Article

“The Power to Govern Men and Things”:
Patriarchal Origins of the Police Power in American Law

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INTRODUCTION

This article explores the genealogy of the police power, the most expansive, least definite, and yet least scrutinized, of governmental powers.¹ For centuries, it has been a commonplace that the power to police “is, and must be from its very nature, incapable of any very exact definition or limitation.”² Upon the police power, “the most essential, the

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¹ Police power is used here, and throughout this article, not in the sense of the power of police officers, but in its original, and broad, sense of the state’s power to police as a mode of governance. See, e.g., ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904); CHRISTOPHER G. TIEDEMANN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT (1886).
² Slaughter-House Cases, 83 U.S. 36, 49 (1873).
most insistent, and always one of the least limitable of the powers of government,” hinges nothing less than “the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.” As such “[i]t extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property,” and underlies a vast expanse of legislation and regulation at all levels of governance, from the national government through the states and down to the smallest municipalities, including American criminal law in its entirety.

Despite its central place among the powers of government, the police power has all but disappeared from American legal and political discourse. Court opinions continue to refer to it in certain doctrinal contexts, most notably in takings jurisprudence (where a taking, which requires compensation, is distinguished from a regulation under the police power, which doesn’t). And treatises mention it in passing, when the need arises to identify the authority underlying a particular type of law or to list various governmental powers. But serious scrutiny of the extent—and limitations—of the police power in

5. Id. at 49. In theory (and blackletter law), the police power is limited to states. In fact, however, the federal government has long exercised a general police power of its own, albeit in the guise of other explicit powers, most notably the power to regulate commerce. See Freund, supra note 1, at 63 (stating that it is “impossible to deny that the federal government exercises a considerable police power of its own”); but see United States v. Lopez, 514 U.S. 549 (1995) (striking down federal criminal statute on the ground that it cannot be justified as an exercise of the commerce power, and in fact amounts to an exercise of a general federal police power).
8. See LaFave & Scott, supra note 6, at 141.
jurisprudence or scholarship is a thing of the past. This article aims to help resurrect the concept of the police power as a worthy object of study, in the hope that a better understanding of its origins will lay the foundation for a critical analysis of its modern manifestations.

The concept of police entered American political and legal discourse in the late eighteenth century. Many of the early state constitutions contained references to “the internal police” of a state. A decade later, at the federal constitutional convention, James Wilson insisted on the preservation of state governments “in full vigor,” for the sake not only of “the freedom of the people,” but also “their internal good police.” In 1779 Thomas Jefferson established a chair of “law and police” as one of eight professorships at the College of William & Mary, in the course of replacing several of the original charter professorships, including one of divinity.

But where did Jefferson, Wilson, and their fellow Founding Fathers get the idea of police? And what did they mean by it? As so often in the historiography of American law, the best place to start is Blackstone’s *Commentaries on*

10. The last comprehensive study of the police power appeared in 1904. See Freund, supra note 1. The last U.S. Supreme Court case to undertake a meaningful review of an exercise of the police power was Lochner v. New York, 198 U.S. 45 (1905).


14. See generally Thomas Jefferson, *Notes on the State of Virginia*, query xv (William Peden ed., University of North Carolina Press 1955) (1781); Thomas Jefferson, A Bill for Amending the Constitution of the College of William and Mary, and Substituting More Certain Revenues for Its Support (1779). According to the appendix to Jefferson’s bill to amend the college’s constitution, this chair was to cover both “municipal” and “oeconomical” law. Municipal law, or law in the narrow sense, included “common law, equity, law merchant, law maritime, and law ecclesiastical.” “Oeconomical law,” or police, encompassed “politics” and “commerce.”
the Laws of England, which “rank second only to the Bible as a literary and intellectual influence on the history of American institutions.”15 In the fourth, and last, volume of the Commentaries, published in 1769, Blackstone set out a definition of police that would shape American legal discourse for centuries to come:

By the public and oeconomy I mean the due regulation and domestic order of the kingdom; whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.16

Until well into the twentieth century, American legislators, courts, and commentators would consult Blackstone when it came time to turn their attention to the police power. Legislators used Blackstone’s police categories to structure their new codes;17 courts invoked Blackstone to police the scope of the police power, as well as to create police offenses of their own (which they called “common law misdemeanors”);18 and commentators built their more or less comprehensive analyses of the police power in action on Blackstone’s definition of their subject.19

Blackstone, however, is only part of the story. For however influential Blackstone proved to be in the New World, he could not, and did not, make any claim to originality. (In fact, it is doubtful that his influence would have been quite as broad had he been more original than conveniently familiar.) At any rate, Blackstone’s view of police in particular was radically unoriginal. It reflected a long tradition of governance that can be traced back to early

17. See FREUND, supra note 1, at 28 n.2.
Greek writings on economics, understood in its original, literal, sense, as the art of the “government of the household for the common good of the whole family.”\(^20\) This mode of *patriarchal* governance\(^21\) can be traced, I believe, through Roman law, which granted the *paterfamilias* plenary power over the *familia*,\(^22\) and medieval law, which recognized a similar discretionary authority of every householder over his household, the *mund*, with the eventual expansion of the king’s *mund*, or royal peace, to cover each constituent of the state considered as “members of a well-governed family.”\(^23\)


21. By patriarchy I mean, quite literally, government of the family, as household, by its head (ordinarily the father), as householder, and, more loosely, the power associated with this form of government. Carole Pateman’s classic account of patriarchy in political theory focuses on the patriarchal power of the household head, as husband, over one particular member of the household, his wife. She argues persuasively that traditional histories, and systems, of political theory have not appreciated the central significance of this intrafamilial relationship—defined by what she calls the “sexual contract”—and instead have paid exclusive attention to the interfamilial relationships among (male) household heads. **Carole Pateman**, *The Sexual Contract* (1988). This paper broadens Pateman’s focus to consider household governance more generally, while also insisting on the insufficiency of any attempt to construct a history or theory of government that disregards—and dismisses as irrelevant—“private” as opposed to “public” governance, or “police” as opposed to “law.” It thereby joins a growing body of work dedicated to uncovering—and rediscovering—modes of governance that have been ignored, if not suppressed, by traditional legal and political histories. *See, e.g.*, **Mariana Valverde**, *Law’s Dream of a Common Knowledge* (2003); **William J. Novak**, *The People’s Welfare: Law & Regulation in Nineteenth-Century America* (1996).

22. *See generally* **David Herlihy**, *Medieval Households* 2 (1985). According to M.I. Finley, the *paterfamilias* was not the biological father but the authority over the household, an authority that the Roman law divided into three elements . . . . *potestas* or power over his children (including adoptees), his children’s children and his slaves, *manus* or power over his wife and his sons’ wives, and *dominium* or power over his possessions.” M.I. Finley, *The Ancient Economy* 19 (1973). Finley stresses the practical irrelevance of these intrafamilial distinctions in the face of paternal power: “the head manages and controls both the personnel and the property of the group, without distinction as to economic or personal or social behaviour, distinctions which could be drawn as an abstract intellectual exercise but not in actual practice . . . .” *Id.*

23. *See Herlihy, supra* note 22, at 48; *see also* **Paul R. Hyams**, *King, Lords and Peasants in Medieval England: The Common Law of Villeinage in the Twelfth and Thirteenth Centuries* 96 (1980) (pointing out that Bracton equated the lord’s authority over the villein “with the Roman law *potestas*, which a master had over his slave, a *paterfamilias* over his family”). The old
As a well-entrenched, and truly basic, mode of governmentality, one would expect to find manifestations of policing before Blackstone, including in colonial America. In fact, Americans were policing long before they imported the concept of policing from overseas in the late eighteenth century, combining long-standing governmental techniques from English law, such as the regulation of vagrants and the punishment of petit treason, with innovations and adaptations of their own, including the comprehensive warning-out system in New England, the internal disciplining of church members, and most significantly the management of slaves in plantation households. Americans of the revolutionary generation thus may well have embraced the concept of police because it named, and apparently systematized, a wide array of governmental practices with which they were intimately familiar.

It’s clear that Blackstone did not originate the idea of state government as household management. Nor, it turns out, did he come up with the idea of naming it police. By the eighteenth century, the term had been around on the continent for at least four centuries, and even had blossomed into “police science,” a full-fledged academic discipline, complete with treatises, university faculties, and training academies. On Blackstone’s side of the Channel, the Scots had been thinking and writing about police for decades. Adam Smith, for one, began delivering his famous Lectures on Justice, Police, Revenue and Arms, which he eventually developed into the Wealth of Nations, at Glasgow in the 1750s, well before Blackstone sat down to write his Commentaries.

It is of course possible, perhaps even likely, that at least some of the Americans who began speaking of police and the police power in the late eighteenth century did not get the concept from Blackstone, but from any of the

notion of mund survives in a few German words, such as “Vormund” (guardian) and “mündig” (of age or responsible, as in “strafmündig” (criminally responsible)).

24. On the notion of governmentalties, and technologies of governance, see Michel Foucault, Governmentality, in THE FOUCALUT EFFECT: STUDIES IN GOVERNMENTALITY 87, 102 (Graham Burchell, Colin Gordon, & Peter Miller eds., 1991) [hereinafter THE FOUCALUT EFFECT].

25. Lectures on Justice, Police, Revenue and Arms delivered in the University of Glasgow By Adam Smith Reported by a Student in 1763 (Edwin Cannan ed., 1896).
representatives of this much more developed, and older, literature on police. Contributors to this body of work included, after all, not only Smith, but also such influential thinkers as Rousseau, Beccaria, Bentham, and even Vattel.

To understand the American concept of the police power, as well as Blackstone’s own view of police, we will have to take a close look at the continental tradition that culminated in the science of police. The police of the police scientists, like the police in Blackstone’s “offenses against the police and oeconomy,” will turn out to rest on a conception of state government as household governance, with the one difference that this conception was worked out into a science of political economy, i.e., an enormously detailed, comprehensive, and complex system of social—“economic”—control, assembled for the benefit of the enlightened prince.26

26. The inherent connection between police science and the police state of absolute continental monarchies exposes a deep tension between police and democratic governance, and between police and law, that has not been sufficiently noted by recent work on early American notions of police. See, e.g., Tomlins, supra note 12; Novak, supra note 21. The operative distinction between police and law was not that between a substantive political community—or “commonwealth”—and an abstract system of rules, nor that between local and central government, between self-government and other-government, or between progressivism and conservatism.

The political community of police might have been a family, but it was a family governed by a paterfamilias with indefinite power over the household resources at his disposal. The historical tension between police and law is not to be confused with the current tension between communitarianism and liberalism.

There was also nothing inherently local about the notion of police. Policing occurred at all levels of government, from small municipalities to the national government. The fiction that police power was limited to the states—rather than the federal government—played a crucial role in the federalist compromise, but it was nonetheless a fiction.

The distinction between autonomy and heteronomy does indeed map onto that between police and law. But it was police that was associated with heteronomy and law with autonomy, rather than the other way around. Finally, the fact that progressives turned to the police power to implement their social reform agenda at the turn of the twentieth century doesn’t make the police power inherently progressive. At around the same time, the police power was invoked to justify racial segregation, Plessy v. Ferguson, 163 U.S. 537, 545 (1896), and the forced sterilization of “defectives,” Buck v. Bell, 143 Va. 310, 318-19 (1925), aff’d, 274 U.S. 200 (1927).

In general, I think it’s a mistake to read the history of American police power backward, through the lens of the traditional reading of the Supreme Court’s “Lochner Era,” which portrays the Court as interfering with popular will—as manifested in progressive social legislation—in the name of abstract
More power than science, American police thrived in the New Republic as the revolutionaries-turned-governors proceeded to order their new realm. A healthy police power was needed “to provide for the execution of the laws that is necessary for the preservation of justice, peace, and internal tranquility.” Following the violent removal of the old government, the new government had to remind its subjects of their duty of obedience. By 1789, Benjamin Franklin warned that “our present danger seems to be defect of obedience in the subjects.”

And so the new rulers put their police power “to govern men and things” to work. Legislatures passed statute upon statute, regulation upon regulation, and ordinance upon ordinance, policing everything from “apprentices and servants,” “bastards,” “beggars and disorderly persons,” and “dogs,” to “the exportation of flaxweed,” “gaming,” “idiots and lunatics,” and “stray cattle and sheep.” Courts, too, looked after the public police, by supplementing the legislature’s policing efforts with “common law misdemeanors,” which captured any threat to the public welfare that might have slipped through the legislature’s regulatory net. Needless to say, the remaining branch of government, the executive, assumed important policing functions as well, so much so that it institutionalized a growing part of itself under that very name, as “police departments” and “police officers” appeared in city after city, and eventually throughout the land.

Occasional attempts to limit it notwithstanding, the police power continued to expand virtually unchecked until, by the 1930s, it had become all but synonymous with immunity from constitutional review. The now famous 1905 case of *Lochner v. New York*, in which the Supreme Court struck down a purported exercise of the police power, was branded, and vilified, as an antidemocratic act of judicial

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despotism. The police power has played its role as “an idiom of apologetics which belongs to the vocabulary of constitutional law” admirably ever since.\textsuperscript{32}

The remainder of this article will proceed as follows. Part I begins by investigating Blackstone’s patriarchal concept of police. Part II discusses the science of police, which preceded Blackstone's theory of the king as the “pater-familias of the nation”\textsuperscript{33} and developed a notion of police as state household governance both more sophisticated and less parochial than Blackstone’s. Part III then documents the evolution of American police power into a broad and multi-faceted mode of governance in the New Republic. Particular attention will be devoted to those features of American police power that continued to bear witness to its patriarchal origins, including its defining undefinability (exposing its radically discretionary nature), the inhumanity of its objects (encompassing “men and things” as constituents of the household), the strict hierarchy of governors and governed (echoing the categorical distinction between householder and household), and, most important, its basic alegitimacy (reflecting the ancient insight of Greek economics that household governance was measured by efficiency, not justice).

I. BLACKSTONE’S POLICE

In Blackstone’s \textit{Commentaries on the Laws of England}, the concept of police as household management first appears in Blackstone’s discussion of the royal prerogative, in volume 1, which was first published in 1765 and dealt with the basic powers and structure of (English) government. There Blackstone explains that the king’s prerogative to regulate domestic commerce “forms a part of oeconomics, or domestic polity; which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases.”\textsuperscript{34}


\textsuperscript{33} 4 \textit{Blackstone, supra note 16, at 127.}

\textsuperscript{34} 1 \textit{William Blackstone, Commentaries on the Laws of England} 264 (University of Chicago Press 1979). The terms police and economy were often used interchangeably at the time. Both were thought to concern themselves with household governance. See, e.g., Rousseau’s definition of economy in his
Blackstone elaborated on the king’s power to police in volume 4, published four years later, which contains his treatment of criminal law. According to Blackstone, the king, as the “father” of his people, and “pater-familias of the nation,” was—as we’ve seen—charged with “the public police and oeconomy” of his subjects, considered as “members of a well-governed family” of “the individuals of the state, like members of a well-governed family.”

Given the influence Blackstone’s patriarchal notion of police was to have in American law, down to the chapter headings of nineteenth century statutory revisions, it’s worth taking a closer look at the sort of offenses he categorized as violations of police. In this way, we will get a better sense of the concept itself.

A. Vagrants and Other Disorderly Persons

From early on, the control of vagrants and various and sundry “disorderly persons” was one of the central preoccupations of the royal pater familias. Of the nine offenses on Blackstone’s list of offenses “against the public police and oeconomy,” three dealt with various forms of vagrancy. This made sense: A vagrant, after all, was someone who had fallen outside the scope of government in the household of the traditional (micro) family, the sphere of “domestic, or private, economy,” in Rousseau’s terms. He therefore was the perfect candidate for early governance at the level of the state (macro) household, in the realm of “general, or political, economy.”

As Blackstone himself points out, beginning in the early part of the sixteenth century with Henry VIII.’s Act relating to Vagabonds of 1536, the English macro householder began to pay serious attention to the problem of idle unattached persons roaming the countryside. Later in the sixteenth century we find a statute providing for the

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Discourse on Political Economy, published ten years before Blackstone’s Commentaries. ROUSSEAU, supra note 20, at 209.
35. See 4 BLACKSTONE, supra note 16, at 162.
36. Id. at 127.
37. Id. at 162.
38. See FREUND, supra note 1, at 2 n.2.
39. See generally ROUSSEAU, supra note 20.
40. Id.
41. See 27 Hen. 8, c. 25 (1536).
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execution of “idle soldiers and mariners wandering about the realm.”42 Another imposes the same punishment on any one of those “outlandish persons calling themselves Egyptians,” “a strange kind of commonwealth... of wandering impostors and jugglers,” as well as on “any person... which hath been seen or found in the fellowship of such Egyptians... [and who] shall remain in the same for one month.”43

These two offenses were felonies, which by that time meant they were punishable by death, the days of bót and wîte having long since passed. And they still appeared on Blackstone’s list of police offenses in 1769, two centuries later.

The next milestone in the control of vagrancy came in 1597, with another Elizabethan statute. This statute proved popular in the American colonies as well, thus illustrating the appearance of macro policing in the New World long before the wholesale American adoption of Blackstone’s notion of police in the late eighteenth and nineteenth centuries. Here is Arthur Scott’s account of the state of vagrancy law in Virginia circa 1750:

In 1672 the Assembly found it necessary to order that the English laws against vagrants should be strictly enforced. The chief of these laws was the 39 Eliz., chapter 4 (1597), which permitted the erection of houses of correction in any county, and directed that rogues and vagabonds were to be whipped by order of a justice, constable, or tithingman, and sent to their own parishes, there to be put in the house of correction until employment was found for them, or until they were banished. The law of 1 James I, chapter 7 (1604), provided that incorrigible and dangerous rogues might by order of the justices be branded with the letter R... The English statute 17 Geo. II, chapter 5, repealed the earlier laws on vagrancy, and went on to provide for the punishment of idle and disorderly persons, vagabonds, and incorrigible rogues. It was from this statute that the Assembly copied extensively in 1748... The law defined vagabonds, and provided that they were to be taken by warrant before a justice, who might order them whipped from constable to constable like runaways, until they reached the parish in which their families last resided. At that point the local justices were to take a bond that the delinquents would find work. Failing this, the next County Court might bind such persons to

42. 39 Eliz. c. 17; 4 BLACKSTONE, supra note 16, at 165.
43. 1 & 2 Phil. & M. c. 4 & 5 Eliz. c. 20; 4 BLACKSTONE, supra, note 16, at 165, 166.
work for a year.44

Note the combination of two aspects of traditional household governance: First, there is the use of whipping—the traditional disciplinary tool against inferior household members—by state officials, reflecting the central authority’s assumption of certain comprehensive order maintenance tasks.45 Second, the use of central householding power still serves merely to return those who would be considered as “lordless” (and hence suspicious) in medieval law to an established household, rather than policing them as members of a quasi-household under central state control. By now, however, the household no longer is the traditional familial community, but consists of a quasi-family, the “house of correction,” where a warden performs the disciplining for a network of traditional households grouped into a new political entity, the county.46

This strategy of social control did not differ substantially from the traditional practice of forcing all men to attach themselves to a lord, or face outlawry as “lordless” men instead.47 The Laws of King Æthelstan, for example, had this to say “of lordless men”:

And we have ordained: respecting those lordless men of whom no law can be got, that the kindred be commanded that they domicile him to folk-right, and find him a lord in the folk-mote; and if they then will not or cannot produce him at the term, then be he thenceforth a ‘flyma’ [outlaw], and let him slay him for a thief who can come at him: and whoever after that shall harbour him, let

44. Arthur P. Scott, Criminal Law in Colonial Virginia 273-74 (1930) (footnotes omitted).
45. See, e.g., 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 415-16 (2d ed. Cambridge, Cambridge University Press 1898) (power of lord to “beat or imprison his serf”); see also Beirne Stedman, Right of Husband to Chastise Wife, 3 Va. L. Reg. (n.s.) 241 (1917).
46. Michael Stephen Hindus, Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878, at 166 (1980) (prisoners subject to “the most perfect military order”); id. at 168 (prisoners as children).
47. See 1 Pollock & Maitland, supra note 45, at 30 (lordless man considered “a suspicious if not dangerous person; if he has not a lord who will answer for him, his kindred must find him one; if they fail in this, he may be dealt with (to use the nearest modern terms) as a rogue and vagabond”).
him pay for him according to his ‘wer,’ or by it clear himself.48

The macro householder here is using his paternal authority indirectly. Rather than assume the correction of the disorderly personally, he assigns that task to the existing micro households. The family has been instrumentalized, and integrated into the state’s comprehensive system of social control. With the erection of houses of correction, the state begins to take more direct responsibility for maintaining order within the realm. Its general strategy, however, still relies on the distribution of responsibility to the proper local authority, as evidenced by the requirement that vagrants be returned to “their own parishes.”

Other colonies, particularly those in which the central police authority was less well developed, did not concern themselves much with the problem of assignment. There someone who did not belong to a resident household had two options: integrate himself into a household or be banished. First came the attempt to identify the unattached. So a Massachusetts law from 1668 required towns “to take a list of the names of those young persons within the bounds of your Town, and all adjacent Farms though out of all Town bounds, who do live from under Family Government, viz. do not serve their Parents or Masters, as Children, Apprentices, hired Servants, or Journey men ought to do, and usually did in our Native Country, being subject to their commands and discipline.”49

Then came the order to integrate, or to leave. As Robert Steinfeld reports, the Plymouth Colony followed suit the next year by passing a law regarding single persons: “Whereas great Inconvenience hath arisen by single persons in this Collonie being for themselves and not betakeing themselves to live in well Governed families It is enacted by the Court that henceforth noe single persons be suffered to live of himselfe.”50

Newcomers faced the same choice between integration and banishment. They could either produce a household

50. Id.
that assumed responsibility for their well-being, and
discipline, or they were “warned out.” 51 No one cared where
they might go, the presumption being that they might
“return to the place from whence [they] came.”

Vagrancy, or rather idleness, figured prominently on
Blackstone’s list of police offenses. Under the newest
vagrancy statute, 17 Geo. II, chapter 5, which we’ve already
encountered, the severity of discipline increased as the
amenability to correctional treatment decreased. “Idle and
disorderly persons” were punished by 1 month’s
imprisonment, “rogues and vagabonds” by whipping and
imprisonment of up to 6 months, “incorrigible rogues” by
whipping and imprisonment of up to 2 years. While the
least serious type of vagrant retained the title of a “person”
with the incidental qualities of being “idle and disorderly,”
the more serious types were defined exclusively by their
deviant status: they are “rogues and vagabonds,” rather
than persons. Any hope for a reclassification as a person
was lost in the case of the most aggravated type of vagrant,
the “incorrigible rogue.”

All of these vagrants posed a threat to the public police
simply through their existence. They were, in Blackstone’s
words, “offenders against the good order, and blemishes in
the government, of any kingdom.” 52 As blemishes, they had
to be removed. Removed they could be through reeducation
or, if they are inherently and unalterably deviant, through
incapacitation.

These vagrancy laws, however, were only the tip of a
police iceberg. Even before their categorization (and
correction) as deviant, suspicious persons were subject to
control under an altogether different set of preventive
measures, sureties for keeping the peace or for good
behavior “intended merely for prevention, without any
crime actually committed by the party, but arising only
from a probable suspicion, that some crime is intended or

51. On warning out, see Josiah Henry Benton, Warning Out in New
England (1911); Ruth Wallis Herndon, Unwelcome Americans Living on the
Margin in Early New England (2001); Douglas Lamar Jones, The Strolling
Poor: Transiency in Eighteenth-Century Massachusetts, J. Soc. Hist. 28 (1975);
see also Marilyn C. Baseker, “Asylum for Mankind”: America, 1607-1800
(1998). Transients were not warned out if they were servants and “responsible
to a master.” Jones, supra at 48.

52. 4 Blackstone, supra note 16, at 170.
likely to happen . . . .” 53 Any justice of the peace could demand such a guarantee on his own discretion or at the request of any person upon “due cause.” 54 If the bound person violated the conditions of his bond (to keep the peace or to show good behavior), he forfeited to the king the amount posted. 55

The recognizance for good behavior “towards the king and his people” applied to “all them that be not of good fame.” Just who fell in this category was up to the individual magistrate. There appears to have been a substantial overlap between members of this group and those convicted of police offenses. Here is Blackstone’s attempt to illustrate the scope of the limitless concept:

Under the general words of this expression, that be not of good fame, it is holden that a man may be bound to his good behaviour for causes of scandal, contra bonos mores, as well as contra pacem; as, for hauntung bawdy houses with women of bad fame; or of keeping such women in his own house; or for words tending to scandalize the government; or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake on the night; common drunkards; whoremasters; the putative father of bastards; cheats; idle vagabonds; and other persons, whose misbehaviour may reasonably bring them within the general words of the statute . . . . 56

Threats to the public police, then, were subject to a three-step disposal regime. First came the surety bond, designed to avert the manifestation of the threat by tying it to conditional financial loss. Next, for police threats so substantial as not to be amenable to such inducements for self-correction, came the forced correction through fines, whipping, infamous punishments, or imprisonment. And

53. Id. at 249.
54. Id. at 250.
56. 4 BLACKSTONE, supra note 16, at 253.
finally, for the incorrigible rogues beyond all hope of reintegation, there was the prospect of incapacitation through prolonged and repeated imprisonment.

B. Other Offenses Against “the Public Police and Oeconomy”

So far, we have dealt with the three vagrancy-type offenses on Blackstone’s list of police offenses. In addition to the vagrancy laws themselves, we mentioned the sixteenth century laws against “soldiers and mariners wandering about the realm” and against “outlandish persons” and their fellows. Six of the nine police offenses still remain.

Two of these were felonies, and therefore punishable by death. The offense of “clandestine marriages” protects the integrity of the family by policing its origin in the marriage ceremony, as well as the authority of the (Anglican) state church, which holds the monopoly on performing this foundational ceremony. In particular, it prohibits “solemnizing” marriages outside certain churches (“except by licence from the archbishop”), marriages without publishing “banns” (absent a “licence obtained from a proper authority”), and various forgeries and false entries in the marriage register. The first two are punished by fine (“pecuniary forfeiture”), the third by death.

Note the brutal punishment of official forgeries. The attempt to assume official authority, to elevate oneself from an object to the subject of power threatens the very order upon which the hierarchical edifice of the quasi-familial commonwealth is built. The king, after all, also was “the head and supreme governor of the national church.”57 This phenomenon is not new; counterfeiting originally was punished as a form of treason.58

Bigamy is the other capital police offense. It so disrupts the “public oeconomy and decency of a well ordered state” that it too is felony (but with benefit of clergy, meaning that it will not be punished by death absent an earlier conviction of a clergiable felony). Though he stresses the seriousness of

57. 1 BLACKSTONE, supra note 34, at 269.
the offense, Blackstone struggles to justify it. He associates it darkly with habits of “eastern nations,” which are contrasted with the “rational civil establishment” of the English commonwealth.  

Bigamy threatens the foundation of the familial model central to the notion of police in at least three ways. First, it disrupts the orderly functioning of individual families, not only by creating uncertainties about the place of the additional wife (or husband) within the familial hierarchy, but also by complicating questions of legitimacy and eventually of inheritance. Second, because the family was the model for the structure and operation of society in general, any challenge to the structure and operation of individual families threatened disruptions on a societal scale.

Third, the existence of alternative familial communities posed a threat to the orderliness of society simply because they were alternative. Bigamous or polygamous families hinted at a foreign origin and were associated with foreigners, and as alien institutions represented potential threats to the macro household the depths of which could not be fathomed and therefore warranted extreme caution. As the persecution of “outlandish persons calling themselves Egyptians,” the punishment of bigamy thus appears to reflect the general xenophobia that pervaded early modern society even more so than in does today.

Among the non-capital police offenses listed by Blackstone, common nuisances occupy the first spot. These “inconvenient or troublesome offenses, as annoy the whole community in general” include

(1) various acts or omissions (such as “annoyances in highways, bridges, and public rivers, by rendering the same inconvenient or dangerous to pass,” “the keeping of hogs in any city or market town,” lotteries, and “the making and selling of fireworks and squibs, or throwing them about in any street”),

59. 4 Blackstone, supra note 16, at 163.

60. The association between stranger and enemy remains strong. Modern sociology has added little to Abraham Lincoln’s observation that “[f]rom the first appearance of man upon the earth, down to very recent times, the words “stranger” and “enemy” were quite or almost, synonymous.” Abraham Lincoln, An Address by Abraham Lincoln before the Wisconsin State Agricultural Society, at Milwaukee, Wis., Sept. 30, 1859, in Abraham Lincoln on the Coming of the Caterpillar Tractor 5 (1929) (emphasis added).
(2) various persons ("[e]aves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse" and the "common scold, communis rixatrix, (for our law-latin confines it to the feminine gender)"), and
(3) various inanimate objects, most particularly buildings ("disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage-plays unlicensed, booths and stages for rope-dancers, mountebanks, and the like" and cottages "being harbours for thieves and other idle and dissolute persons").

Without going into these offenses in any great detail, it's worth noting that this list displays the sort of impatience with principle and specificity that traditionally has characterized household governance and, later on, the police power and its exercise in the macro household of the state. The point of police is the suppression of threats to the public police; as such, its exercise is governed by considerations of efficiency, not formal justice. In this light, the vagueness of a concept such as "nuisance" is not a problem, but an asset. Unconstrained by notice concerns, state officials—not only courts, but executive officials as well—could mold it as they saw fit to deal with "annoyances" to the public at large.

Already a quick glance at the mishmash of offenses on Blackstone’s list makes it clear that, in the face of a threat to the communal police, familiar niceties of criminal law doctrine, such as the distinction between omissions and commissions, were of no significance. The general unwillingness to extend criminal liability to omissions was not to stand in the way of the public welfare (i.e., the public police). The traditional “act requirement,” which limited criminal liability to behavior rather than status or thought, similarly lost all purchase when it came to policing gypsies, eaves-droppers, or common scolds. Another great bulwark of Anglo-American criminal law, the “mens rea requirement,” which frowned upon punishing non-intentional conduct, fared no better. Likewise, when the public police was at stake, vicarious criminal liability was no longer objectionable. In the end, it mattered not whether the annoyance was a person (such as a communis rixatrix) or a thing (such as a building). As a nuisance, it required removal (or “abatement”).

The status-focus of police offenses is reflected in the remaining four categories of police offenses identified by
Blackstone. People at the bottom of the hierarchy were policed whenever they fell out of line. In fact, they were caught in a kind of Catch-22. If they didn't fulfill their obligation to contribute to the familial community’s well-being by performing the menial tasks appropriate to their status, they were policed as idle persons. On the other hand, if they did work hard and through their industry gained the means to acquire the external trimmings of someone higher up in the hierarchy, they ran afoul of another set of police offenses, sumptuary laws against “luxury, and extravagant expenses in dress, diet, and the like,” number 7 on Blackstone’s list.

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

64. 22 Hen. VII. c. 9 (1541-42).
65. Cf. the offense of “criminal impersonation” in modern American criminal law. See, e.g., N.Y. Penal Law § 190.25 (2004) (“pretends to be a public servant, or wears or displays without authority any uniform, badge, insignia or
The final item on Blackstone’s list of police offenses are the game laws, which concern the “destroying such beasts and fowls, as are ranked under the denomination of game . . . .” According to Blackstone, “it is an offence which the sportsmen of England seem to think of the highest importance; and a matter, perhaps the only one, of general and national concern . . . .” It is also an offense that is entirely about the oppression of “low and indigent persons,” in particular and—once again—those who act (or simply are) of out place, either by claiming for themselves a right reserved for those of higher status (the “sportsmen of England”) or by—once again—doing something, in this case hunting, that “takes them away from their proper employments and callings; which is an offence against the public police and oeconomy of the commonwealth.”

The game laws, however, are noteworthy not only because they too illustrate the use of police offenses to maintain the lines separating various levels within the (macro) familial hierarchy, and therefore familial order. They also show that not all of these lines are created equal. The one line that counts above all, and the one whose strict maintenance is vital to the maintenance of the community is that between the head of the household (here, the king) and everyone else. In the end, “the inferior sort of people” includes also “the sportsmen of England” who delight in whipping their respective inferiors into place.

At bottom, game laws are what one might call pure obedience offenses. Game is royal property and it is within the king’s pleasure whether or not to grant someone a license to kill it. So, while game laws on their face govern the relationship between license holders and others, they themselves are based on the fundamental distinction between the king and all other members of his communal family. Without a license, anyone who kills game is guilty of trespass, i.e., of “encroaching on the royal prerogative.” But this fact is often forgotten for all the attention is focussed on those “indigent persons,” who are guilty not only of an offense against the king, but more immediately against their local lord. These supplemental offenses, as Blackstone himself noted, are “so severely punished, and those punishments so implacably inflicted, that the offence

facsimile thereof by which such public servant is lawfully distinguished”).

66. 4 BLACKSTONE, supra note 16, at 174.
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against the king is seldom thought of, provided the miserable delinquent can make his peace with the lord of the manor."\(^67\) According to Blackstone, then, the problem with game laws is not their existence, but their enforcement, and interpretation. They are enforced by local patriarchs, whereas they ought to be seen as manifestations of the power of the royal patriarch. They protect the peace of the king, not that of the local lord, no matter what the latter might think (and have “the miserable delinquent” believe).

Blackstone’s notion of police, then, might be summed up as follows. The power of police derives from the king’s obligation to maximize the welfare of his household, the realm. The king’s police regulates the public oeconomy of the state, as the father’s discipline does the private oeconomy of the family.\(^68\) As the father, as *paterfamilias*, is entitled to enforce his authority through disciplinary measures, so is the king as *pater patriae*.\(^69\) Any violation of the order of the family, and any challenge to his authority, may be punished by the head of the petty, or of the grand, commonwealth. No more precise definition of offenses against the police of the family or of the realm can be given than of the notion of police itself. Any correction inflicted for such an offense, however, occurs for the benefit of its object as a *member of the household*, and therefore ultimately for the benefit of both the micro and the macro household and its respective heads.\(^70\)

C. Police in Colonial America

Blackstone’s discussion of police offenses in volume four

\(^67\) *Id.* at 174.

\(^68\) 1 *BLACKSTONE*, *supra* note 34, at 410.

\(^69\)  *See id.* at 416 (discussing correction of apprentices and servants), 422-23 (wives), 440 (child).

\(^70\) Some members of the micro household, children, are potential future householders and will leave the original micro household to form their own. Paternal discipline of children thus benefits both the micro, and the macro, household in the short run, insofar as every member of the micro household is also a member of the royal *Über* family. In the long run, and this is a matter of great interest to the macro household, properly disciplined children will become competent householders, and therefore competent administrators within the macro household of the king, long after they have left their father’s micro household behind. *See ARISTOTLE, POLITICS* bk. I, ch. 13 (Trevor J. Saunders trans., 1995).
of the Commentaries exerted tremendous influence on American legislators, judges, and commentators. Blackstone’s general influence on American law, and on the thought of the revolutionary generation, was of course monumental, and remained so for decades, even centuries, from the most general issues of political theory to the most specific issues of legal doctrine.\textsuperscript{71} And his discussion of police was no exception. When it came time for state legislators to order the internal police of their state, they turned to Blackstone for drafting advice. As Ernst Freund, the last great American commentator on the police power, explained a century ago in the introduction to his police power treatise, “[t]he influence of Blackstone’s arrangement is noticeable in the legislation of those states which have made police one of the principal divisions of their statutory revisions.” To illustrate, Freund notes that “[t]he term police appears first as a division of legislation in the Revised Statutes of New York in 1829, Massachusetts adopted it in the Revision of 1836, it is now also found in Delaware, Iowa, New Hampshire, Ohio, Rhode Island, Washington, and Wisconsin.”\textsuperscript{72}

But Blackstone’s influence can also be seen among the commentators on the police power, including Freund himself. As a matter of course, every major treatise on the police power quoted, in its introduction, Blackstone’s definition of police from his discussion of police offenses in volume four of the Commentaries.\textsuperscript{73}

Judges, too, frequently invoked Blackstone’s concept of police, often quoting his definition at length, and so did counsel. Few general discussions of the police power were complete without reciting Blackstone’s demarcation of the king-father’s responsibility for maintaining “the public police and oeconomy” of his kingdom-family. So in an 1843 case before the Illinois Supreme Court we find counsel for the appellant, convicted of “secret[ing]” a slave from Missouri, invoking Blackstone’s definition in support of the—unsuccessful—claim that Illinois’s fugitive slave law was not a police regulation, and therefore not immune from

\textsuperscript{71} See, e.g., Ferguson, supra note 15, at 11.
\textsuperscript{72} Freund, supra note 1, at 2 & n.2.
\textsuperscript{73} Cooley, supra note 19, at 704 n.1; Tiedeman, supra note 1, at 2; Freund, supra note 1, at 2.
federal constitutional scrutiny.\textsuperscript{74} To cite another example, the quote also appears, some forty years later, at the heart of a much cited Pennsylvania Supreme Court opinion on the courts’ authority to punish non-statutory, “common law,” crimes.\textsuperscript{75} Courts continued to rely on Blackstone’s definition until well into the 1970s.\textsuperscript{76}

But simply to trace Blackstone’s influence on American law would not be enough. It would fail to capture the full scope of the police concept in American political and legal thought and practice. It would also create the false impression that the notion of police had played no role in American governance before the enthusiastic reception of Blackstone’s work.

Different colonies were governed according to different models of the household. In Maryland for example, as well as in South Carolina and Pennsylvania, the framework for government derived from its proprietary origin as a commercial enterprise.\textsuperscript{77} Its government was a matter of managing property, or of running a corporation. Governed by charters the king granted to private proprietors, the colony was administered to maximize profit. Governing Virginia also was an economic affair, but for a different reason and in a different sense. It spent several of its early years under military government, which presumably influenced the way its colonial administrators conceived of their task.\textsuperscript{78}

Whether they ran a commercial or a military enterprise, colonial officials were keen on protecting their authority. And they did not hesitate to correct any of their charges who did not display the proper respect and obedience, usually with the traditional measures of household discipline, particularly whipping.\textsuperscript{79}

\textsuperscript{74} Eells v. People, 5 Ill. 498 (1843).
\textsuperscript{75} Commonwealth v. McHale, 97 Pa. 397, 408 (1881).
\textsuperscript{76} See also JEREMY BENTHAM, \textit{An Introduction to the Principles of Morals and Legislation}, in \textit{The Works of Jeremy Bentham} 1, 102 n.\textsuperscript{†} (John Bowring ed., Russel & Russel 1962) (1789); ADAM SMITH, \textit{Lectures on Jurisprudence} 486 (R.L. Meed et al. eds. 1978).
\textsuperscript{79} SCOTT, supra note 44, at 164; RAPHAEL SEMMES, \textit{CRIME AND PUNISHMENT IN EARLY MARYLAND} 1-4 (1938).
The model of governance in the Northeastern colonies was different. Nonetheless here too the idea of household governance manifested itself, though not primarily in the form of a corporate enterprise, or a military camp, but as a religious community. In Massachusetts and Pennsylvania, for example, religious communities, no matter of what denomination and or size, were run and viewed as larger scale families under the authority of ministers or elders.\textsuperscript{80} Congregations were large families, and families’ little churches.\textsuperscript{81} In the words of Edmund Morgan, “[t]he essence of the social order lay . . . in the superiority of husband over wife, parents over children, and master over servants in the family, ministers and elders over congregation in the church, rulers over subjects in the state.”\textsuperscript{82}

The church constituted not only an expanded familial community, but itself formed part of a larger family, which reached beyond the local pastor to the king and eventually to God, the Father. “Authority,” under this view of the social world, “should descend, that is, be derived from a superior to an inferior, from God to fathers and kings, and from kings and fathers to sons and servants.”\textsuperscript{83} Every political community thus found its place within the universal family of the Christian Church, under the limitless, even incomprehensible, authority of God.

Here too, all were equal, but only in their inferiority to a superior being.\textsuperscript{84} Whatever authority any human enjoyed over another, he enjoyed at the discretion and by delegation of God. This meant that the power of every head of a political household was limited, and subject to divine revocation. It also meant that every threat to the authority of any person of authority in any political community also was a threat to the authority of God. As such, it shook the foundation of the entire social order and could not be tolerated.

In addition to the quasi-households of the military, the


\textsuperscript{82} Steinfeld, \textit{supra} note 49, at 57.

\textsuperscript{83} Id. at 59.

corporation, and the church, there was another model of governance that must have influenced the way the colonists approached the task of governance in the New World. This household was the English manor, the models’ model, so to speak. The significance of this influence may have varied, depending on where in England the colonists originated. Those who came from sparsely populated rural areas may well have lived without meaningful contact with manorial government. Yet even the fairly independent farmer would be familiar with household governance, simply because he would have to govern a household of his own. At any rate it would seem that, to the extent they were integrated into any system of government in the home country, that system was the manor, run by the lord and subject to manorial jurisdiction. Just what manorial government looked like is a fairly difficult, and rather contested, question; for our purposes, it suffices to note that manorial government functioned as another model of household governance that guided the early colonists’ ideas about how to govern.\(^5\)

The most clear-cut illustration of police power before the invention of American “police power,” however, is provided by the governance of slaves in the American colonies. We’ve already mentioned the efforts of plantation owners, supplemented if necessary by the public discipline meted out by officials in colonial Virginia, to govern slaves as members of their household. Now as Jonathan Bush has brilliantly shown, the law of slavery was in fact “an extensive set of police measures” at both the level of the private household of the plantation and of the public household of the colony.\(^6\) On the plantation, the internal police was maintained according to principles of good household government, or domestic economy, “described in plantation manuals and rule-books, and enforced with whipping and other punishments, including death.”\(^7\)

The internal police of the colony in turn relied on slave codes that resembled Blackstone’s treatment of police offenses in that they too lacked conceptual structure and were content to accumulate, without any claims to comprehensiveness, lists of illustrative offenses. As an

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87. *Id.* at 426.
example, Bush cites the Virginia Slave Code of 1705, which listed, “under four dozen more or less random titles, the activities that slaves and indentured servants cannot do, must do, or cannot do with whites, the things that whites cannot do for slaves, and that blacks cannot do even if free.”

Neither the private, nor the public, version of these compilations of police measures was addressed to those who would suffer from their violation. The slaves were the objects of police, but they were not the audience of police measures. The plantation manuals and slave codes were just that, manuals designed to guide the administration of the private or public household. They were handbooks of good housekeeping, in the tradition of Greek economics.

But Bush makes another, more general and more important, point. He remarks that these guidebooks were examples of “boundary law”: the slave codes “defined and patrolled the public boundaries between free and slave and between non-white and white.” And the plantation manuals performed the same function, in the private context of the micro household.

Policing the boundary between black and white, however, was only one, early, strategy for the maintenance of the distinction between householder and household. Crossing the line between black and white was an inchoate offense against the all-important line between governor and governed. Any black man who failed to show the proper respect for any white man mounted an inchoate challenge against the authority of the white householder over his household.

So by the time Blackstone published his catalogue of offenses against “the public police and oeconomy” in 1769, American governance could look back on an extensive tradition of policing in fact, if not in name. What’s more, colonial officials employed some of the very laws that Blackstone would later list as exercises of the king’s power to police. As we saw, Blackstone’s police offense par excellence, vagrancy, was a colonial police offense long

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88. Id. at 433. Note, once more, the inclusion of omission and status offenses, also familiar from Blackstone’s compendium of police offenses.
89. Id. at 434.
90. Cf. Scott, supra note 44, at 303 (discussing 1680 Virginia statute providing that “for lifting a hand in opposition to any Christian a negro was to receive thirty lashes”).
before anyone thought of it as such. None of this is a surprise, of course, since Blackstone merely classified statutes that were around at the time, and many of which dated back centuries. And these very statutes applied to the American colonies just as they did to the English home country.

A contemporary American reader of the Commentaries thus wouldn’t have been surprised by any of the policing offenses on Blackstone’s list. Perhaps he might have added a few policing tools that were genuine American innovations, in particular the slave codes, but in general the list would have looked familiar indeed.

II. CONTINENTAL POLICE SCIENCE

The one thing that might have given our American reader pause is Blackstone’s categorization of patriarchal governance as “police.” For, in the late eighteenth century, the concept of police was still rather uncommon in English writings on law, even though it had long been a mainstay of continental political and legal thought and practice. Particularly in France and then in Germany, an entire “science of police” had been created, and since the fifteenth century police laws, regulations, and ordinances, as well as police courts, and eventually police officials, and officers, had appeared all over continental states and cities. In Scotland too, the first “Commissioners of Police” had been appointed by Queen Anne in 1714. These “six noblemen and four gentlemen” were in charge of the “general internal administration of the country.”

The Scottish Enlightenment also had taken an interest in the concept, as illustrated by Adam Smith’s Lectures on Justice, Police, Revenue and Arms, delivered at Glasgow in the 1750s and early 1760s. Smith differentiated between “political regulations” founded “upon the principle of justice” and upon that of “expediency,” the latter being “calculated to increase the riches, the power, and the prosperity of a State.”

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92. Id.
93. See SMITH, supra note 25; see generally SMITH, supra note 76.
94. Introduction, in SMITH, supra note 76 at 1, 3 (quoting Dugald Stewart,
right and prudence, justice and police:

- Jurisprudence is the theory of the general principles of law and government.
- The four great objects of law are Justice, Police, Revenue, and Arms.
- The object of Justice is the security from injury, and it is the foundation of civil government.
- The objects of Police are the cheapness of commodities, public security, and cleanliness.\(^{95}\)

Smith was mainly interested in one particular facet of police, the “cheapness of commodities,” or “the opulence of a state.” The other two aspects of police, cleanliness and public security, he mentioned only briefly, finding them “too minute for a lecture of this kind.”\(^{96}\) His concern with the opulence of a state eventually produced the *Wealth of Nations*.\(^{97}\)

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95. ADAM SMITH, *JURIS PRUDENCE OR NOTES FROM THE LECTURES ON JUSTICE, POLICE, REVENUE, AND ARMS* DELIVERED IN THE UNIVERSITY OF GLASGOW BY ADAM SMITH PROFESSOR OF MORAL PHILOSOPHY, in SMITH, supra note 76, at 396, 398.

96. Id.

97. A fellow Scot, who later made his career in London, personified the comprehensiveness of police: Patrick Colquhoun (1745-1820). Colquhoun was a police scientist of continental ambition. Most relevant for our purposes, he called for the establishment of a national police system (A treatise on the police of the metropolis (1795)). He also wrote, among many other things, a treatise on river police (A treatise on the commerce and police of the river Thames (1798)), education police (A new and appropriate system of education for the labouring people; ... containing an exposition of the nature and importance of the design, as it respects the general interest of the community: with details, explanatory of the particular economy of the institution, and the methods prescribed for the purpose of securing and preserving a greater degree of moral rectitude, as a means of preventing criminal offences by habits of temperance, industry, subordination, and loyalty, among that useful class of the community, comprising the labouring people of England (1806) (emphasis added)), as well as treatises on the police of the micro household (Useful suggestions favourable to the comfort of the labouring people, and of decent housekeepers explaining how a small income may be made to go far in a family, so as to occasion a considerable saving in the article of bread (1795) (emphasis added)) and, eventually, the macro household, a sort of *Wealth of Nations* for the British Empire (A treatise on the wealth, power, and resources of the British Empire (1814)). Not surprisingly, Colquhoun’s works on police science were quickly translated into French and German. See, e.g., Traité sur la police de Londres (L. Collin trans.
Unlike Blackstone, Smith presented an account of the origins of the concept of police. This account is useful for our purposes mainly because it captures common notions of police at the time; Smith himself considered his remarks on police as conventional summary, in sharp contrast to his expansive and highly original explorations of what we might call political economy in the narrow sense. Besides listing some of the features that traditionally have been ascribed to police as a mode of governance—including its means (prevention and intimidation), its ends (public security, public peace, and intercourse), and its objects (disturbances and villains)—the following excerpt highlights the conceptual connection between public security and neatness, between keeping the streets safe and clean:

Police, the word, has been borrowed by the English immediately from the French, tho it is originally derived from the Greek politeia signifying policy, politicks, or the regulation of a government in general. It is now however generally confind to the regulation of the inferior parts of it. It comprehends in general three things: the attention paid by the public to the cleanliness of the roads, streets, etc; 2d, security; and thirdly, cheapness or plenty, which is the constant source of it. When Mr. Lamonion was constituted Intendant of Paris he was told by the officers that the king required three things of him, that he was to provide for the neteté, surete, and bon marché in the city. . . . The neteté of a country regards the regulations made in order to preserv(e) cleanliness of the roads, streets, etc. and prevent the had effects of corrupting and putrifying substances. . . . The security of the people is the object of the second branch of police, that is, the preventing all crimes and disturbances which may interrupt the intercourse or destroy the peace of the society by any violent attacks. In generall the best means of bringing about this desirable end is the rigorous, severe, and exemplary execution of laws properly formd for the prevention of crimes and establishing the peace of the state.—Other methods are sometimes more directly taken for this purpose—more immediately striking at the injurious persons. Of this there is a great deal in the French towns. Every one has a march possé or town guard who patrole in the streets and by that means intimidate villains from attempting any crimes and make the escape of a murder(er) or robber more difficult, and also give their assistance at the extinguishing of fires

1807); P. Colquhoun’s Polizey von London (J.W. Volkmann trans. 1802).
or other hazardous accidents.  

Note that Smith repeats the conventional wisdom that “police” is of French origin, which may help explain why, in England, the word police “was still viewed with disfavour after 1760.” An English magazine article from 1763 explains that “from an aversion to the French . . . and something under the name of police being already established in Scotland, English prejudice will not soon be reconciled with it.” In 1756, another magazine writer had commented that “[w]e are accused by the French . . . of having no word in our language, which answers to their word police, which therefore we have been obliged to adopt, not having, as they say, the thing.”

Blackstone himself doesn’t use it until the last volume of his Commentaries, published in 1769. In the first volume, published in 1765, he still speaks in terms of the king’s right, as “master” of the kingdom considered as a “large family,” to regulate “oeconomics, or domestic polity . . . as he pleases.” Only four years later, Blackstone explains that the king is responsible for “the public police and oeconomy” of the state.

98. ADAM SMITH, Report of 1762-3, in SMITH, supra note 76, at 1, 331 (original spelling retained). Smith also specifically refers to de la Mare’s famous and weighty treatise on police. Id. at 332 (citing NICOLAS DE LA MARE, TRAITÉ DE LA POLICE (1705-38)).

99. In fact, there are perhaps only two features of police that could claim something like widespread agreement. One is that it’s indefinable. The other is that it’s French. See, e.g., BENTHAM, supra note 76, at 102 n.†; L.A. WARNKÖNG, FRANZÖSISCHE STAATSGESCHICHTE 309, 365, 474 (1846) (quoted in Georg-Christoph von Unruh, Polizei, Polizeiwissenschaft und Kameralistik, in 1 DEUTSCHE VERWALTUNGSGESCHICHTE (VOM SPÄTMITTELALTER BIS ZUM ENDE DES REICHES) 388, 390 n.3 (Kurt G.A. Jeserich, Hans Pohl & Georg-Christoph von Unruh eds. 1983)).


101. Id.

102. Id.

103. 1 BLACKSTONE, supra note 34, at 264.

104. 4 BLACKSTONE, supra note 16, at 162. At around the same time, John Erskine, the Professor of Municipal Law at the University of Edinburgh, wrote in his Institute of the Law of Scotland, that “[o]ffences against the laws enacted for the police or good government of a country are truly crimes against the state.” JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND 1095 (Alexander MacAllen ed., Edinburgh 1838) (1773); see OXFORD ENGLISH DICTIONARY, “police, n.” (definition 3) (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989),
Now, to the extent Americans thought of Blackstone’s police when they thought of police, they adopted a concept that was steeped in the long tradition of household management. Blackstone’s definition only makes sense if we see it in the context of his general theory of the royal prerogative, which itself is but a modernization, and radicalization, of the age-old power of the householder over his household. Blackstone’s repeated references to the king as the father of the kingdom, the pater patriae, and even the *paterfamilias* stress this foundation of the police power in the traditional notion of “oeconomics,” the art of household government. As Rousseau explained in 1755, ten years before the publication of the first volume of Blackstone’s *Commentaries*:

The word Economy, or Æconomy, comes from *oikos*, *house*, and *nomos*, *law*, and originally signified only the wise and legitimate government of the household for the common good of the whole family. The meaning of the term was subsequently extended to the government of the large family which is the State.¹⁰⁵

Following a long royalist tradition, Blackstone is careful to point out that, despite the common roots of the power of all householders, large and small, the king’s *mund* (i.e., the peace of the royal household and the power to maintain it) nonetheless was superior to that of ordinary lords. So, for example, he explains that the king is owed allegiance and

¹⁰⁵. **ROUSSEAU, supra** note 20.
fealty, whereas the “inferior lord” is owed only the latter:

With us in England, it becoming a settled principle of tenure, that all lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. 106

In fact, the very concept of police can be seen as a similar attempt to differentiate between the king’s householder power and that of other householders. The task of governing the macro household of the state and the micro household of the family is essentially the same. The two households differ in size, not in quality. The one after all developed through an extension of the other. Yet, once the king has extended his household to cover the entire realm, and thereby to encompass all the other households, it is in his interest to stress the uniqueness of his household task, and therefore of his position. And so that task receives a new name: police. Police is public police and by definition concerns itself with the welfare of the people, the nation, the community, in distinction from the father’s traditional task of looking out for his family.

Yet police, at the same time, remains that concept in the discourse of governance which most vividly recalls the familial origins even of state power. Even Blackstone, otherwise so concerned to emphasize the king-householder’s special status, derives the concept of police from the authority of the paterfamilias over his kingdom, considered as a family. The king’s prerogative may mark him off from members of his household, including the “inferior lords,” but a householder he remains nonetheless. Even the “lord paramount” remains a lord.

Still, it’s noteworthy that in accepting Blackstone’s concept of police, the Americans enthusiastically embraced a mode of governance that was intimately connected to the royal prerogative, precisely the kind of arbitrary rule based on the strict separation between governor and governed that they found so intolerable in other contexts. It’s one thing to adopt a notion of police, it’s another to adopt a notion of royal police. Yet adopt it the Americans did, presumably on the ground that police was not necessarily

106. 1 Blackstone, supra note 34, at 355.
 royal police, and that police was a mode of governance common to all government as such. Perhaps the idea of police could be cleansed of its monarchical elements, perhaps by resurrecting the traditional notion of police as patriarchal household governance, which arose long before the English monarchy and what Americans saw as its oppressive potentialities and tendencies.

A. The Science of the Police State

There were after all other sources of the concept of police that Americans might have adapted, or adopted. Blackstone certainly didn’t invent the concept. Unfortunately, these non-Blackstonian sources presented Americans with a concept of police no less monarchical, and oppressive. If anything, the police of the continental tradition was even more closely associated with princely power, and plenary princely power at that. 107 Police, after all, was the paradigmatic mode of governance in the absolutist monarchies of continental Europe. The science of police was, after all, the art of regulating the police state.

The Americans of the time clearly paid much attention to Cesare Beccaria’s Crimes and Punishments (1764), as did everyone else interested in matters of criminal law, including Blackstone. 108 If they also came across Beccaria’s lesser known work in the area of “public economy,” they might have noticed that Beccaria held the uncontroversial view that police was an “object” of public economy and that it comprehended such matters as “the sciences, education, good order, security and public tranquility.” 109 They also


109. CESARE BECCARIA BONESANA, ELEMENTI DI ECONOMIA PUBBLICA 23
would have learned that Beccaria approached the subject of public economy from a distinctly familial perspective. To him, public and private economy were different, yet intimately connected: “the study of public economy must necessarily enlarge and elevate the views of private oeconomy, by suggesting the means of uniting our own interest with that of the publick.” From the point of view of public economy, we “no longer look upon ourselves as solitary parts of society, but as the children of the public, of the laws, and of the sovereign.”

Beccaria’s fleeting comments on police and public economy are neither fertile nor original. It’s unlikely that they would have done much to inspire American minds of the revolutionary era. At any rate, Rousseau’s far more widely read *Discourse on Political Economy* (1755) said what Beccaria said, and said it earlier and better, even if it speaks in terms of “political economy,” rather than the “police,” of “that great family, the State.”

We know that Emmerich de Vattel’s *Law of Nations* was much read in America by the early nineteenth century. Whether he was quite as popular during the formative period of the police concept in American discourse during the 1770s and 1780s isn’t so clear. His importance in treatments of the question of police appears to have grown as that question increasingly transformed itself into one regarding the proper relations between the federal government and the states, which resisted all attempts to interfere with their “internal police.” Vattel’s primary interest, after all, was international law, not domestic law. For that reason, anyone turning to Vattel would have found his comments on police, the domestic matter par excellence, rather sketchy, as well as rather arepublician. Still, there too he would have encountered the now familiar view that


110. CESARE BECCARIA, A DISCOURSE ON PUBLIC ECONOMY AND COMMERCE (1804).

111. ROUSSEAU, supra note 20.

112. Although his treatise first appeared in 1759, its first American edition didn’t appear until 1805. On Vattel’s influence, see NOVAK, supra note 21, at 29, 263 n.46.

113. See, e.g., License Cases, 46 U.S. 504, 618, 628 (1847) (Woodbury, J., concurring) (citing Vattel, B. 1, ch. 18, §§ 219, 231).
“the sovereign . . . ought in every thing to appear as the father of his people.”¹¹⁴ Vattel’s definition of police is not particularly helpful. He simply remarks that “[t]he internal police consists in the attention of the prince and magistrates to preserve every thing in order.”¹¹⁵ Wisdom is the mark of good policing, for “[b]y a wise police, the sovereign accustoms the people to order and obedience, and preserves peace, tranquility, and concord among the citizens.”¹¹⁶ Vattel’s scattered comments on police read like fragments from an old guidebook on good princely government.

In American writings on police, there is also the occasional reference to Bentham’s treatments of the subject. So Cooley quotes Bentham’s definition of police in his influential Treatise on Constitutional Limitations.¹¹⁷ In Bentham’s case we can be fairly certain that any influence came after the first appearance of the concept in American political thought. Unlike Beccaria, Rousseau, and Vattel, however, Bentham had a lot to say about police. Like them, what he said was not original, nor was it meant to be. Still, it’s worth a look, not only because of its influence on later American police discourse, but also for Bentham’s characteristic attention to analytic distinctions. Plus, it captures many of the features of police worked out by continental police theory over the previous two centuries or so. This is no surprise, given that Bentham during his extended stay in Paris must have become familiar with the long tradition of French police science.

Bentham’s discussion of police begins with his distinction among three types of “mischief,” or harm. Harm, according to Bentham, can “come either from external adversaries, from internal adversaries, or from calamities.”¹¹⁸ Police is one of the means for averting mischief originating from internal adversaries. Justice is the other. Police is preventive, justice remedial:

As to mischief from internal adversaries, the expedients employed

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¹¹⁵. Id. § 174, at 83.
¹¹⁶. Id.
¹¹⁷. COOLEY, supra note 19, at 704 n.1.
¹¹⁸. BENTHAM, supra note 76, at 101.
for averting it may be distinguished into such as may be applied before the discovery of any mischievous design in particular, and such as cannot be employed but in consequence of the discovery of some such design: the former of these are commonly referred to a branch which may be styled the preventive branch of the police; the latter to that of justice.\textsuperscript{119}

In another context, Bentham elaborates on the distinction, and further differentiates between the different types of sanctions employed by police and justice, precautions and punishments:

It is difficult to draw the line which separates these two branches of administration. Their functions have the same object—that of maintaining the internal peace of the state. Justice regards in particular offences already committed; her power does not display itself till after the discovery of some act hostile to the security of the citizens. Police applies itself to the prevention both of offences and calamities; its expedients are, not punishments, but precautions; it foresees evils, and provides against wants.\textsuperscript{120}

This distinction between preventive police and remedial justice had been a mainstay of police theory for centuries.\textsuperscript{121} It came to play an important part in American writings on police as well.\textsuperscript{122}

Writing in 1781, Bentham also reconfirms that police at that time had only recently entered the English language, from Greece via France, with a possible assist from Germany:

As to the word police, though of Greek extraction, it seems to be of French growth: it is from France, at least, that it has been imported into Great Britain, where it still retains its foreign garb: in Germany, if it did not originate there, it has at least been

\textsuperscript{119} Id. at 102.

\textsuperscript{120} JEREMY BENTHAM, THE THEORY OF LEGISLATION 242 (C.K. Ogden ed. 1931).

\textsuperscript{121} See, e.g., Albert Cremer, L’administration dans les encyclopédies et dictionnaires français du 17e et du 18e siècle, in FORMATION UND TRANSFORMATION DES VERWALTUNGSWISSENS IN FRANKREICH UND DEUTSCHLAND (18./19. Jh.), 1 JAHRBUCH FÜR EUROPÄISCHE VERWALTUNGSGESCHICHTE 1, 1 (1989) (quoting Louis XIV’s 1667 order to separate “la Justice contentieuse & distributive” from police “qui consiste à assurer le repos du Public & des Particuliers, à purger la Ville de ce qui peut causer les desordres, à procurer l’abondance, & à faire vivre chacun selon sa condition & son devoir”).

\textsuperscript{122} See, e.g., Spalding v. Preston, 21 VT. 9, 12-13 (1848); FREUND, supra note 1, at 2-6 (1904); TIEDEMAN, supra note 1, at 113.
naturalized.  

Whatever the origin of police, Bentham, like so many before and after him, notes the impossibility of defining it. In his words, “the idea belonging to it seems to be too multifarious to be susceptible to any single definition.” Given Bentham’s insistence on precision, which generated the excruciatingly detailed taxonomies scattered throughout his work, this is an extraordinary admission. If Bentham can’t define it, one might think, then no one can. And yet Bentham doesn’t reject the concept as useless, as one might expect. Famously, he was not so kind to other concepts of uncertain scope, such as the idea of natural rights.

Bentham’s discussion of police, however, not only illustrates the difficulty of defining this amorphous concept. It also suggests an explanation for the difficulty. Bentham can’t keep police and justice apart because to him they are, in the end, one and the same thing. Both are means for the enforcement of paternal, and quasi-paternal, authority. What the power of chastisement is to one, the power to punish and to police is to the other. What are threats to the well-being of the family to one, are “diseases of the body politic” to the other:

The magistrate and the father, or he who stands in the father’s place, cannot maintain their authority, the one in the state, and the other in the family, unless they are armed with coercive means against disobedience. The evil which they inflict is called punishment or chastisement. The whole object of these acts is the good of the great or little society which they govern . . .

In basing the power of police on the father’s authority,

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123. BENTHAM, supra note 76, at 102 n.†.
124. Id.
125. See JEREMY BENTHAM, Anarchical Fallacies, Being an Examination of the Declaration of Rights Issued During the French Revolution (1791), in 2 THE WORKS OF JEREMY BENTHAM 501 (John Bowring ed. 1843).
126. BENTHAM, supra note 120, at 271 (emphasis in the original). Note the disease metaphor, which appears frequently in writings on police in general, and on police as criminal law in particular. See, e.g., The Federalist No. 28, at 170-71 (Alexander Hamilton) (Edward Mead Earle ed. 1937) (“seditions and insurrections” as “maladies as inseparable from the body politic as tumors and eruptions from the natural body’); Tomas J. Philipson & Richard A. Posner, The Economic Epidemiology of Crime, 39 J. L. & ECON. 405 (1996).
127. BENTHAM, supra note 120, at 270.
and responsibility, to maintain discipline among his societies petit and grand, Bentham could look back on several centuries of continental police control over public households of various shapes and sizes. Charles VI. began delegating the power of police ("la policité" and "trébonne police") to French cities in the late 14th century.\textsuperscript{128} In Germany, similar assignments of imperial privileges to the cities date back at least to the mid-15th century. After the first such delegation to the city of Nuremberg in 1464, the bishop of Würzburg finds it necessary in 1490 to pass sumptuary laws dealing with the dress of "common" women.\textsuperscript{129}

In the late 15th century, the emperor also began to issue imperial police regulations of his own. The earliest one of these, from 1495, sought to maintain "order and police" in the Holy Roman Empire of German Nation by the control of blasphemy, drunkenness and luxurious dress.\textsuperscript{130} Some years later, in the first imperial police ordinance (1530), that list of police offenses was expanded to include the following titles, in roughly that order:\textsuperscript{131}

- Of blasphemy and oaths
- Of drunkenness
- Of disorderly and Christian dress
- Of excessive expenses for weddings, baptisms, and funerals
- Of day laborers, workers, and messengers
- Of expensive eating in inns
- Of civil contracts
- Of Jews and their usury
- Of the sale of wool cloth
- Of the sale of ginger
- Of measures and weights

\textsuperscript{130} James Goldschmidt, \textit{Das Verwaltungsstrafrecht} 70 (Carl Heymanns Verlag, Berlin 1902) (citing Reichsregimentsordnung of 1495 § 40).
\textsuperscript{131} 1. Reichspolizeiordnung of Nov. 19, 1530 (quoted in Unruh, supra note 128, at 393).
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- Of servants
- Of carrying weapons on horse and on foot
- Of beggars and idle persons
- Of gypsies
- Of jesters
- Of flute players
- Of vagrants and singers
- Of sons of craftsmen and apprentices

These central police ordinances were meant as supplements to the local enforcement of police by the inferior superiors within the empire. For instance, the second imperial police ordinance, from 1548, instructed all superiors (*Obrigkevt*) “to establish and maintain among their inferiors (*Untertanen*) good and honorable order and to punish the disobedient.”\(^{132}\) Moreover, the father of every house (*Hauswirt*) was instructed to ensure that his servants and children refrain from blasphemy and drunkenness.\(^{133}\)

So far the list of continental police offenses looks a lot like Blackstone’s lackluster compendium from 1769, both in form and in substance. Eventually, however, the science of police sought to bring order into the princely pursuit of order within his realm, down to the level of the individual father householder.

B. Policing Populations

The science of police, which blossomed particularly in France and in Germany, became the science of administering a “population” with the aim of maximizing its welfare. Much as William the Conqueror had done in the preparation of his Domesday Book centuries before, the entire realm was transformed into a bundle of resources, which the macro householder took upon himself to administer.\(^{134}\) Beginning in earnest in the 17th century,

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132. *Id.*
134. William first required that every free man swear him an oath of fealty, thus integrating them into his new macro household. *Laws of William*, c. 1 & 2. Then he sent out his officials to take stock of the resources of his new realm, the results of which became known as the Domesday Book. *See Frederic W. Maitland, Domesday Book, in Domestay and Beyond: Three Essays in the*
everyone and everything within the macro household was levelled into a statistic.\textsuperscript{135}

There were human resources, and natural resources. The mode of the resource made no difference to the science of police; all resources were to be utilized by the householder so as to maximize the welfare of the state-household. Just as the difference between resources was one of quantity, or perhaps of functionality, so was the difference between the micro household of classical economics and the macro household of the regent. As a German police scientist put it in 1745, police consists of “the good order and constitution of a state’s \textit{persons and things}.”\textsuperscript{136} Already in 1567, an early French writer on police defined government as “the right disposition of things, arranged so as to lead to a convenient end.”\textsuperscript{137} Michel Foucault captures an important point about police, in contrast to law, when he remarks that “with government,” and with police in particular, “it is a question not of imposing law on men, but of disposing things: that is to say, of employing tactics rather than laws, and even of using laws themselves as tactics—to arrange things in such a way that, through a certain number of means, such and such ends may be achieved.”\textsuperscript{138}

Police deals with any threat to the macro household’s welfare. The nature of the threat is irrelevant. Human threats are policed like nonhuman ones, animate like

\textsuperscript{135} Unruh, supra note 128, at 411; see also Foucault, supra note 24, at 102.


\textsuperscript{137} Guillaume de la Perrièrè, \textit{Miroir politique} (1576) (quoted in Foucault, supra note 24, at 89).

\textsuperscript{138} Foucault, supra note 24, at 95. The human nature of the objects of police can also be seen in a peculiar American usage of the term that appeared in the nineteenth century and continues today. In the American military, to police means “to make or keep clean or orderly.” \textit{Oxford English Dictionary}, “police, n.” (definition 3) (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989), <http://dictionary.oed.com/cgi/entry/00182796> [Nov. 13, 2004]. The result of this policing is the police of the camp. And the soldiers assigned to perform the police task are called, police. \textit{The American Heritage Dictionary of the English Language} 1077 (4th ed. 2000). The task of the military police thus, all in all, is to “preserve civil order and attend to sanitary arrangements.” “Police,” \textit{Webster’s Revised Unabridged Dictionary} (1913), available at <http://www.machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=police>.

Thanks to Rob Steinfeld for bringing this usage to my attention.
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inanimate ones. Recall that Bentham mentioned “calamities” as one group of police objects. The other two, internal and external adversaries, are personal.

From the perspective of police what matters is the managing of something, or someone, by someone. The policer is always a person; the policed needn’t be. In fact, we might go farther and say that, insofar as he is an object of police, he is not a person. For policing disposes, in Foucault’s term, rather than influences, persuades, or convinces or even commands. Police controls, rather than governs. 139

When the police concerned itself with persons in particular, these persons always appeared as the ruler’s inferiors (Untertanen). As inferiors, and therefore as incapable of providing for themselves, they were entitled to the ruler’s protection and provision. Police, one could read in a German encyclopedia in 1748, was an “institution so that the subjects may have good nourishment and convenience.” 140 And again, in 1808, a Prussian ordinance declared that “[a]s provincial police agencies the local governments are charged with the commonweal of our loyal subjects, both in a negative as well as in a positive sense.” 141

But even in the statistical world of population management according to the principles of police science, police always remained rooted in private householding. The king-householder’s subjects were not merely inferior, but inferior to him as the head of the household to which they belonged. We’ve already seen that Rousseau highlights this connection between private and public economy in his Discourse on Political Economy, written at the height of police science, in 1755. Commenting on the French literature, Foucault recognizes that the central problem of the police scientists was “to introduce economy—that is to say, the correct manner of managing individuals, goods and wealth within the family . . . and of making the family prosper—how to introduce this meticulous attention of the

140. 2 Johann Theodor Jablonski, Allgemeines Lexikon der Künste und Wissenschaften 824 (2d ed. 1748) (cited in Knemeyer, supra note 129, at 882).
father towards his family into the management of the state.”142 And, invoking Rousseau’s essay, he continues:

To govern a state will therefore mean to apply economy, to set up an economy at the level of the entire state, which means exercising towards its inhabitants, and the wealth and behaviour of each and all, a form of surveillance and control as attentive as that of the head of a family over his household and his goods.143

In the era of police science, police applied to everyone and everything and everywhere. To serve its comprehensive purpose, police was an enormously flexible, and broad, concept. Police was an end, the means to that end, and the institution enforcing the means. In other words, police was the goal that the police achieved by means of police.

Flexibility also meant essential vagueness. A good police required discretion in the policer. He needed to be able to do whatever needed to be done. There could be guidelines, but no firm principles. And the concept of police had to be broad enough to leave room for the sort of on-the-spot judgment that was required in unpredictable situations. Many writers on police attempted a definition of their subject matter. Even more critiqued existing definitions,144 In the end, not even police science managed to produce a definition of police that was flexible and comprehensive enough without being meaninglessly broad. What remained were, as in the sixteenth century, more or less illustrative lists of various objects of police: agriculture, hunting, fishing, coalmines, crafts, arts,145 but also construction, fire, health, and the poor,146 and, eventually, mountains, dykes, forests, commerce, and markets as well.147

Anything and anyone could be policed. The king policed the realm. The provincial official policed the province. The family householder policed the family household. And the individual policed itself. A German source from 1770 speaks of “internal policing of humans and states.” The well policed

142. Foucault, supra note 24, at 92.
143. Id.
144. Unruh, supra note 128, at 421.
146. Unruh, supra note 128, at 407-09.
147. Knemeyer, supra note 129, at 897.
person is said to be “polite,” considerate, even beautiful.\footnote{Id. at 883-84.}

Police always also meant coercion. Without the power to coerce, no householder could be expected to discharge his duty as protector of his household. And to coerce didn’t just mean to enforce obedience. Obedience was necessary to guarantee the smooth operation of household management. Interference on the part of members of the household, as idleness or general recalcitrance or direct contempt, was a nuisance. It was difficult enough to manage the household without having to contend with malfunctioning tools. As Bentham put it, the power to coerce was crucial since “no one would choose to be a magistrate or a father, if he were not secure in the exercise of his own power.”\footnote{BENTHAM, supra note 120, at 270.}

But police didn’t only mean coercion. After all, most of police had nothing do with persons. Resources are not coerced, they are manipulated, drawn upon, maximized. But even when police dealt directly with persons, it need not coerce them. Since their welfare, as members of the household, was its end, police could rely on the cooperation of its personal objects. Violence thus was necessary only to correct persons for their own good. Discipline only served to force persons to be well, literally.

Occasionally of course it might be necessary even to destroy a particular threat to the community’s well-being. A resource, human or not, that had lost all, even potential, utility for the project of maximizing the household’s welfare might have to be discarded, provided the destruction did not consume more resources than it preserved. In that case, it could not be said that the policing would benefit its immediate object, but the point was not to benefit particulars, but to benefit them \textit{as constituents of the household}. And if their benefit was the household’s loss, then they were beyond the pale of police.

In continental police science, police also wasn’t only about prevention of harm to the community. To maximize the family’s welfare meant to increase it, and not merely not to decrease it. The police in police science, in other words, was affirmative as well as restrictive, positive as well as negative. Recall that the Prussian ordinance from 1808, which we’ve already encountered, instructed local governments—as police agencies—to look after the “the
commonweal of our loyal subjects, both in a negative as well as in a positive sense.”150 It went on to remind the local governments that their effectiveness “in executing the power of police must extend not only to the prevention of dangers and disadvantages and to the maintenance of the current state of affairs, but also to the expansion and advancement of the common welfare.”151 In particular, this meant that “they therefore are entitled and obligated not merely to prevent, and to remove, anything that can bring danger or disadvantage to the state and its citizens, i.e., to take the necessary measures to maintain public tranquility, security, and order, but also to ensure that the commonweal is advanced and increased and that every state citizen have the opportunity to develop his abilities and powers in moral as well as in physical regard and to apply them within legal bounds in the manner most suitable to him.”152 For that reason, the local governments were also charged with overseeing “the edification of the people, public education, and cultural programs.”153

This program for the establishment of a well policed population, in the sense discussed above, should not be confused with a program for the establishment of a self-governing citizenry. Recall that this was still a Prussian ordinance issued by the government of a highly autocratic and centralized monarchy to local governmental entities which enjoyed their power of government in general, and of police in particular, through delegation from the Prussian king. It is an internal administrative decree from a superior administrative agency to an inferior one. It is not addressed to the population whose police it calls upon the inferior bureaucratic agency to maximize. In particular, the point of educating “our loyal subjects” was to maximize their welfare as members of the Prussian state, not to maximize their welfare for their sake, and certainly not to transform them into self-governing individuals whose creation would destroy the very state that brought it about.

Prevention, which Bentham took to be the essence of police, thus was only one side of the police concept in

151. Id. § 50 (cited in K nemeyer, supra note 129, at 891).
152. Id. § 3 (cited in K nemeyer, supra note 129, at 888).
153. Id.
continental police science. Prevention of “mischief” could only be one aspect of policing the household because police was the household’s welfare, and not merely its freedom from threats external or internal.

C. Police and Crime

Still, the distinction between prevention and remedy did play a crucial role in the recurring attempt to distinguish between police and punishment, and between police and criminal (or real) offenses. The need to differentiate between the two arose as police offenses began to multiply along with novel procedures and institutions to enforce them, leading to predictable jurisdictional conflicts with traditional courts. Prussia, to stick with our example, developed a system of police offenses that included police orders issued by police agencies, enforced by police officers, adjudicated by police judges, and punished by police sanctions served in police prisons.\(^{154}\) Police sanctions ran from fines to fourteen days’ imprisonment per offense (dubbed “transgression”), and three months per sentence.

Here we have Prussian police integrating the three powers, or branches, of government—defining, imposing, and inflicting, or legislating, adjudicating, and executing. In a system of police, the distinctions among various modes of power are difficult to maintain. The father of the household always had been legislator, judge, and executioner all wrapped in one. He made the rules, decided when they had been violated, and inflicted disciplinary measures, if and when appropriate. The separation of powers is designed to place checks on government. Police authority is exercised without checks, other than the ultimate end of the community’s welfare. From the perspective of police, a division of power retards the execution of the superior’s measures designed to maximize community welfare.

By their nature, police offenses wouldn’t fit easily into the new criminal codes that began to appear throughout continental Europe. Bavaria, which had produced what is generally considered to be the first “modern” German criminal code in 1813, tried to collect its police offenses in a separate “police criminal code.” Here are a few samples

\(^{154}\) Heinrich Rosin, Polizeiliche Strafverfügungen, in 2 Wörterbuch des Deutschen Verwaltungsrechts 266 (Karl von Stengel ed. 1890).
from the 1822 draft:

- failing to sweep the sidewalk every Saturday
- unauthorized placing of a flower pot
- attaching a weather vane without a lightning rod
- skating on thin ice
- begging
- untimely chimney sweeping
- failing to supply one’s dog with a city tag
- keeping a pigsty that faces the street
- establishing a chemical laboratory in one’s kitchen
- unauthorized river bathing
- disposing waste onto the street
- obstructing a narrow street with a cart
- carrying a stick in a crowd
- ringing church bells during a rainstorm
- operating a coach at excessive speed
- horseback riding by a child
- interrupting another’s concert through excessive noise
- drinking alcohol in a bar after 11 p.m.
- failing to have one’s child inoculated by age three
- failing to make a timely appearance at the water pump in case of fire
- failing to keep one’s fire bucket in proper repair
- failing to heed a request to abstain from exciting animals
- engaging in an act that may endanger a pregnant woman or her fetus
- failing to assist runaway children until official action has been taken
- disseminating principles, opinions, or dispositions dangerous to the state
- disseminating principles, opinions, or dispositions that are directed against the foundations of morality and religion or otherwise tend to discredit morals or religion
- publicly making statements gravely insulting
the admiration of the Highest Being\textsuperscript{155}

Police offenses of this ilk were said to differ from criminal offenses in that they merely threatened protected interests, instead of violating them.\textsuperscript{156} Punishing the former thus served to prevent harm, whereas punishing the latter constituted remedial punishment.

Other attempts to separate police crimes from “true” crimes drew on the communal, rather than the preventive aspect, of police. So P.J.A. Feuerbach argued in the early nineteenth century that police offenses interfered with a public interest, whereas only crimes constituted a violation of a private right of a person.\textsuperscript{157} For purposes of police, after all, the individual is significant only as a member of the household.

Feuerbach (the drafter of the 1813 Bavarian Code) also argued that penalties for police offenses are “nothing but disobedience penalties,”\textsuperscript{158} thus highlighting the hierarchical aspect of the police concept. This idea was later developed by the influential positivist criminal law scholar Karl Binding who argued that the difference between police offenses and real crimes lay in the fact that police offenses


\textsuperscript{156} See, e.g., Heinrich Rosin, \textit{Polizeistrafrecht}, in \textsc{2 Wörterbuch des Deutschen Verwaltungsrechts} 273, 275 (Karl von Stengel ed. 1890); cf. \textsc{Christian Reinhold Köstlin, Neue Revision der Grundbegriffe des Kriminalrechts} 28 (1845); \textsc{Christian Reinhold Köstlin, System des deutschen Strafrechts, I. Abteilung} (1855).

\textsuperscript{157} For a critical, and highly influential, discussion of Feuerbach’s views, see Johann Michael Franz Birnbaum, \textit{Über das Erforderniß einer Rechtsverletzung zum Begriff des Verbrechens, mit besonderer Rücksicht auf den Begriff der Ehrenkränkung}, \textsc{Archiv des Criminalrechts} (Neue Folge) 149 (1834). Birnbaum is credited with establishing that the purpose of criminal law is the protection of \textit{Rechtsgüter} (legal goods), one of the central tenets of German criminal law. Framed as a critique of Feuerbach, who sought to limit criminal law to the protection of personal rights, Birnbaum’s article mounts a sustained defense of police criminal law. The point of replacing rights with legal goods, or interests, was to make room for what in American criminal law came to be known as police offenses, i.e., offenses against various aspects of the public police, including the moral, and religious, police. \textit{See, e.g., id.} at 160-62. Birnbaum made clear that, in the modern criminal law of police, the paradigmatic victim of criminal offenses was the state, whose interests the criminal law sought to protect. \textit{Id.}

\textsuperscript{158} See Feuerbach, \textit{supra} note 155, at 590, 599.
were “pure disobedience offenses.”\textsuperscript{159} They were punishable only because they violated a state command. Real crimes too were disobedience offenses, in that they also manifested disobedience. But they were not purely disobedience offenses, because they also threatened or violated a protected interest.

None of these attempts to differentiate between police offenses and criminal offenses proved successful, though all of them invoked familiar characteristics of the concept of police. Doesn’t the punishment of traditional crimes serve a preventive purpose as well? Isn’t every crime also a violation of a public interest? How can we tell—and why should it matter—whether an offense is only, or also, an act of disobedience? Even if we could draw these distinctions, what would follow for the different—or not-so-different—institutional treatment of police offenses and “true” crimes? Interestingly, nineteenth century American courts struggled with similar questions—and reached similarly unsatisfactory answers—when they faced police offenses of their own, such as vagrancy statutes providing for commitment to houses of correction after summary proceedings before a magistrate.\textsuperscript{160}

III. POLICING THE NEW REPUBLIC

It’s not entirely clear, of course, exactly whom and what the American political and legal thinkers and doers who first spoke of a power to police read and when. It’s also unclear, therefore, to what extent these Americans were directly influenced by any, or all, of the various incarnations of the police concept in early modern Europe or in the police science of the 17th and 18th centuries, or if, perhaps, they got their police entirely from Blackstone’s \textit{Commentaries}, the source of so much institutional inspiration in the New Republic.

Luckily, as we’ve seen, it doesn’t much matter whether the Founding Fathers picked up the police concept from Blackstone or Beccaria or Bentham, or Adam Smith or any

\textsuperscript{159} See, e.g., 1 Karl Binding, \textit{Die Normen und ihre Übertretung} 409 (4th ed. 1922).
\textsuperscript{160} See, e.g., \textit{In re Forbes}, 11 Abb. Pr. 52 (N.Y. Sup. Ct. 1860); United States v. Hing Quong Chow, 53 F. 233, 234 (E.D. La. 1892) (early immigration statute).
of the other eighteenth century police scientists. It doesn’t matter because the core idea of police was the same on both sides of the Channel, for the simple reason that its roots reached back far beyond the divide between continental and English politics and law, to the very origins of Western political thought and practice. Already the Greeks had differentiated between politics, the self-government of householders by householders, on one hand, and the other-government of households by their householders, on the other.\textsuperscript{161} Police marked the point of convergence between politics and economics, when one mode of governance merged into the other, and created the oxymoronic science of political economy. The police power was born when the governmentality of the private (micro) household was expanded, and transferred, onto that of the public (macro) household. Equipped with the power to police, the sovereign ruled “the individuals of the state, like members of a well-governed family,” in Blackstone’s words,\textsuperscript{162} or “of that great family, the State,” in Rousseau’s.\textsuperscript{163}

A. From Police Science to Police Power

It’s no surprise that the Founding Fathers took easily to this theory of government as patriarchy, and of politics as economics; after all, they had been practicing it for quite some time. In their corporations, their camps, their towns, their churches, their families, and on their plantations, they had been doing police long before they had a name for it, that modern, enlightened, scientific concept of police.

The problem, of course, was that this mode of governance stood in deep tension with the principle upon which the American Republic was built, and that gave legitimacy to it, \textit{self-government}. It was one thing for the Kings of England and of Prussia to think of themselves as policing their respective realms, as a more or less benevolent father might his family. It was quite another for the governors of a democratic republic built upon the equality of all, governors and governed alike, to adopt this


\textsuperscript{162} 4 BLACKSTONE, \textit{supra} note 16, at 162.

\textsuperscript{163} ROUSSEAU, \textit{supra} note 34.
patriarchal posture.

But adopt it they did, as they applied themselves to the task of policing the new state with a vengeance, developing a distinctly American notion of police along the way, turning police science into police power. Recognized as the very foundation of government, and even as synonymous with government itself, American police power remained true to the common core of all varieties of police, from France to Germany to Scotland to England: its foundation in the householder’s governance of the household. All of the components of American police power can be traced back to that model. Its undefinability derives from the father’s virtually unlimited discretion not only to discipline, but to do what was required for the welfare of the household. The ahumanity of its object derives from the essential sameness of all components of the household, animate and inanimate, as tools in the householder’s hands. That essential sameness, however, also implies the essential difference between the householder and his household, and therefore the hierarchical aspect of American police power, along with its fundamental amorality. The power to police seeks efficiency, not legitimacy. The patriarch’s concern for the welfare of his household is the police power’s concern for the welfare of the state, a concern that expresses itself positively and negatively, in the correction of inferior members of the state household as well as in its protection against threats.\textsuperscript{164}

But what possible relevance could a view that rooted state power in the king’s obligations toward, and authority over, his kingdom retain in a republic? Wasn’t the American Revolution all about independence, independence also from the king’s arbitrary prerogative, which he exercised over his American subjects like a householder over his household? In short, wasn’t the Revolution meant precisely to rid the Americans of the patriarchal police power of the King of England?

Ending the king’s police power, it turns out, did not

mean ending police power altogether. Nor did it mean
depriving oneself of that power. We have already seen that
policing in fact if not by name already had shaped the
practice of American government since long before the
Revolution, and it continued to do so long thereafter.
Americans had no objections to the notion of one person
policing another, or rather a community of others.
American society was and remained deeply hierarchial,
organized into households of various sizes and types. The
kingdom-household under the authority of the king-father
was only one of these households, and in many ways the
least significant in everyday life. The English king, with
“his” law, was very far away. Government occurred at the
local level, in the family, the church, the town, perhaps the
colony, and of course the plantation.

Americans didn’t appreciate being policed, but they had
no qualms about policing. The Revolution thus can be seen
as the removal of a higher layer of household governance.
Americans extracted themselves from the kingdom-
household so that they could go about policing their
respective households without interference from the macro
householder, the king.165 After the Revolution, for example,
now-state officials no longer would have to deal with royal
missives reminding them that slave owners should be held
to account for killing their slaves, because slaves were not
only members of a plantation household, and the then-
colonial household, but also of the grand household of the
king.166 These decrees were irksome not only because they
interfered with the proper policing of the then-colony, the

165. Cf. Pateman, supra note 21, at 3, 32 & ch. 4 (discussing the notion
of “fraternal patriarchy”); see also Carole Pateman, The Fraternal Social
Contract, in THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM, AND
POLITICAL THEORY 33 (1989). Interestingly, as Pateman also points out, even the post hoc
theorization of American government in John Rawls’s work is formulated in
terms of “heads of families,” who in the public realm—most abstractly, the
original position—make representative choices on behalf of their households. Id.
at 43; see also id. at 37 (discussing Keith Tribe’s work). In this light, the process
of political legitimation appears as a continuous (re)particularization of
autonomy, from the king to the states to the head of household, but no farther.
Even in modern liberalist political theory, then, the unit of deliberation is still
not the person, or the individual, but remains the householder.

166. Scott, supra note 44, at 202 (“at the time, the Slave is the Master’s
Property he is likewise the King’s Subject, and that the King may lawfully bring
to Ttrial all Persons here, without exception, who shall be suspected to have
destroyed the Life of his Subject...”).
now-state, but also because they reminded the officials of 
their inferior status vis-à-vis the royal \textit{paterfamilias}. Under 
the loose supervision of the king-father, Americans had 
been free to enslave, in Jonathan Bush’s phrase.\footnote{Bush, \textit{supra} note 77, at 417.} After 
the Revolution they were truly free to police.

They were free because they were free \textit{from} someone 
else’s police power. They were also free because they were 
free \textit{to} police others. Their autonomy consisted in not being 
under heteronomy \textit{and} in exercising heteronomy over 
others. This is the model of republican government familiar 
from Greek politics, which the American revolutionaries 
studied with great interest.\footnote{See \textit{Arendt}, \textit{supra} note 139, at 30-31.} The new American state was 
to be a republic, but a republic of householders. It was the 
householders who were to participate in government, 
indirectly and directly, by voting and being voted for, and 
resolve disputes amongst themselves. But the business of 
government did not end there. Government also meant, as 
it always had, policing others. And so everyone—and 
\textit{everything}—else incapable of self-government was to be 
policed by those who were so capable. Objects of police 
regulation in the early Republic included, among other 
things (and people), taverns, brothels, bawdy houses, lost 
goods, and gunpowder, paupers, vagrants, disorderly 
persons, prostitutes, drunkards, tipplers, gamesters, the 
unemployed, jugglers, common showmen, as well as 
illegitimate children, and stray animals.\footnote{See, e.g., Novak, \textit{supra} note 30, at 1077-78 (discussing 1830s reforms in 
Michigan and Massachusetts).}

Suffrage limitations didn’t just discriminate against the 
propertyless, women, slaves, children, animals, and 
suffrage and householdership through much of the nineteenth century in the 
United States).} They eliminated those who were under 
the police of another person, or—in the case of those who 
were denied the status of personhood, including slaves, 
children, animals, and inanimate objects—under the police 
of some person. In the householder’s republic, the household 
had no right to govern, only to be governed, or rather 
policed.

A fully matured capacity for self-government was
required for participation in the self-government of the American polity. That capacity was thought to be lacking in those who were mere objects of another’s police, be their householder the family patriarch, as in the case of wives, children, servants, animals, and other household property, or the state as macro householder, in the case of those receiving public poor relief. Even if the capacity for autonomy wasn’t lacking entirely under these conditions, its actual exercise was surely thought to be impossible. Even if objects of police could be free in the abstract, they were not, and could not be, free in fact.

As “persons of indigent fortunes, or such as are under the immediate dominion of others,” objects of police were “suspected to have no will of their own,” and therefore incapable of exercising whatever capacity for self-government they might possess. That “suspicion” in fact manifested itself as an irrebuttable presumption in the form of categorical property qualifications, which persisted in some states until the 1930s.

Now given that there remained so many objects of police, animate and inanimate, even after the Revolution and its ejection of the royal householder and his overseers, there was never any question whether there was to be continued policing in the New Republic but merely who was to do the policing. So obvious was the continued need for police that Americans never managed, or bothered, to develop an indigenous account of the nature of police. In fact, early American treatments of police devoted themselves largely to the task of explaining, and repeating, the very obviousness of police. Take for example the concluding passage of Judge Redfield’s opinion in the 1854 Vermont case of Thorpe v. Rutland & Burlington Railroad Company, which came to be cited as one of the classic American discussions of the police power:

One in any degree familiar with this subject 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,

171. 1 BLACKSTONE, supra note 34, at 171.
172. See Steinfeld, supra note 170, at 335.
173. 27 Vt. 140 (1854).
regardless of merely private convenience, looks like mere
badminage. They can scarcely regard the objector as altogether
serious. And generally, these doubts in regard to the extent of
governmental authority come from those who have had small
experience.\textsuperscript{174}

The answer to the question of who would get to do the
policing in the New Republic was just as obvious: we. “We”
originally meant “the people,” in the sense of the collection
of householders entitled to participate in government. So
some of the early state constitutions feature declarations
such as this one, taken from the Pennsylvania Constitution
of 1776: “the people of this State have the sole, exclusive
and inherent right of governing and regulating the internal
police of the same.” Here the householder-citizens of
Pennsylvania are defiantly throwing off the police power
once held over them by their erstwhile macro householder,
the king.

But the people of Pennsylvania not only announced that
they no longer would be policed by the king of England.
They also clarified that the departure of the ultimate
copercer didn’t mean the departure of police. That the power
of police was intimately connected to the king’s prerogative
didn’t cause much of a problem, and certainly no more of a
problem than the transfer of any other aspect of the royal
prerogative, i.e., the authority enjoyed by the king as father
of the kingdom family. Now that the king was gone, his
prerogative was simply transferred onto the new sovereign:
“the people of this State.” In the context of police, Thomas
Paine’s famous answer to the question “where . . . is the
King of America?”, that “in America THE LAW IS KING,”\textsuperscript{175}
meant that the prerogative police power of one man, the
king, now belonged to a group of men, the people, who had
assumed the power to police.

Once the people of the various states had freed
themselves from the king’s policing of their police, they
were understandably wary of subjecting themselves to the
police power of another master. To many the creation of an
American nation meant being reintegrated into a larger
household under another superior householder. And it is in
the context of the debates about the federal constitution

\textsuperscript{174} Id. at 156.
\textsuperscript{175} THOMAS PAINE, COMMON SENSE (1776).
that one finds the most extended discussions of the obviousness of police power. So we learn that the power to police is an inherent attribute of all government, or least of any free government, where “free” here meant free from a superior police power.

This point about the inevitability of policing in any government was so universally conceded that it helped forge the very consensus upon which the American federalist system of government was built. By leaving “the people of this State” the “sole, exclusive and inherent right of . . . regulating the internal police of the same,” the United States preserved the States’ status as independent households, or units of police. They, in other words, remained free to police. But they gave up the monopoly over that other aspect of government, namely that of “governing” in the narrow sense. Government by law now became a matter not only of the states, but also of the national government. The state-householders could still police their household, but they were now subject to the laws of the nation. Those laws, however, were not to be measures of police, issued by a higher power. They were to be laws made with their participation, as always had been appropriate for a polity constituted by autonomous householders.\footnote{176. On the distinction between autonomy (self-government) of and by adult male householders and heteronomy (other-government) of the household by the householder in classical Athens, see \textit{Arendt, supra} note 139, at 26-27 (“To be political, to live in a \textit{polis}, meant that everything was decided through words and persuasion and not through force and violence. In Greek self-understanding, to force people by violence, to command rather than persuade, were prepolitical ways to deal with people characteristic of life outside the \textit{polis}, of home and family life, where the household head ruled with uncontested, despotic powers, or of life in the barbarian empires of Asia, whose despotism was frequently likened to the organization of the household.”).}  

In fact, American constitutional discourse went one step farther. Not only did it leave the states’ power of “internal police” untouched. But it also denied the federal government any police power of its own. In other words, it retained the household status of the states by denying the household status of the union.

This arrangement was self-contradictory; nonetheless, it has remained in place to this day. The problem with the compromise upon which the union was built was that it insisted that the power to police was inherent in the very concept of government, while at the same ostensibly
erecting a government without that very power. But this inconsistency has not interfered with the rhetorical usefulness of the police concept over the past two hundred years. 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.

As a matter of political fact, if not of rhetoric, the inconsistency did manage to resolve itself. As Ernst Freund remarked in 1904, after only the first century of federal legislation, it had become “impossible to deny that the federal government exercises a considerable police power of its own.”

Despite all the rhetoric about the policeless federal government, already the Federalist Papers referred to a federal police power, even if not in so many words. So Hamilton spoke of the need of government to hand out “a penalty or punishment for disobedience,” and in particular “the disorderly conduct of refractory or seditious individuals.” Here a “vigorous” government was needed to dispose of those “seditions and insurrections . . . that are, unhappily, maladies as inseparable from the body politic as tumors and eruptions from the natural body.”

And this became the general modus operandi of the federal government: use your police power, but call it anything but that. One of the most obvious, and extreme, uses of the federal police power took the form of federal control over Native Americans and their “Indian affairs,” under the auspices of that most police scientific institutions of princely government, a “Bureau.” This clear and prolonged exercise of comprehensive householder authority over a household composed of inferior objects who could have no say in their government, this textbook example of police, in other words, was in fact carried out mostly under the commerce clause, which authorized the national government not to regulate the “police” of the nation, but instead to regulate “commerce” among the micro households

178. The Federalist No. 15 (Alexander Hamilton), supra note 126, at 73, 78; The Federalist No. 21 (Alexander Hamilton), id. at 106.
179. The Federalist No. 16 (Alexander Hamilton), id. at 81, 85.
180. The Federalist No. 1 (Alexander Hamilton), id. at 1, 3.
181. The Federalist No. 28 (Alexander Hamilton), id. at 146.
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(i.e., the States) within the nation, as well as between the nation and other macro households (i.e., other nations). 182

The commerce clause early on emerged as the favorite cover for the exercise of federal police power. The most recent example is the creation of a comprehensive federal code of drug criminal law, all under the guise of preventing interference with interstate commerce. 183 In fact, almost the entire edifice of modern federal criminal law, which has reached proportions that would have surprised even a police realist like Freund, derives from the commerce clause. Only recently has the U.S. Supreme Court begun to review the federal government’s use of the commerce clause to generate police measures. In United States v. Lopez, 184 the Court even went so far as to strike down a federal criminal statute ostensibly based on the federal commerce power. On what ground? Because to uphold the statute would “bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” 185 In other words, the fiction of exclusive state police power is alive and well, even after Lopez.

B. The Need for Order

Having secured “the sole, exclusive and inherent right of governing and regulating the internal police of the same” twice over, once against the king and then against the national government, “the people” of the states turned their attention to the task at hand. With the revolutionary work complete, the time had come to govern. As Benjamin Rush gushed in the summer of 1787: “the same enthusiasm now pervades all classes in favor of government that actuated us in favor of liberty in the years 1774 and 1775, with this difference, that we are more united in the former than we


185. Id. at 567.
were in the latter pursuit.”

And to govern also, and especially, meant to police. For there was much policing to be done. As Benjamin Franklin cautioned in 1789: “We have been guarding against an evil that old States are most liable to, excess of power in the rulers, but our present danger seems to be defect of obedience in the subjects.” Others warned that “[t]he principal fault seems to be, a want of energy in the administration of government.” What was needed was “an increase of magisterial power in order to provide for the execution of the laws that is necessary for the preservation of justice, peace, and internal tranquility.”

It was high time that order be restored in the American state household. Household members had to be put—back—in their proper place, lest they mistake themselves for householders capable of government. There were plenty of people in need of policing. The recently liberated householders saw post-revolutionary America teeming with men “whose fathers they would have disdained to have sat with the dogs of their flocks, raised to immense wealth, or at least the appearance of a haughty, supercilious and luxurious spendthrift.”

The comprehensive pursuit of police permeated every branch, and every level, of government. We’ve already heard about the police commissioners and peace officers who began to appear in American cities in the 1770s and 80s. And these agents were not long confined to executing the statutes on Blackstone’s list of police offenses.

Soon the legislative bodies of the states began issuing their very own police regulations, from the state on down to cities, towns, and villages. As an illustration here is a list of police regulations passed by the New York state legislature between 1781 and 1801, as compiled by William Novak:

- lotteries
- hawkers and peddlers
- the firing of guns
- usury

188. Wood, supra note 27, at 432.
189. Id. at 477.
190. Novak, supra note 30, at 1076.
frauds
the buying and selling of offices
beggars and disorderly persons
rents and leases
firing woods
the destruction of deer
stray cattle and sheep
mines
ferries
apprentices and servants
bastards
idiots and lunatics
counsellors, attorneys and solicitors
travel, labor, or play on Sunday
cursing and swearing
drunkenness
the exportation of flaxseed
gaming
the inspection of lumber
dogs
the culling of staves and heading
debtors and creditors
the quarantining of ships
sales by public auction
stock jobbing
fisheries
the inspection of flour and meal
the practice of physic and surgery
the packing and inspection of beef and pork
sole leather
strong liquors, inns, and taverns
pot and pearl ashes
poor relief
highways
quit rents

There it is again, the typical hodgepodge of activities and objects, animate and inanimate, we've come to associate with police legislation. And as Novak has

191. Mariana Valverde regards “the metonymic technique of ‘the list’” as typical of governance through police and identifies three central features: “(1) the heterogeneity of governance objects; (2) the simultaneous institution of very broad categories (‘public nuisance,’ for example) that create swamps of
shown with example after example, American state legislatures, directly or by delegation to smaller entities within the state, continued producing police measures of this sort throughout the nineteenth century. By the 1820s and 30s, when the young state legislatures began taking stock of their regulatory output, and consolidating and “revising” it in the process, they began grouping these measures under their proper title, police, often using Blackstone’s police categories.

Returning from the constitutional convention to Virginia as governor, Thomas Jefferson too was eager to begin the process of reform, and to get down to the business of running a state, including providing for its internal police. His reform plans, and particularly his comprehensive educational program, reflected the positive aspect of police, which sought to increase the community’s welfare, and not merely to maintain it. Jefferson set out to train capable (“wise and honest”) policymakers and administrators, for “it is generally true that the people will be happiest whose laws are best, and are best administered, and that laws will be wisely formed, and honestly administered, in proportion as those who form and administer them are wise and honest.” To that end, he proposed establishing elementary schools for all children, reforming the College of William & Mary, and setting up a library.

For our purposes most interesting is his transformation of the College of William & Mary from an institution of the Anglican Church into a training ground for the new state’s future policymakers and administrators. By the time Jefferson established the chair of law and police, the education of state officials in the science of police already had had a long tradition in the increasingly bureaucratized European monarchies. In the German states, for example, the study of police began in training academies for state officials, the so-called Kameralbeamten, or bureau-crats discretion; and (3) the dearth of theoretical justification for selecting these particular objects.” Valverde, supra note 21, at 157-63.

192. Novak, supra note 21, at 11.
193. Freund, supra note 1, at 2 n.2.
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(literally chamber or office deputies—offic-ials). These administrative officials were schooled in cameral science, the science of the chamber (Kameralwissenschaft), which included the administration of any policies the king or his delegates had seen fit to decree so as to provide for the police of his subjects. Police training academies were dedicated to disseminating the raison d’état throughout the respective state bureaucracies, and thereby to render the management of the state household more efficient. This required proper maintenance of statistics about the objects of state government, the population, and competent enforcement of royal and superior administrative decrees. Eventually, these training academies were integrated into the state universities. In 1727, William I. of Prussia set up two chairs in cameral science, in Halle and Frankfurt/Oder. Soon chairs in other cities and states followed: Rinteln (1730), Leipzig (1742), Vienna (1752), Göttingen (1755), Prague (1763), Freiburg/Breisgau, Innsbruck, Klagenfurt (1768), and Ingolstadt (1780).

Even after their integration into the university curriculum, courses in cameral science (or “economic police and cameral science”) remained practice oriented. They encompassed a broad spectrum of topics, ranging from general economic policy to administrative science to accounting and statistics.

Jefferson’s reference to “police,” “politics,” “commerce,” and “oeconomical law,” in the appendix to his bill to amend the constitution of the College of William & Mary, of

196. Unruh, supra note 128, at 451; David F. Lindenfeld, The Decline of Polizeiwissenschaft: Continuity and Change in the Study of Administration in German Universities during the 19th Century, in FORMATION UND TRANSFORMATION DES VERWALTUNGSWISSENS IN FRANKREICH UND DEUTSCHLAND (18./19. JH.), 1 JAHRBUCH FÜR EUROPÄISCHE VERWALTUNGSGESCHICHTE 141 (1989). On the particular significance of police science at Göttingen, see Heinz Mohnhaupt, Vorstufen der Wissenschaften von “Verwaltung” und “Verwaltungsrecht” an der Universität Göttingen (1750-1830), 1 id. at 73-103; Michel Foucault, The Political Technology of Individuals, in TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT 145, 158 (Luther H. Martin et al. eds., 1988). Among the more prominent police scientists on the Göttingen faculty was Friedrich Christoph Dahlmann (1785-1860), one of the Göttingen Seven.


198. Id.; see generally ALBION W. SMALL, THE CAMERALISTS (1909) (providing an excellent overview of cameralist thought).

199. Thomas Jefferson, A Bill for Amending the Constitution of the College of William and Mary, and Substituting More Certain Revenues for Its Support,
course comes nowhere near the sophistication of the systematic curriculum in the continental departments of police science. Americans, after all, had neither a police science, nor powerful state bureaucracies devoted to the raison d’état as manifested in the decrees of an enlightened monarch.

And yet the challenge of police that Jefferson—and his American contemporaries—faced was very much the same. Since its earliest manifestation as the householder’s management of his household, police meant the maximization of resources. To this end, it helped if one had a clear picture of what these resources were at a given point in time, and how they changed over time, in response to certain managerial actions. It also helped if these actions were put into action quickly and completely, which required an obedient household as well as—if necessary—a loyal and competent staff of administrators, or overseers.

supra note 14. app. at 541. Jefferson’s reforms of William and Mary are discussed in some detail in Herbert Baxter Adams, The College of William and Mary, 1 Contributions to American Educational History (1887). Writing in 1887, Adams laid particular stress on the parallels between Jefferson’s reforms and continental police academies police, and in fact advocated the creation of an American civil service academy dedicated to the study of police, or “scientific politics and good administration.” Id. at 79. Adams was particularly taken with the École Libre des Sciences Politiques in Paris and the Prussian Statistical Bureau in Berlin, “a training school for university graduates of the highest ability in the art of administration, and in the conduct of statistical and other economic inquiries that are of interest and importance to the Government.” Id. at 80. Note that by Adams’ time, “police”—in Jefferson’s chair of “law and police”—already required an explanatory footnote:

This was much the same as the modern science of administration, which is just beginning anew to creep into our university courses in America. What the German would call Polizeiwissenschaft, and what the Greeks termed πολιτεία, was taught for nearly a century at the college of William and Mary under the head of “police.” That name would probably suggest nothing but constabulary associations to most college faculties in these modern days.

Id. at 39 n.1.

200. On George Washington’s plan for “a national school of politics and administration,” see id. at 43-47. In his will, Washington called for the “establishment of a UNIVERSITY in a central part of the United States, to which the youths of fortune and talents from all parts thereof may be sent for the completion of their education, in all the branches of polite literature, in arts and sciences, in acquiring knowledge in the principles of politics and good government . . .” Id. at 43 (emphases added).
C. Self-Police and Self-Government

The American revolutionaries were right, and so were the defenders of states’ rights: police is an essential component of any government. A look at the continental roots of the police concept reveals, however, that any government also includes highly centralized European states under the absolute authority of the members of a hereditary monarchy. It is no accident that the notion originated and found its most complete exposition and manifestation in France and Prussia, and that in the English tradition it was closely associated with the prerogative of the king as the father of his people. Given its derivation from the power of the paterfamilias over his household, police is easily compatible with hierarchical, and in particular patriarchal, regimes that at the same time maintain a strict division between ruler and ruled, and abstract away distinctions among the ruled, which make up the household as a set of management tools distinguished (only) by functionality.

The categorical distinction between ruler and ruled, on the one hand, and the categorical denial of any significant distinctions among the ruled, on the other, became difficult to maintain in America after the Revolution. That revolution, after all, had stressed again and again the fundamental identity of all persons as such, and had founded the power to govern on a compact among all persons, rather than between the ruler and the ruled.

At the same time, however, deep social divisions remained in American society, revolutionary proclamations, and declarations, notwithstanding. The concept of police was only one way of capturing these divisions and finding room for them in the government of the newly independent American states. Everyone agreed, after all, that the power to police was an inherent right of any government. And this much is true, depending on what police meant. If the power to police meant the power to regulate matters of common interest to all members of a political community, then surely a power to police was not only necessary to government, but one of its primary functions. Also, if the power to police meant the power to enforce the law against unjustified violations, then no objections to its legitimacy could be raised.

The challenge was to bring the legitimate functions of
police in line with a system of government that could not
bear the distinction between policer and policed. The
problem of government was no longer merely to put in place
the most efficient system of police. Instead, police had to be
rendered compatible with the one legitimating principle
that remained after the American revolution, the principle
of self-government, or autonomy. The challenge of police
thus was central to the more general project of erecting a
system of government based on the autonomy of all persons
as such, rather than on the autonomy of some persons as a
factor of their heteronomy over others, i.e., of transforming
America from a democracy of householders into a
democracy of persons.

Jefferson saw this challenge, and took steps toward
meeting it. His educational program, after all, called not
only for the proper training of state police officials, by
attracting the best and the brightest among the state’s
subjects, “those persons, whom nature hath endowed with
genius and virtue, . . . without regard to wealth, birth or
other accidental condition or circumstance.” While
continental monarchs had long ago noticed the inefficiency
of a non-meritocratic bureaucracy, the distinctive, and
distinctively American, aspect of Jefferson’s educational
plan lay in his call for “[e]lementary schools for all children
generally, rich and poor.” Now this provision of course can
be seen as simply a prerequisite for the establishment of a
merit-based system of administration. But it served another
purpose as well: as a protection against, rather than
facilitation of, oppressive police. As Jefferson explained in
the introduction to his education bill, entitled “A Bill for the
More General Diffusion of Knowledge”:

it appeareth that however certain forms of government are better
calculated than others to protect individuals in the free exercise of
their natural rights, and are at the same time themselves better
guarded against degeneracy, yet experience hath shewn, that even
under the best forms, those entrusted with power have, in time,
and by slow operations, perverted it into tyranny; and it is
believed that the most effectual means of preventing this would
be, to illuminate, as far as practicable, the minds of the people at
large, and more especially to give them knowledge of those facts,
which history exhibiteth, that, possessed thereby of the experience
of other ages and countries, they may be enabled to know ambition

201. JEFFERSON, supra note 194, at 527.
under all its shapes, and prompt to exert their natural powers to defeat its purposes.\footnote{202}

In other words, American education was to be used not only to produce competent police officials. It also served to transform mere objects of police into self-governing persons who, just like Jefferson and his fellow householder citizens, would not tolerate the police of another under conditions of “tyranny,” that is, the denial of their fundamental right to self-government as persons.

The European monarchies also had recognized the need for public education. But they continued to perceive it as a matter of police, rather than of self-government. Already the future James I., in 1598, remarked upon the king-father’s duty to educate his children: “as the father of his fatherly duty is bound to care for the nourishing, education and vertuous government of his children: even so is the King bound to care for all his subjects.”\footnote{203} In 1656, a German police treatise, entitled “The German Prince State,” classified education alongside other police objects such as the church, public economy, public order, peace, welfare, and morals.\footnote{204} By the end of the 17th century, the school system in Germany was thought of as a police “institution” (Anstalt).\footnote{205} And as late as 1808, a Prussian police ordinance called on local police organs to look after the police of its “loyal subjects” by overseeing public education.\footnote{206} In fact, education was simply another word for police, as correction was a synonym for a police sanction. The goal of education was to produce “polite” objects of police who appreciated their place among the household.\footnote{207} The aim was self-police, not self-government.

By contrast, Jefferson’s plan can be seen as an attempt to develop the capacity for self-government among children,

\footnote{202. Id. at 526.}
\footnote{203. JAMES I., THE TRUE LAW OF FREE MONARCHY, OR THE RECIPROCALL AND MUTUALL DUTY BETWIXT A FREE KING AND HIS NATURALL SUBJECTS 4 (1642); see also JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 170 (1690).}
\footnote{204. VEIT LUDWIG VON SECKENDORFF, TEUTSCHER FURSTENSTAAT (1656), cited in Kнемe\mbox{\textsc{r}}, supra note 129, at 885.}
\footnote{205. Unruh, supra note 128, at 407.}
\footnote{206. Verordnung wegen verbesserter Einrichtung der Provinzial-Polizei und Finanzbehörden of Dec. 26, 1808, § 3, cited in Kнемe\mbox{\textsc{r}}, supra note 129, at 888.}
\footnote{207. Compare the emphasis in Blackstone’s oft-quoted police definition on “propriety” and “good manners.” 4 BLACKSTONE, supra note 16, at 162.}
who were only temporarily condemned to the status of an object of police. The idea was not to produce objects of police, but to prevent them. For in Jefferson’s view only a body of autonomous citizens would provide a permanent guarantee against the tyranny of police.

CONCLUSION

The history of American law and government can profitably be seen as a continuing attempt to resolve, and to submerge, the inherent tension between police and law, between public welfare and individual rights, and between heteronomy and autonomy. The project of critically analyzing the power to police thus is a crucial part of the general project of critically analyzing state power.\textsuperscript{208} In fact, the two inquiries are identical under the broadest interpretation of the police power as coextensive with the power to govern. The more expansive the view of the police power, the more important the scrutiny of its origin and limitations becomes.

A better appreciation of the patriarchal origins, and nature, of police cannot harmonize patriarchy and democracy, or politics and economics. It can, however, help us see more clearly the nature of the challenge faced by a system of government that seeks not only efficiency, but legitimacy as well.

\textsuperscript{208} On historiography as a form of critical analysis of law, see Markus Dirk Dubber, \textit{Historical Analysis of Law}, 16 Law & Hist. Rev. 159 (1998).