The Dual Penal State

The Crisis of Criminal Law in Comparative-Historical Perspective

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Introduction

The Crisis of the Modern Penal State

This book puzzles over one of the most pressing issues facing legal scholars, and particularly criminal law scholars, today: the rampant, at best haphazard, and ever-expanding use of penal power by states ostensibly committed to the enlightenment-based legal-political project of Western liberal democracy. Penal regimes in these states operate in a wide field of ill-considered and little constrained violence where radical and prolonged interference with the autonomy of the very persons upon whose autonomy the legitimacy of state power is supposed to rest has been utterly normalized.

A. The Crisis of Liberal Penality

I don't know whether the modern liberal legal-political project is correct, or just, or even how we would know whether it is. Given that there clearly are states that see themselves—or would like to be seen—as participating in this project, I'm interested in measuring and understanding, historically and comparatively, doctrinally and institutionally, systemically and specifically, the persistent mismatch in these states between the ideal of liberal criminal law and the reality of modern penality. Getting a better sense of the crisis of liberal penality should help us address it, even if not to "solve" it (whatever that would mean), assuming that this is something we think is important or perhaps even necessary, not merely as a matter of good government or well-considered policy, but as a matter of justice, and ultimately, the legitimacy of state power in a liberal democracy.

If we take the liberal project seriously, and that may be a bigger "if" than most of us are willing to concede, I don't see how we can live with ourselves in light of the systemic failure to meet, and in some cases even to frame, the challenge of criminal law in a liberal state. If we fail to recognize, day-in and day-out, the challenge of the prima facie illegitimacy of penal power in a liberal state, how can we hope to address it? If we don't address it, how can we hope to resolve it? And if we don't resolve it, what does it say about the modern legal-political project as a whole if it lacks the will and the resources to legitimate the state's most awesome power, the power most in need of legitimation?

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It may turn out that the mismatch between liberal ideal and penal reality is not merely a problem of application or administration: a failure to implement a comprehensive account of legitimate state punishment. Perhaps the problem lies at the root of the project of liberal penal law, and by implication of liberal law in general: a failure to assemble a legitimatory account of liberal criminal law in the first place, either because no one saw the need for a radical reconception of penal power or because those who did, produced an account that failed to address it, creating a false sense of complacency that, in the end, hindered the continuous legitimation of state penal power, in all of its aspects, substantively and procedurally, systemically and individually, as threat, imposition, and infliction of penal violence. Either way, the result is the same: a normalized, continuously expanding and sharpening, prima facie illegitimate regime of state penal violence.

The United States, for some time now, has provided the most extensive and notorious example of state penality run amok, home of an extended brutal penal incapacitation campaign called the war on crime, marked by the world's highest incarceration rate and largest prison population, by both "overcriminalization" (what to punish?) and "overpenalization" (how much?), and an attitude of at best malign neglect (Michael Tonry) toward its devastatingly disproportionate impact on nonwhite individuals and communities, in prisons and on the streets, giving rise to a movement around the startlingly simple yet disturbingly non-obvious insistence that Black Lives Matter.

But the U.S. is only one example, if a particularly stark one. Other countries have long sharpened and entrenched their penal regimes, all too often using developments in the United States as convenient cover for comparatively less intrusive, but still significant, expansions of penal power. The current crisis of modern penality is neither limited to the United States, nor is it new. These points are related. I believe, and argue in this book, that the crisis of modern penality is just that, a crisis of *modern penality*. It is not a domestic crisis that plays out in a particular supposedly *sui generis* country that other countries observe in horror from the outside as they continue to refine their ever more perfect manifestation of an enlightened liberal criminal law. Instead, the crisis of modern penality is a crisis of the liberal legal-political project as a whole that, in different ways, reaches every state that considers itself part of it.

Recognizing the crisis of modern penality as a supranational phenomenon forces every state within the liberal legal-political project to turn inward and commit itself to the serious and honest critical analysis of its response to the original fundamental challenge of the legitimation of its exercise of penal power: how to resolve the *penal paradox* as the sharpest formulation of the general paradox of power in a liberal state, i.e., the violent interference with the autonomy of persons upon whose autonomy the state's legitimacy rests.

This critical self-analysis would play out differently in different countries. Take Germany, for instance. There, critical self-analysis would require disturbing a well-entrenched tradition of self-complacency that proceeds from an assumption of superiority vis-à-vis other states, including but certainly not limited to the United States.[1] This privileged vantage point is grounded in two related, and

widely—though certainly not universally—held, views: first, that the German legal system in general, and German criminal law in particular, more perfectly meets the challenge of state power in a modern liberal democracy than any other legal system; and second, that German substantive criminal law in particular looks back on a long and uniquely distinguished history of legal scientific discoveries that extends far beyond the emergence of modern German constitutional law after World War II. This deeply rooted scientific foundation is central to the self-conception of German criminal law scholarship, which regards constitutional law as a relative newcomer whose claim to attention, if not supremacy, in matters of criminal law is unsettling. The adherence to a scientific self-image of objectivity and technical expertise also goes a long way toward accounting for the otherwise perhaps surprising notion, given the events of 1933–45, that German law in general and German criminal law in particular would make promising candidates for substantive models of liberal principledness.

The German sense of superiority in substantive criminal law is matched by the American sense of superiority in matters of criminal procedure.[2] In the United States, it is generally assumed that no other legal system in the world matches the procedural protections enshrined in the federal Bill of Rights (the first ten amendments to the U.S. Constitution, ratified in 1791). Ironically, these supposedly distinctive New Republic protections, in turn, have habitually and uncritically been portrayed as mere modern restatements of long-familiar, pre-revolutionary and distinctly Old World English norms, extending all the way to a short excerpt from a long and vaguely drafted, decidedly pre-modern, and pre-enlightened document from medieval English political history, the Magna Carta of 1215—now, in centuries-long hindsight, widely revered as the origin of the "rule of law."[3] In the United States, this oddly self-denying *longue durée* perspective is conveniently combined with a radically shortened historical horizon that obscures the fact that there was no American constitutional law of criminal procedure to speak of, and the federal Bill of Rights received only scant attention, until the United States Supreme Court invented an American *federal* constitutional law of criminal procedure in the second half of the twentieth century (not to mention that the Supreme Court began blunting these constitutional constraints soon after first recognizing them in the 1950s and 1960s). The vaunted fundamental procedural protections of American criminal law, in other words, are either too old, too new, or too toothless to count as either American, fundamental, or protections. That they did not stand in the way of the massive decades-long incapacitation campaign that is the American war on crime also hardly recommends them as procedural models of liberal principledness.

Seeing the legitimacy of state penal power as a continuous challenge shared among all modern liberal states requires not only turning, and keeping, a critical eye on oneself. It also drives home that this challenge is a central feature of the liberal legal-political project, for two reasons. First, penal violence is an aspect of state power in all states, including those that regard themselves as participating in the liberal legal-political project. The "war on crime"—and its

"tough-on-crime," "law-and-order," *Verbrechensbekämpfung*, or *Kampf gegen die Kriminalität* variations—are contemporary manifestations of penal power in ostensibly modern liberal states. The threat and infliction of state penal violence on a massive scale are liberal phenomena, rather than characteristics of "other," non-liberal societies. Second, the ill-considered use and expansion of penal violence is particularly troubling in a supposedly liberal state because the liberal legal-political project defines, and distinguishes, itself precisely through its insistence on the fundamental and continuous critique of the legitimacy of state power. The unscrutinized use of the most acute form of state power therefore threatens the liberal project at its core and draws into question the distinction between self-classified liberal states and others.

To appreciate the full extent and depth and scope of the crisis of contemporary penality in ostensibly liberal states, it helps to leave behind customary temporal and parochial constraints. Rather than focusing on one country, or another, in this project we'll turn to historical and comparative analysis instead. Only in this way can we see the origins of the crisis of modern penality in the origins of the liberal legal-political project itself and, at the same time, see how this crisis came to manifest itself differently in different states participating in this project.

This comparative, or systemic, approach does not render domestic analysis pointless. Every country's penal history is unique; that is not to say, however, that it is, taken by itself, *sui generis*, or exceptional (or any more exceptional than any other). The countries of the Western liberal tradition belong to the same *genus*, the *genus* of states that participate in the legal-political project of Western liberal democracies. They are *sui generis*, together. The present book takes this commonality seriously. Rather than tracing one, or another, country's penal *Sonderweg* or *exceptionalism*, i.e., a deviation from some imagined norm in one direction, or another, it conducts a comparative-historical inquiry into the shared challenge of modern penality at the general level of the legal-political project of modern liberal states. This comparative-historical inquiry then considers how that challenge has been framed and addressed in various self-identified liberal states. From this perspective, neither the United States nor Germany appears as an exception, distinctive in either its unique failure or its unique success vis-à-vis the challenge of liberal penality; instead, they both appear as illustrations of different ways of framing and of responding to that challenge, or not, as the case may be.

It should be clear at this point, but it's worth emphasizing just the same, that the sort of comparative-historical analysis favored in this book is not of the grass-is-greener variety, comparatively or historically. The point of our comparative analysis is not to reveal one jurisdiction as superior to the other. Similarly, rather than tell a nostalgic story of the loss of some Golden Age or other, or a Whiggish narrative of more-or-less continuous progress since some transformative moment, we'll take the long view instead, tracing long-standing tensions among fundamental modes of governance and conceptions of (penal) power across periods and jurisdictions, focused on the modern liberal legal-political project and its roots in the early history of Western legal and political thought and practice.[4]

B. States of Denial

This broad comparative-historical inquiry into various responses to the challenge of modern liberal penality reveals a systemic failure. It is systemic, first, in that it encompasses the liberal legal-political project as a whole. Constituent states differ in *how* they fail, and perhaps in how badly they fail (though this is a less interesting question, in my view, at least for purposes of this book), but not in *whether* they fail to address the challenge of penal power as the most acute manifestation of state power wielded against its constituent persons.

The failure is systemic also in the more limited sense that it is endemic in each "domestic" penal system, both in that the failure—again—covers the system as a whole (rather than one stage, or aspect, of it) and in that domestic penal systems, again and again, and in imaginatively—even occasionally entertainingly—different ways, operate so as to obfuscate and to evade, rather than to address, never mind to resolve, the challenge of liberal penal violence.

Much of this book will be about the ways in which the failure to address the challenge of state penality in a modern liberal democracy manifests itself, comparatively (across domestic legal systems) and historically (within and across domestic legal systems). One legal system (the United States) may recognize the challenge of liberal state power—i.e., of the enforcement of state authority in the face of personal autonomy—in general, but fail to appreciate the specific, and especially sharp, appearance of that challenge in the case of the state's penal power.

Another legal system (Germany) may recognize the general and the particular challenge. It may then confuse the challenge's recognition with its resolution, however, and, in this way, fail to address it. More troubling, it may even turn out that, upon closer inspection, the original formulation of the challenge already signaled the failure—and perhaps the impossibility—of its resolution. The original formulation of the challenge may reveal itself as at best incomplete and at worst hollow. (We will take a particularly close look at the prevalence of the notion of "penal slavery" in foundational texts at various stages of the liberal penal project.[5])

How various domestic legal systems formulate (or not) the challenge of penal power in a liberal democratic state is one thing. How they fail to address it is another.

At the systemic level, one might fail to acknowledge that the general challenge of liberal state power applies to the state's penal power, either categorically or in particular cases. So one might locate the entire state's penal power outside the realm of state power subject to legitimacy scrutiny (see the U.S. conception of penal power as an instance of the state's "police power," to be discussed extensively below[6]). The objects of penal power, in other words, would appear not as subjects of the liberal legal-political project in the first place. Regarded as mere objects of state power, their penal treatment could not violate a personal autonomy they did not possess.[7]

In a less ambitious version of this conception of penal power, only certain objects of penal power would be treated as outside the legal-political project and therefore beyond the scope of the challenge of liberal penal power. Just how much separates the more ambitious from the less ambitious version would depend on how many penal objects would find themselves on the outside of the liberal project looking in, permanently or temporarily. Depending on the classificatory scheme, penal objects might even find themselves on both sides of the line, even on the basis of the same act, and perhaps even at the same time (see the German two-track system's distinction between "punishment" and "measure," also discussed below[8]).

Alternatively, or concurrently, one might fail to acknowledge an exercise of penal power as an infliction of penal *violence*. For instance, one might refer to penal sanctions not as "punishment" (*Strafe*), but as "correction," or "reformation," "rehabilitation" (*Besserung*) or more broadly as "treatment" or more indeterminately as "measures" (*Maßnahmen*). Use of the term "treatment" may obscure the pain in the infliction of a penal sanction and thus obviate the need for legitimation in the first place. (Ironically, "punishment theory" in certain moods concerns itself with the justification of punishment as "hard treatment," where "hardness" presumably strips "treatment" of its character as a justification-obviating euphemism.) Even if the label "treatment" left room for the infliction of (if no longer physical, then perhaps psychological) pain at least in some cases, it may then obscure the infliction of a penal sanction as an act of violence; after all, treatment might be "painful," but that is not to say that the administration of a nauseating cocktail of prescribed medication or even the performance of an indicated surgical procedure would be classified as "violent." The "treatment" of a disorder or abnormality—say, "criminal dangerousness"—diagnosed by penological experts thus would not even raise the question of the legitimacy of state violence. The administration of "peno-correctional treatment," which always—if only *sub rosa*—also included rehabilitation's less sanguine alternative, incapacitation (*Sicherung, Unschädlichmachung*), instead would appear as a beneficial, and benevolent, exercise of expert medical authority.[9]

It makes little difference, for the moment, whether the challenge of the penal paradox is evaded through the denial of violence, of pain, or of the need for an inquiry into the legitimacy of any remaining benevolently prescribed and administered beneficial pain. Not even the threat or the infliction of capital punishment, it turns out, has posed an insurmountable problem for systemic obfuscation.

On the contrary, the American death penalty regime of the turn of the twenty-first century is a particularly powerful and poignant example of a modern liberal state's ultimate failure to address the challenge of liberal penality through evasion and dispersion. One might begin by characterizing the sanction of capital punishment in general as one, admittedly extreme, form of "peno-correctional treatment."[10] In fact, considerable effort has been devoted to rendering its administration "painless," eventually through the administration of a lethal drug cocktail that, in Ronald Reagan's words, was unobjectionable precisely because it kills the condemned person as painlessly as the veterinarian might ("humanely") put down an injured horse: "the horse goes to sleep—that's it."[11] Any lingering discomfort—however misplaced—that might be experienced by individuals at the very end of the process of execution

could be deflected (if only temporarily[12]) in various ways. Most crudely, one randomly chosen member of a firing squad could be shooting blanks. More recently, one could delegate to a computer the task of randomly selecting which of two people flipped the switch or pushed the button that in fact set in motion the process of administering the lethal injection.[13] The elaborately choreographed "execution protocol" at the end, and the core, of the American death penalty regime is a comical, and macabre, effort to erase violence even from the least erasable instance of the most extreme infliction of penal violence, an effort as telling as its futility is inevitable.[14] In fact, the death penalty regime taken as a whole allows each participant (from prosecutor to jury to trial judge to appellate judge to federal habeas judge to federal appellate judge to warden, etc.) to locate the significant penal act or acts in either direction along the procedural spectrum, or in both directions at the same time (except, of course, at each extreme of the process)—if, and as necessary to alleviate any pangs of interpersonal empathy that might remain for objects of the state's penal power who systemically had been removed from the shared legal-political enterprise and whose penal "treatment" had been drained of any connotation of penal violence.[15]

Focusing on the sharpest point of the sharp end of the stick of state penal power, the moment of intentionally causing the death of another person as punishment, also powerfully illustrates the distinction between the abstract threat of penal violence for the violation of a substantive norm of criminal law and the infliction of that threatened violence on a particular person, by a particular person, in a particular way, at a particular time, in a particular place. Legitimating state penal power requires legitimating both aspects of the state penal regime, norm and application, and substantive and procedural criminal law.

Whether the effort to address the challenge of penal power in a liberal state head-on will prove more successful than the effort to evade it remains to be seen. But it is an effort that a liberal state cannot permit itself *not* to make if it is to remain—or to be seen as remaining—true to its professedly existential, or at least distinctive, commitment to subject its own power to the rigorous and continuous critical analysis of its legitimacy.

Liberal penality, as it manifests itself in the vast and complex enterprise of state penal power, in all of its institutional, doctrinal, and conceptual aspects, from threat to imposition to infliction of penal violence, is pervaded by a culture of acritical complacency. The legitimacy of the state penal regime is simply assumed, either because it requires no legitimation or because its legitimacy is obvious or because its legitimacy has been established by someone somewhere somehow sometime. The state penal regime in this way is reduced to a quotidian system of (discretionary[16]) enforcement, of the (at best) appropriate application of established norms whose legitimacy is beyond inquiry.

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The book has three parts. In Part I, we'll investigate some of the ways in which the challenge of the penal paradox in contemporary liberal democratic states has been obfuscated and evaded, with a particular focus on semantic, taxonomic, or

formalistic deflections and diversions that appear throughout various aspects of the structure, doctrine, and theory that constitute, supplement, and facilitate the state penal complex. Some of these rhetorical devices we've already seen in action, if only in passing: the basic distinction between "punishment" and "measure" (and other apparently non-punitive, non-violent, or pain-free classifications), the wholesale tabooization of the former (e.g., in the Model Penal Code), and the merging of both into a two-track system (e.g., in the German Criminal Code). Other instances will pop up throughout this book, from the creation and meticulous maintenance of entire doctrinal enterprises that resolve legitimatory challenges by label ("police law," "administrative law") to the semantic deflection of legitimatory challenges in specific cases where the denial of the use of penal power carries special, perhaps symbolic, significance (e.g., by labeling corporate sanctions as non-penal).

Our discussion of the rhetorical moves at various levels of abstraction and sophistication that have insulated modern liberal penal power from the fundamental, continuous, and comprehensive scrutiny of its legitimacy in all aspects will focus on German criminal law, which has been particularly inventive, and influential, taxonomically speaking. This isn't to say that American criminal law has been averse to semantic avoidance, merely that it has been less productive in drawing the sort of dispositive lines in the doctrinal sand. This shouldn't be surprising; there's less of a need to put up interior taxonomic walls in a system that drew a fundamental distinction between criminal offenders and the subject-objects of liberal self-government, removing the objects of penal power from the legitimatory project altogether, and thus obviating the need for less dramatic distinctions within that project.

Then, in Part II, we'll home in on the question of how we might go about framing and facing the existential systemic challenge of penal power in a modern liberal democratic state. *Dual penal state analysis* regards penal power from parallel perspectives that correspond to two modes of state governance, *law* and *police*, characteristic of the law state (*Rechtsstaat*) and the police state (*Polizeistaat*), respectively. Comparative-historical analysis plays a key role in this project, in both the construction and genealogy of the dual penal state framework and in its application to various aspects of penality across jurisdictions; the scope of the inquiry is not jurisdiction-specific but systemic, located at the level of the shared legal-political project of modern democratic states. The conception of the dual penal state, and the distinction between law and police as two modes of state governance more generally, are associated with the historical moment of the launch of this project around the turn of the nineteenth century. The study of penal power, therefore, is more specifically a study of modern penal power consistent with the pursuit of the ideal of liberal law to which states that regard themselves—or wish to be regarded by others—as participants in the modern legal-political project are committed. The point of the comparative-historical analysis in the dual penal state is not only to illuminate certain features of a given jurisdiction, or several jurisdictions, or to assess the extent to which jurisdictions have implemented their shared ideal of liberal law, but ultimately also critically to assess the defining ideal itself.

In Part III, we put this dualistic approach to work on a genealogy of American penality told as a series of failures to frame, never mind to address, or even to

resolve (whatever that might mean), the liberal state's penal paradox, starting with the first and best opportunity radically to rethink the state's penal power through law: Thomas Jefferson's effort at criminal codification in his Virginia Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital of 1779. We'll end with a comparative glance at the genealogy of modern German penality as triggered by the initial recognition, around the same time, of the need to reconceive penality in a state beholden to the new liberal idea of law. This recognition has long since given way to the complacent conviction that the penal paradox was resolved in Germany long ago, once and for all, thus conflating recognition with resolution, theory with practice, and postulation with implementation, as well as relegating the challenge of legitimating penal violence in a liberal state from a continuous critical scrutiny, systemically and individually, to a historical curiosity.