

The New Police Science and the Police Power Model of the Criminal Process

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There was once a unified concept of police. Police was the means and the end of patriarchal governance. Policing meant governing the state as a household for the sake of its “public police and oeconomy” (Blackstone 1769, 162; see also Rousseau 1755; see, generally, Dubber 2005b). Police science was devoted to the study of police thus understood.

Today the concept of police has fallen apart. On one side lies the police of “police power,” pure and simple, as exemplified by the police officer. On the other lies the police of “the police power,” as exemplified by the police regulation. Police science survives as police officer science: the study of investigative techniques and “police management.”¹ Police science as the study of the police power has disappeared. The police that the police officer protects, and the police power that she personifies, no longer exist. Instead, the police officer has been reconceptualized as a law enforcement officer, just as police science has become a subcategory of the field of criminal justice (see, e.g., John Jay College of Criminal Justice 2004).

The New Police Science seeks to recover the unified concept of police as an object of study (on the predisciplinary ambitions of this project, see Neocleous 2005). It concerns itself with the police power as a general mode of governance, rather than with one of its specific institutional manifestations, the police department, or one of the specific personal components of that institutional manifestation, the police officer. Clearly, a comprehensive theory of the police would have to find room for the police department and its members, but one cannot hope to come to grips with the concept of police by focusing exclusively on the duties and skills of the cop on the beat. Occasionally, one can catch a glimpse of the old concept of police in discussions of the functions of a police officer. Police officers are, after all, also often referred to as “peace officers.” As U.S. Supreme Court Justice Clarence Thomas recently pointed out, dissenting in *Chicago v. Morales*, “the idea that the police are also *peace officers* [is not] simply a quaint anachronism. In most American jurisdictions, police officers continue to be obligated, by law, to maintain the public peace” (*Chicago v. Morales* 1999, 107).

The “public peace,” however, is simply one aspect of, if not synonymous with, the public’s police. It therefore only made sense that Thomas went on to quote approvingly from a leading nineteenth-century treatise on the *police power*, “The vagrant has been very appropriately described as the chrysalis of every species of criminal. A wanderer through the land, without home ties, idle, and without apparent means of support, what but criminality is to be expected from such a person?” (*Chicago v. Morales* 1999, 104, n. 4 [quoting Tiedeman 1886, 116–17]).

The point of this chapter, however, is not to explore the relationship between police power and *the* police power (on this point see Neocleous 2000; and see chapter 5), but to illustrate those features of the criminal process as a whole that reflect its foundation in the power to police. It has long been black-letter law in the United States that the power to punish, and therefore the entire enterprise of state coercion through criminal law, is grounded in the police power (*Foucha v. Louisiana* 1992, 80; LaFave and Scott 1986, § 2.10; Laylin and Tuttle 1922, 622; *Sutton v. New Jersey* 1917). This doctrinal fact, however, is treated as though it were of no consequence whatsoever, if it is noted at all. It is odd, to say the least, that the foundation of criminal law, the basis for the right to punish, has attracted so little attention. Despite

an ever-expanding literature on the theory of punishment, however, the nature of the legal or political authority underlying the state's criminal process has been left unexplored. How can this be?

Police Power as Patria Potestas

The answer lies in the concept of the police power itself. The police power is constructed as inevitable, self-evident. The power to police, it is said, is incident to the very idea of government. To govern is always also to police. Sovereignty without the power to police is no sovereignty at all. At the same time, the police power is defined as indefinable, limitless. To identify a state action as grounded in the police power is to insulate it from analysis and critique. The police power is but an "idiom of apologetics" (Hamilton and Rodee 1933, 190 [quoted in Novak 1994, 1082, n. 58]).

Merely to recognize the label "police power" as inoculation against principled critique, however, is not enough. The potency of the police concept makes sense only if we see it within its genealogical context. As I have argued elsewhere in some detail, the inevitability and limitlessness, even the often-asserted naturalness, of the police power reflects its origins in the patriarchal power of the householder over his household (Dubber 2005b). The householder's patriarchy, in other words, is more than a convenient metaphor used by eighteenth-century writers (Rousseau 1755; Blackstone 1769, 162) to capture the nature of domestic government in the purported service of the public welfare, i.e., "the police." It is, rather, a basic mode of governance that can be traced throughout the history of Western politics, beginning at least with the pre-Aristotelian *Oikonomikos*, "a work of practical advice to the gentleman landowner about the sound management of an estate, its slaves, household, and land" (Meikle 1995, 5). Today's "public peace" is grounded in the ancient "householder's peace," and the power to police is a modern manifestation of the householder's authority to maintain his peace, expanded and transferred onto the state-as-household.

To consider the criminal process—as with any other governmental practice or institution—in light of the police power thus means to explore the extent to which its functioning can be illuminated by regarding it as an instance of patriarchal household governance.

Historically, the householder's patriarchal power over his household was unlimited *except insofar as the he proved himself unfit for his post*. Unfitness was a character—or personality—flaw that prevented the householder from functioning as the maximizer, or at least the sustainer, of the household's welfare. So in medieval law the lord was prohibited from depriving his serf of life or limb (Pollock and Maitland 1896, 1:415–16, 437; Hyams 1968, 127). It is important to understand, however, that this limitation—doubtless of greater theoretical than practical significance—did not derive from anything like the serf's "right" to physical integrity or even to life, never mind to treatment consistent with "human dignity." It was of evidentiary significance: certain punishments were so brutal (later on, the "rule of thumb" performed a similar function) that they were indicative of the punisher's inability to run the household or lack of interest in discharging the function of maximizing the household's welfare, since a life- or limbless serf was at least presumptively useless as a household resource. A patriarch not in control of his emotions was incapable of policing himself. And someone incapable of internal police—of himself—also was incapable of external police—of others.

This apparent limitation on patriarchal power, however, itself implies the existence of a superior and limitless patriarchal power. Each familial patriarch ultimately was subject to the authority of the royal patriarch, who claimed the power to police over his subjects considered as members of his macro household. The king himself was not subject to patriarchal power (except, in premodern times, to the patriarchal power of the Christian god, who regarded all of *his* creatures as members of his household, and whose patriarchal fitness was beyond scrutiny—unlike that of the [chief!] gods of the Greeks or the early Germans, whose follies are the stuff of mythology).

Police power then is primarily concerned with status. The patriarch's power derives from his status as householder. That status is defined in relation to the status of the members of his household. The householder governs, and the household is governed. Discipline is used against household members who act in a manner inconsistent with their status (on sumptuary police regulations, see Hunt 1996). The most obvious and blatant form of acting up is to defy the authority—and thereby to deny the status—of the householder. The most extreme manifestation of defiance is the destruction of the householder—*treason* (grand or petit, depending on whether the victim is the head of the macro or a micro household) or, in its original sense,

felony as the breach of the duty of loyalty owed the householder (Pollock and Maitland 1896, 1:303).

At the same time, if the householder “acts down” by behaving in a manner characteristic of the mean or base who constitute the household, then he is demoted—or rather demotes himself—to the status of the governed. Where he was once the whipper, he now becomes the whipped (*Foot v. State* 1883 [“An Act to inflict corporal punishment upon persons found guilty of wife-beating”]). Reduced to the status of those incapable of self-policing (self-restraint, “politeness”), he is now subject to the police power of another who is capable of externalizing his internal capacity to self-police and whose self is expanded to include the entirety of his household.

Threats—and open challenges—to the authority of the policer are threats to the household itself. As the embodiment—*not* the representative—of the household, the householder’s welfare is also the household’s. So important is the welfare of the householder that the remotest threat to his well-being must be eliminated. Already imagining the death of the macro householder is treason. (By contrast, only the actual killing of the micro householder amounts to—*petit*—treason [Treason Act of 1351, 25 Edw. 3 stat. 5 c. 2].)

The policer-householder will not hesitate to interfere as soon as a threat to his authority manifests itself. The greater the threat, the earlier he is likely to interfere. The police power thus is often associated with preventive—as opposed to remedial—measures (Bentham 1789, 102; *Commonwealth v. Alger* 1851). Prevention, however, is neither essential nor unique to police. It may be empirically true that the policer will often interfere earlier rather than later. *Ex post* intervention, however, is not necessarily incompatible with the police power, although it may provide evidence of unfitness to govern insofar as it indicates vindictiveness (or tardiness), which in turn would represent a failure of self-police on the part of the policer. Nor is *ex ante* intervention necessarily *compatible* with the police power as it may indicate paranoia or fearfulness. To regard police as characterized by prevention thus is to miss its discretionary essence: the policer will choose whatever measures he considers to be best suited to accomplish his end of maintaining the police of the household, which is coextensive with his peace, or *mund* (Herlihy 1985, 48; see also Hyams 1968, 96), be they preventive or not. The policer certainly is not precluded from taking preventive measures, but that is not to say that he will not turn to retrospective measures if necessary.

In a patriarchal regime the victim of every offense is the householder. The paradigmatic offense is the breach of the householder's peace. Offenses against members of the household are significant insofar as they are offenses against the household, including its head. Offenses against members of the household challenge the householder's ability to maintain the peace and therefore his authority. They also deprive him of a resource. Mayhem, for instance, was punished as "an atrocious breach of the king's peace, and an offense tending to deprive him of the aid and assistance of his subjects" (Blackstone 1769, chap. 15). Most dramatic was the elimination of a royal human resource through homicide; the circumstances surrounding the homicide were beside the point as the king-householder lost a human resource either way—even killings in self-defense required a royal pardon, i.e., the macro householder's exercise of his discretion *not* to punish (Baker 1990, 601).

If an outsider inflicts the injury, the medieval householder must be made whole, either through the payment of wergild or through the delivery of an equivalent resource (the offending sword, servant, tree, dog; Brunner 1894b). Injuries inflicted by one household member upon another are dealt with in the discretion of the householder, to be exercised in the interest of the household's welfare.

Gustav Radbruch saw in intrahousehold discipline of household members by the householder the origin of criminal law (Radbruch 1950). Intrahousehold offenses are different in quality from external ones; besides diminishing household resources and challenging the householder's *mund*, they reflect disloyalty. Disciplining the offender serves to reassert the householder's superior status and to prevent future resource deprivation, at the lowest possible present cost. That is why physical discipline, such as whipping, is a more popular disciplinary sanction than the other traditional householder sanction, incarceration—it indicates superiority without incapacitating the offender from contributing to the household's welfare for extended periods of time. Injuries to life and limb are suspect—and cast suspicion on the householder's ability to police the household—because, and insofar as, they are liable to have a long-term incapacitative effect.

Interhousehold offenses, by contrast, are resolved through arrangements among the heads of household. Radbruch regarded the resolution of interhousehold disputes as the origin of modern international law (Radbruch 1950). The head of the offending household is responsible for the delivery

of the wergild or other compensation to the head of the offended household. If attempts at interhousehold settlement failed, the offended householder could turn to violence, often resulting in a cycle of vengeance that could be broken only with the disappearance of one of the households, through either destruction or subjugation, i.e., the integration of its members into the surviving household. This alternative dispute resolution through violence (in case compensation could not be arranged) can be seen as the origin of the modern law of war, insofar as it too was subject to rules of proportionality and did not amount simply to an acting out of hostilities.

Those offenders who belong to no household—or at least are treated as such—do not fit into this household-centered regime. They are subject to the patriarchal power of no one. They are the unpoliced. They are the “lordless men” of Anglo-Saxon dooms who must either be integrated into a household, and thereby subjected to the police of another, or become not only lordless, but “peaceless” as well (Pollock and Maitland 1896, 1:31). As outlaws, vagabonds, rogues they roam the countryside and can be destroyed with impunity or subjected to whatever lesser harm seems fitting (cf. Brunner 1894a; Agamben 1998).

Unlike the policed, their treatment is not even subject to theoretical limitation. Visiting boundless cruelty upon them does not reflect a deficit of self-police; they no longer contribute to the police of any household, micro or macro, so that their well-being, their productivity (their human resource), and even their existence is of no import. They are treated like wolves, except that even wild animals are under the protection of the king—as members of the king’s macro household, any harm to the life or limb of a wild animal is also an offense against the king’s *mund*. This is the origin of game laws, which—as Blackstone pointed out—were eventually mistaken for protections of the authority of local lords, who were, however, no more than caretakers, or custodians, for the king’s animal resources (Blackstone 1769, 174).

Carceral Police: Wars on Crime and Other Police Actions

Modern equivalents of the lordless man can still be found in national and international affairs, long after the label “outlaw” has disappeared from the official vocabulary of the criminal process (though in English law the term

remained in use well into the nineteenth century). In the international realm, the lordless man is the “irregular” or “enemy” combatant, or “partisan” (cf. Schmitt 1963). Prisoners of war (POWs) are subject to the laws of war. They belong both to another macro household (they are citizens, or at least permanent residents, of another nation) and, just as important, to a micro household (that country’s armed forces) that is under the police control of various intermediate householders (from the commander in chief down to the leaders of smaller units). As such, POWs are entitled to treatment analogous to the treatment they would receive within their own micro (military) household, down to the retention of internal status—i.e., rank—differentiation within POW camps. In fact, their treatment is to be comparable to that of members of the armed forces that are holding them in custody (Department of the Army 1956, §§ 101, 158).

Partisans, by contrast, as unpoliced human threats are entitled to no protections of any kind. They may be shot on the spot (Department of the Army 1956, §§ 80–82). Should they be taken prisoner for one purpose or another (e.g., clarification of status [Liptak 2004], interrogation), their guards do not (and could not) act as placeholders for their nonexistent heads of household. Guards are free to treat them as they see fit, without regard to their welfare; at the same time, their welfare does not affect the welfare of the guards’ household. Absent the disobedience of specific orders (which always constitutes a police offense), their treatment does not reflect upon their guards’ ability to police themselves, because their treatment is not meant to police.

The “war on terror” detainees at Guantánamo Bay’s Camp X-Ray were classified as “unlawful enemy combatants” precisely because this classification removed them beyond the reach of the law of war and the domestic law of the United States (Cole 2002). Instead they are subject only to whatever constraints their captors (and interrogators) choose to impose upon themselves. As a facility, Camp X-Ray therefore differs from a POW camp and, perhaps more significant, an ordinary prison for criminal suspects and convicts. By contrast, POW camps and convict prisons are organized as quasi households and, in that sense, as police institutions. The POW has not violated any norms, nor has he acted beyond (or beneath) his station. The captive regular soldier has performed his household function, which turns out to be inconsistent with the police of the captor household. He is constructively governed according to rules analogous to those of his own

household until he can be reintegrated into that household (through a prisoner exchange or at the end of the war).

The prison inmate, unlike the POW, has violated a household norm—or, in the case of pretrial detainees, at least has been suspected of having violated one. As such, he requires not only sustenance, but also correction. For that reason, the law of war prohibits housing POWs in ordinary convict prisons, or “penitentiaries,” even for disciplinary purposes (Department of the Army 1956, §§ 98, 173).

Traditionally, prisons—*houses of correction*—have been organized under a quasi-familial model, be it as a family, a factory, a military unit, or a slave plantation, with the warden occupying the position of head of household and the guards acting as overseers. Even when prisoners were officially designated “slaves of the state” (*Ruffin v. Commonwealth* 1871, 796), they were, as slaves, treated as household members, i.e., not as mere detainees but as inmates, a term also used for members of a Germanic household (Vinogradoff 1913).

Focusing on the exceptional treatment of the unpoliced highlights the similarities between law and war and suggests that even waging a “war on crime” does not necessarily imply a complete paradigm shift from “traditional” law enforcement. The U.S. war on crime began in the 1960s in large part as a war on *organized* crime. The war on organized crime, however, was a distinctly *interfamilial* dispute in that the micro household of the police was pitted against the micro household of the Mafia. In a different interfamilial scenario, the Kennedy family—with Robert Kennedy as Attorney General leading the charge—waged war on various “crime families” (see Goldfarb 1995). Mafiosi were subject to the police of their superiors who enforced certain codes of conduct, much as police officers on the beat were policed by their higher-ups in addition to being subject to the laws of the macro household, the nation. In this sense, the war on crime began as a civil war.

The crime war metaphor threatens to break down, however, as soon as one tries to apply it to the eradication of so-called street crime. The disturbances of the late 1960s that gave rise to Nixon’s declaration of a war on crime unmodified were not attributed to organized crime (Nixon 1968). Instead, the phenomenon of street crime was from the beginning highly racialized, so that the only group to which enemies in the war on crime might be seen to belong was a racial group: African Americans. In fact, much of

the fear of street crime arose from its apparent randomness; it was radically disorganized, unpoliced by crime families or syndicates. The war on crime unmodified was no longer a struggle among households within the confines of the macro household. Instead of a civil war, it was a domestic police action against a racial group that mirrored the external “police actions” against North Vietnam (as well as previously against North Korea and subsequently against Iraq) (Corn 1999; Agamben 2000, 102; see also chapter 7).

The enemies of the second, broader, stage of the war on crime were more analogous to partisans, or enemy combatants, than to military enemies in war. Even when attention was turned to criminal gangs, these clusters of criminal threats tended to be conceptualized differently than the organized crime families of the original war on crime, as their structure was often assumed to be less complex and more fluid, with insufficient oversight and continuity to qualify for the title of a criminal organization. Unlike a low-level mafioso, enemy combatants in the war on crime were not subject to the police authority of a micro householder. As lordless men, as unpoliced threats, they were beyond the scope of the police of the macro household. As alien combatants, they were not subject to correction but to incapacitation through various means, ranging from execution to prolonged warehousing to continued postrelease supervision (see Garland 2001; Dubber 2002b; see also Bastian 2004).

Prisons for domestic enemy combatants in the war on crime unmodified are not run on a police power model. They are not so much households as they are *camps*, in the sense described by Giorgio Agamben (Agamben 1998; see chapter 7). The warden is not the father, nor the factory owner, nor the military superior. The *familial* model that best fits a carceral warehouse for enemy combatants is the slave plantation, not only because of its racialized hierarchy, with nonwhites predominating among the “inmates” and whites predominating among the guards (Dubber 1995, 720–22), but also because the distinction between lordless men, on the one hand, and nonhuman members of the plantation household, on the other, may be difficult to draw. Even the slave, however, remained subject to the police power of the householder, which meant that—at least in theory—his ill-treatment could expose the householder to discipline at the hands of the macro householder, provided it reflected the householder’s unfitness to police (Dubber 2005b). Not even these theoretical, or aspirational, limitations apply to the treatment of prisoners as domestic enemy combatants.

In practice, of course, the treatment of prisoner-inmates as nonhuman members of the prison's quasi household may closely resemble that of prisoner-outlaws as unpoliced (and unpoliceable) nonmembers of that, or any other, household. The very fact that even the rightless slave could be conceptualized as a member of the household illustrates that, at bottom, the object of internal household governance (the policed) is essentially *abuman*. He, she, or it is a resource in the hands of the householder (the policer)—the power to police is the “power to govern men and things” (*License Cases* 1847, 583). While the competent householder will adjust his governance according to the nature of his object, differential and object-specific treatment is determined by considerations of expediency and the maximally efficient use of available resources, as opposed to the object's entitlements or “rights.” It may be prudent to give household members notice of what constitutes proper behavior since it is easier to obey explicit rules than implicit ones, but they are not *entitled* to receive notice, nor would they have standing to complain about the absence of notice in the event of a reprimand for the violation of an unannounced—and presumably unknown—rule. The household includes, after all, not only humans, but also animals, inanimate objects, and real property, not all of which could receive notice, never mind act accordingly. At best, to the extent that humans, for instance, operate more efficiently with notice—and perhaps, in some sense, animals as well—a householder may decide to give notice, even as a rule, whenever he seeks to manage (certain) humans (or animals), on certain days, in certain situations (Fuller 1969, 207–17; rule of law principles as prudential guidelines of “managerial direction”).

The point is that police governance is driven by the policer-householder's analysis of the exigencies of a given threat scenario. The householder decides what is best for the household at any given moment and therefore also determines what requires his disciplinary attention. He may decide to use his disciplinary power, or he may decide not to use it. He may decide that a household governed by consistent rules operates more efficiently than one without such rules. He is the ultimate arbiter of threats—a particular act may constitute a challenge to his authority (or a threat to the household's police), or a certain thought, even a glare, or a less than expeditious carrying out of an order, or tardiness, or improper dress (either too fancy—an assumption of higher status—or not fancy enough—a sign of disrespect;

Hunt 1996), or impolite language, or an insufficiently bent knee, and so on (the list is by necessity endless). Since different household members may manifest disrespect in different ways, there is no reason to think that they are subject to identical rules of behavior, other than the one rule that they must not cause or threaten harm to the commonwealth of the household and or to the authority of its head.

Criminal Police: Protecting the Peace of Macro and Micro Households

Justice Thomas's reference to peace officers in *Morales* was meant to remind us that police officers do more than enforce the law; they also keep the peace. Vagrancy, the offense at issue in *Morales*, is the peacekeeping offense par excellence (cf. Neocleous 2005). As lordless men loitered about the English countryside in the fourteenth century, the royal household sought to control them by reintegrating them into various households in various ways, by forcing them to accept job offers rather than pursuing more lucrative employment opportunities, by delivering them to a householder who claimed them as his own, and eventually by committing them to the quasi household of the prison (23 Edw. 3, New Statute, c. 1 [1349]; 25 Edw. 3, Stat. 1, c. 1 [1350]). Vagrancy statutes thus served to protect, not any peace, but the *king's* peace—i.e., the king's *mund* over his newly claimed macro household of the realm—through various means, including, at the beginning, the use of micro households as local peacekeeping institutions.

But focusing on vagrancy threatens to obscure the true scope of criminal police. For *every* offense in the end is a police offense, and not just those traditionally categorized as such. Ultimately, there is no distinction between the two functions of the police officer. She is not *also* a keeper of the peace; she is nothing else. Being a peace officer is not part of a police officer's function; it is her only function. Criminal law in its entirety derives from the state's power to police; a crime is a crime insofar as it breaches the peace (*Foucha v. Louisiana* 1992, 80; LaFave and Scott 1986, § 2.10; Laylin and Tuttle 1922, 622; *Sutton v. New Jersey* 1917). But "the peace" is simply the householder's *mund*, and its "breach" represents an offense against the householder's authority to maintain the *mund* of his household. A crime is an "offense" precisely because it offends the sovereignty of the state. The "victim" of

murder is not the person whose life has been extinguished or his relatives or any other person who suffers indirectly as a result of his death—it is the sovereign whose authority has been challenged (see *Heath v. Alabama* 1985; Dubber 2002b).

Hausfriedensbruch and *Landfriedensbruch*—breach of the house peace and of the land peace—are one and the same insofar as the peace of the land (the public peace) is also the peace of the sovereign's house (the private peace). Breaking the peace of a micro householder constitutes two offenses, then, one against the micro householder and one against the macro householder who long ago has incorporated all micro householders into his macro household, reducing former householders to household members. The offense of treason illustrates the point. Originally, there was only treason, the ultimate act of *felonia*, i.e., the breaking of the bond of loyalty between any man and his lord. Then, with the Treason Act of 1351, petit treason was distinguished from treason unmodified: petit treason was directed at the micro householders, and treason unmodified at the macro householder (Treason Act of 1351, 25 Edw. 3 stat. 5 c. 2).

Petit treason could be committed only against the *head* of a micro household, the local lord. Treason unmodified, by contrast, could be committed against any member of the king's *micro* household (Treason Act of 1351, 25 Edw. 3 stat. 5 c. 2). Furthermore, the king's micro household included not only his immediate relatives (his family in the narrow sense) but also his officials. An offense against a royal justice, for instance, was an offense against the king himself and therefore constituted treason. (In fact, it was this expansive definition of the king's personal household, and the concomitant broad reading of treason, that prompted the definition of treason in the Treason Act in the first place and, much later, would become a bone of contention in the lead-up to the American Revolution [Dubber 2005b].) Still, while merely imagining the king's death was enough to be treason, one would actually have to kill a royal official to commit treason. The scope of petit treason was likewise limited to actual killings of local lords, reflecting once more the integration of the micro householder into the king's macro household. The local lord deserved no more, and no less, protection through the criminal law than did a royal official.

Eventually, petit treason disappeared entirely, along with—in Anglo American law, but not in German law (see German Penal Code §§ 123

[breach of house peace], 125 [breach of land peace]—breach of the house peace. Only treason unmodified remains, where it is understood to mean treason against the sovereign. The integration of the micro householder and his household into the macro household is complete: Initially, there were only offenses against the micro householder. Then offenses against the macro householder were differentiated from, and considered more serious than, offenses against the micro householder. Eventually, there were only offenses against the macro householder.

Today petit treason is classified as ordinary murder.² As with any other homicide, the murder of a micro householder constitutes a crime only insofar as it offends the dignity of the sovereign. Killing a micro householder is no longer offensive to the micro householder himself but to the macro householder. As with any other homicide, murdering a micro householder defies the macro householder's authority, and breaches his *mund*, all the while depriving him of a human resource.

In the United States, the rationale of petit treason survives, however, even if the crime did not. The offenses of breaking and entering, and of trespass, are at bottom offenses against the householder's peace. The move away from a territorial or physical approach to the law of trespass—and, by extension, the law of burglary, which is defined as trespass plus an intent to commit a crime while inside—represents not so much an abandonment of anachronistic formalism as it does a more direct manifestation of the nature of trespass as a breach of the peace, as opposed to the penetration of a physical barrier: trespass was always about breaking a peace, not a window. Similarly, the householder's discretionary authority to use deadly force to protect his household against burglary, even if none of its human constituents is endangered in any way, survives in many U.S. jurisdictions (N.Y. Penal Law § 35.20(3); see Dubber and Kelman 2005, chap. 7).

Most interesting, perhaps, is the significant role the peace of the micro household continues to play in the federalist system of U.S. government and, more specifically, in the conceptualization and development of federal criminal law in relation to state criminal law. The theory of U.S. federalism attempts to integrate micro households—states—into a macro household while maintaining their household identity (sovereignty). The states must retain their police power, for without that power they would no longer exist as political households. The American revolutionaries went so far as to deny

the national government the power to police, framing the federal government instead as a coordinator, arbitrator, and representative of a group of sovereign households (contrast chapter 3, which explores the evolutionary dispersion of central police power in Canadian federalism). Having thrown off the policer-king, the American Founding Fathers were understandably leery of subjecting the newly independent states to the police power of another householder. And so they arranged for an apersonal national government that facilitated the exercise of the states' internal police power (Dubber 2005b).

This arrangement persists on paper to this day. In fact, however, the federal government soon began exercising a police power, all the while insisting that its power was limited to the regulation of interstate and international commerce and the like (see, already, Freund 1904, 63; see also Novak 2002, 269–70). The Founding Fathers did not go so far as to deny the national government the sovereignty that they thought essential to the very notion of government. The concept of sovereignty, however, was not radically reconceptualized, but remained rooted in the concept of the householder's authority. As a householder, any sovereign also possessed the power to police. And so setting up a national government necessarily also meant granting that government the power to police. The history of the federal police power in the United States—and with it of federal criminal law as a manifestation of that power—thus has been the history of its denial. Most recently, in *United States v. Lopez*, the U.S. Supreme Court struck down a federal criminal statute because it amounted to a de facto exercise of the police power, a power the federal government does not have de jure (*United States v. Lopez* 1995). And yet federal criminal law continues to expand, while courts continue to intone the familiar refrain that criminal law remains “the business of the States” (*Patterson v. New York* 1977, 201).

The classification of a *state* statute as an exercise of the police power has the exact opposite effect: it virtually insulates the statute from scrutiny. (When it comes to federal statutes, the commerce clause—which gives the federal government the power to regulate interstate commerce—performs very much the same function, *pace Lopez*.) The one notable exception to this general rule is the infamous case of *Lochner v. New York*, where the U.S. Supreme Court invalidated a state maximum-hours statute backed up by criminal sanctions as an improper exercise of the police power (*Lochner v. New*

York 1905). (The Court reasoned that there was an insufficient connection between the means—limiting the number of hours bakers could work—and the purported end—the police, i.e., the public welfare, as opposed to the welfare of bakers or the interests of unions.) This opinion, however, was soon repudiated by the Court—most notably in a series of cases upholding New Deal legislation—and has for decades been the subject of virtually unanimous criticism, if not outright derision, among judges and academic commentators, to the point where “Lochnerization” became synonymous with judicial usurpation of power.

The coexistence of federal *de facto* police power and state *de jure* police power is most vividly illustrated by the so-called dual sovereignty exception to the prohibition against double jeopardy. Since a crime is a crime insofar as it gives the state offense, a single act can be subject to punishment by several offended sovereigns. If the fatal blow is inflicted in one state and the victim dies in another, both states can take offense and punitively respond to the assault on their sovereignty in the form of a violation of one its criminal norms and the deprivation of one of its human resources. This double punishment for a single act does not technically violate the federal constitutional prohibition against twice putting someone’s life or liberty in jeopardy “for the same offense” (U.S. const. amend. V) because there were in fact two offenses—one against the first state, and another against the second (*Heath v. Alabama* 1985). More significant for our purposes, the dual sovereignty exception also applies to acts that offend both a state and the federal government. The nation, in other words, also enjoys sovereignty and therefore also possesses the police power incidental to it.

The distinction between petit treason and treason highlights not only the distinction between the macro household of the state and micro households within it, but also that between the king’s macro household and his own micro household. While it is true that the expansion of royal power was also the expansion of the royal household—by means of the expansion of royal “common” law applied and enforced by the royal courts—the distinction between the king’s micro household and the macro household (the kingdom) remained significant. This distinction underlies that between bureaucracy and population, between state and civil society (cf. Neocleous 2005), between officials and the public. In England the household origins of today’s state institutions were better preserved than in the United States,

as illustrated by such institutions as chancery (headed by the chancellor, the king's chaplain, also referred to as "the king's conscience"), exchequer, chamber, and wardrobe ("Household" 2004).

Even as the macro householder expanded his household to encompass every resource—human and otherwise—within his realm, he also maintained the distinction between his micro and macro households. While, within his micro household, every member owes deference to him as the householder, every member of the macro household also owes deference to members of the sovereign's micro household, who are under his immediate *mund*. Members of the sovereign's micro household perform the function analogous to that of the slave overseer in the plantation household—they enforce and protect the authority of the master while personifying it. The head of household is constructively present in its deputies and any offense against them is ultimately an offense against him. Disobedience of a police officer's orders thus is also disobedience of the sovereign, an offense against the authority of the state (see, e.g., N.Y. Penal Law § 195.10; refusing to aid police officer classified as offense against "public administration"). Even injuring a police animal "while in the performance of its duties" is criminalized (N.Y. Penal Law § 195.06). The German Penal Code devotes an entire chapter to offenses constituting "resistance to state authority" (German Penal Code chap. 6).

Offenses against a state official represent two offenses against the state: like all other offenses, they offend the public peace; but they also constitute a form of treason in that they specifically offend the private peace of the sovereign's micro household (see, already, Treason Act of 1351, 25 Edw. 3 stat. 5 c. 2; killing of royal justice constitutes treason unmodified). For that reason they are subject to enhanced punishment; the offender has manifested an exceptional level of disrespect for state authority and therefore requires exceptional correction.

While the distinction between the sovereign's micro household and his macro household continues to be vigilantly policed—also in the criminal prohibition of impersonating state officials (see, e.g., N.Y. Penal Law §§ 190.25 and 190.26)—it is at the same time obscured and denied in various ways. Note, for instance, state officials' self-characterization as "public servants." The servant status of public officials is taken quite literally. U.S. federal criminal law, for instance, sanctions breaches of a duty of loyalty owed by public servants to the public. It constitutes federal criminal fraud to

deprive the public of its “right to honest services” (18 U.S.C. § 1346). This federal criminal provision mirrors—and increasingly serves to supplement—private law, which places upon employees the same duty of loyalty toward their employers (see Dubber and Kelman 2005, chap. 11). It is not difficult to conceptualize a business as a quasi household; by contrast, thinking of clerks at the local Department of Motor Vehicles office as members of a household governed by the public-as-householder is not so easy. Public servants are servants of the public only—and at best—in the sense that they are servants of the sovereign who in turn *represents* the public.

Representation should not be confused with identity, however, no matter how strenuously the ideology of the modern democratic state might deny the existence of a sovereign apart from the public it is said to represent. “The public,” after all, is also the sovereign’s macro household. To declare the identity of public and sovereign cannot alter the fact that the sovereign continues to exercise the power to police over the public considered as members of his household. That is what the police power is, after all—the expansion of patriarchal power over one’s micro household to the macro household of the state (Rousseau 1755).

Now, it is of course true that, at least in the United States, members of the public, or to a lesser degree even members of the sovereign’s micro household (though members of the President’s “cabinet” continue to “serve at his discretion,” as do his cadre of “White House” advisors, counsels, deputies, etc.) no longer owe personal allegiance to an individual householder. The personal head of the household has been removed, but the mode of household governance has been retained. Allegiance is still required—and its absence sanctioned—but the allegiance now pledged, in the United States, is to apersonal lords and, eventually, to a god: “the Flag of the United States of America, and to the Republic for which it stands: one Nation under God, indivisible, with Liberty and Justice for all.” Alternatively, the head of the republican household is said to be “the law” (in Thomas Paine’s words, “in America THE LAW IS KING” [Paine 1776]). In this view, the head of household to whom loyalty is owed is not an abstract symbol of a political community but an abstract idea, or perhaps a set of abstract norms. (The U.S. Pledge of Allegiance captures one central aspiration of the idea of law—“liberty and justice for all.”) The republican sovereign then is the public, a flag, a nation, a deity, an idea, or an aspiration. Whatever the sovereign is,

it is emphatically *not* a person. This credo was treated as true by definition; for if the sovereign were a person, the United States would no longer be a republic, and the American Revolution would have been for naught.

But what is true by definition is not necessarily true in fact. In fact, sovereignty is always also personal as persons wield the power to police over the very public whose identity with sovereignty is postulated. Since their sovereign power is not acknowledged, however, it also is not subject to scrutiny or critique. In fact, since the state itself does not exist according to the prevailing ideology, and as the public polices itself in the position of both policer and policed, householder and household, state power becomes invisible. From the perspective of the stateless United States, the problem of the legitimacy of police power is limited to those countries—“continental Europe”—that acknowledge the existence of the state and recognize the administration of the state and its relationship with the public, on one hand, and the government, on the other, as a central challenge of state governance.

A principle of legality (*Legalitätsprinzip*) that radically—if incompletely—restricts the discretion of state officials, say, by requiring them to pursue every violation of state norms, is therefore only appropriate in these countries (German Code of Criminal Procedure § 152; principle of compulsory prosecution). In the United States, state officials need no such constraints because whatever power they exercise, they exercise in the name of the public as householder. They are, at most, the public’s deputies, mere instruments of the public’s self-police.

Acting Up and Acting Down: White Collar Crime and the Case of Martha Stewart

Many members of the public do identify themselves with state officials in general, and police officers in particular, and thus view themselves as insiders, i.e., as members of the sovereign’s micro household, or perhaps deny the existence of a distinction between the sovereign’s micro and macro household altogether. This identification is particularly common, we may surmise, among those members of the public who rarely come in contact with state officials or, if they do come in contact with them, summon their assistance, rather than feel the sting of their nightstick. These individuals, we may

further speculate, in private life also are more likely to wield householder power rather than be the object of another's householder power.

Collectively, as the law-abiding public, these individuals regard themselves as engaged in a common policing task with police officers, finding the distinction between themselves and the state obscured. That distinction, however, emerges all too clearly on those occasions when they feel state power brought to bear against them, rather than against those whom they regard as the proper objects of police power. So complete is the identification between the privileged and the police that even minor exercises of state power that would appear routine to the mass of the policed (see, for instance, the outcry about traffic arrests of suburbanites [cf. *Atwater v. City of Lago Vista* 2001]) are experienced as blatant overreaches of state power against the public by one of its servants.

Perhaps the most dramatic reminder of the vigilance with which the state polices the line between its micro household and the public's macro household, between the state and civil society, is the prosecution of white-collar crime. Consider, for instance, the much-publicized case against Martha Stewart, the self-made queen of domestic bliss and CEO of Martha Stewart Living Omnimedia, a company listed on the New York Stock Exchange and with over two hundred million dollars in annual revenue (in 2003). In April 2004, Stewart was convicted of lying to federal investigators about her reasons for selling stocks in another company. She was convicted of "obstructing justice" and making false statements to federal officials, both serious crimes under federal law, each punishable by up to five years in prison (18 U.S.C. §§ 371, 1001). The following month, Frank Quattrone, an investment banker, was convicted of obstruction of justice for forwarding an e-mail instructing subordinates to destroy documents related to an ongoing federal investigation (Glater 2004). In both cases, the defendants were not charged with the criminal conduct that was under investigation. The investigations with which Stewart and Quattrone were said to have interfered in fact turned up insufficient evidence of criminal conduct. The cover-up was not worse than the crime; it was the crime itself.

Stewart and Quattrone were put in their place. They were prosecuted for crimes against the state. In summation, the federal prosecutor in Stewart's trial urged the jury to contemplate the victim impact of her lies to federal investigators: "Don't think about the S.E.C. Don't think about the F.B.I.,

though they certainly were victimized. It's really our entire nation, our country, that is victimized" (Toobin 2004, 72).

Note that this plea not only labels state agencies as the victims of a criminal offense, but then glides from the victimhood of the Securities and Exchange Commission and the Federal Bureau of Investigation into that of the "entire nation." The implication here is that an offense against the authority of the state is an offense against civil society, much as an offense against the authority of the householder is an offense against the household. The welfare, if not the survival, of the macro household (civil society) depends on the householder's (the state's) ability to take measures as he (it) sees fit.

Identifying the interests of civil society with those of the state allows one to deny the possibility of difference between the two. When the operation of the state is obstructed, when a police officer's orders are disobeyed, when evidence is destroyed, when criminal liability is denied under oath or to a federal investigator's face, the victim is not just the state but "really" the entire macro household policed by the state.

Martha Stewart's case in particular illustrates the macro householder's age-old struggle of integrating micro householders into the macro household. As the head of a corporation, Stewart policed the members of her corporate household. This did not entitle her, however, to disrespect the authority of the macro householder over her. And so the state reminded her of her inferior status. In fact, the prosecution went farther; it implied that Stewart was unfit even for her status as micro householder, by exposing her gratuitously abusive behavior toward members of her micro household which—much like the medieval lord's inflicting harm on his man's life or limb—suggested that she was incapable of policing herself and therefore of policing her household. She was literally "demeaned," i.e., exposed as "mean" in the traditional sense of "low" or "base" (Strachan-Davidson 1912, 170), and her correction may be seen as reflecting her failure to act her part as a member of the macro household and, at the same time, as the head of her micro household. (It is no accident that frequent comparisons were drawn between Stewart and another businesswoman who was the target of a federal white-collar prosecution some ten years earlier, hotelier Leona Helmsley, dubbed the "Queen of Mean" [see Hales 2004].) In the end, her case was not about reminding Stewart that she was not above the law; it was about reminding her that she was below the state.

At this point, it should be noted that the criminal conduct under investigation in Stewart's and Quattrone's cases bore no obvious relation to harm suffered by particular individuals (i.e., by victims other than the state and its agencies). Securities fraud is a regulatory offense that is said to threaten the "integrity" of financial markets (*United States v. O'Hagan* 1997, 654). Under this view, the point of punishing securities fraud is not so much to prevent financial losses to individuals as it is to encourage—or at least to remove a disincentive for—individuals to invest in the market, on the theory that fewer people would invest less money in a market that does not give them a fair shake, say, because insiders trade on the basis of nonpublic information.³

The criminal offense of securities fraud, in other words, itself is a policing tool in the hands of the regulatory state, even if the institution being policed is the market (which is supposed to do best without policing). Securities fraud interferes with the state's regulatory framework and threatens its police authority (see, already, Blackstone 1765, 264; policing of "public marts"). For that reason alone, and wholly apart from any impact on individual victims, it entitles the state to use its police power to criminalize it.

Securities fraud, along with obstruction of justice and false statements, illustrates a type of offense that is central to the police power model of the criminal process: the victimless obedience offense (Dubber 2002b). In its focus on victimless obedience offenses, the police power model of the criminal process differs significantly from Herbert Packer's well-known crime control model of the criminal process (Packer 1968). Packer drew a distinction between what he termed the due process and the crime control models of the criminal process. Whereas the due process model sought fairness and truth, the crime control model was concerned with the efficient suppression of crime. Packer's crime control model, however, still assumed that the paradigmatic victim of a criminal offense is a person. The paradigmatic offenses were homicide, rape, robbery, and burglary, each conceptualized as an (intentional) act of interference with the rights or interests of another person. To prevent this interference, or at least to minimize its occurrence, the crime control model sought to put in place an efficient system of case disposition. The due process model operated with the same notion of crime, even though it emphasized bringing the perpetrators of these crimes to justice, rather than eradicating crime.

The police power model abandons this shared individualist foundation. Its paradigmatic crime is the offense against the state. Put another way, crimes

that would appear victimless under the due process or crime control model now do have a victim, the state. Under the police power model of the criminal process, the state as householder disciplines individuals as members of the household for threats to its authority. The police power model thus is, at bottom, a familial model.

A rather different familial model has been proposed as an alternative to Packer's two models. In 1970 John Griffiths criticized Packer for drawing a false distinction between the due process and crime control models. In Griffiths's view, both models could be reduced to a "battle model" of the criminal process, one that "assumes disharmony, fundamentally irreconcilable interests, a state of war" (Griffiths 1970, 371). Instead, Griffiths argued, we should proceed from "an assumption of reconcilable—even mutually supportive—interests, a state of love."

The police power model proceeds from an altogether different assumption of identity—between the interests of the state and the interests of society, and by implication of every one of its members, including the offender herself. Punishment is no longer punishment, but correction. Offenders are subjected to "peno-correctional treatment," which may include capital punishment (Dubber 2000). The state as patriarch metes out correction as it sees fit, rather than meting out justice for what is deserved. Where there is no conflict, there is also need for constraint.

The rationale for punishment under the police power model is treatmentism, which upon closer inspection turns out to be no rationale at all but rather the denial of the need for one (nor is it, strictly speaking, about punishment, which might be taken to imply constraints of desert and blame): once redefined as treatment, punishment needs no justification (or its justification is self-evident; Dubber 2002a). While Griffiths—and many others with him, including the drafters of the Model Penal Code, which has set the tone for U.S. criminal law scholarship and reform since the 1950s—held a benign view of treatmentism as rehabilitation, the police power model of the criminal process has shifted emphasis onto the repressive side of the treatmentist coin, incapacitation. Incapacitation is rehabilitation without the hope—or pretense—of reform.

The paradigmatic offender of incapacitative treatmentism is the incorrigible lordless man, who is literally beyond correction. The paradigmatic sanctions of incapacitative treatmentism thus are (physical or civil) death through execution; fatal imprisonment (which is fatal either because the

sentence is life imprisonment without the possibility of parole or because prison conditions are such that death is likely before expiration of a sentence short of life)⁴; postprison supervision under strictly enforced and highly intrusive conditions; and a host of collateral disabilities (including ineligibility for state support and, most important, mass disenfranchisement—now four million persons [Allard and Mauer 2000]), which incapacitate by themselves in addition to increasing the likelihood of carceral incapacitation in the future. Heinrich Brunner long ago postulated outlawry as the *ur*penalty, which deprived its object of all rights (Brunner 1894a). Other, lesser, penalties—including afflictive penalties against the body—represented merely sticks in the bundle of deprivations that is outlawry. Today, physical and civil death are modern forms of outlawry, from which all lesser incapacitative police sanctions derive.

Rules of Law in the Police Power Model of the Criminal Process

In the remainder of this chapter, we will explore how some representative doctrines of U.S. criminal law fare in a police power model of the criminal process. Not surprisingly, traditional rules of criminal law—some of the most cherished among them—will turn out to interfere little with the operation of the treatmentist police regime in action. They survive mainly as the object of theoretical investigation and the subject of university instruction, in a parallel principled universe largely untouched by the reality of the criminal process.

LEGALITY PRINCIPLE

Let us begin with the principle that comes closest to an explicit attempt to place the state's police power within rules of law, the principle of *legality* (see Dubber and Kelman 2005, chap. 2). While U.S. law is occasionally said to recognize a principle by that name, a look at its various components suggests that it does not in fact place significant constraints on the discretionary power of state officials in the criminal process.

As we have already noted, there is no requirement that prosecutors or police officers pursue every provable violation of a state criminal norm

(principle of compulsory prosecution), leaving charging and investigatory decisions to the discretion of individual officials, without meaningful guidance or review of any kind.

Moreover, the requirement of notice is entirely fictional. Good-faith reliance on a misinterpretation of a state criminal norm does not constitute a defense (see, e.g., *People v. Marrero* 1987). Publication of state criminal norms is required, but the publicity of legislative deliberations preceding the adoption of the norm satisfies the requirement (*United States v. Casson* 1970).

Retroactive criminal norms are prohibited, but here too courts have turned a blind eye to the retroactivity of judicially created—as opposed to statutory—norms (*Rogers v. Tennessee* 2001). In addition, they have refused to apply the prohibition to modern punitive measures such as registration and notification requirements for sex offenders (*Smith v. Doe* 2003) and even the indefinite incarceration of so-called sexually violent predators beyond their legally imposed sentence (*Kansas v. Hendricks* 1997).

Another aspect of the legality principle, specificity, is sporadically enforced and often treated less as a constitutional requirement than as a rule of statutory construction. Federal criminal law in particular abounds with vague criminal prohibitions that are regularly upheld on the ground that their vagueness was intended by the legislature. The federal racketeering statute (the Racketeer Influenced and Corrupt Organizations Act [better known as RICO]), for instance, explicitly provides that it “seek the eradication of organized crime,” and to that end directs that “the provisions of this title shall be liberally construed to effectuate its remedial purposes” (Pub. L. 91-452, §§ 1, 904, 84 Stat. 922 [1970]). Another prominent example is federal mail fraud and “honest services” fraud in particular (18 U.S.C. § 1346), as the following exchange between a legal advisor to a congressional subcommittee considering the proposed adoption of the honest-services fraud statute (Ronald Stroman) and a justice department official testifying in support of its adoption (John C. Keeney) illustrates:

Mr. Stroman: Well, honest services of [a] public official, do you think that is . . . specific? I mean what does “honest services” mean? Certainly if I am a public official—

Mr. Keeney: Well, it means that—it means what the circuit courts of appeals have been saying for years that when a

[public official] corruptly uses his office he is depriving the citizens of that State of his honest services.

Mr. Stroman: . . . If I am an official in the Government and I see the term “honest government,” that certainly does not alert me . . . as to what you are trying to cover. I do not know what that means. . . . I would have to read the cases to specifically understand what the statute is attempting to get at. (*Mail Fraud* 1988, 48–49)

The vagueness of the federal mail fraud has been lauded as a breakthrough in the war on crime because it places discretion in the hands of state officials (prosecutors and, to a lesser extent, judges) to determine its proper scope: “When a ‘new’ fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil” (*United States v. Maze* 1974, 405 [Burger, C. J., dissenting]; see also Kahan 1997). Displaying great appreciation for the difficulty of precisely defining prohibited conduct in advance in the pursuit of criminal elements, federal courts in particular have largely abandoned the traditional canon of strictly construing ambiguous criminal statutes according to the “rule of lenity” (*in dubio pro reo*; Kahan 1994).

Actus Reus

Traditional (“common law”) principles of criminal liability likewise fit uneasily into the police power model of the criminal process. The presumptive limitation of criminal liability to affirmative acts, for instance, is beside the point in a system that seeks to identify threats to state authority. An attitude of disobedience can manifest itself in affirmative acts as well as in omissions. Any time the state commands action, the failure to act challenges its authority.

In some respects, omission liability has become the norm, rather than the exception. Take possession offenses, which account for a significant proportion of arrests and prison sentences in U.S. criminal law⁵ and range from misdemeanors to first-degree felonies punishable by life imprisonment without the possibility of parole (e.g., *Harmelin v. Michigan* 1991). Possession offenses cannot be reconciled with the traditional act requirement in criminal

law for the simple reason that possession is not an act, but a status, or a relationship between an individual and an object (see, generally, Dubber 2002a). So they are recast as omission offenses: possession of an item is criminal insofar as it implies the failure to separate oneself from the object, based on a general—but implicit—duty to *dispossess* oneself of contraband (see, e.g., Model Penal Code § 2.01; Texas Penal Code § 6.01[b]).

White-collar offenses provide another example.⁶ Omission offenses are widespread in white-collar criminal law. A prime example is the crime of failing to file a tax return. Omission is also a common offense modus in corporate criminal law; the notion of a corporation not engaging in a voluntary act it ought to (and therefore must have been able to) commit is apparently less problematic than that of a corporation engaging in a voluntary act it ought not to commit (e.g., Model Penal Code § 2.07[1][b]). Moreover, officers within the corporation tend to be held individually liable for failures of supervision, rather than for affirmative acts. The omission may even consist of a failure to prevent or to end another omission, as in the seminal case of *United States v. Park*, where the CEO of a supermarket chain was held criminally liable for failing to keep a subordinate from failing to keep one of the chain's warehouses sufficiently rat free (*United States v. Park* 1975).

Mens Rea

The traditional *mens rea* requirement fits no more comfortably into the police power model of the criminal process than does the *actus reus* requirement. Strict liability crimes are proliferating in U.S. criminal law. Simple possession offenses, which criminalize mere possession of an item without the need to prove an intent to use it in some way (for instance, through consumption or distribution in the case of controlled substances and through operation or threatened operation in the case of firearms), are popular policing tools (Dubber 2002a). Felony murder, which imposes strict liability murder liability on anyone who causes—even accidentally—another's death in the course of a felony, remains a central feature of U.S. criminal law doctrine, despite decades of academic criticism (see Dubber and Kelman 2005, chap. 10). Statutory rape, i.e., sexual intercourse with an underage female, continues to be treated as a strict liability felony. As a New York appellate court put it, a statute that “forbids 21-year-old males from having intercourse with females under 17, regardless of whether the accused is aware of the female's age” falls

under “what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes” (*People v. Dozier* 1980).

In the case of white-collar crime, strict liability is the rule, rather than the exception. Individual criminal liability in a corporate setting frequently requires no proof of *mens rea*—the mere failure to discharge one’s supervisory duty is often enough, without the need even to prove negligence (*United States v. Dotterweich* 1943).

In the case of corporate criminal liability, strict liability is the paradigmatic offense form, as traditionally the concept of a corporate *mens rea* was considered too fanciful a construct (or at least yet more fanciful than that of a corporate *actus reus*). Here the trend has been toward the recognition of corporate criminal liability for intentional crimes (*State v. Chapman Dodge* 1983), just as individual criminal liability has moved in the opposite direction, away from a presumed limitation to intentional crimes to the recognition of criminal liability for strict liability offenses.

In either case the police power model has increased the scope of criminal liability and thereby the authority of state officials who wield the unconstrained discretion to seek criminal sanctions against a particular object. From the standpoint of the discretionary police power model, the presence or absence of *mens rea* (or for that matter, *actus reus*) is simply of no moment—the decision whether a particular threat source requires elimination, or at least containment, rests with the sovereign and his deputies, largely unconstrained by cumbersome doctrinal rules (see Kahan 1997).

Offenderless Offenses

In an important sense, the police power model of the criminal process operates with offenses that are not only victimless, but offenderless as well. The *actus reus* and *mens rea* requirements are compromised to such an extent that the humanness, the personhood, of the offender is no longer a prerequisite for criminal liability. To the extent that the police power model of the criminal process focuses on the identification and elimination of threats to the state, rather than the definition and punishment of wrongs to persons, and reflects the sovereign’s “power to govern men and things” (*License Cases* 1847, 583), the distinction between human and nonhuman threats has no principled basis. As threats to the police, persons are no more entitled to

certain treatment than are other types of threat. It may well be, of course, that a wise policer will in fact differentiate between human and nonhuman threats, just as a wise householder might decide to treat his wife differently from his sons, his daughters from his horses, and his slaves from his olive trees. But, from the perspective of police, all threats are rightless, including human ones. At bottom, the object of police governance through the criminal process is the threat, not the offender.

Not traditional conduct offenses but status offenses and character offenses characterize the police power model. Explicit status offenses like loitering have been revived in the war on gangs (*Chicago v. Morales* 1999). Implicit status offenses like possession dominate the business of police, prosecutors, and courts (occasionally combining one status with another, as in the popular felon-in-possession statutes [Dubber 2002b, 73–74]). Character offenses like honest-services fraud criminalize disloyalty in any form. Endangerment offenses of all shapes and sizes—reckless endangerment (Model Penal Code § 211.2) is only the most explicit among them—that authorize the state to interfere before the infliction of harm, in many cases before the creation of risk in a particular case, flourish (Dubber 2005a).

So-called inchoate (or preliminary) offenses, like attempt, conspiracy, facilitation, and solicitation similarly authorize state officials to interfere at ever-earlier points in the spectrum from criminal character to criminal thought to criminal act. Criminal solicitation, for instance, is complete once one person writes a letter asking another to commit a crime, even if the letter is not delivered, never mind read by its intended recipient (*People v. Lubow* 1971). An attempt has been committed as soon as the person has taken a “substantial step” in the direction of consummating the offense, no matter how far she is from actual consummation (*Commonwealth v. Danton* 1995); the defense of impossibility has been abandoned so that anyone manifesting abnormal dangerousness is punishable even if her attempt had no chance of succeeding, say, because the police officer she thought she was disobeying was in fact an actor on a TV show or because the cocaine she thought she was buying from an undercover agent was actually powdered sugar (*People v. Dlugash* 1977). A criminal conspiracy today is complete once one person *thinks* she is agreeing with another to commit a crime, even if her supposed coconspirator has no intention of ever committing it, so that there is no chance of the conspiracy bearing fruit (*People v. Berkowitz* 1980). Criminal

facilitation has been committed as soon as a person does anything that she believes may help another to commit a crime; criminal intent on the part of facilitator is no longer required (*People v. Gordon* 1973). And of course even conduct that falls well short of an attempt, or for that matter of traditionally nonpunishable “preparation,” is criminalized under the host of possession statutes that populate modern U.S. criminal law—including those criminalizing the possession of instruments of crime or weapons (Dubber 2002a).

In general, the creation and interpretation of criminal law is driven by a deeply felt need to facilitate the elimination of criminal threats. Ease of enforcement accounts for the popularity of possession offenses in the war on crime: they are easy to detect (through everyday pat downs or searches incident to arrest) and easy to prove (thanks to the elimination of *actus reus* and *mens rea*) (Dubber 2002a). Any residual complications are removed through the liberal use of presumptions (from presence to possession, from possession to knowing possession, from knowing possession to the intent to use; on “Anti-Social Behaviour Orders” in the United Kingdom as police facilitators, see chapter 5).

Criminal Procedure

The absence of constraint through traditional doctrinal rules of law permeates the entire criminal process; it characterizes not only the substantive law of crimes, but the law of criminal procedure (i.e., the criminal process in the narrow sense) as well, not to mention the practice of penal enforcement, which—as we have already noted—occurs primarily in carceral warehouses, where inmates are at best policed and at worst detained as lordless men.

Criminal procedure under the police power model is dominated not by the traditional criminal trial, but by plea bargaining, which brings to bear the full power of the householder-state upon the suspect in that it is dominated by the essentially unreviewable discretion of state officials—including not only prosecutors and judges, but also court-appointed defense counsel and public defenders (Dubber 1997). Appellate review of plea agreements is virtually nonexistent. Except for a small minority of cases (less than 10 percent), all criminal cases are resolved through a guilty plea, not counting cases that are resolved through a bench trial, a juryless streamlined proceeding before a judge. While plea bargaining in theory is not necessarily inconsistent with a different model of the criminal process (Dubber 2004), plea bar-

gaining in practice fits the police power model well, and does so by design: it is marked by the steeply hierarchical relationship between state officials and suspects, manifested in part by sentence discounts for acts of self-degradation and self-incrimination (“acceptance of responsibility” and “substantial assistance”; U.S. Sentencing Guidelines §§ 3E1.1, 5K1.1).

The process of the state’s reasserting its authority through degradation and humiliation, of course, is not complete with the entry of a guilty plea (or in those rarest of cases, a guilty verdict). It continues, and intensifies, with the imposition and infliction of the criminal sanction, which publicly communicates and then inscribes onto the convict a message of degradation. The paradigmatic sanction in U.S. criminal law is incarceration in warehouses for criminal threats, supplemented with intrusive noncarceral state supervision that treats offenders as incapable of self-police and frequently results in the resubmission to carceral supervision for technical violations of parole or probation conditions. (In 2001 the U.S. carceral population reached two million, at the world’s highest incarceration rate of seven hundred per hundred thousand, with another four million persons on various types of “supervised release” [Bureau of Justice Statistics 2002a and 2002b; Walmsley 2002].)

Despite the obvious degradation implicit in the imposition and infliction of such police sanctions, U.S. criminal law recently has sought to sharpen the message of degradation and humiliation. Although corporal sanctions (with the important exception of capital punishment) have yet to resurface (but see Blecker 1990; Newman 1995), shaming sanctions have found enthusiastic supporters among the judiciary and even academic commentators. The degradation of white-collar offenders has attracted particular attention (see Kahan and Posner 1999). Not only does their elevated social status leave greater room for degradation, but—as illustrated in the Martha Stewart case previously discussed—their offensive behavior may be taken as evidence of an overestimation of their status vis-à-vis the state and its norms.

Public shaming, however, has been advocated for and applied in other cases as well. In *United States v. Gementera*, for instance, a 24-year-old convicted of “pilfer[ing] letters from several mailboxes along San Francisco’s Fulton Street on May 21, 2001” was sentenced by a federal trial judge to “spend a day standing outside a post office wearing a signboard stating, ‘I stole mail. This is my punishment.’” (*United States v. Gementera* 2004; with

additional examples). The sanction was upheld on appeal against the charge that it constituted “cruel and unusual punishment” in violation of the Eighth Amendment to the U.S. Constitution on the ground that shaming sanctions are “hardly unusual” given their “proliferation” in U.S. courts. Persons convicted of driving while intoxicated, committing sexual offenses, and soliciting prostitution find themselves frequently among the targets of degradation sanctions (for instance, by being forced to wear special bracelets or to display bumper stickers identifying their crime of conviction, or having their picture, personal information, and crime of conviction published in newspapers, on billboards, on local TV stations, on the Internet, and distributed to neighbors and local schools).

Conclusion

To say that the criminal process can profitably be analyzed from the perspective of the police power is not to say that it cannot be viewed from other perspectives as well. In fact, I have argued elsewhere that the criminal process can be seen as manifesting the principle of autonomy, the basic principle of legitimacy in political theory since the enlightenment (Dubber 1998, 2004a). In the autonomy model, central features of state punishment—including the legality principle, the conduct and intent requirements in the substantive law of crimes, the jury trial before representatives of the offender’s community, even plea negotiation as a participatory process of self-punishment in the law of criminal procedure, and inmates’ participation in prison governance along with the retention of inmates’ minimal rights as persons—are (re)conceptualized as attempts to legitimate the practice of punishment by rendering it consistent with the idea of self-government (Dubber 2004b).

One way of thinking about the police and autonomy models of the criminal process is as radicalizations of Packer’s crime control and due process models.⁷ Since the publication of Packer’s *Limits of the Criminal Sanction* in 1968, the war on crime has transformed the comparatively quaint crime control model, which centered on the protection of individual rights through preventive interference, into the police power model, which instead seeks to eliminate threats to state authority. This development has thrown the due

process model into sharper relief and exposed it as an essentially groundless historical construct ill suited to prevent the emergence and eventual dominance of the exigency-driven police power model. Today, the police power model better captures the reality of the criminal process, while the autonomy model must content itself with shaping its ideology.

Notes

1. See, for instance, the “principal objective” of the *International Journal of Police Science and Management*: “to facilitate . . . research into the criminal justice system and the practicalities of its day-to-day management of criminal justice organisations including, but not necessarily confined to, the police. Topics such as police operational techniques, crime pattern analysis, crime investigation management, accountability, performance measurement, interagency cooperation and public attitude surveys are welcome” (*International Journal of Police Science and Management* 2004).

2. Note, however, that originally the concept of murder too was intimately bound up with the notion of a betrayal of one’s lord, and was therefore treason (O’Brien 1999, 79; 1996).

3. Consider, once again, the Stewart case. Initially, Stewart also was charged with *securities fraud*—and not merely with making a false statement to state officials—for having denied any insider trading with the intent to artificially inflate her company’s stock price by dissuading investors from selling shares. (This count eventually was dismissed by the trial judge on the facts, not on the law.) Here, securities fraud and false statements work hand-in-hand to enforce state authority (see Moohr 2004).

4. As of 2003, almost one in every ten prison inmates in the U.S. was serving a life sentence. In some states, including California and New York, that proportion approximates one in five (Mauer, King, and Young 2004).

5. For instance, in 1998, possession offenses accounted for 17.9 percent of arrests in New York State and 20 percent of jail or prison sentences (Dubber 2002a, 834, 857).

6. Note also that the concept of a white-collar offense itself is based not on conduct but on status.

7. Another way is to regard the distinction between the two models as reflecting that between the realms of “police” (patriarchal apersonal order maintenance according to maxims of expedience) and of “law” (self-government of persons by persons under principles of justice). The latter distinction is explored in Dubber 2005b and problematized in Farmer 2005.

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