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THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT. By Markus Dirk Dubber. *Columbia University Press*, Pp.288. $50.00.

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> . . . in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare . . . .
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> *Preamble*, United States Constitution (1788)[1]

> The universal Law of Right may then be expressed, thus: 'Act externally in such a manner that the free exercise of thy Will may be able to coexist with the Freedom of all others, according to a universal Law.'
>
> Immanuel Kant, *The Philosophy of Law* (1796)[2]

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1. U.S. CONST. pmbl.

2. IMMANUEL KANT, *Introduction to The Science of Right*, *in* THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 47 (W. Hastie trans., The Lawbook Exch., Ltd. 2002) (1887).

> Rule of law and rule of police are two different ways to which history points, two methods of development between which peoples must choose and have chosen.
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> Eduard Lasker, Zur verfassungsgerichte Preussens (1874)[3]
>
> The 'law' of the police really marks the point at which the state, whether from impotence or because of the immanent connections within any legal system, can no longer guarantee through the legal system the empirical ends that it desires at any price to attain. Therefore the police intervene 'for security reasons' in countless cases where no clear legal situation exists, when they are not merely, without the slightest relation to legal ends, accompanying the citizen as a brutal encumbrance through a life regulated by ordinances, or simply supervising him. Unlike law, which acknowledges in the 'decision' determined by place and time a metaphysical category that gives it a claim to critical evaluation, a consideration of the police institution encounters nothing essential at all. Its power is formless, like its nowhere tangible, all-pervasive, ghostly presence in the life of civilized states.
>
> Walter Benjamin, "Critique of Violence" (1921)[4]

The further in time we depart from the Enlightenment, the greater our apprehension at its prescriptions for human perfectibility becomes; the keener the questions we ask of their details; and the more skeptical our responses to their performance. In the American case, for example, we notice that *We the People*'s prescription for a state of perfection, justice, tranquility, and universal well-being lives cheek by jowl with the purposeful textual sedimentation of enslavement: precisely 143 words separate the United States Constitution's soaring self-justification from its paydirt, the three-fifths compromise.[5] And of course there is more to come. Before the Founders exit Article I, a

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3. EDUARD LASKER, ZUR VERFASSUNGSGESCHICHTE PREUSSENS 208 (1874), *translated in* LEONARD KRIEGER, *THE GERMAN IDEA OF FREEDOM: HISTORY OF A POLITICAL TRADITION* 353 (1957).

4. WALTER BENJAMIN, *Critique of Violence*, *in* REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 287 (Peter Demetz ed., Edmund Jephcott trans., 1986).

5. *See* U.S. CONST. pmbl., art. I, § 2, cl. 3.

guarantee of twenty more years of international slave trading is tacked onto the blessings of liberty.[6] A few clauses after that, the Founders agree that restraint of movement shall be part of the fundamental law that ushers in the new state—not just the movement of the "fugitive slave" but of any and every person "held to Service or Labour."[7] Seemingly, the texts that secure "Liberty to ourselves and our Posterity" must, to that precise end, be riddled through with the violence of necessity—civic hierarchy and the means to its enforcement. The primal American statement of enlightened autonomy lies alongside the political and legal economy of alterity and subjection.[8]

Markus Dubber's passionate and provocative book on the police power intends at once to expose and to sever the link, to rescue human autonomy from the necessity of hierarchy.[9] His history of the police power is philosophically committed to a strict demarcation between rule of law and rule of police as modalities of human development, the same demarcation made explicit by the nineteenth-century German liberal, Eduard Lasker.[10] The position Dubber

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6. *See id.* at art. I, § 9, cl. 1.

7. *Id.* at art. IV, § 2, cl. 3.

8. Hence William Lloyd Garrison's denunciation of the U.S. Constitution as "a covenant with death." *See* Randy E. Barnett, *Was Slavery Constitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation* n.1, www.lysanderspooner.org/PLJINT.htm (last visited Nov. 9, 2005) (citing *Resolution Adopted by the Antislavery Society* (Jan. 27, 1843)). The figure of speech is taken from *Isaiah* 28:15 (King James): "We have made a covenant with death, and with hell are we at agreement; when the overflowing scourge shall pass through, it shall not come unto us: for we have made lies our refuge, and under falsehood have we hid ourselves."

9. MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT (2005).

10. *See* KRIEGER, *supra* note 3, at 352-53 (1957). Lasker (1829-1884) had an American following, so much so that on his death the U.S. House of Representatives resolved (in a gesture of provocation against Chancellor Otto von Bismark):

> That his loss is not alone to be mourned by the people of his native land, where his firm and constant exposition of, and devotion to, free and liberal ideas have materially advanced the social, political and economic conditions of these people, but by the lovers of liberty throughout the world.

Edward Lasker, http://38.1911encyclopedia.org/L/LA/LASKER_EDUARD.htm (last visited June 26, 2005).

advocates is essentially Kantian.[11] By rule of law, Dubber means principled commitment to the realization of personal autonomy for all, to the rights of persons, as the only means to just resolution of conflict among autonomous equals. Law is the power to protect rights and remedy wrongs. "[L]aw concerns itself with, *and only with*, the harm one person inflicts upon another."[12] By rule of police, Dubber means the management of men and things, and of men as things.[13] In Blackstone's classic statement, which echoes throughout the book, police is the maintenance of "due regulation and domestic order" in the state, 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 neighborhood, and good manners; and to be decent, industrious and inoffensive in their respective stations."[14] The rule of law, hence, is autonomy; of police, it is

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11. DUBBER, *supra* note 9, at 111, 112-13, 160; *see also* IMMANUEL KANT, *Division of the Science of Right*, *in* THE PHILOSOPHY OF LAW, *supra* note 2, at 54-58.

12. DUBBER, *supra* note 9, at 111.

13. *Id.* at xiv, 160. Chief Justice Taney put it thus in Thurlow v. Massachusetts (License Cases):

> [W]hat are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 583 (1847). On people as articles of commerce, see *Edwards v. California*, 314 U.S. 160, 172 (1941) and generally Mary S. Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV.743 (1996).

14. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 162 (1769). DUBBER, *supra* note 9, at xii.

heteronomy.[15] Law is ex post; its criterion is remedy.[16] Police is ex ante; its criterion is efficiency—prevention, manipulation, improvement.[17] Law reacts; police anticipates.[18] Law is modern, forward-looking, hopeful.[19] Police is ancient, suspicious, authoritarian.[20] It comes to us encrusted with the blood of generations of subjects.[21]

The categorical distinction with which Dubber confronts us is defensible, as we shall see. But we shall also see that it is a philosophical rather than a strictly historical—that is to say, an empirical—distinction. Historically, law and police manifest an almost irresistible propensity to seep into each other, as the United States Constitution demonstrates, so that in the end, their separation may be less significant for its expression of distinctions specifiable in history than for its expression of normative desire for what law *might* and *should* be (autonomy), to distinguish law from what police has been and *is* (heteronomy).

To the extent that law is less than absolutely distinct from police, might law and police not, in fact, be considered heteronymous?[22] In effect, Walter Benjamin suggests such an understanding in the course of his 1921 essay, *Critique of Violence*.[23] Benjamin's essay, also a philosophy of law rather than an empirical account of it, eschews Kant's categorical imperative as a point of departure for law's authority in human affairs, for a more basic authoriza-

15. DUBBER, *supra* note 9, at 3.

16. *Id.* at 68-69.

17. *See id.* at 68-69, 73, 82.

18. *Id.* at 128.

19. *See id.* at 3, 159-60, 211-17.

20. *Id.* at 3, 10-11.

21. *See, e.g., id.* at 27-36.

22. That is, not polarities but correlatives, or distinct ways of expressing the same relationship. We should note that in developing his *Science of Right*, Kant grants recognition to rights expressive of relations of heteronomy, as in conjugal, parental and household relations, albeit very carefully defined. *See* IMMANUEL KANT, *Principles of Personal Right that is Real in Kind, in* THE PHILOSOPHY OF LAW, *supra* note 2, at 108-09; *The Rights of the Family as a Domestic Society, in id.* at 109-20.

23. *See generally* BENJAMIN, *supra* note 4.

tion—violence, or force.[24] Law is made by violence; law is also preserved by violence.

> [T]he function of violence in lawmaking is two-fold, in the sense that lawmaking pursues as its end, with violence as the means, *what* is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence, but one necessarily and intimately bound to it, under the title of power.[25]

Law uses that violence to which it is 'intimately bound' to preserve itself as a modality of rule, a "juridical order,"[26] from threats—specifically the threat constituted by violence lying outside itself. "[T]he law's interest in a monopoly of violence vis-à-vis individuals is not explained by the intention of preserving legal ends [for then violence as such would not be condemned, but only that directed to illegal ends] but, rather, by that of preserving the law itself. . . ."[27] Law and police, then, are each a manifestation of authorized violence, police "taking over," as it were, at the moment of law's insufficiency in the achievement of ends. When the

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24. *Id.* at 285. It is important to note that the title of Benjamin's essay, in its original German publication was *Zur Kritik der Gewalt*. *See* Walter Benjamin, *Zur Kritik der Gewalt*, 47 ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK 809 (1920-21). The original title may be interpreted as differing from the implications of the subsequent English translation in two respects: First, and less important, *Zur Kritik der Gewalt* might better be rendered as "On the Matter of the Critique of . . ." or "Toward the Critique of . . . ." This reinforces the correct sense of *Kritik/Critique*, which is evaluative rather than condemnatory. Benjamin is undertaking a critique and simultaneously exploring how the critique may be undertaken. His text is perhaps more experimental that the flatly assertive English title implies. Second, and more important, *Gewalt* can also be translated as "legitimate power" or "authority" or "public force." What is translated as "violence" thus can mean state action to exert pressure, threaten or coerce in the name of authority, rather than physical onslaught and destruction from any source. *See* JACQUES DERRIDA, *Force of Law: The Mystical Foundation of Authority*, *in* ACTS OF RELIGION 234 (Gil Anidjar ed., 2002) (*Force of Law* is in large part an extended commentary on Benjamin's *Critique of Violence*, *supra* note 4.)

25. *Id.* at 295; *see also id.* at 283-86.

26. DERRIDA, *supra* note 24, at 267.

27. BENJAMIN, *supra* note 4, at 280-81.

state for whatever reason can no longer act through law, police, which is unlike law, steps in.[28]

Benjamin, however, did not argue that law and police were the same phenomenon. Police was "violence for legal ends"—the power of disposition.[29] But police was in addition "the simultaneous authority to decide these ends itself within wide limits"—the power to decree.[30] In police, law-making violence and law-preserving violence become the same. Police simultaneously asserts legal claims for any decree and acts to enforce what it asserts. There are no decisions, no limits—nothing need ever be decided. Hence the formless, all-pervasive, spectral presence of police, the absence of essence, what Dubber calls its "defining undefinability."[31]

We will have occasion to revisit Benjamin before we are done. Meanwhile (and as a final preliminary), if we wish to suggest the possibility of a lesser degree of distinction between law and police than Dubber would have us accept, we should acknowledge that we do so not only as a matter of historical-empirical observation, but also as a matter of present concern. We muddy law, to some extent, not to cleanse police, but to register cautious resistance to the confidence, implicit in Dubber's dichotomization of these phenomena, that law can be trusted to "overcome" the heteronomy of police. For while, as Lasker insisted, rule of law and rule of police may well imply utterly distinct

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28. *See id.* at 287.

29. *Id.* at 286.

30. *Id.* at 287. As Benjamin puts it, there is the police that "accompany[ies] the citizen as a brutal encumbrance through a life regulated by ordinances, or simply supervise[es] him," and then there is the police that is intervention " 'for security reasons' in countless cases where no clear legal situation exists." *See id.*

31. DUBBER, *supra* note 9, at xv, 120; *see also id.* at 120; BENJAMIN, *supra* note 4, at 287. Benjamin states that "[u]nlike law, which acknowledges in the 'decision' determined by place and time a metaphysical category that gives it a claim to critical evaluation, a consideration of the police institution encounters nothing essential at all." *Id.* What does this mean? As Derrida puts it, a decision "cuts and divides." DERRIDA, *supra* note 24, at 252. It is finite. But "if the act simply consists of applying a rule, of enacting a program or effecting a calculation," there is no decision. *Id.* at 251. Police, that is, is not a decision but an absence, embodied in the suspension of differentiation between law-making and law-preserving violence. Therein lies its spectrality, its lack of definition or limit. "One never knows who one is dealing with, and that is the definition of the police . . . unlocatable." *Id.* at 276.

philosophies of human development, it is not so clear, particularly in the current conjuncture, that in fact they follow different strategies.

Dubber's purpose in this book is to change our understanding of the police *power* by subjecting the police *concept* to critical historical analysis.[32] On the success of his critique turns the bite of Lasker's sense of absolute difference, and the persuasiveness of his own turn to law-figured-as-autonomy. To Dubber's critique, then, we should turn without further delay. In Part I, I will offer an account of *The Police Power,* sticking reasonably closely to Dubber's text, confining commentary to instances of disagreement (not particularly extensive) in historical interpretation. Then, in Part II, I will attempt to situate his text in legal-historical discourse, by asking of it, crudely, why this subject; why now? I will examine the most important contours of Dubber's analysis, attempting a critique of the critique. And I will address the central relationship—the relationship between law and police.

Considered as a work of scholarship, *The Police Power* is a deeply penetrating appraisal of the historical expression and significance of the concept of police. But because the book extends its purview beyond history, one must also ask whether Dubber's considerable insights provide a basis for critique of the present. Of this I am less convinced.

I. DESCRIBING THE POLICE POWER

Western political theory and practice has been organized by a contrast between two modalities of governance—autonomy, or self-government, and heteronomy, or government of the self by others. Governance as such rarely exists in any polity in one or the other pure form, but this does not preclude an idealization of these modalities as distinct in essence. Hence, people may govern themselves by making *law*, but they and their affairs are also governed, administered, and managed, which is *police.*

32. One must know the history of the idea of police, Dubber argues, or one will fail to understand the nature and scope of the police power. "And that is precisely what has happened in modern American law." In law's failure lies considerable danger. "A power obscured cannot be checked." DUBBER, *supra* note 9, at 159.

Law and police, Dubber tells us, have distinct histories and distinct genealogies, and conceive of the state in very different ways:

> From the perspective of law, the state is the institutional manifestation of a political community of free and equal persons. The function of the law state is to manifest and protect the autonomy of its constituents in all of its aspects, private and public. From the perspective of police, the state is the manifestation of a household. The police state, as *paterfamilias*, seeks to maximize the welfare of his—or rather its—household.[33]

Seen in Aristotelian terms, the law state can exist only on the basis of the police state. The "political community of free and equal persons" was precisely the community of household masters, or (in Roman law) *paterfamiliae*, each rendered free from the necessities and obligations of self-support by a household of subordinates, servile persons organized in a rank-ordered hierarchy—"wife, servant, slave"—to perform the "necessitous struggle for livelihood" that sustained the master in his enjoyment of a life of noble and free action and virtuous civic participation.[34] Autonomy, then, was produced for the master from the activities of the *oikos* (household) community, or *familia*, over which he presided. It was the master's responsibility, in turn, to manage the welfare of the *familia* through his direction of the use of the household's resources—human and material, men and things.

The fundamental legal-political distinction that emerged from the household polity was, inevitably, between householder and household. Whether as members of the ancient Graeco-Roman household or of its medieval successor, the Germanic *Mund*, it was the fate of the vast majority of people to be subjects governed by household masters. The exterior of the household—the polity itself, and politics—became identified with the condition of the tiny minority of household masters, such that when later nineteenth-century romantic legal historians fastened on the Teutonic "germ" theory of Anglo-Saxon democracy, masters became the prototype of free men. For those who

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33. *Id.* at 3.

34. WILLIAM JAMES BOOTH, HOUSEHOLDS: ON THE MORAL ARCHITECTURE OF THE ECONOMY 4-8, 27 (1993).

lived on the interior of the household and participated in its economy, however, household governance "defined daily life."[35] The facts of household governance were relatively straightforward: a leveling down of distinctions among subjects in the face of the fundamental distinction between subject and master, from which emerged the classic exchange that defined the household model of rule—loyalty (ligeance) in exchange for protection.[36] The same pattern was repeated on the grand scale of the king's household, which became effectively coequal with the realm and point of origin of the state, and into which all microhouseholders were incorporated as subjects of the king's authority as macrohouseholder. "Whatever distinctions might exist among the member of the kingly household, before the king everyone was equal . . . in their inferiority as constituents of the king's *familia*." All households manifested variety in contents—persons of different status, animals, material goods. But all differences "paled in comparison to the one defining distinction, that between every constituent of the household and the householder."[37]

Thus developed the patriarchal household as the model for governance of the vast majority of the population of Europe. From it came the foundational components of early modern legality, particularly criminal law, and of political theory. The peace of the household (its legality) was constructed by allegiance. Breach of allegiance was *felonia* (felony)—the "*ur*offense," as Dubber puts it, that generated the "*ur*penalty" of outlawry.[38] From the poenalization of felony, originating in the concept of *amercement* (fine in mitigation) grew eventually modernity's complex hierarchy

35. DUBBER, *supra* note 9, at 10; *see also id. at* 8-11.

36. *Id.* at 11-14, 49-50.

37. *Id.* at 16-18. Dubber's succinct but necessarily condensed summary of a long and complex historical process leaves him acknowledging but not investigating the contours of potent jurisdictional conflicts between the claims of the king and of "inferior" householders outside the arena of criminal law. On the structures and ideologies of governance that claimed and distributed jurisdiction to rule in early-modern England, see, for example, HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY (2005) and RICHARD LACHMANN, FROM MANOR TO MARKET: STRUCTURAL CHANGE IN ENGLAND, 1536-1640 (1987).

38. DUBBER, *supra* note 9, at 15, 24; *see also id.* at 14-21.

of offenses and punishments.[39] The ultimate breach of allegiance was to kill the king, the macrohouseholder, or to "compass or imagine"[40] the king's death. This was high treason. Treason was also the ultimate breach in all microhouseholds, as "[w]hen 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."[41] But this became petty treason only, a distinction that underlined the differentiation of the king from other householders as the king's household grew to encompass all. Discipline within all households was the creature of punishment, which by its long lasting corporal form (for example, whipping) signified the abasement of the offender before the household master, the reinforcement of the felon's meanness.[42]

Thus, in the police of the household—the enforcement of obedience—we find the origins of modern criminal justice's key components, offense and punishment. Indeed, to Dubber, the law of crime and punishment has always been and continues to be "the most awesome" and "the most patriarchal" manifestation of the police power.[43] In Dubber's analysis, the object of criminal law is to act as an agency of protection of the welfare of the state "considered as a family."[44] The power to punish remains "rooted in the notion of police."[45] Relations between householders, in contrast, were not amenable to household discipline. As in Aristotelian republican theory, householders in European monarchic polities constituted the community of free and equal persons. The monarch's responsibility lay in providing means for the resolution of disputes amongst these equals, "not to enforce obedience, but to do justice."[46] Here we encounter the realm of law for the first time in Dubber's analysis, a realm of civic adjustments among

39. *Id.* at 20.

40. *Id.* at 22-23 (quoting 25 Edw. III stat. 5 cl.2 (1351)).

41. *Id.*

42. *See id.* at 23-36.

43. *Id.* at xi, xv.

44. *Id.* at 48; *see also id.* at 48-62.

45. *Id.* at 37.

46. *Id.*

equals,[47] a realm that the Enlightenment's radical ideals of equality and political autonomy would greatly elevate and that would become embodied in notions of substantive right.[48] But householders also remained members of the macrohousehold of the monarch. So, to the extent that their actions, or conflicts amongst themselves, might become threats to the macrohousehold's peace, they remained fully subject to its police.

So too, in early-modern liberal political theory, we find the realms of equality and police distinct but entwined. For Locke, the power to make law, to legislate, could come only from the consent of those for whom law was made.[49] But the power to execute law once made against threats within the polity, or to protect the polity from threats from without, were powers of police, nonconsensual. "In this realm of administration, or house*keeping*, the model of household governance survives intact, undisturbed by political theory and its elaborate apparatus for scrutinizing the legitimacy of state action. After Locke, governing through law must be legitimate—and for him that meant consensual. Governing through police, by contrast, came to be held to a lower standard, of minimum competence."[50] Consigning the test of legitimacy to law *making* and to the mandarin science of politics allows police unchallenged occupancy of the humdrum—"management of the societal household."[51] Indeed, the new sciences of politics and of police, of the

47. Criminal law could be *law*, Dubber emphasizes, only if envisaged or reinvented as a system of "right, structuring relationships and conflicts among persons, rather than controlling threats to the household." *Id.* at 181.

48. For Dubber the elevation of *law* (as he defines it) to the point of generating tension with governance as police is a comparatively recent occurrence. "It didn't arise until what J.B. Schneewind has termed 'the invention of autonomy' in enlightenment political and moral philosophy, and particularly in the work of Rousseau and Kant. Only at that time was autonomy identified as a characteristic of personhood, rather than as an attribute of status, and of householder status in particular." *Id.* at 160 (quoting J.B. SCHNEEWIND, THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY (1998)).

49. *Id.* at 46-47; *see also* BREWER, *supra* note 37, at 90-98.

50. DUBBER, *supra* note 9, at 47 (emphasis added).

51. *Id.* at 47; *see also id.* at 47-49.

state as *consent* and of the state as an *apparatus of administration*, emerge more or less at the same moment.[52]

The expansion and elaboration during the eighteenth century of enlightened *sciences* of politics and police (and, of course, of law[53]) marks the consolidation of the state as such, and the relative eclipse of the microhousehold as a meaningful unit of governance. "As the entire state transforms itself into a single family, Rousseau's 'great family of the state,' the *ur*family becomes one social group among others within the *über*family of the entire realm, under the authority of the *über*father, the king."[54] For England and its North American colonies, Blackstone's list of offenses against "the Public Health, and the Public Police or Oeconomy" offers a summary guide to the state's growing capacities to prevent disturbances to domestic order, marshal the resources of the household-kingdom, and generally intrude itself into the detail of life in the micro-households of the realm and the social order of the whole.[55] Preventive police, for example, exists in Blackstone's sanitary references to the enforcement of quarantines and regulation of the sale of provisions: it is worth noting that these, like the sumptuary regulations, gaming statutes, and game laws that he also listed enforced social station and punished people who were found out of their assigned place.[56] Blackstone's "rules of propriety" and decency, such

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52. That is, during the century beginning 1650.

53. On the development of police science, see DUBBER, *supra* note 9, at 63-77. *See also* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 39-43 (1993); *supra* notes 15-39. On law as science, see 4 BLACKSTONE, *supra* note 14, at 2-33. Kant's great work on law was, as Kant indicated in its title, intended to restate the fundamental principles of jurisprudence—the philosophy of law—as "the science of right." *See* KANT, *supra* note 2.

54. DUBBER, *supra* note 9, at 50 (quoting JEAN JACQUES ROUSSEAU, A DISCOURSE ON POLITICAL ECONOMY (1755)).

55. 4 BLACKSTONE, *supra* note 14, at 161-75. Dubber discusses Blackstone in some detail in both the English and colonial contexts. *See* DUBBER, *supra* note 9, at 48-62.

56. Thus "if any person infected with the plague, or dwelling in any infected house, be commanded by the mayor or constable, or other head officer of his town or vill, to keep his house, and shall venture to disobey it; he may be inforced, by the watchmen appointed on such melancholy occasions, to obey such necessary command." 4 BLACKSTONE, *supra* note 14, at 161; *see also id.* at 161-62, 170-75. On the police of quarantine, see MICHEL FOUCAULT, DISCIPLINE

as those preventing clandestine marriage and polygamy, had the same effect.[57] The state's vital interest in preventing disturbances and promoting popular industriousness is similarly expressed in the proliferation of regulations "against the good order and oeconomy of the kingdom"—idle soldiers and mariners wandering the realm, gypsies, idle and disorderly persons, rogues and vagabonds. All mobility without engagement was a species of vagrancy, purposeless uncontrolled wandering beyond the scope of household government, a waste of resources and as such, inherently offensive to the state. Idleness was (and remains) a particular object of state suspicion. "Idleness in any person whatsoever is . . . a high offense against the public oeconomy."[58] Like all of Blackstone's police offenses, the power to mobilize labor expressed the king's desire and obligation "to maximize the welfare of his household, the realm."[59]

In England and its colonies, as a theory of consent begins to dominate the political foreground, setting conditions on authority's use, police proliferates in the background, forming the character of authority in operation. Proliferation, though, bred no transformation of the concept in Anglophone discourse: in Blackstone's conception, police remained rooted in a conception of household management, part "of his general theory of the royal prerogative, which is nothing but a modernization and radicalization of the age-old power of the householder over his household."[60] It was in continental Europe that police more completely transcended its household origins to be reborn as a science of governance and economy, "the science of administering a 'population' with the aim of maximizing its welfare," an academicized knowledge "complete with treatises, university faculties and training academies"[61] concentrating on the development of the tools necessary to that end: statistics, to keep an inventory of the population;

AND PUNISH: THE BIRTH OF THE PRISON 195-97 (Alan Sheridan trans., Vintage Books 1979).

57. 4 BLACKSTONE, *supra* note 14, at 163-64.

58. *Id.* at 165-70.

59. DUBBER, *supra* note 9, at 58; *see also id.* at 58-59.

60. *Id.* at 65.

61. *Id.* at xiii.

documents (passports, passes, permissions, tickets of leave, timetables) to trace and control its movements; constant reporting to improve the state's knowledge of its objects and of the effects of its administration; manuals to direct its operations.[62] Nor was the science of police confined to population. All the state's resources fell within its purview—men and things. Police became a science of immense precision, "of endless lists and classifications,"[63] and of immense discretion: it "applied to everyone and everything and everywhere" but with "an essential vagueness . . . guidelines but no firm principles" that left the policer absolute discretion "to do whatever needed to be done."[64] Thus, there was "a police of religion, of customs, of health, of foods, of highways, of public order, of sciences, commerce, manufactures, servants, poverty. . . ." Police science "aspire[d] to constitute a kind of omnivorous espousal of governed reality, the sensorium of a Leviathan."[65] Much more than merely a mechanics of control, police science was an aesthetics of good order, of self- and other-improvement. Police produced "the well policed person . . . 'polite,' considerate, even beautiful."[66]

One can find some reflection on the sophistication and ambition of continental police science in Adam Smith's 1762-1763 Glasgow University lectures on moral philosophy, gathered in a manuscript entitled "Juris Prudence or Notes from the Lectures on Justice, Police, Revenue and Arms. . . ."[67] What is interesting about Smith's discourse on police was how critical and, essentially, dismissive it was. First, contrary to Blackstone, who, as we have seen, would supply police with a domestic genealogy, Smith treated police as an alien phenomenon, "French."[68]

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62. *See* DUBBER, *supra* note 9, at 71-72. On the "swarming" of disciplinary mechanisms, *see* FOUCAULT, *supra* note 56, at 211-27.

63. Colin Gordon, *Governmental Rationality: An Introduction*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 10 (Graham Burchell et al. eds., 1991).

64. DUBBER, *supra* note 9, at 72.

65. Gordon, *supra* note 63, at 10.

66. DUBBER, *supra* note 9, at 73.

67. ADAM SMITH: LECTURES ON JURISPRUDENCE 5 (R.L. Meek et al. eds., 1978). DUBBER, *supra* note 9, at 63-64.

68. SMITH, *supra* note 67, at 331.

Second, Smith made police a residual category of governance, distanced from the realization of justice, devoted instead to the expedient—cleanliness (sanitation), public security, and above all the "the proper means of introducing plenty and abundance into the country," that is, the means of improvement of the wealth of the state.[69] Smith considered matters of cleanliness and public security "of too mean a nature" to be included in a University of Glasgow lecture, though noting with fine condescension that they were "no doubt matters of considerable importance."[70] The improvement of the wealth of the state, of course, was a different matter. It would become Smith's most famous concern, his lectures on police eventually transmorphing into his *Inquiry into the Nature and Causes of the Wealth of Nations*.[71] But what is of particular interest is the extent to which *The Wealth of Nations* was written as a refutation of police as a modality of wealth maximization. Smith's lectures, in short, decisively distinguished the jural (law) from the prudential (police); identified "the first and chief design of all civil governments" as "to preserve justice amongst the members of the state and prevent all encroachments on the individualls in it, from others of the same society," or, stated differently, "to maintain each individual in his perfect rights;"[72] confined the prudential to very specific functions, most of which were too "mean" to warrant much attention;[73] and finally, began the development of an account of political economy that in its fullest statement would answer continental police's cameralist theories of wealth maximization through state manipulation of its resources (men and things) with a politics of markets, individual self-interest and freedom of movement.[74] Or in other words, autonomy.

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69. *Id.* at 333.

70. *Id.* at 331. Smith explained: "The *neteté* of a country regards the regulations made in order to preserv[e] cleanlyness of the roads, streets etc. and prevent the bad effects of corrupting and putrifying substances. This could never be treated of in this place." *Id.*

71. DUBBER, *supra* note 9, at 64. *See generally* DONALD WINCH, ADAM SMITH'S POLITICS: AN ESSAY IN HISTORIOGRAPHIC REVISION (1978).

72. SMITH, *supra* note 67, at 7.

73. *See supra* text accompanying note 70.

74. *See generally* WINCH, *supra* note 71. *See also* TOMLINS, *supra* note 53, at 75-78.

Thus, in Smith we encounter an extended theorization of autonomy that elevates it to a matter of determinative behavioral significance in law and economy. Well and good. But it is precisely police's meanness that, at this point, becomes its cloak. As we have seen, liberalism's mandarin discourses—of consent as the test of law making (Locke), of autonomy as the object of law and justice (Smith) and the road from economic serfdom (Anglophone economics) concentrate on the high ground of governance. Police, by the very lowliness attributed to its objects, flies under the radar.[75] In Anglophone discourse, its conceptual head was raised infrequently, and only by those, such as Patrick Colquhoun and Jeremy Bentham, interested in building upward from quotidien policing to theories of the production of happiness through strategies of prevention and discipline.[76]

To this point, *The Police Power* has concentrated on establishing the historical character of police and law. Hereafter, Dubber moves to his subtitle, "the foundations of American government." Or perhaps, more accurately, the foundations of government in the United States; for, Dubber properly contends, it was not until the late eighteenth century that "the concept of police entered American political and legal discourse."[77] One may of course detect many prior manifestations of police as a modality of governance throughout the North American colonies: regulation of the poor, of indentured servitude, and of vagrancy; plantation management of enslaved Africans; slave patrolling; church and household discipline; petit treason and corporal punishment. "Americans were policing long before they imported the concept of policing . . . combining long-standing governmental techniques from English law . . . with innovations and adaptations of their own."[78] When the revolutionary generation discovered the

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75. As Benjamin has told us, police is "formless . . . nowhere tangible, all-pervasive, ghostly." BENJAMIN, *supra* note 4, at 287.

76. On Colquhoun, see TOMLINS, *supra* note 53, at 79-80; Mark Neocleous, *Theoretical Foundations of the "New Police Science," in* THE NEW POLICE SCIENCE: POLICE POWERS IN COMPARATIVE PERSPECTIVE (Markus Dubber & Marianna Valverde, eds., forthcoming 2006). On Bentham, see DUBBER, *supra* note 9, at 68-70; TOMLINS, *supra* note 53, at 46.

77. DUBBER, *supra* note 9, at xi.

78. *Id.* at xiii; *see also id.* at 28-36, 51-53, 59-62.

concept of police for the first time, they drew upon a long-standing practical familiarity with "a wide array of governmental practices" that the concept "named, and apparently systematized."[79]

Though Dubber's object of attention as a historian of the police power is its genealogy, surprisingly he expresses little interest in establishing with any precision the genealogy of its conceptual transportation to, and adoption in, post-revolutionary America. "[I]t doesn't much matter whether the Founding Fathers picked up the police concept from Blackstone or Beccaria or Bentham, or Adam Smith or any of the eighteenth-century police scientists."[80] The reason it doesn't matter is that, as we have seen, Dubber argues "the core idea"[81] was invariant across the Anglo-European spectrum, deeply expressive of the ordered oeconomy of the ancient patriarchal household, unaffected by its continental restatement as a science. Politics was the self-government of autonomous householders; police was their government of their household economies. What had occurred in the eighteenth century was a convergence of these two levels of governance, autonomy and heteronomy, politics and economy, creating the "oxymoronic"[82] science of political economy. But in fact it does matter, to some extent at least, how the founding fathers understood police. For the convergence that Dubber describes was mediated differently in Anglophone and continental discourse, in the one case by liberal political science (consent),[83] and in the other by administrative science (police). The result was distinct approaches to politics, to economic theory, and to the objects of governance that situated the points of convergence of autonomy and heteronomy at different points along the spectrum of possibility. Compare continental Europe, particularly Germany (the home of police science) and England, for example, and one will discover wholly distinct sciences of economics—the one emphasizing historical and contextual circumstance, the other postulating the operation of invariant a priori

79. *Id.* at xiii.

80. *Id.* at 81.

81. *Id.*

82. *Id.*

83. *See generally* BREWER, *supra* note 37.

principles. Far from an oxymoron, "political economy" stands for the relative "conditions of freedom" that shall pertain in an economy and for the basis upon which outcomes shall be justified.[84]

Whatever its genealogy, Dubber does establish beyond doubt the presence of the core patriarchal idea in the Republic's theory of goverance. That presence created, of itself, an inherent contradiction.[85] The founding theory of the republic was supposedly self-government—enlightened autonomy. Its founding statements stressed the equality of all. A patriarchal police was, hence, far more explicitly in tension with theories of governance in the new United States than old Europe. Revealing some consciousness of this, early state constitutions, even as they acknowledged and embraced the state's governing role vis-à-vis its "internal Police," defined that role as one under the supervision of "the people." The Delaware Declaration of Rights (September 1776) is typical: "the people of this state have the sole exclusive and inherent Right of governing and regulating the internal Police of the same."[86] State constitutions established exclusivity of right in two directions—first that it lay in the people of the state, directly represented in democratic legislatures, rather than any other agency; second, and subsequently, that it lay in the people of the state as against any other layer of governance. As each state re-created itself as a political-jurisdictional successor to a colony—an autonomous self-governing entity with known borders and an interior—it located sovereignty in its people and established exclusive jurisdiction in their name over its internal affairs and arrangements (its internal police). The concept of police became, piecemeal, virtually synonymous with the power to govern itself, and police became *the police power*, a power identified in each of the several states, exercised in and by

84. Thus the French Société d'Économique Politique met in 1855 to debate whether "the right of property [is] better founded on the principle of social utility than on the principle of justice and individual right." *See* HEATH PEARSON, ORIGINS OF LAW AND ECONOMICS: THE ECONOMISTS' NEW SCIENCE OF LAW, 1830-1930, at 25 (1997). *See generally id.* at 5-42.

85. *See* DUBBER, *supra* note 9, at 82.

86. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 136 (1980) (quoting DELAWARE DECLARATION OF RIGHTS § 4 (1776)).

the states, that only the states had.[87] The police power had become the power to govern, transferred by revolutionary succession from the king.[88]

Majoritarian legislative democracy—the course followed by many of the states during the confederation period—bred police legislation that, Dubber argues, was remarkably (for supposedly revolutionary polities) continuous with Blackstone's English model of police, which as we have seen was built on the king-householder's standing as *paterfamilias* to the entire nation.[89] Dubber is thus deeply skeptical of claims made by scholars (such as me) that the discourse of police emerging in the new post-revolutionary states "gave political voice to a conception of republican government . . . as a means, informed by constitutional declarations of communal as well as individual rights, of maximizing opportunities for the sovereign people to participate in the framing of the collective good."[90] Continuities in the practice of heteronomy are simply too marked, he argues, its genealogy too compelling to allow for any kind of epistemological break in the concept.[91]

One must be careful here to take note of the sources of opposition to the democratization of police. Opposition came from "those who spoke in the more conventional idiom of elite dominion," such as Peter Oxenbridge Thacher, Boston attorney and future judge of the Boston Municipal Court, who identified "excellence" in the city's police precisely with a shifting of governance from the town meeting to "a simple, united and energetic government under the gravest and wisest of citizens."[92] The goal was "a well-regulated city . . . where each knows and preserves his own place," where "regular gradation" and the "orderly distribution of duties" would result in a "correct arrangement and subordination of

87. *See* DUBBER, *supra* note 9, at 86.

88. *See* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 78 (1851).

89. *See* DUBBER, *supra* note 9, at 83.

90. TOMLINS, *supra* note 53, at 58-59; *see also id.* at 35-106.

91. *See* DUBBER, *supra* note 9, at 220-21 n. 19.

92. *See* PETER OXENBRIDGE THACHER, AN ADDRESS TO THE MEMBERS OF MASSACHUSETTS CHARITABLE FIRE SOCIETY, AT THEIR ANNUAL MEETING, IN BOSTON, MAY 31, 1805, at 5-21 (1805).

the parts which constitute a magnificent whole."[93] In fact, much of the half century after the Revolution was spent emptying popular sovereignty of any real substantive content. "Suffrage limitations . . . discriminate[d] against the propertyless, women, slaves, children . . . [and anyone] under the police of some person."[94] Membership in the sovereign people, for purposes of political action, became limited to those who could demonstrate a sufficiency of autonomy.

Independently, during the 1780s, culminating in the writing of the federal constitution, state governance capacities came under attack from *national* elites anxious that the states still remained excessively democratic—in behavior, if not in franchise—and uncontrollable, that their exercise of police powers materially threatened elite property rights. "The internal police as it would be called & understood ought to be infringed," Gouverneur Morris told the Philadelphia convention.[95] Morris cared little about the states' use of their powers in pursuit of a Blackstonian agenda. His concern was "paper money and other tricks [of finance] by which citizens of other States may be affected."[96] The convention agreed that the authority of the new national government it was designing should extend to the enactment of legislation "in all cases for the general interests of the Union, and also to those in which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[97]

Dubber represents the creation of the Union as a consensus that left the police power both untouched and associated exclusively with the states. In the patriarchal logic of household government, the states remained independent households, free to police within their borders, and subject to no superior federal police power but only to

93. *Id.*, *quoted in* TOMLINS, *supra* note 53, at 95-96; *see also id.* at 133-37.

94. DUBBER, *supra* note 9, at 84.

95. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 26 (Max Farrand ed., 1937).

96. *Id.*

97. TOMLINS, *supra* note 53, at 62-63 n.8.

federal law made with their own participation.[98] In broad terms, this is indeed the case. There is no federal police power as such. On the other hand, the Constitution's preamble, as we have seen, embraces a concept of the Union as the perfected outcome of an enlightened police effected by the Constitution itself. And the substance of the Constitution actually limits the states' capacities to police not only beyond what was strictly "internal" but also within the internal in certain crucial respects. Article I, Sections 8-10 describe wide-ranging federal powers that simultaneously removed "a broad range of legislative powers in the economic domain from the state legislatures."[99] Here, the Commerce Clause became the decisive arbiter of which government got to exercise a de facto police. Simultaneously, Dubber agrees, the Constitution constructed a de facto police power for the Union in areas that it declared outside state jurisdiction: for example, management ("government and regulation") of land and naval forces, of immigration and naturalization, and of relations with indigenous peoples.[100] Given that the United States was the reincarnation and continuation of an imperial process of continental expansion, these were crucial and strategic realms for federal power.

The effect of the Constitution, then, was to leave the states' police powers unimpaired within the domain of "internal police" left to the states by the federal constitution. "The clear assignment of police power to the states, and only to the states, dramatically simplified constitutional analysis. If it was police, it was the states' business."[101] But this was only to remove the qualifier—"if"—to the terrain of the now constitutionalized argument over what police was.

Constitutionalization added the further wild card of judicial determination of outcomes to the mix. The prominence of the judiciary in American police processes,

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98. *See* DUBBER, *supra* note 9, at 86.

99. Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798, 811 (1987).

100. *See* DUBBER, *supra* note 9, at 86-87. For conferral of rule-making powers of government and regulation on the federal government in various spheres of activity, see U.S. CONST. art. I, § 8, cl. 3-5, 14, 16.

101. DUBBER, *supra* note 9, at 86.

however, long predated the constitutionalization of American law and politics. In England and its colonies, the magistracy had long been the first line of local administration and enforcement of police regulations—its own institutional history as "justices of the peace" was founded on the creation of an office to enforce the regulation of labor mobility.[102] In early nineteenth-century American cities, "police" and municipal courts were established as institutional successors of local magistrates, administering local police regulations and common law offenses—the Blackstonian core of the Anglophone police regime.[103] But the constitutionalization of the police power had, as we have seen, rendered the police power open to inquiry into its potential limits. The evolution of judicial review, itself controversial, identified the courts as the locale of inquiry. "And so it is in judicial opinions, specifically in judicial opinions on the constitutional limits of the power to police, that we find the most extensive, and certainly the most influential, treatments of the nature and sources of the police power."[104] Constitutionalization, the emergence of judicial review, and the Kantian identification of law as the idealized expression of a general autonomy all come together at the same post-Enlightenment, post-Revolutionary moment when the otherness of law to police emerges and is debated.

Perhaps most interesting in Dubber's account of this debate is his contention that its default setting holds police as a mode of governance in essence limitless until shown otherwise. Rather than contained by the discourse of law, Dubber would have us think of police as a largely unexplored terrain. To the extent that law contains police, it does so only in specific realms of contention.[105] Judges—at least state court judges—appear quite complacent in sustaining the default: Dubber offers copious examples of judicial discourse emphasizing police's protean nature, its

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102. *See* ROBERT C. PALMER, ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348-1381: A TRANSFORMATION OF GOVERNANCE AND LAW 23-24, 50-51 (1993).

103. For commentary on the Boston Police Court, created in 1822, see TOMLINS, *supra* note 53, at 271. On New York, see *id.* at 132. On the role of the judiciary in the police regime, see generally DUBBER, *supra* note 9, at 93-119.

104. DUBBER, *supra* note 9, at 94.

105. *Id.* at 94; *see also id.* at 94-138.

obviousness and inevitability, in fact the impossibility of imagining appropriately-ordered human existence without police. As Isaac Redfield of Vermont put it in *Thorpe v. Rutland & Burlington Railroad Company* (1854):

> One in any degree familiar with [the police of the large cities] would never question the right depending upon invincible necessity, in order to the maintenance of any show of administrative authority among the class of persons with which the city police have to do. To such men any doubt of the right to subject persons and property to such regulations as the public security and health may require, regardless of merely private convenience, looks like mere badinage. They can scarcely regard the objector as altogether serious. And generally those doubts in regard to the extent of governmental authority come from those who have had small experience.[106]

Defending the proposition that American legislatures had "the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions," Redfield took illustrations of police in action from the never-contested Blackstonian core and used them to find against a railroad corporation that had not fenced its track, contrary to statute, in an action for damages for loss of sheep struck by a locomotive.[107] Lemuel Shaw had done something not dissimilar three years earlier in the iconic nineteenth-century police power case *Commonwealth v. Alger* (1851), in finding that it was a perfectly appropriate exercise of the police power to specify the dimensions of wharves in Boston Harbor, so that one built in violation of statutory specification and found liable to abatement could legitimately be destroyed and the owner fined.[108] Though its boundaries were difficult to mark or limits to it easily found, the police power was nevertheless "a settled principle, growing out of the nature of well-ordered civil society."[109] The fitness of its exercise by "well-ordered governments" was "so obvious, that all well-regulated

106. 27 Vt. 140, 156 n.† (1854).

107. *Id.* at 142-43, 149-50.

108. *See* 61 Mass. (7 Cush.) 53.

109. *Id.* at 84-85.

minds will regard it as reasonable."[110] Both judgments illustrate the difficulty state courts had in finding how there could ever fail to be a police power. Shaw's opinion, for example, built the police power on a string of conveyances of sovereignty (his term) dating to the earliest moment of English colonizing: the colonial charter that clothed government with so much of the royal prerogative as was necessary to maintain and regulate public right in the colony; the Declaration of Independence and the Treaty of Paris (1783) that dispelled whatever royal prerogative capacity remained; and the Massachusetts Constitution that secured the entirety of sovereign power—dominion and regulation of the public right—to the new post-colonial government. Successive conveyances had created the means to establish *Alger*'s well-ordered society rather than any explicit act of sovereign popular consent or active involvement.[111]

In the federal realm, in contrast, police power discourse acquired spatial referents. The "if" question—whether something was police—depended on where and to whom and to what it was applied. We have seen that the federal constitution established a de facto police power in the national state (a power, one might say, "that durst not speak its name") by allocating to the federal state police of the nation's outsides —Indians, immigrants, international commerce and so forth. Here, constitutional discourse very deliberately excised significant realms of action from juridical purview without much argument. Developed early in the Marshall Court's Indian cases, the notion that Congress and its agents could assert "plenary" (exclusive) powers of governance beyond courts' capacity to review was enriched and extended during the course of the later nineteenth century in a series of Supreme Court cases addressing the government, transfer and dispersal of Indian tribes, the regulation and restriction of immigration, and the administration of new territories (continental and transoceanic).[112] The combination of the Court's

110. *Id.* at 85 (1851). Dubber discusses both *Thorpe* and *Alger*, and related cases, at some length. *See* DUBBER, *supra* note 9, at 85, 104-19.

111. *See* 61 Mass. (7 Cush.) at 64-93.

112. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); United States v. Rogers, 45 U.S. (4 How.) 467 (1846); United States v. Kagama, 118 U.S. 375 (1886); Chae Chan

acknowledgment of the ascendancy of plenary over juridical authority with its development of "political question" doctrine—in which it refused to exercise the jurisdiction it did possess in matters considered "inherently political" and hence the business of the executive and legislative branches of government—erects a constitutional law that constrains not police but rather the effectivity of liberalism's legalist panacea itself.[113]

The nation's interior presented a more difficult problem. The states enjoyed "internal police," but this could clash with federal jurisdiction over the nation's outsides when states framed regulatory measures that competed with federal authority. Dubber uses the Supreme Court's decision in *Mayor of New York v. Miln*[114] as an illustration. New York law required that masters of incoming ships file a report with state authorities of all passengers brought into the state.[115] Miln, a shipmaster, had been fined $15,000 for failing to file.[116] He argued that the state statute was invalid under the Commerce Clause.[117] Under Chief Justice Marshall, the Supreme Court had used the Commerce Clause quite aggressively to establish an exclusive federal jurisdiction over commerce. Under Roger Taney, matters changed. State law that affected interstate and international commerce was valid and would remain so as long as Congress chose to abstain from actively asserting its jurisdiction. The state's statute was justified as a "regulation . . . of police," hence well within state capacities.[118]

> It is apparent, from the whole scope of the law, that the object of the legislature was, to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign

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Ping v. United States, 130 U.S. 581 (1889); Nishimura Ekiu v. United States, 142 U.S. 651 (1892); United States v. Hing Quong Chow, 53 F. 233 (E.D. La. 1892) (discussed in DUBBER, *supra* note 9, at 141-42); Fong Yue Ting v. United States, 149 U.S. 698 (1893); DeLima v. Bidwell, 182 U.S. 1 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904).

113. "Political question" doctrine originated in *Rogers*, 45 U.S. (4 How.) 467.

114. *Miln*, 36 U.S. (11 Pet.) 102 (1837).

115. *Id.* at 130.

116. *Miln*, 1837 U.S. LEXIS 169, 1 (discussed in the "prior history" section).

117. *Miln*, 36 U.S. (11 Pet.) at 131.

118. *Id.* at 132.

> countries, or from any other of the states; and for that purpose a report was required of the names, places of birth, &c. of all passengers, that the necessary steps might be taken by the city authorities, to prevent them from becoming chargeable as paupers.[119]

Interestingly, while Justice Story, in dissent,[120] held out for the Marshall Court's position that federal jurisdiction was exclusively whether Congress had acted or not, he did so in terms that acknowledged the formidable extent of the police power that underlay the state's claim:

> I admit, in the most unhesitating manner, that the states have a right to pass health laws and quarantine laws, and other police laws, not contravening the laws of congress rightfully passed under their constitutional authority. I admit, that they have a right to pass poor laws, and laws to prevent the introduction of paupers into the state, under the like qualifications. I go further, and admit, that in the exercise of their legitimate authority over any particular subject, the states may generally use the same means which are used by congress, if these means are suitable to the end. But I cannot admit that the states have authority to enact laws, which act upon subjects beyond their territorial limits, or within those limits, and which trench upon the authority of congress in its power to regulate commerce. It was said by this Court in the case of Brown v. The State of Maryland, 12 Wheat 419, that even the acknowledged power of taxation by a state,

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119. *Id.* at 132-33.; *see also* Paul Finkelman, *The Taney Court, 1836-1864: The Jurisprudence of Slavery and the Crisis of the Union, in* THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 80 (Christopher Tomlins ed., 2005). Finkelman adds:

> The police powers doctrine would remain a permanent part of American federalism and constitutional law. In *Cooley v. Board of Wardens of Port of Philadelphia* (1851), the Taney court would reaffirm the doctrine in allowing the port of Philadelphia to require that ships involved in interstate commerce hire a local pilot to guide the ship to a dock. Ultimately, *Miln* and *Cooley* set the stage for local regulation of interstate and international commerce in the absence of federal regulation. This was one of Taney's most lasting contributions (or alterations) to constitutional law and illustrates a significant break with the Marshall Court tradition.

Id. Miln is discussed in DUBBER, *supra* note 9, at 143-45.

120. *Miln,* 36 U.S. (11 Pet.) at 153 (Story, J., dissenting).

> cannot be so exercised as to interfere with any regulation of commerce by congress.[121]

As Dubber notes, addressing "the distinction between state and federal power" quite clearly "captured the breadth of police, external and internal, personal and apersonal" and simultaneously illustrated police's conceptual role in American constitutional jurisprudence "as the boundary of state power vis-à-vis the power of the national government."[122] But this, we must acknowledge, has been a shifting boundary, accompanied, furthermore, by considerable debate over the substance of power asserted on each side of the line. Never was this more the case than in the century following the Civil War, when both line drawing and substance were greatly complicated by alterations in both the character and the balance of power in the American state brought about by accelerating social and economic change, and by the evolution of Fourteenth Amendment jurisprudence. From the *Slaughter-House Cases* through *West Coast Hotel*, as a consequence, one encounters a sequence of Supreme Court cases that attempt to define and redefine the practical realms of police and law in both state and federal spheres. [123]

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121. *Id.* at 156.

122. DUBBER, *supra* note 9, at 143.

123. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); West Coast Hotel v. Parrish, 300 U.S. 379 (1937). On the transformation of the state by Civil War and Reconstruction, see RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877 (1990). On the impact of social and economic change, see MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS (1988). On the evolution of Fourteenth Amendment jurisprudence, see Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975). *See also* Howard Gillman, *The Waite Court, 1874-1888: The Collapse of Reconstruction and the Transition to Conservative Constitutionalism, in* THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 124 (Christopher Tomlins ed., 2005); Linda Przybyszewski, *The Fuller Court, 1888-1910: Property and Liberty, in id.* at 147; William E. Forbath, *The White Court, 1910-1921: A Progressive Court?, in id. at* 172; Melvin I. Urofsky, *The Taft Court, 1921-1930: Groping for Modernity, in id.* at 199; William G. Ross, *The Hughes Court, 1930-1941: Evolution and Revolution, in id.* at 223.

Among all of these, *The Police Power* isolates *Lochner v. New York*[124] for attention. Though Dubber makes this notorious case the subject of a fascinating analysis that serves to throw into high relief the law/police distinction that is key to his book, it seems to me an error to address *Lochner* in comparative historical isolation, for the case has an argumentative context that deserves at least some attention.

Why does Dubber invest such significance in *Lochner*? The case, which set aside a New York State law limiting the hours of bakery workers as "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty,"[125] was in his estimation nothing less than a historically isolated, magnificently futile stand "for the proposition that the state's police power is not unlimited."[126] In *Lochner*, the Supreme Court fumbled for both "an understanding of the nature of police . . . [and] an understanding of its legitimate limits"[127] that would subordinate the police power to law and establish constitutional limits on its use. That the State of New York possessed a power to police was not in question. Nor did the Court question the state's capacity to use its police powers to protect "the safety, health, morals and general welfare of the public."[128] But the Court found that the Hours Statute did nothing to protect the public as a whole, merely a particular segment of the public (bakery workers), and that it did so by depriving them of the opportunity to exercise full freedom of contract, thus denying them substantive autonomy. However careless or sloppy the majority may have been in their formulation of the issue, Dubber argues the Court's stance was entirely appropriate. "*Lochner* did what courts, and the public, should do in the American view of law and government: it subjected state action to principled scrutiny. More specifically, it scrutinized the state's exercise of its police power, a power that traditionally had been defined by its undefinability."[129] In

124. 198 U.S. 45 (1905).

125. *Id.* at 56.

126. DUBBER, *supra* note 9, at 191.

127. *Id.*

128. *Lochner*, 198 U.S. at 53.

129. DUBBER, *supra* note 9, at 195.

form and execution, the Court's scrutiny might have been wanting, but not "the larger enterprise of exploring the limits of state police power."[130]

Dubber notes, as have others, that the Court was not showing itself hostile to the use of state police powers to enact hours legislation as such. In *Holden v. Hardy* (1898), it had upheld Utah legislation limiting hours of work in the state's mining industry on the grounds that protection against hazard was in the public interest.[131] In *Muller v. Oregon* (1908) it would again uphold state limitation of hours of work, this time in the case of female laundry workers, accepting the state's contention that women's reproductive capacities were put at risk by unpoliced hours of work, constituting an "emergency" that threatened the natal well-being of the race.[132] The approach taken in *Lochner* did not, that is, ordain "the unconstitutionality of the sort of economic and social regulation so dear to progressives of the time."[133] Curiously, however, Dubber does not much investigate precursors of *Lochner*—other explorations of the bases upon which limits to the police power might be erected. Yet such had been a characteristic of Supreme Court constitutional debate for the previous thirty years. The *Slaughter-House Cases* (1873), for example, are famous for Justice Stephen J. Field's dissent from the majority's decision to uphold Louisiana's creation, for public health reasons, of a slaughterhouse monopoly in New Orleans. The dissent was woven from two strands—one an attempt to distinguish legitimate from illegitimate resort to the state's police powers, the other the statute's interference with the rights of butchers to follow their trade. As to the first, the State had argued that the act "was adopted in the interest of the city, to promote its cleanliness and protect its health," and hence "was the legitimate exercise of what is termed the police power of the State."[134] Such a power, Field noted:

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130. *Id.*

131. *See* 169 U.S. 366 (1898); *see also* DUBBER, *supra* note 9, at 193-95.

132. 208 U.S. 412 (1908); *see also* DUBBER, *supra* note 9, at 195-96.

133. DUBBER, *supra* note 9, at 196.

134. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 86 (Field, J., dissenting).

> undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. All sorts of restrictions and burdens are imposed under it, and, when these are not in conflict with any constitutional prohibitions or fundamental principles, they cannot be successfully assailed in a judicial tribunal. With this power of the State and its legitimate exercise, I shall not differ from the majority of the court.[135]

But only two provisions of the statute could properly be called police provisions, those that confined the landing and slaughtering of animals to a particular district outside the city, and those that required the inspection of the animals before they are slaughtered. "When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars, the act is a mere grant to a corporation created by it of special and exclusive privileges by which the health of the city is in no way promoted."[136] As to the second, Field argued that the state could not be allowed, "under the pretence of prescribing a police regulation . . . to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment."[137] It was:

> one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation and without being restricted by any of those unjust, oppressive, and odious monopolies or exclusive privileges which have been condemned by all free governments.[138]
>
> . . . .
>
> [Such] equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every

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135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 106 (quoting Live-Stock Dealers' Ass'n v. Crescent City Live Stock Landing, 15 F. Cas. 649, 652 (C.C.D. La. 1870) (No. 6972)).

> pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but, when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations.[139]

This, Field concluded, was "the fundamental idea upon which our institutions rest."[140] Citing both Adam Smith and the Fourteenth Amendment, he held it "essential to the validity of the legislation of every State that this equality of right should be respected."[141] It was a matter of profound regret that the majority had permitted Louisiana's legislation to "reject[ ] and trample[ ] upon" citizens' equality of right, "for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated."[142]

Over the following thirty years, *Slaughter-House*'s minority became *Lochner*'s majority. Field reiterated his demands that the Court develop a new police power jurisprudence in *Munn v. Illinois* (1877), which upheld state regulation of property—grain elevators—devoted to a use in which the public had an interest.[143] In dissent, Field once more condemned indiscriminate state resort to its police power, "which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government,"[144] and repeated his contention that the Fourteenth Amendment substantively protected citizens from state regulations that threatened their enjoyment of life, liberty and property.

> The legislation in question is nothing less than a bold assertion of absolute power by the State to control at its discretion the property and business of the citizen, and fix the compensation he shall receive. The will of the legislature is made the condition

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139. *Id.* at 109-10.

140. *Id.* at 110.

141. *Id.*

142. *Id.* On due process, see also *id.* at 115-18, 122 (Bradley, J., dissenting); *id.* at 125-28 (Swayne, J., dissenting).

143. *See* 94 U.S. 113 (1877).

144. *Munn*, 94 U.S. at 145 (Field, J., dissenting).

> upon which the owner shall receive the fruits of his property and the just reward of his labor, industry, and enterprise.[145]

In *Wabash, St. Louis, and Pacific Railway Co. v. Illinois* (1886), the Court changed course, severely curtailing state resort to police powers in matters of commerce by affirming federal exclusivity, silently vacating *Miln*.[146] Defenders of state police powers, now in the minority, were reduced to using some of Field's language recognizing state capacities to regulate in an attempt to embarrass him.[147] In *Chicago, Milwaukee and St. Paul Railway Co. v. Minnesota* (1890), the Court majority adopted the *Slaughter-House* and *Munn* minorities' due process arguments,[148] and in *Allgeyer v. Louisiana* (1897) it affirmed unanimously that due process would trump state police powers where the latter might be found to have infringed upon "the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property," for these were "an essential part of [a citizen's] rights of liberty and property, as guaranteed by

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145. *Id.* at 148.

146. 118 U.S. 557, 577 (1886). The majority stated:

> Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.

Id.

147. *See id.* at 589.

148. 134 U.S. 418, 456-58 (1890).

the Fourteenth Amendment."[149] The Court added that its judgment did not mean that a state could no longer exercise its police power in any such case. Rather, it meant that the substance of any exercise was subject to the Supreme Court's scrutiny, case by case. "When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises."[150] Thinking again now of *Lochner* and its companions, *Holden v. Hardy* and *Muller v. Oregon*, we can see that case by case consideration is precisely what the Court undertook. As Dubber notes, scrutiny of such state police power measures continued into and beyond the 1930s.[151]

Given this history and context, why, then, does Dubber make so much of *Lochner*? The answer lies less in the decision per se than in the potential of the decision and the reaction to the decision. On its face *Lochner*, like its predecessors, addressed only social and economic regulation—just one tiny fragment of police power usage. "[P]olice power measures included all manner of . . . laws designed to control the dangerous classes."[152] The police power provided the basis for the "entirety of the criminal law."[153] The police power was the basis for state segregation statutes, state eugenics statutes, state criminalization of interracial marriage, state sodomy laws and "a host of other threats to the moral police of the public,"[154] all matter-of-factly accepted. The Court's trajectory toward *Lochner* was confined within a very narrow path of inquiry—Field's initiating *Slaughter-House* dissent, for example, eschews critique of the state's powers of moral and criminal police, concentrating, as we have seen, on the citizen's economic liberties.[155] *Lochner*, to Dubber, represents a majority's modest move toward meaningful and principled judicial review of police power legislation with the potential for

149. 165 U.S. 578, 590 (1897).

150. *Id.*

151. *See* DUBBER, *supra* note 9, at 195-98.

152. *Id.* at 197.

153. *Id.*

154. *Id.*

155. *See supra* text accompanying note 135.

eventual extension to that vast mélange of laws and powers that is the police power, a move nevertheless significant in its apparent confirmation of a shift in juridical discourse (first intimated in *Allgeyer*) from a jurisprudence of charting limits to one of actual scrutiny, and the quite radical implications of such a shift:

> The narrow issue in Lochner was the propriety of a particular piece of social legislation. The broad issue was the legitimacy of state police power, and the need to justify exercises of that power in every instance, and in reference to specific criteria subject to meaningful scrutiny, not only by the courts, and not only under the constitution, but by the political community at large and on the basis of whatever principles of legitimacy that define it.[156]

It is, one must confess, difficult to find in *Lochner* any hint at all of quite so expansive an agenda. But the urgency of the question that underlies Dubber's seizure of *Lochner*, indeed underlies his entire book—that is, whether heteronomy or autonomy shall rule[157] —and is not weakened by that absence. As we shall see, the question is less historical than philosophical, but the effects of failing to answer it, or even ask, lie littered all about us today, in the vast regime of restraints and powers, matter-of-factly accepted, that constitute the state in contemporary life.

The responsibility for that litter does not escape those "progressive critics" who vilified the Court for its *Lochner* decision.[158] But their concerns—with perhaps the exception of Oliver Wendell Holmes (for whom, as Dubber shows, the whole exercise of trying to specify something called the police power of the state and scrutinize its use was simply an absurdity, "for the simple reason that *all* governmental power was police power")[159]—were for the preservation of progressive social and economic legislation. In this they were not unsuccessful. But responsibility lies more with those who, from the outset, were desirous of ensuring the inviolability of the state's capacity to police "men and things" as it chose, and who, hence, criticized *Lochner* as an

156. DUBBER, *supra* note 9, at 196.

157. *See id.* at 211.

158. *Id.* at xiv, 194, 196.

159. *Id.* at 201.

instance of judicial overreach that imperiled state power—and did so with such success that *Lochner*'s promise of meaningful scrutiny of assumed authority remained unrealized.

Among them, we find Roscoe Pound, whose 1909 critique, *Liberty of Contract*, provides a fitting point upon which to terminate the first part of this excursion into Dubber's *Police Power*.[160]

In *Liberty of Contract*, Pound attributed the jurisprudential tendencies that informed the majority in *Lochner* to the influence of an exaggeratedly individualistic juridical ideology that denigrated "public right"; to an excessively "mechanical" or conceptualist mode of juridical reasoning that ignored practicalities; to an absence of regard for the societal role of state power; and to the general prevalence of legal principles over "situations of fact."[161] His ideal was a "sociological" jurisprudence that would "adjust[ ] . . . principles and doctrines to the human conditions they are to govern."[162] Just what this meant in practice is best illustrated by the approach Pound advocated in the realm of criminal and municipal justice. As Michael Willrich has established in some detail, Pound was a key figure in the turn-of-the-century reconstruction of urban court systems as managers of urban populations through the discretionary application of "socialized law."[163] In the cities, socialized law meant "centralized judicial bureaucracies with specialized branches"[164] such as (in Chicago's case) branch courts addressing discrete populations and problems—domestic relations, morals, and juveniles.[165] More important, it meant giving law a new therapeutic role. As Willrich describes it, the socialization of law brought the installation of "staffs of disciplinary personnel" or "social experts" as strategic players in the

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160. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909). *See also* Note and Comment, *The Police Power and Liberty of Contract*, 7 MICH. L. REV. 507 (1909) [hereinafter J.F.K.].

161. Pound, *supra* note 160, at 457-58.

162. *Id.* at 464.

163. MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 98 (2003); *see also id.* at xxxi-xxxii, 96-115.

164. *Id.* at xxxii.

165. *Id.* at 114-15.

court bureaucracies. "Psychologists, psychiatrists, physicians, social workers, and probation officers . . . examined offenders and advised judges on the best 'individual treatment' given the offenders' mental makeup, family background, and social history."[166] As Progressive Era innovations spread, 'treatments' proliferated:

> To the conventional punitive measures of fines and incarceration, state legislatures added the far more discretionary techniques of indeterminate sentences, probation, parole, compulsory medical treatment, routine commitment to state institutions for the insane or feebleminded, and eugenical sterilization. In socialized criminal justice, the case was only the starting point for a much broader set of investigations and interventions that aimed not so much to punish crime but to reform criminals and the larger social world that had produced them.[167]

As we have seen, Dubber argues throughout *The Police Power* that criminal law is "the most patriarchal manifestation" of this most patriarchal power. In the early twentieth century, cheered on by Roscoe Pound, we see that patriarchal manifestation acquiring the fully elaborated form that would become the modern twentieth-century criminal justice system. Pound was fully aware of the patriarchal origins of the authority of the state to criminalize and punish.[168] Rather than scrutinize that authority, Pound desired its refinement and extension to "secur[e] social interests regarded directly as such, that is, disassociated from any immediate individual interests with which they may be identified."[169] What were those social interests? "The general security, the security of social institutions, the general morals, the conservation of social resources, the general progress" and, trailing last, "the individual life."[170] Preemptive interventions "to prevent disobedience" would be the new order of things—social

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166. *Id.* at xxxii.

167. *Id.* at xxxii-xxxiii.

168. DUBBER, *supra* note 9, at 126-27.

169. Roscoe Pound, *Introduction* to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW xxxii (1927), *quoted in* DUBBER, *supra* note 9, at 169.

170. Pound, *supra* note 169, at xxx, *quoted in* DUBBER, *supra* note 9, at 169.

control, "preventive justice."[171] This was the police power with the bit between its teeth.

II. CONSIDERING THE POLICE POWER

Ambitions to preempt and prevent are no strangers to the early twenty-first century. This alone provides one immediate and potent answer to the question that I posed at the outset: "Why this subject; why now?" And indeed, the police of the international sphere no less than of the nation has attracted growing attention from contemporary politicians, scholars, and advocates of all stripes. For example, the contemporary Anglo-American project to allow only a conditional or probationary sovereignty for states that, in its estimation, ignore their obligations to what one might term "the natural society of the human race" is a classic instance of the intervention of Dubber's macro-householder in the affairs of the microhousehold, of heteronomy on a world scale.[172] Leading Canadian intellectual Michael Ignatieff's neo-liberal agenda for breeding "peace, order and good government" throughout the world through the export of Canadian expertise in administrative technocracy—he calls it, without obvious irony, a Canadian kind of imperialism—represents another, "softer" mobilization of the discourse of police in response to the widespread assumption of threat posed by "failed" states.[173] So also, one finds in the attempts of contemporary social theorists to analyze the "state of exception" or "necessity" or "emergency" or "siege" implied in contemporary governments' responses to that same widespread assumption, revelation of a conceptual

171. Pound, *supra* note 169, at xxxv, xxxvi, *quoted in* DUBBER, *supra* note 9, at 168,127.

172. *See e.g.*, Andy McSmith and Jo Dillon, *Blair Seeks New Powers to Attack Rogue States*, THE INDEPENDENT, July 13, 2003, at 1. RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT, 34-47 (1999).

173. Michael Ignatieff, Director, Carr Ctr. for Human Rights Policy, John F. Kennedy School of Gvt., O.D. Skelton Memorial Lecture, Peace, Order and Good Government: A Foreign Policy Agenda for Canada (Mar. 12, 2004), http://www.ksg.harvard.edu/cchrp/pdf/Skelton.pdf; *see also* Ron Levi and John Hagan, *International Police*, *in* THE NEW POLICE SCIENCE, *supra* note 76; Mariana Valverde, *'Peace, Order, And Good Government': Police-Like Powers In Postcolonial Perspective*, *in* THE NEW POLICE SCIENCE, *supra* note 76.

apparatus and a history that closely tracks the police idea and its dichotomous relationship to law.[174] Giorgio Agamben asks:

> If exceptional measures are the results of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds, then they find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form.[175]

Describing the state of exception as "the original structure in which law encompasses living beings by means of its own suspension,"[176] Agamben uses as his immediate point of reference President George W. Bush's military order of November 13, 2001 authorizing indefinite detention and trial by military commission of suspected terrorists, an order that "radically erases any legal status of the individual," whether under the Geneva Convention or U.S. law. Detainees become "the object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and from judicial oversight."[177] The definition of the true sovereign, says Agamben, following Carl Schmitt, becomes "he who decides on the state of exception."[178]

Discourses of necessity, emergency, self-preservation—"the preventive, even anticipatory aspect of police"[179]—are prominent in Dubber's account of the police concept. Prevention, anticipation, preemption, and intervention all "reflect[ ] the foundation of police in the unquestionable right of self-preservation under conditions of necessity."[180] Necessity and emergency, indeed, have always been central to police as a mode of governance (or, in Agamben's words, a

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174. GIORGIO AGAMBEN, STATE OF EXCEPTION 1-31 (Kevin Attell trans., 2003).

175. *Id.* at 1 (citations omitted).

176. *Id.* at 3.

177. *Id.* at 3-4.

178. *Id.* at 1 (citing CARL SCHMITT, POLITISCHE THEOLOGIE (1922)).

179. DUBBER, *supra* note 9, at 114.

180. *Id.*

"paradigm of government").[181] Necessity is the rule of the household in performance of its oeconomic role; coercion ensures the continuance of necessity in the face of threat. The condition is one of exception, or emergency, made routine. Yet, fruitful conjunction with contemporary discourses of necessity notwithstanding, the "why" of *The Police Power* is not to be attributed to the onset of the "Global War on Terrorism" and its tactics. Dubber's purposes, rather, lie in exposure and critique of police as a mode of governance deeply implicated in American practice yet more or less ignored, until recently, in mainstream American political-legal history. *The Police Power* is both the latest product of a trend in Anglophone and European scholarship that has been busy constructing a broad history of police to replace a prior historiography that concentrated on the organizational development of uniformed police forces, and also a critic of directions followed by elements of that trend.

It is unnecessary to rehearse the trajectory followed by the "new police history" here. Suffice to say, it has tended to concentrate on the eighteenth and nineteenth centuries, and that we can find in it various but related points of origin—Michel Foucault's transformative investigations of power and of the techniques and effects of governmentality; the "new criminology" of the 1970s; and the pioneering institutionalist and intellectual-historical research on the state and political economy, both European and, more recently, American, on-going for some twenty-five years.[182] It is the latter, American, work, however, that catches Dubber's critical eye, for he finds it insufficiently sensitive to the "deep tension" between police and democratic

181. AGAMBEN, *supra* note 174, at 1; *see also id.* at 1-31.

182. *See generally* FOUCAULT, *supra* note 56; THE FOUCAULT EFFECT, *supra* note 63; GIANFRANCO POGGI, DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION (1978); IAN TAYLOR, PAUL WALTON AND JOCK YOUNG, THE NEW CRIMINOLOGY: FOR A SOCIAL THEORY OF DEVIANCE (1973); CAPITALISM AND THE RULE OF LAW: FROM DEVIANCY THEORY TO MARXISM (Bob Fine et al. eds., 1979); WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT (Istvan Hont & Michael Ignatieff eds., 1983); TOMLINS, *supra* note 53; WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Pasquale Pasquino, *Theatrum Politicum: The Genealogy of Capital—Police and the State of Prosperity*, *in* THE FOUCAULT EFFECT, *supra* note 63, at 105.

governance, and police and law, that his book details.[183] The essence of police is hierarchy and heteronomy, deriving from its household origins. Scholars who have found in it potential or actual realizations of popular self-government, an energetic citizenry, and active and engaged political communities, ignore this at their peril. For the same reasons, scholars are equally mistaken who imagine rule of police as a democratic alternative to rule by remote juridical elites wielding an undemocratic common law.[184] Law, Dubber insists, in fact furnishes the only system of rule that can protect the citizen *against* police. He reinstitutes the principled distinction, eroded in much contemporary history, between a sphere of autonomy and individual rights and the demands, absolutist or majoritarian, made in the name of the public good or common-weal.[185] The common law maxim *sic utere tuo ut alienum non laedas* is a principle of justice symbolic of the first.[186] The maxim *salis populi primus lex est* is symbolic of the second.[187]

Dubber gives his critique of trends in American scholarship particular point by underlining the intricate relationship between the genealogies of police and hierarchical governance across a millennium of European history, and in particular "[t]he inherent connection between police science and the police state of absolute continental monarchies" that developed during the Enlightenment.[188] This inherent connection supposedly undercuts any prospect that police could be given any form of democratic reading. The force of the critique is diluted by Dubber's indifference to any need to specify the modes of discursive transmission, which leaves him dependent upon analogy. As we have seen, he tells us "it doesn't much matter" where the Founding Fathers picked up their ideas about the police concept, because whether expressed in continental European or Anglo-American discourse, the "core ideas" associated with police were invariant, rooted in

183. DUBBER, *supra* note 9, at 220, n.19.

184. *Id.*

185. *See id.* at 110-11.

186. *Id.*

187. *Id.*

188. *Id.* at 220, n.19.

the household. In fact, it is indisputable that while police was being perfected as an agency of absolutism in continental discourse, Anglo-American political theory, under the influence of Locke, was recentering itself on a departure from household-derived emphases on heteronomy and status by exploring the conceptual bases of "consent" and contract.[189] Dubber does not ignore this development, associated in particular with Locke, but does rather minimize it, by distinguishing between Locke's emphasis on consent in matters of law making and the "entirely different matter" of law's execution—the maintenance of order.[190] Still, the existence of alternative theorizations of politics, and, arising from those, of the bases of welfare, persisted. By the later eighteenth century, as we have seen, one may find in the work of Adam Smith a radical critique of police models of political economy that posited the decisive importance to wealth maximization of markets and individual freedom.[191] But this was not the only course that variation took, for it is also clear that an ideal of the common welfare remained potent in post-Revolutionary American thought. Whether one probes the writings of obscure autodidacts like William Manning or elite theorists like Thomas Jefferson, it is apparent that a great deal of intellectual energy was devoted during the early years of the Republic precisely (as Dubber acknowledges) to "bring the legitimate functions of police in line with a system of government that could not bear the distinction between policer and policed," or in other words to render police compatible with autonomy.[192]

Dubber's approach throughout *The Police Power* is that to achieve this outcome police must be placed within the limits of law.[193] This relies on a *conceptual* distinction between police and law, for, examined empirically and institutionally, police and law in the Anglophone tradition are far from distinct.[194] Consider, as Dubber notes, that

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189. *See* BREWER, *supra* note 37.

190. DUBBER, *supra* note 9, at 46-47.

191. *See supra* text accompanying notes 67-74.

192. DUBBER, *supra* note 9, at 91. On Manning and Jefferson, see TOMLINS, *supra* note 53, at 1-8, 36, 81-89.

193. *See, e.g.*, DUBBER, *supra* note 9, at 181, 211.

194. *See, e.g.*, NOVAK, *supra* note 182.

Thomas Paine's famous dictum, "in America THE LAW IS KING," endorsed law rule only so far as law was recognized to be subject to popular authority.[195] Consider that the history of the rule of law in the United States is precisely the history of a process locating law in the hands of juridical elites distanced from popular authority.[196] Consider finally, as Dubber notes, that police in America, to an extent unparalleled elsewhere, was a juridically-administered discourse. "American courts, while helping to exercise the police power, in their applicatory function as inferior state officials, did more than anyone else to define and justify it."[197] Empirically and institutionally, that is, one may argue that in the United States, police indeed was placed within the limits of the law. The problem was that law did not conform itself conceptually to the provision of an ideal of autonomy.

Dubber realizes that, to be plausible, his history of the police concept thus requires that we rewrite, or write anew, the history of law so as to establish it as "an account of law, or right, as such, based on the basic legal right of autonomy."[198] In other words, Dubber's history of the police concept requires a companion history of the law concept that conforms it to the distinction he draws, if the distinction upon which so much of his analysis depends can in fact be maintained.[199] One has to wonder whether such distinct histories can in fact be written at any other level than the conceptual/intellectual. We have already noted, at the beginning of this essay, the ease with which the apparently enlightened autonomy embraced in the preamble to the U.S. Constitution is succeeded by a text devoted in good measure to the rules and practices of

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195. Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification and Explanation*, 16 YALE J.L. & HUMAN. 323, 327-28 (2004).

196. *See id.* at 330-32.

197. DUBBER, *supra* note 9, at 93.

198. Currently, Dubber observes, such an account is missing. *Id.* at 214.

199. Law-as-autonomy is empirically elusive in *The Police Power*. *See generally* DUBBER, *supra* note 9. Indeed, it is worth observing that the absence of a *history* of law as autonomy can leave the reader not a little perplexed at the confidence with which Dubber invokes the autonomy standard to judge the history—and histories—of police, for this renders the exercise essentially normative. Dubber uses the conceptual to critique the empirical.

heteronomy. Empirically, we might claim, autonomy for some, no matter how inclusive its sphere, always turns out to be built on the police of others, whether men or things—of a race, a class, a gender, a people, a nation, a species, an environment.[200]

In fact, it is not at all clear that, even conceptually, law is an expression of autonomy, or that law and police may be treated as distinct. To develop these points, let us now, at last, return to Walter Benjamin's *Critique of Violence.*

The task of a *Critique of Violence,* Benjamin says, is to "expound[ ] its relation to law and justice. For a cause, however effective, becomes violent, in the precise sense of the word, only when it bears on moral issues. The sphere of these issues is defined by the concepts of law and justice."[201] Studying law and justice entails studying the relationship of means to ends. Violence is means, but to critique violence

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200. This is a large assertion that I cannot develop more than briefly. Essentially, the claim is that autonomy always requires the exploitation of resources, both men and things, and that all forms of exploitation are unjust, not simply human but also animal and environmental. I will assume that the assertion that race, class and gender exploitation is subject to moral constraint is relatively uncontroversial. Animal exploitation has been the subject of rights campaigning for more than 150 years. *See* KEITH TESTER, ANIMALS AND SOCIETY: THE HUMANITY OF ANIMAL RIGHTS (1991). As Dubber notes, the question of animal exploitation has been given prominence by the work of such individuals as Tom Regan. *See* TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983); DUBBER, *supra* note 9, at 159, 249 (text accompanying note 7). In addition to Regan, one should of course note the work of Peter Singer. *See* PETER SINGER, ANIMAL LIBERATION: TOWARDS AN END TO MAN'S INHUMANITY TO ANIMALS (1975). As to environmental exploitation, the assertion that "[t]he police of things that belong to no particular person, such as 'public lands,' or rivers or forests or mountains or wild animals . . . doesn't require a justification for the interference with personal rights" and "simply doesn't touch upon the realm of law, or justice," DUBBER, *supra* note 9, at 159, ignores moral notions of stewardship and in some circumstances will prove simply ethnocentric. *See* WENDY NELSON ESPELAND, THE STRUGGLE FOR WATER: POLITICS, RATIONALITY, AND IDENTITY IN THE AMERICAN SOUTHWEST (1998). Also see Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects.* 45 S. CAL. L. REV. 450 (1972) and Gary E. Varner, *Do Species Have Standing?* 9 ENVTL. ETHICS 57 (1987), which support the proposition that recognition as a rights-bearer is a matter of convention not essence, as is, therefore, refusal of recognition. Nonhuman legal entities do in fact occasionally gain standing 'for themselves,' through, for example, endangered species legislation or world heritage listing. To be fair to Dubber, one should note his acknowledgement that it is "no longer a foregone conclusion" that animal and environmental exploitation fall outside the category of meaningful heteronomy. DUBBER, *supra* note 9, at 249.

201. BENJAMIN, *supra* note 4, at 277.

as such requires that one isolate it from ends, otherwise the critique is simply absorbed by the justness of the end. Thus, where (as in natural law theories) ends are paramount and violence is a phenomenon of nature, only violent means to an end antithetical to natural law may be termed unjustified. Positive law on the other hand scrutinizes not ends but means. It treats violence not as a phenomenon of nature but of history. Positive law thus distinguishes sanctioned ("historically acknowledged") from unsanctioned violence independent of any assessment of ends. But positive law still assures us that ends reached by legal means are justified—"positive law . . . 'guarantee[s]' the justness of the ends through the justification of the means."[202] Obviously, the question becomes whether the distinction between different kinds of violence is meaningful.

Positive law checks resort to violence by the individual as legal subject by ignoring the criterion of naturally just ends. Instead, it erects legal ends (one of which is the subordination of citizens to law)—that is, ends pursued by legalized power. Resort to violence outside legality undermines the system of legalization and must therefore be suppressed, not because it threatens legal ends (for then not violence per se but only violence directed to an illegal end would be controversial) but because violence when not sanctioned, "when not in the hands of the law, threatens it . . . by its mere existence outside the law."[203]

The concrete threat of unsanctioned violence is that in contesting "the order of existing law" it has the effect of creating new law. That is, violence is law-making. Indeed, Benjamin may be seen as arguing that violence is foundational to law in that no act of creation of a legal order can have an anterior legitimation to which it can turn.[204] Rather, law-making—acts of creation or acts against existing laws to transform them—can only begin from the point of absence of legitimation, or against what exists. Once law is made, violence preserves law, in that law uses

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202. *Id.* at 278; *see also id.* at 277-78.

203. *Id.* at 281.

204. *See* DERRIDA, *supra* note 24, at 269; *see also id.* at 267-72. The origins of law lie in a violence that Benjamin calls "mythic" or imposed by fate. *See* BENJAMIN, *supra* note 4, at 293-97.

the threat and actuality of its monopoly of legal violence as the means to its own safe-keeping.[205]

These two forms of violence combine most fully in the realm of punishment. Law's declared power over life, especially the power to end life, is the ultimate law-preserving violence. But law-making violence is also present, for "it may be readily supposed that where the highest violence, that over life and death, occurs in the legal system, the origins of law jut manifestly and fearsomely into existence."[206] Punishment, as Dubber has shown us, is supremely creative—it proliferates endlessly. "Its purpose is not to punish the infringement of law but to establish new law. For in the exercise of violence over life and death more than in any other legal act, law reaffirms itself."[207] From here we move quickly to a trenchant discovery. "[I]n this very violence" (the violence over life and death), he says, "something rotten in law is revealed."[208]

At this point, Benjamin seems to me to hesitate. He has been insisting on a distinction between different forms of violence, and the distinction has now collapsed under the weight of capital punishment. Benjamin will acknowledge this, but only indirectly, only after moving away from law to "another institution of the modern state"—police.[209] Here also, he states, both law-making and law-preserving violence exist alongside each other. But here their separation is entirely suspended. "Police violence is emancipated" from the restraints that distinct orders of violence imply.[210] "It is lawmaking, for its characteristic function is not the promulgation of laws but the assertion of legal claims for any decree, and law-preserving, because it is at the disposal of those ends."[211] But if this suspension of the distinction is what enables police, it is also what *distinguishes* police from law. They are different phenomena.

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205. BENJAMIN, *supra* note 4, at 281; DERRIDA, *supra* note 24, at 267.

206. BENJAMIN, *supra* note 4, at 286.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 286.

211. *Id.* at 286-87.

> The assertion that the ends of police violence are always identical or even connected to those of general law is entirely untrue. Rather, the 'law' of the police really marks the point at which the state . . . can no longer guarantee through the legal system the empirical ends that it desires at any price to attain.[212]

What is "rotten" in the state of law is, it would appear, the corruption that spreads from police, for it is police that instantiates the collapse of the law-making/law-preserving distinction. But police is nevertheless kept conceptually distinct from law.

Can this conceptual distinction be maintained? I think not, which perhaps explains Benjamin's hesitation over the significance of law's "reaffirmation" of itself. For reaffirmation is both creation and preservation—production anew and reproduction. That is law's praxis. Derrida calls it the law of iterability, meaning that iteration and reiteration cannot be distinguished. "[T]he very violence of the foundation or *positing of law* (*Rechtsetzende Gewalt*) must envelop the violence of the *preservation of law* (*Rechserhaltende Gewalt*) and cannot break with it. It belongs to the structure of fundamental violence in that it calls for the repetition of itself and founds what ought to be preserved. . . . [T]here is no more pure foundation or pure position of law, and so a pure founding violence, than there is a purely preserving violence. Positing is already iterability, a call for self-preserving repetition. Preservation in its turn refounds, so that it can preserve what it claims to found. Thus there can be no rigorous opposition between positing and preserving."[213]

Benjamin argues that law-making and law-preserving violence are different species of violence. But in this, Derrida has shown, he is unsuccessful.[214] Benjamin argues that the suspension of the distinction occurs in police. But the suspension cannot be cabined. "He never gives up trying to contain in a pair of concepts and to bring back down to distinctions the very thing that incessantly exceeds them

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212. *Id.* at 287.

213. DERRIDA, *supra* note 24, at 272.

214. *See id.* at 279.

and overflows them."[215] Law and police may be strategically differentiated—hence heteronymous—but in their common conceptual relation to a common violence they are of a piece.[216]

Now, we should be the first to say that Dubber's law, figured as autonomy, is not Benjamin's (or Derrida's) law, figured as violence/force. But here we are not traversing an empirical argument about what law is, but rather a philosophical argument about how we conceptualize law. And in doing so, perhaps, we uncover the nub on which *The Police Power* turns, in that although this is a book cast as a history, and to a large extent written as one, in its central characteristic—the proposition that an essential opposition exists between concepts of police and law—it is making a philosophical and not a historical argument. For while the heteronomy of police is indeed historically indubitable, the autonomy of law is not—it is asserted, it cannot be proven. No history of it, we have seen, is available.[217] So, if Dubber argues that the essence of law is autonomy, which distinguishes it from police, it seems at this point sufficient as a retort, or at least demurral, to show that one can read law differently.[218]

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215. *Id.*

216. *Id.*

217. *See supra* text accompanying notes 198-99.

218. It is important to note that at one point in Benjamin's text, he moves toward a reading of relational possibility that coincides to some extent with the autonomy Dubber adduces for law. Just as it takes a "refined sensibility" to detect the rottenness in law, BENJAMIN, *supra* note 4, at 286:

> [n]onviolent agreement is possible wherever a civilized outlook allows the use of unalloyed means of agreement. Legal and illegal means of every kind that are all the same violent may be confronted with nonviolent ones as unalloyed means. Courtesy, sympathy, peaceableness, trust, and whatever else might here be mentioned are their subjective preconditions.

Id. at 289. But he continues, "Their objective manifestation, however, is determined by the law . . . that unalloyed means are never those of direct, but always those of indirect solutions. They therefore never apply directly to the resolution of conflict between man and man, but only to matters concerning objects." *Id.* That is, autonomy cannot characterize direct relations between men but only indirect relations mediated by "objects"—goods, commodities. This presents Dubber with the considerable irony that law-as-autonomy is possible only where things are the immediate concern, not people. Recall that, for Dubber, "law concerns itself with, and only with, the harm one person inflicts

That one *can* read differently is indeed evident in the most dramatic moment of the book itself, in which, we have seen, Dubber rescues the *Lochner* decision from "the enormous condescension of [in this case liberal-legal] posterity."[219] For Dubber acknowledges, there are several different ways of reading the case, only one of which is his. First, we may read *Lochner* as a narrowly-conceived display of laissez-faire jurisprudence negating a state's legitimate resort to its police powers; or, second, as an exercise in laissez-faire jurisprudence negating legislative regulation of the conditions of labor on the grounds that this was an attempt by the state to claim a commerce power not within its jurisdiction, camouflaged as a use of the state's police powers; or, third, as a principled scrutiny of a police regulation to determine whether it was "fair, reasonable and appropriate" as opposed to "unreasonable, unnecessary and arbitrary."[220] The orthodox liberal critiques concentrate on the first and second readings: *Lochner* was a "judicial usurpation of the legislative prerogative" that smuggled "conservative anti-labor laissez-faire views into constitutional doctrine."[221] Dubber finds these readings understandable, given progressive concerns for the enhancement of regulatory capacity, but dogmatically indifferent to the absence of accountability of state power. He concentrates on the third—scrutiny of resort to "a particular aspect of the police power in a specific context"—arguing that this is exactly what the American view of law

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upon another. . . . A person who suffers harm from something other than another person is not the law's concern." DUBBER, *supra* note 9, at 111. Benjamin points to one instance of unalloyed means as "the conference, considered as a technique of civil agreement," where "the exclusion of violence in principle is quite explicitly demonstrable by one significant factor: there is no sanction for lying." *Id.* Even here, however, unalloyed means —"peaceful intercourse between private persons" —are constantly under pressure from legal violence. *Id.* at 290-91. They decay (rot) through, for example, its criminalization of lying, i.e. fraud or deception. *Id. See also* DERRIDA, *supra* note 24, at 284-85.

219. The phrase is E.P. Thompson's; the interpolation mine. *See* E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 12 (Vintage Books 1966) (1963).

220. DUBBER, *supra* note 9, at 192-93 (quoting *Lochner*, 198 U.S. at 56); *see also id.* at 190-93.

221. *Id.* at 193.

and government should lead one to expect courts to do.[222] Admitting the Court's execution might have left something to be desired in the particular instance, "the larger enterprise of exploring the limits of state police power" in the interests of protecting the autonomy of citizens vis-à-vis the state was appropriate.[223] But opposition both on the Court and beyond it eroded the initiative,[224] and while the Court continued to examine police power cases, it returned to an older default assumption that police powers per se were unreviewable, beyond its ken: the only question was whether the end sought was appropriate to the police (good

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222. *Id.* at 195.

223. *Id.*

224. In *McLean v. State of Arkansas*, decided less than a year after *Muller*, at a time when the Court appears still to have been in the phase of case by case scrutiny (see *supra* text accompanying notes 150-51), the Court upheld the constitutionality of an Arkansas statute establishing standards for payment of wages in the state's coal mines, arguing as follows:

> [T]he police power of the State is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

McLean v. Arkansas, 211 U.S. 539, 547 (1909). The Court proceeded to summarize those principles, thereby creating a basis to guide scrutiny:

> If the law in controversy has a reasonable relation to the protection of the public health, safety or welfare it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the Government.

Id. at 547-48. It continued:

> If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.

Id. at 548. *Lochner* was not mentioned, except by counsel for the unsuccessful plaintiff in error. Justice Rufus Peckham, the author of the *Lochner* decision, dissented. *See id.* at 551. And one commentator concluded that in sustaining the statute as a valid exercise of the police power, the Court "seems to have extended that doctrine to a much greater length than it has in some of its later decisions." *See* J.F.K., *supra* note 160, at 507.

order) of the community as a whole and the means employed "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[225] The basic issue—whether the state indeed had, or should have, the capacity to coerce citizens in the name of the "police . . . of the political community"—became a non-question.[226]

The police/autonomy dichotomy breaks down, however, in a fourth reading of the case that Dubber offers, namely that the New York legislature's statute did not restrain the autonomy of bakery workers, as the Court argued, but rather enhanced it. Exchange relationships between employers and employees are invariably asymmetrical—invocations of mythically equal citizens engaged in exercising their freedom of contract simply camouflage protection of sustained inequalities of resources and status.[227] Dubber argues that this reading is consistent with an account of law that confirms its foundation on "the basic legal right to autonomy" asserted throughout:

> In this reading, *Lochner* wasn't a police power case at all but a justice power case. The New York statute . . . protected the status of bakery employees as autonomous persons under law, by allowing them to manifest their capacity for autonomy in their contractual relationship with their employers, rather than falling prey to the employers' superior power.[228]

Why, then, did the Court strike down the autonomy-enhancing statute, choosing instead to protect and sanction the existing asymmetry of the employment relationship

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225. Lawton v. Steele, 152 U.S. 133 (1894), *quoted in* DUBBER, *supra* note 9, at 200. It is worth noting the statement that occurs in Justice Stevens' opinion for the Court in the recent and controversial takings (eminent domain) case *Kelo v. City of New London* that "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *See* Kelo v. City of New London, 125 S. Ct. 2655 (2005), *available at* http://straylight.law.cornell.edu/supct/html/04-108.ZO.html.

226. DUBBER, *supra* note 9, at 199. Dubber notes a revival of interest in state courts beginning in the 1980s. *Id.* at 203-08.

227. *See, e.g.*, Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

228. DUBBER, *supra* note 9, at 215.

against an attempt at legislative melioration? Does this reading not render the heteronomy/autonomy dichotomy that has sustained the police/law dichotomy throughout the book murky? It would be absurd to read one case to produce so over-determined a conclusion, yet one must also allow that in the multiple readings of *Lochner* one sees precisely the seepage of law and police into one another, a merger of agents that produces outcomes more ambiguous than the clarity of Dubber's dichotomy allows. One sees clear traces of Benjamin's law-preserving violence—the violence done, for example, in the preservation of sanctioned asymmetries. And one sees that as an instance of reiteration, the sanction of asymmetry—from whatever motive or principle—has reproduced asymmetry in law, and thereby produces it afresh.

III. TO CONCLUDE: *FORT-DASEIN*[229]

In an immediate sense, the police power evaded principled scrutiny both of its bases and its effects because the moment of its emergence in American political-legal consciousness—the later nineteenth and early twentieth centuries—was simultaneously the moment of its defense.

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229. "The police become hallucinatory and spectral because they haunt everything; they are everywhere, even there where they are not, in their *Fort-Dasein*, upon which one can always call." DERRIDA, *supra* note 24, at 280. "Dasein," literally "being-there," is a term from Heideggerian philosophy describing the form of existence unique to self-conscious human beings, that is, an existence "in" the world and inseparable from it. One cannot be without a world to be in. *See* MARTIN HEIDEGGER, BEING AND TIME (John Macquarrie & Edward Robinson trans., 1962). Derrida's point is that there is nowhere in existence that police *is not* present, including of course that place (Fort-Dasein, perhaps an allusion to the anomic dystopian 1981 "cop" movie, *Fort Apache — The Bronx*) where we expect police definitively *to be*. DERRIDA, *supra* note 24, at 278. But police is not present anywhere particular, because it is present everywhere. *Id.* The police, he says:

> are not simply the police. They do not simply consist of policemen in uniform, occasionally helmeted, armed and organized in a civil structure on a military model to whom the right to strike is refused, and so forth. By definition, the police are present, or represented, everywhere there is force of law [*loi*]. They are present, sometimes invisible but always effective, wherever there is preservation of the social order. The police are not only the police (today more or less than ever), they are there (*elle est là*), the figure without face or figure of a *Dasein* coextensive with the *Dasein* of the *polis*.

Id.

Associated in the liberal mind with benevolent resort to the state's capacities to elevate its citizenry, the police power became the principle means to elevate "public right," address the social (rather than merely individual) interests with which public right was purportedly identified, and thereby, ultimately, improve the human condition. The purpose of *The Police Power* is to establish a basis upon which we can think very differently—critically—about the police power. It locates the concept of police historically in patriarchy and heteronomy, uses that locale to define it as a mode of governance, and counterposes to it the concept of law, labeled *justice power* and expressive of autonomy, as the essential standpoint outside police from which the critique can be mounted.

In thus summarizing the project of *The Police Power*, and to a degree throughout this essay, I have been engaging in a professional academic exercise of "review." Here is one more scholarly book addressing one more scholarly subject. The routine of review categorizes its author's "contribution" to some specific or general pool of knowledge, and moves on. But is that all that should be said? I think not.

Dubber, like Benjamin, is telling a ghost story,[230] one full of warning for our time. For our time is one in which a past—the past of police—has "flashe[d] up at the instant when it can be recognized," a supreme "moment of danger."[231] Throughout *The Police Power*, police haunts law, indeed haunts life itself. Its spirit is ubiquitous but formless, de-centered, dispersed and distributed, unlimited and indefinable, always beyond law's grasp. For Benjamin, police was particularly threatening to the life of democracies—"the[ ] spirit [of police] is less devastating where they represent, in absolute monarchy, the power of a ruler in which legislative and executive supremacy are united, than in democracies where their existence . . . bears witness to the greatest conceivable degeneration of violence."[232] Derrida comments "[i]n absolute monarchy, police violence, terrible as it may be, shows itself as what it is and what it ought to be in its spirit, whereas the police

230. DERRIDA, *supra* note 24, at 278.

231. Walter Benjamin, *Theses on the Philosophy of History*, *in* ILLUMINATIONS 255 (Hannah Arendt ed., Harry Zohn trans., 1969).

232. BENJAMIN, *supra* note 4, at 287.

violence of democracies denies its own principle, making laws surreptitiously, clandestinely."[233] The point is, we know the truth of this so much more now than Benjamin in 1921, or even than Derrida in 1989, even after he added to Benjamin's his own words on "modern technologies of communication, of surveillance and interception . . . [that] ensure the police absolute ubiquity, saturating public and private space, pushing to its limit the coextensivity of the political and the police domain," even after he asks, "[i]s this the contradiction of which Benjamin thought? The internal degeneration of the democratic principle inevitably corrupted by the principle of police power, intended, in principle, to protect the former but uncontrollable in its essence, in the process of its becoming technologically autonomous?"[234] For we now live in a new age, an improved state of exception, our own absolute state of police.[235]

For Benjamin, the only answer, the final answer, was revolutionary violence, "a justice of ends that is no longer tied to the possibility of law."[236] Thus at the end of the

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233. DERRIDA, *supra* note 24, at 281.

234. *Id.* at 279-80.

235. As suggested by the WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Mar. 6, 2003), http://antiwar.com/rep/military_0604.pdf. The report, presents what Giorgio Agamben describes as "the state of necessity . . . interpreted as a lacuna in public law, which the executive power is obligated to remedy. In this way a principle that concerns the judiciary power is extended to the executive power." AGAMBEN, *supra* note 174, at 31. But, continues Agamben:

> [I]n what does the lacuna in question actually consist? Here the lacuna does not concern a deficiency in the text of the legislation that must be completed by the judge; it concerns, rather, a *suspension* of the order that is in force in order to guarantee its existence. Far from being a response to a normative lacuna, the state of exception appears as the opening of a fictitious lacuna in the order for the purpose of safeguarding the existence of the norm and its applicability to the normal situation. The lacuna is not within the law [*la legge*], but concerns its relation to reality, the very possibility of its application. It is as if the juridical order [*il diritto*] contained an essential fracture between the position of the norm and its application, which, in extreme situations can be filled only by means of the state of exception, that is, by creating a zone in which application is suspended, but the law [*la legge*], as such, remains in force.

Id.

236. DERRIDA, *supra* note 24, at 286.

Critique of Violence, Benjamin writes, "on the suspension of law with all the forces on which it depends as they depend upon it, finally therefore on the abolition of state power, a new historical epoch is founded."[237] Dubber, we have seen, believes that police may be made controllable, subjected to law.[238] This is his answer—like Benjamin's, no less, no more than an "act of hope."[239]

Deep layers of ironic coincidence here cloud the possibility that Dubber's answer is viable. Dubber begins and ends *The Police Power* identifying his goal —principled scrutiny of the police power from the standpoint of autonomy (law)—with a project begun by Thomas Jefferson in 1778 to interrogate governance in the new United States from the standpoint of the "unalienable rights" declared in the act of revolutionary violence known as American independence, and continued in 1779 when Jefferson established the new Republic's first chair "of law and police"

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237. BENJAMIN, *supra* note 4, at 300. Writing, in the spirit of Walter Benjamin, of the "spectral figure of the law in the state of exception," Giorgio Agamben concludes:

> One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good. What is found after the law is not a more proper and original use value that precedes the law, but a new use that is born only after it. And use, which has been contaminated by law, must also be freed from its own value. This liberation is the task of study, or of play. And this studious play is the passage that allows us to arrive at that justice that . . . [Benjamin] defines as a state of the world in which the world appears as a good that absolutely cannot be appropriated or made juridical.

AGAMBEN, *supra* note 174, at 64.

238. It must be said that elsewhere Dubber has seemed less sure, noting in the course of a searing disquisition upon the quotidien realities of American criminal law and procedure (police's most developed expression) that "traditional rules of criminal law . . . survive mainly as the object of theoretical investigation and the subject of university instruction, in a parallel universe largely untouched by the reality of the criminal process." See Markus Dirk Dubber, *The New Police Science and the Police Model of the Criminal Process*, in THE NEW POLICE SCIENCE, *supra* note 76.

239. James Boyd White describes finding "a way of living in an unjust world by imagining an ideal into partial reality" as an act of hope. *See* JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS 307 (1994).

at the College of William & Mary.[240] Jefferson is well known for his throwaway endorsement of revolutionary violence,[241] but his interrogation of governance from the standpoint of the unalienable rights it had brought forth was not at all productive, perhaps because as both a private and a public governor, Jefferson knew only too well the benefits of police. Jefferson the governor of slaves was patriarch nonpareil, the classic Aristotelian beneficiary of classic household governance. Jefferson the governor of Virginia, in pursuit of "worthy" ends, was spectral police incarnate. "It is very much the Interest of the good to force the unworthy into their due Share of Contributions to the Public Support, otherwise the burthen on them will become oppressive indeed" he wrote to Garret Van Meter on the occasion of Claypool's Rebellion, an obscure protest that erupted in April 1781, centered on Hardy and Hampshire Counties in western Virginia, against statutes passed by the Virginia Assembly to levy taxes to subsidize the recruitment of troops for the Continental Army, and to requisition supplies.[242]

> [M]en on horseback have been found the most certain Instrument of public punishment. Their best way too perhaps is not to go against the mutineers when embodied which would bring on perhaps an open Rebellion or Bloodshed most certainly, but when they shall have dispersed to go and take them out of their Beds, singly and without Noise, or if they be not found the first time to go again and again so that they may never be able to remain in quiet at home.[243]

The governor of slaves knows firsthand that his noble unalienable autonomy (law) has been enabled by the

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240. DUBBER, *supra* note 9, at xii, 216 (describing Jefferson's project to revise Virginia's laws of crime and punishment to conform to the principles advanced in the Declaration of Independence).

241. "I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical." Letter from Thomas Jefferson to James Madison para. 4 (Jan. 30, 1787), *available at* http://earlyamerica.com/review/summer/letter.html.

242. Letter from Thomas Jefferson to Garret Van Meter para. 1, (Apr. 27, 1781), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch3s6.html; *see also* Letter from Garret Van Meter to Thomas Jefferson, (Apr. 11, 1781), *available at* http://www.wvculture.org/history/revwar/claypool01.html.

243. Letter from Jefferson, *supra* note 242.

meanness of slavery (police). The governor of Virginia thinks it perfectly appropriate to use agents of *public* punishment clandestinely, to disappear rebellious rights-holders from their beds, or harass them until they singly flee, to serve "the Interest of the good."[244] Is this not all too drearily familiar? Can such men as these "revolutionaries-turned-rulers" seriously be treated as the initiators of a critique of the "something rotten" embedded at the heart of this particular "state of exception" (by which, of course, I mean "exceptional" America[245]) at the time of its beginning, as authors of first principles to which we should now return? [246] Dubber's faith in law-as-autonomy is not naïve. But to turn to a law-that-has-never-been, a law that has no history, as a means to resolve the degeneration of democracy that police so pervasively has been and *is*, cannot be counted as anything but an act of hope, and, I fear, a vain one at that.

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244. *Id.*

245. *See generally* DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE (1991) and CULTURES OF UNITED STATES IMPERIALISM (Amy Kaplan and Donald Pease eds., 1993) for a general discussion on the "national ideology of American exceptionalism," ROSS, *supra* at 22, and the nineteenth and twentieth discourses of exception that its realization would require.

246. Dubber argues that inspiration to resolve the problem of the American police power can be found in the Republic's moment of origin, when "[t]he revolutionaries-turned-rulers of the new republic . . . were revolutionaries first, and rulers second" with interests in "erecting a novel system of government under law." DUBBER, *supra* note 9, at xv-xvi.