶⁸ Moreover, the consumption of drugs is not, or at least not without more, a harm to autonomy. On the contrary, it appears as an affirmation of the consumer's autonomy, at least with respect to substances not so addictive that their first consumption destroys the consumer's capacity for autonomy.⁶⁹ Drug possession offenses thus punish the relation between an object and its possessor, which might or might not transform itself into a particular use of that object by the possessor, which use (distribution) might or might not be transformed into another use (consumption) by some other person (the eventual consumer, who may or may not be the original recipient), which in turn appears as a *prima facie* affirmation of, rather than interference with, that person's autonomy. Gun possession offenses work much the same way, except that the connection between possession and use other than distribution is seen as less remote and that this eventual use is more likely to interfere with the autonomy of some person (and some person *other than* the user), where that use, moreover, is itself subject to criminal prohibition (unlike, say, the consumption of drugs).⁷⁰

Possession offenses, in sum, are paradigmatic police offenses in that they enforce the authority of the state, in the name of extinguishing remote threats to the public police (in particular, its security) rather than punishing violations of the autonomy of particular persons. They treat their objects, possessors, not as persons who exercise their capacity for autonomy in one way or another (by not using the object possessed or by using it in a harmful, or harmless, way) but as hazards to the police and the state charged with maintaining it. Possessors, through their relation to an object, have revealed themselves as nuisances who, along with the object, require abatement. And so possessor and possessed alike are disposed of according to the nature and degree of their dangerousness. Some are cleansed of their dangerousness; others—those *per se* hazardous—are incapacitated. In a possession regime, everyone—except the state through its officials—is presumptively dangerous (that is, incapable of exercising one’s capacity for autonomy in general or in a nonharmful way in particular). To escape punishment requires rebuttal of this presumption, through obtaining a discretionary “license” from the state or joining the state apparatus. In extreme cases, the possessor is considered so dangerous that possession in general is prohibited except as otherwise provided.⁷¹

In the end, possession offenses work very much like vagrancy offenses. Possession is criminal unless the possessor can give a good account of himself.⁷² Both are discretionary police measures for the elimination of threats to the public police. Unlike the rather crude vagrancy offense, however, possession offenses supply the state with an efficient tool for the prolonged, and even the permanent, incapacitation of police hazards.⁷³

Conclusion

The police power is a useful tool of critical analysis. On the one hand, it allows us to better appreciate the functioning of modern state government, by placing apparently disparate strategies and interventions within a systematic and historical context. On the other, it opens up opportunities for internal and external critique. To the extent that police government is subject to norms or at least guidelines, say, of efficiency or security or order or even welfare (i.e., *police* itself in its original, comprehensive, sense), its compliance with these norms can be assessed. Insofar as police government, as a mode and rationale of state governance, is also subject to the legitimacy norms generally recognized to apply to state action in, say, a liberal state or *Rechtsstaat* under the rule of law, then it can be subjected to the sort of legitimacy scrutiny outlined in this chapter.