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The Power to Police: An Analysis of Modern Police Power and of its Evolution

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Introduction

In western society the power to police is an instrument of government that stands beside the law-making process. Law and police differ in many aspects as police serves mainly a pre-emptive purpose, if law is a reaction police is an action, and it relies on the absence of the pluralistic and political elements that grant to law its legitimacy. Police power is the power to act as hastily and thoroughly as is needed in order to avoid possible harm to the public good or to the nation itself. This definition, though simplistic, shows how the nature herself of police power could easily be considerate alien to the democratic form of government. This concept, dating back to classical Athens, is a crucial element in the management of the state, of society and, if needed, of the citizens themselves. In fact the word "police" is an umbrella term that refers to all measures deployed by the head of a hierarchical structure, such as a family, a kingdom or a state, in order to manage his subjects or preserve his belongings. Police power is nothing but the power to deploy such measures. The interesting part is understating what lies behind this apparently basic concept in order to fully comprehend its role throughout history and, more importantly, in modern democratic nations.

This paper will try to answer the question: what is modern police power? In order to answer, the elaborate will be divided in three parts. The first part will consist in a generic overview of the historical evolution of police power ranging from classical Athens to the eighteenth century and will show the historical pattern followed by police power which led to its current conception. The second part will analyse the three main natures of modern police powers through the opinions of various scholars and will attempt to frame the main functions and roles of police power in modern society. And lastly the third part will describe how police power has evolved differently across the Atlantic and how it adapted to modern democracies and to their institutions through the concepts explained in the previous chapters and two practical examples of deployment of police power.

Chapter 1. The historical evolution of police power

1.1 Introduction

It is impossible to thoroughly understand the concept of police power without an adequate understanding of its historical evolution. This chapter will try to charter the historical evolution of police power in order to explain how it obtained its modern characteristics. For this purpose, this part will be structured upon the chronological map employed in Markus Dirk Dubber's "The Police Power"[1], hence it will start by looking at the classical world and at the contrast between the citizen governing themselves together and the non-citizens being governed, the second part will be a description of the concept of *Mund* in the chiefdoms of the Germanic tribes of western Europe and how such concept influenced the evolution of police, the third part will describe how police power reacts to the enlargement of hierarchies by describing the power of the king in medieval monarchies and by focusing on the concept of treason and on its implications the last part will describe how, after the end of feudalism, police power starts to acquire characteristics that are closely linked to its current conception.

1.2 Classical Era

In Classical Athens there was a sheer contrast between the rights of the freemen, citizens of Athens with the right to participate to political assemblies, and those of the others who, excluded from all collegial organs, had none. This contrast is emblematic as it represents the difference between rulers and subjects that would give birth to the first concept of police. As the apex of the power hierarchy in Ancient Greece was occupied by many people, among them there was no ruler, because they all belonged to the same political status and they all possessed the same rights, they were only subjects of the law, which they jointly decided upon in the many assemblies of 5th century Athens and which they all agreed on, thus achieving a condition of isonomy where they all stood before the law as equals. The others were subjects of both the law, even though they were not allowed to have any role in its creation, and of the lawmakers, who could interact with the others without being bound to the "*inter pares*" relation that existed among citizens. In Athens there were the

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[1] Dubber, Markus Dirk (2005), *The Police Power. Patriarchy and the Foundations of American Government*, Columbia University Press.

householders, who decided and were equals, and the others, who were decided upon and found themselves in a condition not that different from that of inanimate objects or property. It was a society of householders and household. The householder managed the household, comprised by all of its animate and inanimate components, as he saw fit. As observed by Hanna Arendt:

> "[t]o be political, to live in a polis, meant that everything was decided through words and persuasions and through force and violence. In Greek self-understanding, to force people by violence, to command rather than persuade, were pre-political ways to deal with people characteristic of life outside the police, of home and family life, where household ruled with uncontested, despotic powers, or of life in the barbarian empires of Asia, whose despotism was frequently likened to that of the household".[2]

In the polis what wasn't a relation between citizen became *oikonomos* (management of the household). Nonetheless in the household there was an unequal partition of rights as the member of the family were somewhat protected from the abuses of the family-leader and only slaves were truly comparable to inanimate objects.

One of the main reasonings behind this social structure, surely one of the most interesting when looking at early police power, was the timocratic logic that gave freedom only to those who had enough wealth to be free. It wasn't a price tag on one's freedom as for the *liberti* in Ancient Rome, it was a question of possibility, those who were free had the financial means to be as such, or to put it differently such system prevented those who would not have been able to financially sustain their freedom from being free. The fact that the possession of police power, which in this case consisted in the ability to command the animate and inanimate components of the household, was closely linked to the possession of wealth is of radical importance for grasping one of the main aspects of police power. Police power is the power to manage property.

In the roman world the figure of the householder was embodied by the *paterfamilias* because of the radical differences between Roman and Athenian institutions, the word householder comprehended a much larger slice of the general population in Rome than it did in Greece, the householder was the patriarchal figure at the head of the household no matter his social status, as long as he wasn't a slave, and there were *paterfamilias* from the coast or North Africa to northern Britain. The aspect of self-government that characterized the relations

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[2] Arendt, Hannah (1958), *The Human Condition*, The University of Chicago Press, pp. 26-27, quoted in Dubber (2005: 4).

between Athenian householders was not as present in the Roman world, but the systems were both structured on the binary distinction between the domain of the family, where the *paterfamilias* ruled with a quasi-absolute power, and the domain of the outside where the householders interacted between them according to the law. As explained by historian James Strachan-Davidson:

> "We must imagine a number of households, each united under its own paterfamilias. Inside the household the father is the sole judge. The relations of the household and its members to other households resemble … international concerns rather than transactions between individuals".[3]

The appellative "sole judge" is the key to understand roman contribution to police. Police power has already been defined "the power to manage the household" and this conception makes the householder appear as little more than an entrepreneur focused on maximizing its wealth. But this definition of police power cannot exist without the power to punish those who reject the paternal authority or rebel against it. The contribution of the Roman world to the evolution of police power is the codification of this power to punish in Roman Law. In the roman household the father was not allowed to punish all of his subjects, a word that will appear frequently from now on, with the same severity. Only slaves who were at the level of the inanimate were completely at the mercy of the householder. The members of the household who would have grown up to be free citizens themselves were protected from cruel and unjustified punishment. This concept is not different from the differences in treatment reserved to roman citizens when they were punished for their crimes. The *paterfamilias* was forbidden from punishing his family members without justification Markus Dirk Dubber (2005: 6) states:

> " a household head who maliciously harmed the members of the household forfeited his title; as no longer worthy of his position of responsibility, he also was no longer worthy of protection from the state from measures to discharge that responsibility".

The householder unrightfully harming his family members was harming the other householders, because he diminished the welfare of a household greater, albeit not yet fully institutionalized, and more powerful than his. When subject to limitations to his police power, here used as a synonym of power to manage according to the Blackstonian definition

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[3] Strachan-Davidson, James Leigh (1912), *Problems of the Roman Criminal Law*, Cornell University Library, quoted in Dubber (2005:6).

as it will often be used throughout this paper, he lost his status of *dominus* becoming part of a domus, the ruler became a subject himself. This idea of hierarchy of households and the concept of the limitation of the power of the householder will be of fundamental importance from now on.

1.3 Germanic Societies

The Germanic system was developed independently from the Greco-Roman one, despite the presence of considerable similarities between the two, and would become of the utmost importance for the formation of the various barbaric kingdoms that followed the end of the Roman Empire. The Germanic householder, who will be called chief from now on, was the leader of a household larger than the roman *familia*. The chief was the leader of a household which comprised his enlarged familial unit, all his relatives, and many slaves, animals and inanimate objects. The chiefs had a parliament where, as equals, they dealt with issues and, more interestingly, the resolved their legal disputes. This Germanic parliament was called *Thing*, this institution was admired in its function throughout history up to the point when the founding fathers looked at it when looking for inspiration for the soon-to be born United States. Thomas Jefferson would refer to this parliament between chiefs and say:" that happy system of our ancestors, the wisest and most perfect ever yet devised by the wit of man, as it stood before the 8th century"[4]. If Germanic society might have looked like a garden of Eden ruled through direct democracy from the chief's point of view, for the subjects it was not different from the condition of the household members in the Greco-Roman world. The self-government of the elite could only exist thanks to the police management of the rest. The concept which represented the power of the chief over his household was called *mund*. It was codified by the Franks who called it *munt* or *munduburdium* but it was a fundamental element in the legal systems of all Germanic societies. While *mund* will be analysed more thoroughly later in the chapter it is interesting to understand the mechanisms behind the settlement of disputes between householders. Chiefs were liable for both their actions and the actions of the members of their household, as there was very little difference between the two. While problems internal to the household were dealt with hastily thanks to the power of the chiefs over their subjects. When a subject damaged another chief's household

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[4] Dubber (2005: 9) quotes Jefferson to Pendleton, Aug.13, 1776, in *1 Jefferson Papers* 492 (Julian P. Boyd ed.1950), quoted in Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 122 [2d ed. 1998], Omohundro Inst. of Early Amer..

the question was much more complex and nuanced. In the latter case the chief had two possible possibilities, he could either surrender the offender to the damaged party and leave him to them to discipline or pay a *wergild*, a monetary sanction proportional to the damage that was done. The payment of the wergild was contemplated also if the chief was thought not to have distanced himself quickly enough from the offender. This practice shows, once again. that the household was considered nothing but an extension of the householder. He was liable for his subjects' actions because they were his actions. The *mund* represented the chief's power to police over his household and policing also meant protecting, the chief had the right and the obligation to preserve the peace that derived from his authority. All free men had their *mund* no matter their social status even a *ceorl*, a common free man, was given compensation for damage to its property as it was considered a violation of its household. In a society where the chiefs were at the top of the power hierarchy it was their duty to protect their households and their right to manage them. As the Germanic chief followed a logic similar to the roman *paterfamilias*, the police power of the Germanic world was a power to manage one's property and it mainly followed two axioms the maximation of profit, hence the nearly absolute power of the chief over the household, and the preservation of one's household, no longer because of legal limits posed by a higher authority as for the classical world but because of the chief's role as protector of the *mund*. In the centuries that followed the fall of the roman empire the Germanic tribes would merge their traditions with the roman institutions and a new society would arise in western Europe based on the feudal system. Because feudal lords were subject to the authority of the king their police power was limited to those that were effectively beneath them in the social hierarchy. This stratification of police power between lords of different status and, eventually, a king, who would become the only true householder, above everyone else is one the main steps in the passage from early police power to current police power. What happened in medieval society was little more than an enlargement of the chief's *mund*, which would eventually engulf all the householders but one. The householder's *mund* had become the king's *mund* and the preservation of the king's peace and the maximization of its wealth had become the law of the land. The nobles preserved the nearly absolute power to police derived from their status only when dealing with their subjects and continued to behave among them with the inter pares attitude employed by Germanic freemen, Greek citizens and roman paterfamilias but to the overseeing authority, in this case the king, they had become household, hence, remembering that there had always been difference in status between the members of the household, at their core they were more similar to serves than

freemen. The ultimate power to discipline at this time was held by the king, the monarch was a physical person whose household was the entirety of the kingdom, if in earlier instances of police power what limited the power of the individual householder were the laws or conventions decided by the householders in collegial institutions, in the Middle Ages there were only the household of the king and the king's peace. The idea of the king's peace, a *mund* extended to the entirety of the kingdom and of its members, is described by Pollock and Maitland as follows:

> "Breach of the king's peace was an act of personal disobedience, and a much graver matter than an ordinary breach of public order; it made the wrongdoer the king's enemy. The notion of the king's appears to have had two distinct origins. There were, first, the special sanctity of the king's house, which may be regarded as differing only in degree from that which Germanic usage attached everywhere to the homestead of a free man; and, secondly, the special protection of the king's attendants and servants, and other persons who he thought fit to place on the same footing".[5]

The most important concept is that the consequences of breaching the king's peace are the most radical and harsh consequences possible, breaching the king's peace, and becoming the king's enemy, meant being removed from the household. At this time the concept of outlawry would begin to become common and outlaws, being outside of the king's *mund*, were also exempted from that oversight of the household's well-being that had been a duty of the householder since the times of Athens. Becoming an outlaw meant becoming rightless and propertyless. Beside the disciplinary aspect of police power existed the management of the household and the best example of this side of police are the actions of William the conqueror after his conquest of Britain 1066. In 1085 the Normal ruler would send commissioners all over his newly conquered dominion to produce an accurate description of the population and the fiscal capabilities of his domain, the product of this inquiry was "The Domesday book". This fiscal register stood as the backbone for the economic policies that would be deployed in the following years. "The Domesday Book" differs from the register of a roman householder mainly in the quantity of information that it contains. The king wanted to exert his right of householder and, in order to do that, he needed accurate information on all subjects and objects the composed his household. For the first time,

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[5] Pollock, Frederick and Maitland, Frederic Willian (2d ed. 1898), *The History of English Law Before the Time of Edward I*, Vol. 1, Cambridge University Press, p. 45, quoted in Dubber (2005: 15).

thanks to union of the German *mund* and the classical world's *oikonomos*, the householder was moving from being the paterfamilias to the pater-patriae.

1.4 The medieval Kingdom

In the Middle Ages a series of measures would be adopted by the monarchs to ensure the preservation their power. One of the main differences between the power of law and of police is in the modes of application, in order to police one needs a power that is nearly absolute and the possibility to deal with little to no delay. This part of the chapter will focus on how the newly institutionalized supreme householder, the king, manages to obtain the power required to police in a household, the kingdom, incredibly vast and populated by an enormous variety of social realities. It has already been explained that the householder did not treat equally all the members of the household, but the medieval king didn't have to simply distinguish his family members from slaves, he had to police lords, who were householders in their own right, serves, who comprised his household as much as the other lords' household, and all the inhabitants of his kingdom. If sheer strength and the existence of intermediate householders were enough for the managing the general population that had always been object of police, the king needed a formal submission from the lords, which represented their official entrance in the sovereign's *mund*. Even though there existed a hierarchy of lords and many lords received the submission of other nobles, this part will focus mainly on the submission to the king because lords are similar to the chiefs of the German tribes, and the monarch is the more interesting figure being the supreme householder of householders. The submission happened through a precise ceremony, which could be found with few differences all over Europe and was sealed with the pronunciation of an oath from the submitter to his lord. Pavel Vinogradoff describes the general aspects of the ceremony were the bond between the lord and the household member was forged:

> "The relation is generally initiated by two acts: firstly the submission of the follower to his chief as symbolised by the former stretching out his folded hands which the latter receives in his own; secondly, an oath of fidelity by which the follower promised to support his lord and to be true and faithful to him in every respect. The corresponding duties of the lord were to afford protection to his followers and to keep them well".[6]

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[6] Vinogradoff, Paul (1913), "Foundations of Society", *Cambridge Medieval History*, Vol. 2, Cambridge University Press, pp. 630, 642, quoted in Dubber (2005: 18).

The subject accepted the protection of the lord in exchange for his absolute loyalty. The oath of loyalty of the Middle Ages is an example of the householder accepting to become household. The laws of the kings Alfred, Guthrum and Edward the elder, dating back to the tenth century contain the formula that was to be used when swearing fealty:

> "By the lord , before whom this relic is holy, I will be to ___ faithful and true, and love all that he loves, and shun all that he shuns, according to God's law, and according to the world's principles, and never, by will nor by force, by word nor by work, do ought of what is loathful to him; on condition that he keeps me as I am willing to deserve, and all that fulfil that our agreement was, when I to submitted and chose his will".[7]

By creating this social construct structured upon the exchange of freedom for protection the medieval king was able to obtain his nearly absolute power. The protection granted by the householder was double: he granted safety from harm and this coincided with the disciplinary aspect of police, and he granted financial well-being and, if possible, prosperity because of his role as manager of the household, of which all the lord who submitted immediately became part. This mutual relation of interest between the lord and he who submitted was the pillar on which medieval society was built, hence the betraying of one's lord was the most serious crime of all. The breach of one's fealty oath was considered the crime at the origin of all offenses, it constituted *felonia* and becoming a felon meant being subjected to worst of punishments. Because the relation was mutual also the lord could be charged with *felonia* but if on one side a breach of the oath of fealty implied the most gruesome and violent of punishments, on the other hand a lord charged with *felonia*, because he didn't manage his household properly, did not face real punishment, the subject who lamented of having been wrongfully mistreated, not protected or simply not cared for according to his oath was given back his freedom and freed from his oath. The reason behind the stark differences in punishment is the nature of police power itself. The farmer who rebelled against the lord was dangerous on a societal level, and had to be dealt with in a way that would dissuade others from challenging the standing order. The lord who mistreated his subject was still going against the social order, but the severity of his crime depended on the status of his subject and on the nature of the oath that bound them. Because the lord resided on a higher step than his subject there were fewer and fewer people who could police him, the higher he stood on the social hierarchy the less he was a subject. At the top of the

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[7] Quoted in Dubber (2005: 19).

hierarchy there was the king who had no one above him but God himself. Even if the relation between police power and the concept of punishment will be analysed more thoroughly in the next chapter is fundamental to understand that an enlargement of the *mund* could not exist without a more defensive use of police power.

The most severe breach of the oath of fealty was the killing of one's lord. If punishment post-facto sufficed in disciplining a subordinate who had committed a lesser crime and in restoring the social order, the disciplinary measures aimed at avoiding the killing of the householder had to be pre-emptive. The "Treason Act" of 1351 promulgated by king Edward the third of England gives a useful review of what was considered treason at the time and, more in general, what the supreme policer had to be wary for order to be maintained:

> "Whereas divers Opinions have been before this time [what case should adjudged Treason, and what not;] the King, at the Request of the Lords and of the Commons, hath made a Declaration in the Manner as hereafter followeth, that is to say, when a Man doth compass or imagine the Death of our lord the King, or of our Lady his [Wife] or of their eldest Son and Heir; or if a Man do violate the King's [Wife] or the King's eldest Daughter unmarried, or the Wife [of] the King's eldest Son and Heir; or if a Man do levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, or be adherent to the King's Enemies in his realm, giving to them Aid and comfort in the Realm, or elsewhere, and therefore be [proveably] attainted of open deed by [People] of their condition: And if a Man counterfeit the King's Great or Privy Seal, or his money; and if a Man bring false Money into this Realm, counterfeit to the Money of England, as the Money called Lushburgh, or other, like to the said Money of England, knowing the Money to be false, to merchandise or make Payment in Deceit of our said Lord the King and of his people; and if a Man slea the Chancellor, Treasurer, or the king's justices of the one bench or the other, Justices in Eyre, or Justices of Asise, and all other Justices assigned to hear and determine, being in their Places, doing their Offices: And it is to be understood, that in the Cases above rehearsed, [it] ought to be judged Treason which extends to our Lord the King, and his Royal Majesty: And of such Treason the Forfeiture of the Escheats pertaineth to our Sovereign Lord, as well of the Lands and Tenements holden of other, as of himself: And moreover there is another manner of Treason, that is to say, when a Servant slayeth his Master, or a Wife her Husband, or when a Man secular or religious slayeth his

prelate, to whom he oweth faith and obedience; and [such Manner of Treason giveth Forfeiture of escheats] to every Lord of his own Fee...".[8]

The only crimes that this charter lists that would nowadays be considered treason are the action of helping the enemies of the country and levying an army inside an army inside the country to fight against the governing authority. The other numerous crimes listed are part of the apparatus of protection needed by the supreme policer in order to fully enjoy his police power. The crimes considered treason are not only the ones against the physical person of the king. The list comprehends crimes against members of the family of the king who are important for the king's wealth, his son who is the heir and his unmarried daughter who is vital in diplomatic relation. Crimes against the functionaries who are the embodiment of the power of the king throughout the kingdom, which is ubiquitous and ever-present. And particular attention is given to the judges who represent the king's power to discipline. The list links to treason also several crimes connected to the other aspect of police power: the power to maximize the wealth of the household. It is treason to counterfeit the king's seal, fundamental for any measure of government, and to counterfeit coin and to deal with such money, as the control of coinage is maybe one of the most crucial powers of the policer after the enlargement of the *mund*. Then again a lot of emphasis is put on the concept of killing, as homicide of one's householder was the worst possible crimes, but if the killing of those who are below the king is an act of treason, the conceptualization of the king's and of his immediate family's death was treason. Because the worst possible bane for the order of things is the death of the supreme policer, hence to act after the crime is committed is too late the action must be pre-emptive and avoid the crime. When enlarged to a national level police becomes the art of prevention as much that of management and discipline. A secondary effect of the codification of treason in the legal system was a limitation of the king's power. The king would become unable to choose indiscriminately who was a traitor, this measure, which at first glance would seem in contrast with the figure of the absolute policer, is strictly linked to the dual bond on which the police relation is built: the duty of the householder not to be unjust with the members of his household who do not deserve it. Because of the variety of crimes that were considered treason at the time, the authorities would start to distinguish between high treason, plots against the king or his family and the actions still considered treason to this day, and petty treason, crimes not as serious as those previously cited. As High treason was to be prevented rather than dealt with the policer

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[8] Quoted in Dubber (2005: 22-23).

recurred to gruesome ritualized punishments that would discourage any aspiring traitor from following the footsteps of the felon. Crushing as violently as possible those who committed high treason would remain a staple practice of western tradition for several centuries. An average punishment for high treason is accurately described by Blackstone:

> "The punishment of high treason in general is very solemn and terrible.1. that the offender be drawn to the gallows, and not be carried or walk, though usually a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement.2. That he be hanged by the neck and then cut down alive.3. that his entrails be taken out and burned, while he is yet alive.4. That his head be cut off.5. That his body be divided into four parts.6. that his head and quarters be at the king's disposal.

> The King may, and often doth, discharge all the punishment, except beheading, especially where any of noble blood are attainted. For, beheading being part of the judgement, that may be executed, though all the rest be omitted at the king's command".[9] 27

Beside the enormous symbolic value of an execution turned into a show for the public, it is interesting that the king could eliminate parts of the sentence as acts of mercy. During the Middle Ages the policer, being the absolute policer or partial policers, had the power to grant amercements, to forgive the offender granting him a lesser punishment, this system was an inheritance of the Germanic *weregild*, and many times, as it was tradition for the householders, mercy was granted to those who stood higher on the social ladder. During the Middle Ages the king would obtain the power to police nations dealing with them as the roman paterfamilias would have dealt with his household, in this period the monarchs would develop the instruments needed for such an enormous task developing police power and bringing it closer to our current definition. After the age of feudalism the pater-patriae would have to focus more on the management of the household rather than on his personal safety and on establishing his authority.

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[9] Blackstone, William (1769), *Commentaries on the Laws of England*, Vol. 4, Clarendon Press, p. 75, quoted in Dubber (2005: 27).

1.5 Post-Feudal Europe

After the decline of feudalism, towards the end of the Middle Ages, the king would progressively engulf all the powers that, under the feudal system, were held by the nobility. Because the nobility coexisted with the monarch, and both were householders in their own right, a medieval king had absolute power to discipline because of his position above all the others but his power of management was limited by the existence of a constellation of lesser policers who acted out of their own interest, always respecting the oath of fealty that bound them to the king, policing their household. The disappearance of this smaller and partially autonomous policers would give to the monarch the possibility to fully enjoy both the disciplinary and economic sides of police power. Only after the end of the feudal lords the king would truly become the pater-patriae. This concept is very clearly expressed in this declaration of King James the first of England:

> " [by] the law of nature the King becomes a naturall father to all his Lieges at his Coronation. And as father of his fatherly duty is bound to care for nourishing education and vertuous government of his children even so is the King bound to care for all his subjects... As the kindly father ought to foresee all inconvenients and dangers that may arise towards his children, and though with the hazard of his own person, presse to prevent the same: So ought the King toward his people. As the Fathers wrath e correction upon any of his children, that offendeth, ought to be by a fatherly chastizment seasoned with pity, as long as there any hope of amendment in them: So ought the King towards any of his Lieges that offends in that measure... As to the other branch of this mutuall, and reciprock band, is the duty and allegeance, that lieges owe to their king".[10]

King James' statement perfectly resumes the position of the king in the post-feudal era and it does so through a thorough description of his police power. With the disappearance of the feudal nobility the king becomes effectively the only authority able to police and he is free to embrace his role of father of the nation. As stated by James the first the duties of a king become much more similar to those of parents than to the cold defensive figure that was the medieval monarch. As the authority of the policer becomes stronger the manifestations of police change. In this period prisons would be created to deal with those who committed lesser crimes and policing would progressively influence more aspects of the lives of the people. Police power would be employed to affect nearly all aspects of the public life of the

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[10] Quoted in Dubber (2005: 46).

citizens. The householders of the classical world were economists, the German chiefs were economists and judges and the medieval monarch was a German chief whose sphere of influence comprised an entire kingdom. The king after the middle-ages was much more. The supreme policer was the ultimate judge, an economist, a lawmaker and a teacher. The householder was now charged with the maintenance of the moral health of the nation and, despite the how hard such task is, this use of police power is one of the main characteristics of modern police. Police power would be used, after the end of the feudal system and in particular after the Black Plague, to force all the subjects of the king to work for a living. Such result would be obtained declaring that vagrancy was a felony and as such it was punishable by death. Both Henry the eight and Elizabeth the first would emanate laws against wanderers and gypsies who wouldn't directly contribute to the wealth of the kingdom. To fully comprehend how police power evolved from the Middle Ages is useful to look at Blackstone's, whose view of police will be thoroughly analysed in the next chapter, list of noncapital police offenses:

> "1. various acts or omissions (such as "annoyances in highways, bridges, and public rivers, by rendering the same inconvenient or dangerous to pass", " the keeping of hogs in any city or market town," lotteries, and "the making and selling of fireworks and squibs, or throwing the about in any street"),2. various persons ("[e]aves droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse" and the "common scold, communis rixatrix, (for our law-latin confines it to the feminine gender)"), and 3. various inanimate objects, most particularly buildings ("disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage-plays unlicensed, booths and stages for rope-dancers, mountebanks and the like" and the cottages "being harbours for thieves and other idle dissolute persons")".[11]

All the offenses Blackstone lists have one thing in common: preventing them grants a lot more benefits than punishing them. The pre-emptive character of police, that was of radical importance in medieval times for the survival itself of the social hierarchy, becomes the main criteria the householder applies when managing the household. By looking at these offenses one truly understands how pervasive police power becomes after the Middle Ages. With the supreme policer obtaining a truly absolute authority he becomes the custodian of public health, the watcher of moral health, the guardian of public safety, the giver of prosperity, the keeper of public safety, the administrator of justice or, to narrow it to one

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[11] Quoted in Dubber (2005: 11).

definition, the father of the nation. The amount of power the supreme policer obtained was of radical importance in the processes of creation of the modern national state. As his powers grow the King and the state would progressively overlap up the point when, because of his absolute police power, the King becomes the state itself. In the 17th century* states, a term interchangeable with King at this point, would start to interact among them as equals applying the principal of *superiorem non recognosciens*. States interacted on an inter pares relation as the German chiefs or the classical world family leaders would. The Middle Ages had turned police power into the only power in the government of society. But thanks to the enlargement of police competences and the accumulation of police power in the hands of a single householder charged with managing the entirety of the nation the duality that police power needs in order to be called as such would appear. After the Middle Ages the world would become the parliament of supreme householder. Only with the enlightenment the idea that government had to derive from a collegial decision-making process. But even after the arrival of democracy police power would survive in western political science and retain its importance as an instrument for governments. A statement from justice Story shows how confusing it would become for men of the enlightenment to think about the police power of Kings:

> "I confess that it never occurred to me until this trial that any person in this country ever dreamed of the existence of such an arbitrary power. This is emphatically of government of laws not of men".[12]

But the power that was born as the father's authority over his family and had slowly become the power of the king over his kingdom is still, to this day, an essential part of the powers of western governments.

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[12] Quoted in Dubber (2005: 32).

Chapter 2. The Concept of Police Power

2.1 Introduction

To Grasp the role of police power in modern governmental sciences it is essential to look at the opinions of various political thinkers about the subject. After the first chapter's charting of the evolution of police power, this second chapter will describe the main conceptualizations of police power itself employing the views of various thinkers. In many of the cases cited in the previous chapter, the householder never referred to himself as policer or to his power as police power. The first chapter was about the evolution of police power in history, this chapter will be an analysis of the nature of police power in governmental sciences. The concept of a branch of the powers of the ruling authority consisting in a power to police dates back to the seventeenth century and continues to exist up to the current times. This chapter, whose main sources will be Michel Foucault (2007) and Markus Dirk Dubber (2005) because of his analysis of the works of William Blackstone, will consist in a tripartite analysis of the concept of police power. In the first part police power will be analysed as the power to manage the economy. In the second part police power will be analysed in its role of safekeeper of morals and in the third part police power will be analysed as the power to grant peace and security.

2.2 The Power to Police the Economy

The policing of the economy has two main faces. The management of ordinary things needed to grant a proper functioning of the economic system, a role clearly derived from the powers of the householder figure, and the prevention of all crises which might harm the economy or the wealth of the citizens. William Blackstone, one the most influential jurists of the eighteenth century, considers this aspect of fundamental importance. Blackstone could be considered one of the fathers of Police power, as a concept, and his theory of police is built on the idea of the king *pater-patriae,* whose role is to take care of his subjects as a father would take care of his children. Even though Blackstone will have a central role in the second part of the chapter the power to police the economy is clearly Blackstonian in nature.

Adam Smith in his "lecture on Justice, Police, Revenue and Arms" delivered in Scotland between the 1750s and the early 1760s would explain the difference between law and police as follows:

> "Jurisprudence is the theory of the general principles of law and government. The four great objects of law are Justice, Police, Revenue and Arms. The object of justice is the security from injury and it is the foundation of civil government. The objects of police are the cheapness of commodities, public security and cleanliness".[13]

The cheapness of the commodities is not obtained simply through price control. The policer manages the economy through the creation of an environment where trade is possible and through the conservation of such environment. The swiss jurist Emerich De Vattel in his book "The Law of nations" perfectly resumes the relation existing between the policer and his subjects:

> "It must also be observed, that individuals are not free in the oeconomy or government of their affairs as not to be subject to the regulations of polity, made by the sovereign. For instance, if vines are greatly multiplied in a country, which is in want of corn, the sovereign may forbid the planting of the vine in fields proper for tillage, for here the public welfare and the safety of the state are concerned. When a reason of such importance re- quires it, the sovereign, or the magistrate, may oblige an individual to sell all the provisions that are more than sufficient for the subsistence of his family, and fix the price. The public authority may and ought to hinder monopolies and suppress all practices tending to raise the price of provisions".[14]

Police power in the economy is the manifestation of the paternal role of the policer, who must take care of his enlarged family and grant an adequate amount of prosperity. Another very interesting opinion on the subject is expressed by Samuel Pufendorf in his book "The Law of Nature and Nations":

> "But now this Power we are here speaking of, may, I think, be reduc'd to three Heads: First, to the Right of making Laws to direct such a Proportion in the Use and

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[13]Smith, Adam (1978), *Juris Prudence or Notes from the Lectures on Justice, Police, Revenue, and arms delivered in the university of Glasgow by Adam Smith Professor of Moral Philosophy, in Lecture on Jurisprudence* (R.L. Meed, D.D. Raphael, and P.G. Stein eds.), pp. 396, 398, quoted in Dubber (2005: 63).
[14] De Vattel, Emerich (1834), Le Droit des Gens, ou Principes de la Loi Naturelle, Appliques à la Conduite et aux Affaires des Nations et des Souverains [The Law of Nations], Vol. I, (Joseph Chitty trans., Sweet et al. eds.), p. 104, quoted in Legarre, Santiago (2007), *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L., pp. 754-755.

Consumption of certain Goods and Commodities, as the State of the Commonwealth requires. Secondly, to the Right of levy- ing Taxes. Thirdly, to the Exercise of the Transcendental Propriety. To the first Head we may reduce all Sumptuary Laws, or such as prescribe Bounds to extravagant unnecessary Expenses, which would, in Course of Time, be the Ruin of private Families, and, in Consequence, weaken the Commonwealth itself, by carrying the publick Money abroad into foreign Countries; whither the Humour or Vanity of Luxury and Waste generally runs. Besides, another Inconvenience to be prevented by such Laws is this, That they squander away their Fortunes extravagantly, make them- selves incapable of serving the Publick ....To this Head, also, may be reduced Laws against Gaming, and Prodigality ....And further, under this Head we may rank all Laws that determine the Rates and Qualities of Possessions and Estates ....And we may further reduce under this Head all Laws which determine the Quantity and Measures of Grants and Legacies ....As, also, certain Laws that forbid certain Subjects to possess certain Kinds of Goods.... Moreover, Laws against idle and lazy People".[15]

These two texts would be more than sufficient in explaining the nature of the involvement of the policer in the economy. The authority, term that from hence forth will substitute king or householder, must make sure that the gears of the economy function properly and it does so for two reasons: firstly because of the nature of the relation between household and householder discussed at length in the first chapter, and secondly because it has the power to do so. The most interesting element about the theories of Pufendorf, Vettel and Blackstone is the how chronological proximity of their formulation. These three authors can be considered the fathers of police power as a concept. And the element they all share is that, to understand the nature of the power of the authority in modern society, they looked at the management of the economy and at the presence of police in that context.

After having seen the role of police power in the standard management of the economy attention must be given to the other aspect of economic policing, that of crises prevention. The thinker who thoroughly analysed this concept is Michel Foucault. Because of his adoption, due to his proximity to our times, of a viewpoint more focused on society itself and on the relations between different social groups. Foucault would link the power to prevent economic crises to the maintenance of the social order. In his book "Security,

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[15] Pufendorf, Samuel (1749), *The Law of Nature and Nations: or, a General System of the Most Important Principles of Morality, Jurisprudence, and Politics* (Basil Ken- Net Trans., London, 5th Ed. 1749), (1st Ed. 1672), pp. 827-828, quoted in Legarre (2007: 756).

Territory and Population" he takes as an example the actions of the authority in order to prevent famines and says:

> "This system is basically an anti-scarcity system, since what are these prohibitions and obstacles intended to achieve? On the one hand, all the grain will be put on the market as quickly as possible. [With grain] put on the market as quickly as possible, the phenomenon of scarcity will be relatively limited, and what is more the prohibition of export, hoarding, and price rises will prevent the thing that is most feared: prices racing out of control in the towns and the people in revolt".[16]

By summing up the views that have been cited in this part,. one has a clear understanding of role police power has when dealing with economic affairs. Even though many concepts expressed about the ordinary management of the economy might result outdated or, more generally, out of touch with the current institutional reality. It suffices not to think about the source of such interventions as a single all-powerful individual, but as a governmental organization and these intuitions become much more realistic and practical, examples of modern instances of deployment of police power will be the bulk of half of the next chapter. The policer when dealing with economic issues is not far from the figure of the roman *paterfamilias*. In the first chapter we have seen how the root of the power of the policer was the *do ut des* relation he had with his subjects. As the centuries went on and thinkers started to formalize police power into a philosophical concept they understood that police power in economic relation is little more than the relation of the householder towards the household.

2.3 The Power to Police Morals

The power to police morals is an aspect of police power that progressively lost its centrality as time progressed. Policing of morality is the most Blackstonian aspect of the three we will discuss in this chapter. The authority of policing the morality of the population directly stems from the idea that the king, as father of the nation, must maintain a fatherly behaviour towards his subjects. The nature of this power is perfectly described by William Blackstone in his collection of volumes "Commentaries on the Laws of England:

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[16] Foucault, Michel (2007), *Security, Territory, Population: Lectures at the College de France 1977-1978,* (Michel Senellart ed.), Palgrave Macmillan, p. 54.

"The public police and the oeconomy [,i.e.,] 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 situations".

The policing has a hybrid goal, as the effects of moral police power impact the economic dimension as well as the security one. The most important word employed by Blackstone is "decent". The role of police power in relation to public morality is to facilitate the creation of "decent" citizens. By moulding the citizen's values the authority can promote certain behaviours. The creation of a moral system founded on axioms that are related to the supreme policer's view for his household and that facilitate the success of his plans is the infrastructure that permits to police power to work. In earlier societal models moral policing was of relative importance because of the small number that composed the household, the focus was on the education that was given to members of the household who held a higher status, or, more generally, moral policing in earlier households was nurturing future householders. In the national state and even in the enlarged household created starting from the Middle Ages. Moral policing was one of the only ways to allow the enlarged household to function properly. Because of the historical development of western culture is hard for a contemporary man to imagine a society built upon imposed morals and structured so that those who strand from the proper moral path are punished. But, as for economic policing, moral policing did not disappear. It adjusted in size and became more subtle. Monogamy is an example of moral policing that survived from early policing. The conservation of the familial unit is of radical importance for the authority to ensure that the economy is able to perform at its best and for the youth to integrate in the society with a conception of which behaviours are "decent" and which aren't. Moral policing is the best way to preserve public peace and well-being. In this passage William Blackstone explains the scope of moral policing:

"Under the general words of this expression, that be not of good fame, it is holden that a man may be bound to his good behaviour for causes of scandal, contra bonos mores, as well as contra pacem; as, for haunting bawdy houses with women of bad fame; or of keeping such women in his own house; or for words tending to scandalize the government; or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such keep

suspicious company, or are reported to be pilferers or robbers; as such as sleep in the day, and wake in the night; common drunkards; whoremasters; the putative father of bastards; cheats; idle vagabonds; and other persons, whose misbehaviour may reasonably bring them within the general words of the statute".[17]

Blackstone uses the expression "*contra bonos mores*" (against good manners) and it shows that, those who codified modern police power, considered the policing of morals not an act aimed specifically citizen but a way to preserve the social order and moral pillars on which it was built. He then says "*contra pacem*" (against peace) showing the narrow link between the policing of morals and security. This connection is the demonstration of another characteristic of moral policing because it shows that the policing of morals can only be pre-emptive. The goals of moral policing are obtainable only if policing is employed before a crisis happens. Because of its central role in the balance of the macro-household policing of moral was equal across the financial. Those who were subject to the majority of the restrictions where the lower classes. And Markus Dirk Dubber perfectly explained this concept when analysing the police offenses that Blackstone referred to when talking about "gaming" statutes:

> ""Gaming" statutes too concerned themselves with status and station. Their central concern-apart from some gentle reminders to gentleman about the dangers of compulsive gambling- was to eliminate the treat any sort of amusement posed to public police, by "promot[ing] public idleness, theft, and debauchery among those of a lower class". Based on this inchoate idleness theory, gaming statutes were designed "to restrain this pernicious vice among the inferior sort of people". So we find a statute from the time of Henry VIII."prohibit[ing] to all but gentlemen the games of tennis, cards, dices, bowls and other unlawful diversions there specified, unless in the time of Christmas". People of "the inferior sort" were not to gamble because it kept them from contributing to the public welfare through their labor both directly, as they could make more productive use of their time, and indirectly, by plunging them into the abyss of a debauched lifestyle. Plus, since gaming was acceptable for gentleman, but not for other, playing tennis by itself amounted to trying to pass for a gentleman, a violation of the familial order akin to the excessive dress or diet polices by the sumptuary or by the prohibitions against counterfeiting or fraudulent marriages".[18]

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[17] Blackstone (1769: 253), quoted in Dubber (2005:54).
[18] Dubber (2005: 57).

Moral policing could be resumed in the directive: the people must not strand from the right path in order to work and remain honest. And, of course, the one to decide which path is the right one would be the supreme policer.

In conclusion it can be said that moral policing is the hardest kind of police to define as an isolated concept but shows it all of its importance when linked to the two other aspects of police. Moral police is the most Blackstonian because it is founded upon the idea that the authority must behave fatherly towards his subject. The aim of moral policing is the creation of the condition that permit to society to function with as little problems as possible. Moral policing is a form of pre-emptive police applied to the population, especially on its poorer members, in order to create citizen who will behave accordingly to the rules of the nation and who will live mindful of the public police. Even though modern examples of police power usage will be the bulk of the second half of the chapter, China's law that limits the amount of time that minors are allowed to spend playing video games is the perfect example of moral policing. China employs such stark measure as they want to avoid, hence the connection with the pre-emptive character of police, that their youth grow up losing the values needed in order to make the economy flourish, hence the connection with the aims of moral police.

2.4 The Power to Police Society

This is undoubtedly the broadest and most important conception of police. The idea of policing as an instrument of appeasement through punishment and restriction is at the base of many modern governmental institutions. This part of the chapter will be tripartite: the first part will consist in an comparison between the concepts of law and police, the second part will analyse the role of punishment in the application of police to security and the third part will be explain the difference of policing of security and offenses to police

An analysis of police as a disciplinary power cannot be undertaken without an understanding of where police and law stand in modern society. Law and police are the two instruments in a state's arsenal for the maintenance of public order and to ensure that its authority is respected. But police acts where law is limited and enjoys the strength of not being limited by the natural characteristics of law in a democratic state. One of the most important difference is the origin of these instruments. As we have extensively proven in the first chapter the difference between the origin of law and that of police is the involvement of those who will be subjected to the law in the legislative process. Law, most importantly law

in democratic countries, is a product of collegial decisions undertaken by individuals who share the same rights, who are not influenced by differences in status amidst them, as it was for the *thing* or for the collegial organs of Athens, and who, and this is a recent yet fundamental development, stand in those collegial organs as elected representatives of all of the inhabitants of a nation. Police is instead a product of powers that are not influenced by the democratic process and which ignore most of the boundaries that are imposed to the legislative process. The second difference, not less important than the first, is in the aim of these two instruments. Law serves the purpose of describing what cannot be done in order to make the punishment of those actions a consequence codified in the legal order. The focus when making law is on the reaction as it only applies *post-facto.* Police is instead the art of prevention. As we have seen in the previous parts of this chapter police, when applied to society with clear objectives in mind, serves the purpose of building dams that will eventually prevent simple offences from turning into floods of crime and societal disorder. As stated by Michel Foucault in his collection of lectures "Security, Territory, Population":

> "In other words, order is to be established by taking the point of view of disorder and analyzing it with increasing subtly, that is to say, order is what remains. Order is what remains when everything that is prohibited has in fact been prevented. I think this negative thought and technique is typical of a legal code".[19]

It must be said that there is one compartment of law which is strictly linked to police and that might even be the evolution of certain aspects of earlier police into modern legal systems. Such compartment is criminal law because, as police, it is much more useful to avoid such offenses than to remedy to them. The way in which the authority is able to prevent offenses and to preserve public police is through an enormous attention given to punishments. In fact police could be called the science of punishments as much as the art of prevention. In the first chapter it was described how the monarch had to deploy harsh and articulated punishments in order to maintain its power and the social order. From a Blackstonian prospective the deployment of violent measures as an instrument of discipline was not different from a father slapping his son to teach him a lesson. Markus Dirk dubber explains how one of the most importance manifestations of police is the creation of normalized prisons, which would work as houses of correction for citizen recalcitrant to accept or conform to the social and legal order imposed by the authority. One practice that

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[19] Foucault (2007: 68).

remained common in prisons for many years was whipping. Whipping, of all disciplinary measures, is the best one to represent the role of punishments in policing society. It is true that almost everywhere rules were imposed that limited the number of whippings and gave some directives to executioners as to when they should stop. But the goal of whipping is both to hurt and humiliate the subject who gets punished, the process itself serves as a reminder of the difference in status between the executioner and the prisoner. The Texas supreme court in a ruling in 1851stated:" among all the nations of civilized man, from the earliest stages, the infliction of stripes has been more degrading than death itself", and this concept of punishment and humiliation being complemental is the element that grants to police its pre-emptive nature. Policing of security is possible if some aspects of prisons and of punishment in prison are taken and enlarged to the micro-household of the nation as explained by Markus Dirk Dubber.

> " The analogy between the household and the prison, and between household discipline and prison discipline, becomes clear if we see the prison as a supplementary household that picks up where the traditional household leaves off. As such, prisons appear as an initially rather modest, and eventually terribly ambitious, attempt by the governing authority to discharge the responsibility that came with transforming the entire state into a single household under central control, by the king and the later by the state. Now that the very purpose of prison was to correct, where else might one correct the recalcitrant but in a *house* of correction? And what was more natural than to use to use the same correctional tools that had always been available to the master of the house?

> But whipping was not confined to the prison any more than the prison was the only means of public discipline. Corporal punishment naturally appeared wherever the state asserted itself as the macro household and its head as the macro householder. In the household of the state, after all, not only prison inmates were in need of correction. They formed a small, and at the beginning rather insignificant, portion of the mass household which the state had taken upon himself to discipline".[20]

Because police is focused on avoiding crimes instead of reacting to them the punishments for violations of the legal codes are lectures aimed at discouraging the criminal, and those who assist to the punishment, from perpetuating such actions a second time. The disciplinary aspect of policing of security is an example of forced policing of morals. It is also useful to differentiate between the policing of society aimed at the maintenance of order and security

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[20] Dubber (2005: 34).

and offenses against police. Security policing is a weapon of the central authority to maintain order and social peace which origins through a process parallel to law and which aims at preventing crimes and dangerous situations through limitations to freedoms and structured punishments. Police offenses were minor offenses that were distinguished from criminal offenses and were useful as they marked the boundaries of acceptable behavior. It might be said that police offenses are more strictly linked to the two aspects of police power previously discussed in this chapter. The difference between criminal offenses and police offenses is perfectly by Ernst Freund who says:

> "There is however a difference between police legislation and criminal legislation which is popularly well understood and which is not without legal and constitutional significance. The peculiar province of criminal law is the punishment of acts intrinsically vicious, evil, and condemned by social sentiment; the province of the police is the enforcement of merely conventional restraints, so that in the absence of positive legislative action, there would be no possible offense. The difference here referred to roughly corresponds to that between misdemeanors and felonies or infamous crimes, or perhaps still more to that between *mala prohibita* and *mala in se*".[21]

It is important to understand that, even though police offenses stem from police power, they are two separate things. The police power to manage security, hence order and peace inside society, cannot simply be limited to a list of offenses. The power to police society is the most important aspect of modern police power. It is the power of the state to swiftly act in a dimension parallel to the democratic law-making process to deal with internal threats. The reason why it is pre-emptive is because the only way to deal with threats is to anticipate and avoid their consequences. Security policing achieves its goals through quick stark action, through extensive limitations to general freedom and, more importantly, through the symbolic and didactic value of punishment. Security policing is undoubtedly the most important aspect of modern police powers. Firstly because many of his mechanism are based on the fundamental aspects of human nature, hence they are timeless. Secondly because it is the most valid instrument in the hands of governments to deal with critical situations.

This chapter focused on the analysis of the three faces of modern police: the economic one, moral policing and, thirdly, policing of security. Even though all the aspects share the pre-emptive character and some aspects of the process needed to deploy them. Each face

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[21] Freund, Ernst (1904), *The Police Power: Public Policy and Constitutional Rights,* The University of Chicago Press, pp. 21-22, quoted in Dubber (2005: 129).

represents an aspect of the possibilities of direct intervention of modern governments in different areas of society. If one side only, the third aspect, remains a vital instrument in the hands of governmental institutions because of its universal value, the first two, Blackstonian in nature, have acquired new dimensions following the liberal-democratic revolution, still remaining fundamental powers in the hands of the authority for the management of the macro-household which is the nation.

Chapter 3: Police Across the Atlantic

3.1 Introduction

This last chapter will analyze the differences in the processes of integration of modern police power in the United States and in European nations and will give examples of the application of police power in these two contexts. After the last two chapter described the historical evolution of police power and the main aspects of its current conception, this chapter will serve the purpose of tracing the last steps of police power's integration in modern institutions and will later show recent applications of police power that will prove the central role that police has in nowadays governmental sciences. This chapter will be divided in three parts. The first part will analyze how the newborn American republic integrated police power in its institution and the main source will Markus Dirk Dubber's book "The Police Power" (2005). The second part will analyze the integration of police power in European democracies and various sources will be employed for this analysis. The third part will consist in an analysis of the Patriot Act as an application of police power, the various notions explained in earlier chapters will be employed to do so, and in a review of the main measure deployed by the Italian government in the containment of Covid-19's spread analyzing it as measure of police.

3.2 Police Power in American Institutions

The integration of police power in the newborn American Republic is not as intuitive as it might seem. After they declared their independence in 1776 and achieved victory over the British forces in 1783 the founding fathers had to create a nation from scratch. The problem about police power was that its nature, as it was conceptualized at the time, was clearly in opposition to the values of the American Revolution. The United States used to be British colonies and as such they were used to British law and they were familiar only with the British administrative system. The father of police in the British tradition is undoubtedly William Blackstone, who has been extensively analyzed in previous chapters, and the main point of police power according to William Blackstone was its origin: Police Power was the power of the king to behave like a father. Hence the problem that the founding fathers faced was the codification of a royal power in the institutions of a nation that was born thanks to a war against monarchy. Here the nature of police would be the solution as, no matter the

codification, there can be no ruling without police hence the founding fathers had no trouble in obtaining all the competences of police and adapting them to the newborn Republic's institutions. Police power had existed in America as the king's power and the main effect, from an external standpoint, upon the citizens was the belonging to an ulterior household above them. The most important form of police that the colonists were subject to was the control of the supreme authority aimed at avoiding high treason and a certain degree of economic police, from which stemmed some of the causes of the revolutionary war, that is common for colonial territories. If one side the Americans were used to being household, condition that changed as they freed themselves from English rule with the Revolutionary War, they were very familiar with the position of the householder. The first colonial towns founded by the pilgrims in North America were run through police and functioned thanks to very strict behavioral codes that had to be respected by all the members of the communities. But the most important place where the Americans learnt how to behave as householder where the big plantations, at the common in all the colonies, that employed slaves as a workforce. Plantation management was police power at its best. There is case, employed by Markus Dirk Dubber to show how important police power was in plantation management, in colonial Maryland, where four servants were sentenced to receive thirty lashes, the employment of the whip is typical of measures of police as explained in chapter two, because they had complained to the official authorities that their master would not treat the properly. Here the judge would intervene and reduce the punishment, deploying the amercement power that was typical of medieval kings, and the servants were forced to apologize through a specific ceremony very similar to the fealty oath of medieval vassals:

> "Kneeling before the judges of the provincial court, they begged their master, Mr. Preston, and the court to forgive them "for their former misdemeanors" and promised obedience in the future. In view of this humble attitude the members of the court declared that they would suspend the sentence of the whipping for the present, but at the same time they warned the four servants that they must be on their good behavior towards their master "ever hereafter"".[22]

Because the Americans were used to manifestations of police power in practice what happened in the United States was the first example of modern republican police power. The supreme policer was no longer an individual who stood above all others it was simply

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[22] Dubber (2005: 30).

a class of citizens who recreated the contraposition of the two dimensions of society that already existed in the Classical World. In the United States many householders, as for earlier police power, would discuss as equals to manage the common household and would enjoy enormous powers in the management of their household. Because this model was not applicable to a modern nation America would find its absolute policer in its government and in the rule of law, Markus Dirk Dubber proves this by quoting the Pennsylvania constitution of 1776 and says:

> "But the people of Pennsylvania not only announced that they no longer would be policed by the King of England. They also made clear that the departure from the ultimate policer would not mean the departure of police. That the power of police was intimately connected with the king's prerogative didn't cause much of a problem, and certainly no more of a problem than the transfer of any other aspect of the royal prerogative, i.e., the authority enjoyed by the king as father of the kingdom family. Now that the king was gone, his prerogative was simply transferred onto the new sovereign: "the people of this state." In the context of police, Thomas Paine's famous answer to the question "Where… is the King of America?", that " in America THE LAW IS THE KING", meant that the prerogative police power of one man, the king, now belonged to a group of men, the people, who has assumed the power to police".[23]

And because the people are the engine of the legislative process through their democratic participation, the word "law" Thomas Paine's sentence could be changed into "people". The solution to the difficulties of codifying a concept alien to the principles that the newborn Republic was funded upon was an integration of the population in the lawmaking process, making them, even if only namely, the ultimate policer. After having understood the progress of the theoretical integration of police power in the United States is important to observe some cases of applications of police powers in order to understand the practical integration of police. Because the application of police measures that, contrary to law, are not employed as a reaction to a crime but as preemptive measures was controversial in American society the task to justify police measures in everyday law practice fell upon the courts. There are two cases that are considered the more influential in the debate on police. The case of *Commonwealth v. Alger* because of the written opinion of Chief Justice Shaw. And the case of *Spalding v. Preston* thanks to the opinion of Judge Redfield about the case. In the case of Alger a Bostonian had built a wharf in Boston harbor violating Massachusetts

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[23] Dubber (2005: 85).

that forbid the construction of wharfs or piers in that area, but respecting the earlier statutes that were employed in the construction of structures close to the water. The discussions about the Alger case and, more importantly, the opinion expressed by Chief Justice Shaw would go on to shape American police power. Chief justice Shaw had to justify the power of the government to regulate private property in the public interest. In his opinion he would describe three origins of this power: the Royal Prerogative, the Massachusetts constitution and "the nature of well-ordered civil society". While the first two points are clear expressions of the process of integration described earlier the third part is the most interesting to analyze in the context of the application of police. He would base his statement on the idea that the Alger case was a clear example of contrast between *jus privatum,* Alger and his property, and *jus publicum*, the rules and well-being of the state. And when this conflict arises *jus publicum* is hierarchically superior to *jus privatum.* In his opinion Shaw does not go out of his way to give theoretical justifications for the deployment of police measures from the authorities. In his writing the power of the state to intervene on private property seems almost tautological. He describes Police Power as a *conditio sine qua non* for every organ of the state willing to deploy any measure or form of control. Through his writing Shaw had single-handedly justified police power and its preemptive nature in the American legal system. After Shaw's contribution Judge Redfield, in the case of *Spalding v. Preston*, would complete the endeavor of welding police power in American legal tradition. In the case of Spalding a sheriff had seized silver coins that had all the characteristics for being counterfeited into actual dollars. The sheriff was sued by the owners of the coins as statutory law only granted him the power to seize money and counterfeiting tools, there was no mention of coins in the law. The court would rule in favor of the sheriff and Judge Redfield would write:

> "[T]he [sheriff's] authority must rest merely upon general grounds of preventive justice, aside of any statute whatever upon the subject. All governments, upon the most obvious principles of necessity, exercise more or less of preventive force, in regard to all subjects coming under their cognizance and control. This is in analogy to the conduct of individuals, and, indeed, of all in normal existence, Many of the instincts of animals exhibit their most astonishing developments in fleeing from the elements, from disease and from death, at its most distant sound long before the minutest symptom appears to rational natures. This is the great secret of personal enterprise and success. So, too, in the history of civil governments prevention is more important and far more available than cure. All sanitary cordons and preventive regulations, everything in regard to the

police of our cities and large towns, indeed prohibitions of lotteries, gambling houses, brothels and disorderly taverns, whether done by general statutes, or mere police regulations, all come under the right of preventing more serious injuries by stifling the fountains of evil".[24]

This statement perfectly resumes the role that police power would embody in the American legal system for the years to come. In this part we have seen how the Americans had to adapt the concept of police power to their newly found republican values. But they did so starting from a strong familiarity with the concepts of police and police power. And it was also explained how the judges integrated police power, in its preemptive and coercive functions, in common legal practice.

3.3 Police Power in European Institutions

The integration of police power in the institutions of Western Europe is much simpler and more linear than that of its American counterpart. In Europe there would be no need to find theoretical justifications for police power as an instrument of the state or for the aspects or for it to be employed in common jurisprudence. The various conceptions of the great philosophers of the eighteenth century, quoted in the previous chapter, would be sufficient in European tradition to justify police power's presence. If the United States needed to create the institutions of an almost completely unheard-of form government. The adaptation of police power in European institutions simply consisted in naming a power dynamic that had existed for two millennia and that would have continued to exist in the foreseeable future. Norms of police might have been different between European countries. But the police power of the state was not. Government through police power was the standard and remained at the apex of the governmental hierarchy until modern democracy started to become a sustainable form of government. But the process that police power underwent following the birth of democracy was not a radical change of function or composition, the only thing that changed for police power was its justification. As Europe begun to turn into the land of democracy police power underwent the shift in sources that it had already undergone in America. The source was no longer and individual who stood above all others and acted as supreme policer, police power was in the hands of governments elected democratically. As in America a century earlier the king had become "we the people". But

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[24] *Spalding v. Preston* (1848)*, 21 Vt. 9, pp. 12-13, quoted in Dubber (2005: 116).

the functional aspect of police power needed little integration in European practice as they were already perfectly integrated. The most interesting aspect of European police power is its necessary transformation as the European Union progressively integrated larger portions of sovereignty. At the end of the first chapter was proposed the idea that the internal supremacy granted by the hierarchization of domestic police power and by its absolutist nature had an important role in the creation of the international community. A community comparable to the Germanic thing were each monarch, who represented his nation, acted as a householder who stood among his equals. The European Union is an international organization which now comprises twenty-seven European countries and manages certain policy areas which the states, when signing the treaties that mark the entry in the union, have given up sovereignty of. The main principle that grants to the European Union its unique condition if compared to other international organizations is that of the supremacy of European law. For member states primary, and to a certain degree secondary, European law have no need to be integrated in the national system by the national parliaments and grant to the citizens of the state rights that cannot be denied in the national courts. There is a certain list of policy areas, most importantly the common market, where the European authorities have nearly unlimited power. When the Union took its first form, it was a commercial union between six European states who, in the aftermath of the Second World War, had agreed to create an external entity endowed with the task of controlling the trade of the two goods which are the most important for states preparing to go to war: steel and coal. The ECSC (European Coal and Steel Community) was created in 1951 with the signature of the treaty of Paris. This international organization would progressively evolve and grow both in membership and competences. As of now certain competences of the European Union are considered exclusive competences and, in those cases, European institutions enjoy absolute power to deploy legislation and to maintain the conditions needed for their goals to be attained. The case that has given to the judiciary organ of the European Union the possibility to clarify the position of the union in the hierarchy that had been created as the member states had signed the foundational treaties is the infamous *Van Gen den Loos* case. A postal company, which imported chemicals from West Germany, would have been forced to pay higher duties because of internal regulations of the BENELUX countries, and objected said measure saying that it did not respect the provisions of European Treaties. To thoroughly comprehend the magnitude that the supremacy of European has for member states is useful to observe the judgement of the ECJ (European Court of Justice) in the previously cited case:

"The objective of the E[U] Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the [Union], implies that this treaty is more than an agreement which merely creates mutual obligations between the contracting States. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. it is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. furthermore, it must be noted that the nationals of the States brought together in the [Union] are called upon to cooperate in the functioning of this [Union] through the intermediary of the European Parliament and the Economic and Social Committee. In addition the task assigned to the Court of Justice under Article [267 TFEU], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals, confirms that the States have acknowledged that [European] law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the [Union] constitutes a new legal order of International Law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of Member States, [European] law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage".[25]

As can be seen in the court's judgement the states had intentionally given up part of their sovereignty in order to create this innovative international organization. The principle upon which this cession of sovereignty functions is called principle of conferral. The Member States agree to give up their authority of supreme policer and become part of a much. Larger, international household. The innovation brought to police power by the European union seems to be a modern, and partial, adaptation of the oath of fealty which in the Middle Ages had a central role in the creation and institutionalization of the figure of the king as supreme policer.

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[25] Case 26/62, *Van Gen den Loos v. Netherlands Inland revenue Administration* (1963), ECR (English Special Edition) 1, quoted in Schütze, Robert (2018), *European Union Law,* 2nd edition, Cambridge University Press. p. 78.

3.4 Two Examples of Modern Police Power

After the terrorist attacks of 9/11 the United States had to deal with terrorism in an unprecedented scale, and terrorist attack are part of that category of threats where preemption is infinitely more useful than punishment. Hence the Bush administration proceeded in approving a law which represents the biggest deployment of police power, maybe second to the measures taken to avoid Covid contagions, in modern American history. Congress would approve the USA PATRIOT Act October the 26th 2001, approved in the Senate with only one vote against it. The name is an acronym that stand for Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism. The practical effects of the Patriot Act were as simple as they were controversial. The many governmental agencies charged with the maintenance and safeguard of security were strengthened in almost all aspects and the powers of the organs charged with the overwatch of those agencies were diminished. The most important field where the powers of the security agencies were strengthened was that of surveillance and preemptive imprisonment. The agencies obtained the power to control all forms of communication and to imprison indefinitely anyone, even non-Americans, who might be considered a terrorist or linked to a terrorist organization. If perquisitions entered in the sphere of the Patriot Act the need for a warrant and the fourth amendment would not apply. The case of the Patriot Act perfectly resumes the role and the risks of police power in modern society. The Patriot Act deploys nation-wide invasive measures aiming at preventing all terrorists that might arise. It is a task in many aspects comparable to the attempts of Medieval kings to prevent treason in their kingdom. As many measures of modern police power are, the Patriot Act is a reaction to a crisis that would be very complex to manage with regular legislative means. The starkness and invasiveness of the measures of the Patriot Act give rise to a debate which is the natural reaction of modern democratic societies to invasive measure of police: up to which point is security more important than freedom? This question never received a clear answer and it remained a debate for academics and scholars. The way the original Patriot Act circumvented the accusations of being a purely dictatorial measures was through an expiration date put on the various measures that would have brought them back to the attention of congress for a possible review or annulment. This measure did not hinder the Patriot Act as Congress almost never opposed the measures or their renewal. The validity of the Patriot Act as a governmental measure is shown by its bipartisan nature, as it was voted and renewed under both democratic and republican administrations. The Patriot

Act incarnates the values that were cited in the previous chapter. This Act is representative of the supremacy of *jus publicum* over *jus privatum* expressed in the opinion of Judge Shaw in the Algier case and has at its core the notion of "stifling the fountains of evil" of Judge Redfield's opinion in the Spalding case. Representing the quintessential example of American police power.

On the other side of the Atlantic the best example to observe the deployment of police power are the measures of European States reacting to the Covid-19 pandemic. All European countries have found themselves in the middle of an unprecedented sanitary crises and have been forced to deploy coercive measures, the degree of coerciveness varies according to the country, aimed at preventing ulterior crises, or the worsening of already existing ones, because of the spreading of the Covid virus. The measure that will be analyzed for the purposes of this paper will be the Italian "traffic light" system applied to the various regions. The system has been applied thanks to a series of law decrees emanated by the executive thanks to the powers granted because of the emergency status deriving from the pandemic. According to the "traffic light" system each region would be assigned a color and depending on the color various rules and limitations would apply to the region in order maintain the contagion levels stable. The most severe measures would be undertaken when a region would be given the red color, for a certain period all regions but Sardinia were red, and, in that case, all the freedoms that are standard parts of everyday life would be eliminated or reduced. In a red region a certification was required for going out of one's home, most businesses had to be shut down and restaurants could only work through deliveries. The Italian traffic light system is an ulterior example of the presence of police power in the arsenal of western government. After Covid-19 western nations had to be balance their action between restrictive measures and the civil liberties and rights of their citizens. Because an outburst of the pandemic would been completely unmanageable and would have costed countless lives. European government looked at police power to prevent such a disaster from happening. Embodying all the characteristics described in the second chapter and through the powers it had acquired in its historical evolution. Police power permitted to western democracies to answer the crises of the pandemic putting aside the characteristic traits of liberal democracy and managing the nation as a father manages his family or as householder manages his household.

Conclusions

This paper focused on the historical evolution of police power and om its main aspects and applications in practical situations. Charting the evolution of police power it has been proven that in its earliest form it existed in the households of the classical world where the figures of the Latin *paterfamilias* and of the Greek *oikonomos* were householders who enjoyed a nearly absolute power over their household and, at the same time, interacted between them as equals and created laws that were to be applied to the whole of society. Another form of early police power could be found in Germanic chiefdoms where the concept of *mund* represented both the authority of the householder over hi household and the liability of the householder for his household's action, and the *thing* represented the other aspect of police power being a parliament were the chiefs met as equals to discuss matters of law and to settle disputes between them. The fusion of these early forms of police power would lead to the creation of the figure of the medieval king who stood as a householder whose household was the kingdom in its entirety and as chief whose *mund* encompassed the whole nation. The medieval king would start to employ police power in way which would lead to its current conception giving it its strongly preemptive character and the tendency to be employed with issues whose preemption is much more convenient than their solution. The power of the king would later become the power of the state and the absolute nature of the king's power would have a vital role in the creation of the modern international community. It was described how modern police power, whose character is mainly preemptive and exists in a dimension parallel to that of the law, is employed to deal with three main issues. Economics, morals and security. Police power in the management of economics is employed by the authority to maintain the functioning state of the market and o deal with crises either before they arise or right after their arrival. The policing of morals is the more complex of three conceptions as it is the hardest to find n current society, but it is employed by the authority to ensure that the future citizens will behave correctly and to avoid the various crises, both economic and of security, that would arrive if the population strands from the path given charted for them by the managing authority. Security policing is the most important and evident aspect of police and it functions thanks to the characteristics that distinguish legislative power and police power. Security police is strongly focused well structured punishments that dissuade other to follow the offender's path and is, in general,

the most important instrument in the hand of modern governments when a quick answer to a serious threat is needed.

In the last part it has been described how the newborn adapted police power, whose main theorist at the time was William Blackstone who linked it strongly to the royal prerogative, adapted a fundamentally monarchical power to its institutions and justified its characteristics despite their natural opposition the democratic values of the United Stated. It has been observed how European nations had a much smoother transition because of the absence of strong anti-monarchical sentiments as foundational elements and how the innovation brought by European states to Police Power is the new system of conferred sovereignty at the base of the European Union, where householders agree to partially become household. With an analysis of the USA PATRIOT Act of 2001 and of the "traffic light" system employed by the Italian government to deal with Covid-19 it has been proven that police power is still present and strong in modern governments.

Hence an acceptable answer to our initial question would be: Modern police power is the power of governments to deploy stark measures, through a process parallel to democratic law-making, with strong preemptive and controlling purposes. It is a power with deep historical and philosophical roots based on the right of the householder to treat its household, formed by people and objects, as he considers fit and in the way that best nurtures his interest.

There are few doubts that police power will continue to be a fundamental tool held by governmental institutions. Despite their dictatorial appearance measures of police will become progressively more present in democracies considering the periods of strong uncertainty that lay ahead for the nations of the liberal and democratic west.

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The Power to Police: An Analysis of Modern Police Power
and of its Evolution

Riassunto

1. Introduzione

Il potere di polizia è un potere governativo fondamentale nella gestione della nazione, in tutte le sue componenti, ma difficile da giustificare in un'ottica democratica. La legge e il potere di polizia, soprattutto nell'attualità, si distinguono per molti aspetti: la legge nasce da un processo legislativo ufficiale e formalizzato, mentre la polizia è un prodotto che ignora questi processi per sua natura; la legge si fonda su una logica punitiva e si basa sulla reazione ad un evento, mentre il potere di polizia si fonda su una logica preventiva; infine, la legge è il prodotto di un organo collegiale che decide e rappresenta chi decide grazie ai meccanismi democratici, mentre il potere di polizia ha una natura coercitiva e verticale.

Dopo questa breve descrizione il potere di polizia sembra non avere nessun posto nelle moderne democrazie liberali. Per comprendere meglio perché il potere di polizia continui a restare presente, e fondamentale, negli arsenali dei governi ci si può dunque chiedere: Che cos'è il moderno potere di polizia? La risposta a questa domanda sarà divisa in tre parti. In una prima parte si cercherà di tracciare l'evoluzione del potere di polizia nell'Occidente fino all'Illuminismo. Nella seconda parte si cercherà di descrivere i principali aspetti del moderno potere di polizia, riconosciuti da filosofi e pensatori. Nella terza parte si concluderà analizzando gli ultimi passi dell'adattamento del potere di polizia allo stato moderno e verranno analizzati due esempi di applicazioni del potere di polizia attraverso le nozioni spiegate nelle parti precedenti.

2. Analisi storica

William Blackstone, uno dei pensatori che maggiormente si è occupato di analizzare il potere di polizia, trova l'origine di questo concetto governativo nel potere, quasi assoluto, del capofamiglia di disporre come preferisce della sua casa, composta da elementi animati e inanimati. Storicamente questa nozione del potere del capofamiglia può essere trovata sin dall'era classica in due ambiti indipendenti: nel mondo classico e nel mondo germanico. Nell'Atene classica il governo era una forma di democrazia a partecipazione diretta a cui

potevano accedere soltanto i cittadini in grado di dimostrare di possedere un certo livello di sangue ateniese; al contempo, la distribuzione delle cariche governative si basava, spesso attraverso macchinazioni, sul patrimonio. Esisteva quindi nell'Atene classica un dualismo tra il governo dei cittadini e gli "altri" che venivano governati. In questa società il potere del capofamiglia nella gestione della sua casa era quasi del tutto illimitato almeno finché si rimaneva nell'ambito domestico. La relazione, che non era politica, cioè tra eguali in un ambito collegiale o in generali tra cittadini, era una relazione di *oikonomos*, cioè una relazione di carattere gestionale da parte del cittadino nei confronti della sua proprietà. La gestione economica del capofamiglia seguiva due principi cardine: la massimizzazione dei suoi guadagni e del suo patrimonio e la difesa dei membri della casa che erano a tutti gli effetti una responsabilità del padrone di casa.

La figura equivalente al capofamiglia greco nel mondo romano era il *paterfamilias* che era il gestore della casa ed aveva sui membri della *domus* un potere semiassoluto. La differenza principale tra i cittadini greci e il *paterfamilias* romano era la diffusione dello status. I cittadini greci qualche migliaio che viveva nell'Atene del V secolo, da lì derivava l'importanza della dimensione legislativa collegiale, mentre a Roma c'erano *paterfamilias* dalla costa del Nord Africa sino al Vallo di Adriano. Il potere domestico di queste due figure era più o meno equivalente. Il principale contributo romano a questa prima forma di potere di polizia è stata la codificazione nel sistema giuridico di punizioni per i *paterfamilias* che abusavano della loro posizione. L'abuso consiste nell'applicazione di punizioni crudeli e non necessarie nei confronti dei membri della casa con lo status più vicino a quello del capofamiglia. Un *paterfamilias* che, ingiustamente, puniva o feriva i suoi figli stava, in prospettiva, danneggiando un suo futuro pari. Il contributo del mondo romano consiste quindi nel fatto che i capifamiglia decidono di accettare un'autorità in grado di punirli la quale sta al di sopra del potere di gestione quasi assoluto e si basa sull'idea del conservare una casa che contiene tutti i capifamiglia e dalla cui ricchezza dipende la ricchezza di tutti i capifamiglia.

Nel mondo germanico avveniva uno sviluppo parallelo di un primo potere di polizia che non riguardava semplicemente i capifamiglia ma i capi delle varie tribù che esistevano al di là del Reno. La dimensione collegiale di questi capitribù esisteva nell'istituzione del *thing*: un proto-parlamento a cui partecipavano i capitribù che interagivano in maniera egalitaria decidendo le leggi, creando accordi e risolvendo le varie dispute legali che esistevano tra le varie tribù. L'elemento che fungeva da rappresentazione immaginaria del potere gestionale dei capitribù era il *mund*. Il *mund* era la sfera di influenza del singolo individuo; tutti gli

uomini liberi avevano un loro *mund* indipendentemente dal loro ceto o dal loro livello sociale. Il concetto della responsabilità del capo nei confronti del suo *mund* è il punto fondamentale di questo primo potere di polizia delle tribù germaniche. Quando un suddito del capofamiglia commetteva un crimine all'interno della "casa" – con questo termine ci si riferisce alla sfera domestica allargata –, era soggetto alla disciplina del capotribù che derivava dal suo potere praticamente illimitato di gestire gli affari domestici. Nel momento in cui un membro della casa commetteva un crimine nei confronti della casa di un altro capotribù la questione diventava più complessa. Il capotribù doveva cedere il membro della sua casa che aveva commesso il reato e compensare pecuniariamente l'altro capotribù. Il compenso monetario veniva chiamato *wergild* e variava in base alla velocità di reazione del capotribù nella consegna del soggetto reo e in base all'entità del danno e allo status del danneggiato. L'uccisione di un uomo libero richiedeva una *wergild* varie volte superiore a quella dovuta per la morte di uno schiavo. Questa disuguaglianza nel compenso mostra perfettamente l'eterogeneità tra i vari sudditi del capofamiglia che esisteva anche nel mondo greco.

Con il passare dei secoli, e con la caduta dell'Impero romano, si andarono a fondere la tradizione classica e quella germanica e si venne a creare un potere di polizia, antenato del suo corrispondente odierno, che univa gli aspetti gestionali e legali dei due. Nel Medioevo il potere di polizia ebbe un ruolo fondamentale nello sviluppo del feudalesimo e dei regni medievali. Il concetto del feudalesimo è infatti un diretto risultato dell'ampliamento e rafforzamento del concetto di *mund* che entra all'interno di una gerarchia complessa. Il re medievale era, alla base, un capofamiglia il cui *mund* comprendeva l'intero regno. Se il compito del capotribù era di mantenere la pace nella sua casa, quello del re era di preservare la pace nell'intero regno. Fu in questo periodo che il potere di polizia acquisì la sua seconda caratteristica più importante: il suo carattere prettamente preventivo. Durante il Medioevo il re si trovava a gestire gerarchie complesse composte da un sovrapporsi di *mund,* vale a dire il feudalesimo, rispetto ai quali doveva primeggiare e i cui capifamiglia erano semplici membri della sua casa. Il documento che al meglio testimonia questa linea d'azione del monarca medievale è il "Treason Act" del 1351, un editto promulgato da Edoardo I d'Inghilterra che codificava nelle leggi inglesi il reato di alto tradimento. In parte, l'alto tradimento consisteva nel compiere azioni che ancora oggi coincidono con tale reato, quali il sollevare eserciti ribelli e il supportare i nemici dall'interno del regno; d'altra parte, si andavano a definire "alto tradimento" tutti i crimini che implicavano un disturbo dell'attività gestionale e della pace che derivavano dal *mund* supremo posseduto dal monarca, come ad

esempio la falsificazione di denaro o l'uccisione di ufficiali giudiziari. Le punizioni per l'alto tradimento erano brutali, spietate e gestite attraverso un cerimoniale formalizzato. Il punto era, infatti, dissuadere gli aspiranti traditori dall'agire, mostrando loro gli orrori che li avrebbero aspettati. Una caratteristica del legame feudale è il fortificarsi della dualità del rapporto tra casa e capofamiglia. Gli individui che giuravano fedeltà, attraverso processi molto precisi e fortemente simbolici, offrivano sé stessi, diventando parte della casa di un altro capofamiglia, in cambio della garanzia della protezione e del loro benessere; in caso di mancato rispetto degli accordi, il suddito aveva diritto di richiedere di essere liberato dal suo giuramento. L'unica casa da cui non si poteva uscire era la onnicomprensiva casa protetta e composta dal *mund* del re.

Con il tramontare dell'era feudale il monarca acquisì sempre più potere, assorbendo le competenze che prima venivano gestite da capofamiglia intermedi. Il re divenne l'unica figura al comando e il suo potere di polizia era solido ed assoluto. Con questo definitivo ampliamento dell'autorità reale il potere di polizia acquisì gli aspetti gestionali che prima appartenevano alle autorità intermedie, diventando molto simile allo strumento di governo nelle mani dei moderni stati. Un'altra conseguenza del consolidarsi del potere reale fu la creazione di una nuova dimensione collegiale in cui i monarchi, che non riconoscevano nessuno al di sopra di loro ed avevano il potere di dettare legge a tutti quelli sotto di loro, si incontravano e gestivano questioni di giustizia e legge "*inter pares*".

3. I concetti teorici

Il potere di polizia, una volta concettualizzato da pensatori come William Blackstone nel diciassettesimo secolo, può essere diviso nelle sue applicazioni pratiche in tre domini: la polizia dell'economia, la polizia della moralità e la gestione della sicurezza. La polizia dell'economia consiste in due aspetti importanti: la gestione degli elementi del sistema economico e la prevenzione delle crisi. Nella gestione da parte dell'autorità degli elementi che permettono al sistema economico di continuare a funzionare secondo gli interessi e i piani dell'autorità all'apice della gerarchia, la polizia consiste nella gestione dei prezzi e nella garanzia di un ambiente che permetta di intrattenere attività economiche. La prevenzione della crisi, invece, consiste nelle misure che l'autorità prende per prevenire, sfruttando la funzione principale del potere di polizia, crisi che causerebbero durissimi colpi al sistema economico e, in generale, al benessere della nazione. Michel Foucault, come esempio di polizia economica, porta la prevenzione delle carestie da parte dello stato. In

questo caso l'autorità si trova a dover prendere misure che, nel tentativo di prevenire una forte scarsità, portano a costrizioni straordinarie nei confronti di mercanti e contadini. La polizia economica ad oggi è complessa da immaginare, dal momento che l'assenza della gestione statale è uno degli assiomi del libero mercato; ma l'altro aspetto della polizia economica, la prevenzione delle crisi, è un'arma nell'arsenale governativo a cui i politici non hanno alcuna difficoltà a ricorrere nel momento in cui ce ne sia bisogno.

La polizia della morale consiste, invece, nell'impegno dello stato a mantenere integra la moralità dei cittadini affinché si comportino onestamente, rispettino la legge e lavorino contribuendo al patrimonio comune. Al fine di comprendere la polizia della morale è necessario considerare la concezione blackstoniana del potere di polizia. Secondo Blackstone il potere di polizia consiste nel dovere dell'autorità, nei suoi scritti il re d'Inghilterra, di avere un atteggiamento paterno nei confronti dei suoi sudditi proteggendoli e prendendosene cura. La polizia della morale è fondamentale secondo la logica preventiva del potere di polizia poiché, andando ad influire su come si sviluppano i futuri membri della comunità, riesce a compiere un'opera di prevenzione strutturale che influenza sia l'ambito della sicurezza che quello della produttività economica. Esempi di applicazione di polizia della morale sono i divieti riguardo a storpiature di istituti fondamentali per la società come, ad esempio, la poligamia può esserlo rispetto al matrimonio. E, più in generale, consiste nell'applicare varie forme di divieto nei confronti di comportamenti che non vengono considerati appropriati o di attività che non vengono ritenute consone ad un buon cittadino. È complesso trovare esempi espliciti di forti misure di polizia morale dal momento che la moderna società occidentale si fonda su principi di libertà e la dimensione individuale ha acquisito una grande importanza. Tuttavia, guardando a paesi con una diversa visione del diritto, se ne trovano chiari esempi: il più lampante e recente esempio di una misura di polizia della morale sono i divieti e i limiti che la Cina ha imposto sui minorenni per quanto riguarda il gioco online.

Infine, la gestione della sicurezza, forse la pratica di polizia più importante, consiste nell'applicare misure che permettono di evitare le crisi di sicurezza invece che di doverle affrontare. Il potere di polizia, al contrario della legge, gode del vantaggio di non essere limitato dai principi che governano i processi legislativi nelle democrazie occidentali. Le misure di polizia vengono applicate in maniera fulminea, dando importanza marginale agli organi legislativi e applicando misure abbastanza dure e severe da permettere una prevenzione su larga scala. L'elemento che, nelle misure di sicurezza, incarna tutti i principi del potere di polizia sono le punizioni corporali. La punizione corporale affianca infatti alla

funzione punitiva una funzione didattica: il condannato che viene punito davanti a tutti attraverso rituali precisi è la dimostrazione di quale comportamento va evitato. La punizione più caratteristica è l'utilizzo della frusta. La frusta, infatti, grazie alla sua brutalità e alla sua composizione, permette di infliggere una punizione terribile facendo rimanere il boia in una posizione di chiaro distacco e superiorità rispetto al condannato. La punizione con la frusta dissuadeva i possibili criminali e ricordava loro le gerarchie in base alle quali funzionava il mondo. La polizia della sicurezza è quindi uno strumento fondamentale nelle mani delle autorità governative che permette il mantenimento della pace e dell'ordine sociale attraverso l'applicazione di misure restrittive e fulminee, atte a prevenire comportamenti criminali o atti pericolosi per lo stato.

4. L'adattamento alle istituzioni in America ed Europa

L'adattamento del potere di polizia nelle istituzioni degli Stati Uniti non è scontato come potrebbe sembrare. All'indomani della Dichiarazione d'indipendenza del 1776 e della conseguente guerra con gli Inglesi che si concluse nel 1783, i padri fondatori si trovarono, nell'integrare il potere di polizia nelle neonate istituzioni americane, a dover trovare il posto ad un potere di deriva monarchica – al tempo la concezione del potere di polizia era quella di Blackstone che lo legittimava attraverso la prerogativa reale – in un paese che era nato grazie ad una battaglia contro la monarchia. Nel pratico, le difficoltà di integrazione esistevano solo sul piano ideologico. Se da un lato, prima dell'indipendenza, gli Americani avevano interagito col potere di polizia subendo le misure di controllo economico e di sicurezza caratteristiche del dominio coloniale, dall'altro, sin dai primi insediamenti gli Americani avevano avuto esperienze in quanto capofamiglia, soprattutto nell'ambito dei villaggi puritani e delle piantagioni di schiavi. Il potere di polizia era quindi uno strumento che agli Americani era molto familiare. L'unico cambiamento nel potere di polizia era la fonte: esso non derivava più dall'autorità del sovrano ma da quella del popolo sovrano. L'integrazione del potere di polizia nell'ambito giuridico è invece legata principalmente a due casi e alle relative opinioni espresse dai giudici: il caso di *Commowealth v Alger* cui seguì il contributo del giudice Shaw e il caso di *Preston v Spalding* dove venne espressa l'opinione del giudice Redfield. Nel primo caso il signor Alger aveva costruito un molo nel porto di Boston che rispettava la legge dello stato, ma violava uno statuto della città. Alger, nel momento in cui venne incarcerato e obbligato a pagare una multa, fece ricorso al tribunale. In quell'occasione il giudice Shaw confermò la condanna, spiegando che certe

misure, alle quali va lasciato un certo margine per renderle adattabili, possono essere applicate quando esista un contrasto tra il diritto pubblico e quello privato, precisando che, quando avvengono questi scontri, il diritto pubblico ne esce sempre vincitore. Nel secondo caso uno sceriffo aveva requisito delle monete che stavano per essere contraffatte benché la legge lo autorizzasse a requisire solo banconote. In quel caso il giudice Redfield spiegò che in certi momenti, quando si deve prevenire un crimine, i poteri della giustizia non possono essere limitati dagli statuti scritti e ufficiali.

L'integrazione del potere di polizia nelle istituzioni europee è molto più semplice poiché segue un processo lineare e non deriva da un sentimento opposto a quello che governa il potere di polizia. L'innovazione nei confronti del potere di polizia è legata all'ambito dell'integrazione europea e all'Unione Europea. Attraverso la concessione di sovranità all'Unione Europea, che è un'organizzazione internazionale dalla natura unica in quanto funziona grazie alla sovranità concessa dagli stati membri attraverso la firma dei trattati, gli stati europei hanno ricreato la dimensione collegiale che esisteva nel mondo greco accettando di diventare parti di una casa, rinunciando ad alcuni dei poteri da capofamiglia attraverso una manovra simile a quella del mondo feudale.

Due esempi pratici di potere di polizia sono il PATRIOT Act negli Stati Uniti e le misure anti-Covid utilizzate dal Governo Italiano. Il PATRIOT Act è un decreto votato dal Congresso nell'ottobre del 2001 in reazione all'attacco terroristico dell'undici settembre. In modo da poter prevenire possibili attacchi terroristici, una delle funzioni principali del potere di polizia, il governo degli Stati Uniti decise di ampliare enormemente i poteri di controllo delle forze di sicurezza, dando loro enormi facoltà e riducendo i poteri delle autorità create per controllarle. Il PATRIOT Act è una misura di polizia della sicurezza basata su una forte logica preventiva che ignora completamente ogni aspetto legato alla dimensione democratica e ai diritti degli individui. Le misure applicate dal Governo italiano nei confronti della pandemia sono, invece, un esempio di potere di polizia applicato al fine di preservare sia la sicurezza che il benessere economico. Il sistema a semaforo, un sistema che assegnava alle regioni un colore in base al livello di contagio e le obbligava ad applicare leggi e limitazioni in base al colore assegnato, è un valido esempio di una misura governativa prodotta parallelamente alla dimensione legislativa; è infatti il risultato di una serie di decreti del Consiglio dei Ministri che, al fine di prevenire una possibile crisi, applica severe misure e limitazioni alle libertà dei cittadini.

5. Conclusioni

Il moderno potere di polizia è quindi una delle più valide armi nell'arsenale di un qualsiasi governo. Le misure di polizia vengono applicate quando serve una soluzione immediata ed efficace atta a prevenire una possibile crisi. Il potere di polizia ha profonde radici storiche ed è il prodotto di una precisa evoluzione che si estende nella maggior parte della storia europea. Può essere diviso in tre principali aspetti: la gestione della sicurezza, la gestione della morale e la gestione dell'economia. Benché per sua natura sembri alieno alla forma di governo democratica, vista la sua utilità pratica, è uno strumento a cui i governi ricorrono per prevenire crisi e a cui ricorreranno progressivamente di più a causa delle grandi incertezze che riserva il futuro.