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Governance, governmentality, police and justice: A New Science of Police? A Review of: Markus D. Dubber and Mariana Valverde, *The New Police Science. The Police Power in Domestic and International Governance*, Stanford 2006, Stanford University Press, Pp. 294

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BOOK REVIEW

Governance, Governmentality, Police, and Justice: A New Science of Police?

THE NEW POLICE SCIENCE: THE POLICE POWER IN DOMESTIC AND INTERNATIONAL GOVERNANCE. Edited by Markus D. Dubber & Mariana Valverde. *Stanford University Press*, 2006. Pp. vii, 308. \$55.00 (hardcover).

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INTRODUCTION

Originating in fifteenth century French-Burgundy, the term “police” was first used to describe the governmental powers of the early modern state (fourteenth to eighteenth centuries).¹ In France, the term was replaced in the nineteenth century by “administration,” and in the course of the twentieth century “government” came into vogue to refer to the array of powers *produced by* and *constitutive of* the modern state. By this time, the meaning of the term “police” was reduced to the constabulary force of the modern state, resulting from—and giving effect to—the monopoly of

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1. Mark Neocleous, *Theoretical Foundations of the “New Police Science,”* in THE NEW POLICE SCIENCE: THE POLICE POWER IN DOMESTIC AND INTERNATIONAL GOVERNANCE 17, 22 (Markus D. Dubber & Mariana Valverde eds., 2006).

violence. The early use indicates that the term originates from before Montesquieu's division of powers, and even today, different claims are made as to the scope of the power of police: does it refer to the competence of the executive branch of government only; its legislative competence regarding issues of public welfare and public safety; or does it ultimately encompass the power to govern—including the power to legislate, to punish, and to adjudicate? Is the power to police—in whatever sense—in the end a discretionary power that can only be limited by means of self-limitation, or is the power to police derived from and restricted by the power to legislate, requiring a legal basis for every act of government? The first conception equates police with an undivided sovereignty, the second subscribes to a legalistic understanding of public competence. Could it be, alternatively, that the power of police in a constitutional democracy is the power to exercise the positive freedom of government *to create and sustain both the negative and positive freedom of the citizens that constitute the polity*? Could it be that such a power of police is inherently *underdetermined* (a discretionary power) but not *undetermined* (no unlimited discretion)? Would this resolve the opposition of law and police that seems to be a red thread in this book? Does it make sense to argue that, instead of claiming law and police to be incompatible domains of governmental power, we should understand the power of police as falling within the scope of the rule of law (*État de droit*) without adhering to a legalistic conception thereof (*État légal*)? Or must such claims be dismissed as dangerous forms of wishful thinking?

All these questions and many more are raised by the collection of essays that compose the volume under discussion. The salience of each of the perspectives taken, the timely appearance, the diversity of approaches, and the combination of historical detail and theoretical courage make this book compulsory reading for students and scholars of criminology, criminal law, political science and theory, and the history of law and government. Though clearly written for an audience familiar with Anglo-American legal traditions, the perspectives taken are often inspired by continental European authors such as Schmitt, Foucault, Agamben, Negri and Hardt, Latour, as well as

Colquhoun, Smith, and Blackstone.² Though seemingly focused on domestic powers of the modern state, two highly topical contributions demonstrate the relevance of “police science” for military operations in the age of international terrorism and the resurgence of the idea of just war.³ In fact, the diversity expounded in this volume circles around a concept of police that refers to a set of distinct but overlapping concepts like governance, governmentality, political economy, security, prevention, repression, regulation, and sovereignty. They originate from very different discourses about the mechanisms by which well-ordered and not so well-ordered societies flourish or suffer. Doubts can be expressed as to whether there is enough family resemblance between the different conceptions of “police” to justify the idea that this volume presents “the” new police science, and one also wonders in which respect the theoretical analyses presented deserve the title of “science.” However, though a label like “police theory” could instantly clarify which kind of investigations are at stake here, I will argue that good reasons can be given for the idea that this book indeed provides us with a coherent idea of a new science of police.

The book has an excellent introduction that aptly leads the way into the different chapters and an interesting final chapter that evaluates the achievements of the volume.⁴ I shall not repeat this exercise. Instead, this Review is organized in three Parts that aim to provide a survey of what is at stake in the volume without pretending to uncover a common core that may in fact be missing. Three thematic Parts should offer the analytic framework to interconnect different chapters, digging up the transversal

2. The book has been written by authors from the United States, Canada, Europe, and Australia: Markus Dubber, John Hagan, Christopher Tomlins, and Pasquale Pasquino teach in the United States; Alan Hunt, Ron Levi, and Mariana Valverde in Canada; Mark Neocleous, Lindsay Farmer, and Pasquale Pasquino in Europe; and Mitchell Dean in Australia.

3. Mitchell Dean, *Military Intervention as “Police” Action?*, in *THE NEW POLICE SCIENCE*, *supra* note 1, at 185; Ron Levi & John Hagan, *International Police*, in *THE NEW POLICE SCIENCE*, *supra* note 1, at 207.

4. Markus D. Dubber & Mariana Valverde, *Introduction: Perspectives on the Power and Science of Police*, in *THE NEW POLICE SCIENCE*, *supra* note 1, at 1; Christopher Tomlins, *Framing the Fragments: Police: Genealogies, Discourses, Locales, Principles*, in *THE NEW POLICE SCIENCE*, *supra* note 1, at 248.

themes that make this book such an interesting endeavor. The aim of the Review is not to offer a precise description of its contents but, rather, to open a debate on some of the points made. In fact, the diversity of the contents and the abundance of relevant points made forced me to make a choice of which issues to pursue to prevent remaining on the surface of things. After the Introduction, Part I discusses the concept of police as an essentially contested concept—confronting the repeated claim that the “police” is unlimited by definition and thus indefinable by nature. This Part will also touch upon the question of whether the study of police in its broader scope should be understood as a science and termed a “new police science” while keeping in mind that the undertaking of the authors seems at odds with the objectives of the old “*Polizeiwissenschaften*” of the eighteenth and nineteenth centuries. Part II recounts the way that Dubber masterfully traces the historical roots of the power to police in the *patria potestas* of the householder. Complementing his account, I will discuss the concept of suzerainty as a crucial entry into the meaning of sovereignty. I will argue that the *patria potestas* belongs to the age of suzerainty and the preceding age of the Germanic non-state society and cannot be equated with the power of police that fits the era of sovereignty without further qualification. This qualification relates to the internal division of sovereignty as envisioned in the substantive conception of the *Rechtsstaat*, a point to be discussed in Part III, *The Core Dichotomy: Law and Police*. This Part will move into the fact that many of the authors presume that law and police are mutually exclusive domains of regulation—mostly building on a legalistic conception of law that seems powerless in the face of the state of emergency that calls for an effectively unhampered exercise of the power to police as well as in the face of an emerging transnational governmentality. I will claim that the opposition is forgetful of the move from what the French called the *État légal* to the *État de droit*. With this I mean that law does not imply legalism and that discretion is not necessarily exercised outside of the empire of law.⁵ I will then finish with concluding remarks.

5. Suspecting me of affinity with Dworkin’s empire is not altogether unjustified. RONALD DWORCKIN, *LAW’S EMPIRE* (1986).

I. THE COURAGE OF OUR ANACHRONISMS

A. *Back to the Old Notion of Police*

In chapter one, *Theoretical Foundations of the “New Police Science,”* Mark Neocleous discusses the concept of police and the idea of a new police science.⁶ Being aware that the modern usage of the word “police” refers to the constabulary force, he argues against the ensuing reduction of police-studies “to the study of crime and law enforcement . . . [which leads to them being] absorbed into the discipline of criminology,”⁷ and against “the empirical mode and policy-oriented focus of what has passed as ‘police studies.’”⁸ The problem of reducing police-studies to a branch of criminology is that it isolates the police from other practices of power while political science itself has abstained from serious study of the police.⁹ So Neocleous seeks what he calls a pre-disciplinary understanding of police focusing on “police” in the old sense of the word and depicting the aim of modern government as the production of a well-ordered society. From its inception at the beginnings of modernity, the term “police” denoted what we would now call government or administration, nourishing on the idea that society can be molded into a more prosperous order and eventually, such police was bent on enlarging what Adam Smith coined the “wealth of nations.”¹⁰ The police, in that anachronistic sense, is meant to enhance the general welfare of a people by means of often detailed regulation of social and economic life including the technological infrastructure, the distribution of space, and the mobility within and between territories.¹¹ From this perspective, police and police science are connected with the science of political economy as initiated in the seventeenth century by

6. Neocleous, *supra* note 1, at 17-41.

7. *Id.* at 17.

8. *Id.* at 18.

9. *Id.* at 19.

10. ADAM SMITH, LECTURES ON JURISPRUDENCE 562 (R. L. Meek et al. eds., 1978); see also Lindsay Farmer, *The Jurisprudence of Security: The Police Power and the Criminal Law*, in THE NEW POLICE SCIENCE, *supra* note 1, at 145.

11. See Farmer, *supra* note 10, at 146.

Smith and with the science of cameralism—practiced from the sixteenth through the eighteenth centuries in Germany, of which the *Polizeiwissenschaften* originally formed a part.¹² Those were the “old police sciences” that inspired the *courageous anachronism*¹³ of “the new police science” in the title of this volume.

The proposed usage of the concept of “police” invites connotations with a range of contemporary terms—notably, politics, policy, empire, governance, and governmentality. The reader is thus confronted with Dubber’s explicit separation of the realm of politics (self-government of free and independent peers) from the realm of police (the authoritarian rule of the household and the state);¹⁴ the less explicit mingling of policy and police in the discussion of Colquhoun’s analysis of the necessity of poverty for a prosperous civilization;¹⁵ Adam Smith’s analysis of the role of “the management of the economy and the production of social wealth” for the control of crime;¹⁶ various uses of the term “empire” (the Holy Roman Empire of the middle ages and early modernity;¹⁷ Hardt and Negri’s emerging global empire based on the juridical notion of the state of exception;¹⁸ and the colonial (British) empire¹⁹); the

12. See Arnold J. Heidenheimer, *Politics, Policy and Policey as Concepts in English and Continental Languages: An Attempt to Explain Divergences*, 48 REV. POL. 3, 16 (1986). Regarding cameralism, the German science of the economics of government, which “saw in the welfare of the state the source of all other welfare,” see ALBION W. SMALL, *THE CAMERALISTS: THE PIONEERS OF GERMAN SOCIAL POLITY*, at viii (1909).

13. See Neocleous, *supra* note 1, at 18.

14. Markus D. Dubber, *The New Police Science and the Police Power Model of the Criminal Process*, in *THE NEW POLICE SCIENCE*, *supra* note 1, at 107.

15. See Neocleous, *supra* note 1, at 30-31.

16. See Farmer, *supra* note 10, at 146.

17. Starting from the coronation of Charlemagne in 800 A.D., Frankish and later German emperors have considered themselves to be successors to the Roman emperors claiming the ensuing imperial powers until the imperial title was renounced in 1806. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 89, 483 (1983).

18. MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 26 (2000); see also Dean, *supra* note 3, at 186.

19. See Mariana Valverde, *Peace, Order, and Good Government: Policelike Powers in Postcolonial Perspective*, in *THE NEW POLICE SCIENCE*, *supra* note 1, at 73.

Foucauldian notion of governmentality which refers to an array of governmental techniques challenging grandiose concepts—like sovereignty—while entailing a logic distinct from the rights discourse of liberal democracy;²⁰ and the topical notion of governance—originating from the discourse of corporate business management, referring to the effective management of public and/or private enterprises, including the state.²¹ A reader that has not been initiated into the language games from which these concepts have been mined may be at a loss since familiarity with these concepts seems to be taken for granted. As this is not a textbook, some *vorverstandnis* may be presumed on the side of the reader, but as the different chapters draw on different academic discourses in which similar terms have alternative meanings, confusion is probable. The ambition to develop a pre-disciplinary *science* for a post-disciplinary age²² turns out to require an extensive trans-disciplinary background. Since this new police science aims to broaden the scope of contemporary police and policy studies that tend to engage in a rather narrow social science enterprise, more explanation of the basic terminologies employed is warranted.

B. *The Offspring of the Polis*

“Politics,” “police,” “policy,” and “polite” all derive from the Greek *politeia* (government) and *polis* (city-state), just like “civics,” “civil,” “civilized,” and “civil society” derive from the Latin *civitas* (citizenship).²³ It seems most interesting that “politics,” “policy,” “police,” and “polite” all share the same root, especially when we take note of the fact that the French and the Germans have no separate

20. See Farmer, *supra* note 10, at 149.

21. Governance is generally considered to function in a networked environment as compared to government which is associated with top-down models of governing. See, e.g., Mark Bevir & Rod Rhodes, *Decentering British Governance: From Bureaucracy to Networks* 1, 17 (Univ. of Cal. Berkeley Inst. of Governmental Studies, Working Paper No. 2001-11, 2001), available at <http://igs.berkeley.edu/publications/workingpapers/WP2001-11.pdf>.

22. See Neocleous, *supra* note 1, at 19.

23. See Heidenheimer, *supra* note 12, at 4 on the Greek roots. For the Latin, see the entry for “civitas” in Encyclopaedia Britannica Online, <http://www.britannica.com/eb/article-9082770> (last visited Feb. 6, 2008).

terms for “politics” and “policy” (both referred to as *politique* and *Politik* respectively).²⁴ An interesting study has been made of this curious situation in which Heidenheimer relates the continental use of *one term for two concepts* to the more prominent role of a hierarchical state that unilaterally decides issues of public order:

As the absolutist states assured internal order and security under the label of *Policey* they approached a situation in which internally there was “literally only *Policey*, and no longer any *Politik*,” in the characterization of Carl Schmitt. “*Politik* in the larger sense, high *Politik*, was then only foreign *Politik*, which the sovereign state conducted with other sovereign states.”²⁵

The diversity of the offspring of the Greek term *polis*, as well as their common root, are a salient indication of the complexity and ambiguity we may encounter when inquiring into the historical dynamics of the power of police. Further questions can be raised as to the difference between *the police* and *the power of police*: is the police—in the sense used here—aptly described as a function, as a power, as a competence, as a means to achieve order, or as the purpose of government (the promotion of welfare and security)? Is there a difference between the power of police and the power to police; the first being a competence, the second being a bare fact? The authors have found an interesting way out of the need for analytical rigor by claiming that the police and the power of police are indefinable,²⁶ a point to which we will return below.

C. *The Productive Dimension of the Police*

One of the most salient features of this book is the way the police is held to be a positive, productive force within

24. *Id.* at 6.

25. *Id.* at 14 (quoting CARL SCHMITT, *DER BEGRIFF DES POLITISCHEN* 10-11 (1963)). The absolute (police) states of the seventeenth and eighteenth centuries integrated the concepts of police, policy, and politics into one unilateral and undivided power of government.

26. In my opinion, analytical rigor is interesting in as far as it raises our awareness of significant issues. I would not, however, promote attempts to petrify the usage of terms or conceptual nitpicking for its own sake. There is too much at stake to pretend that the use of concepts is a purely technical endeavor.

the modern state. If the contributions have a common core, this is it. The recent reduction of police to the ensemble of police officers reduces the police to a negative, reactive force that prevents and represses disturbances of the social order. The return to the old concept of police (government in a very broad sense) allows one to unveil the constructive dimension of the police that may be of far greater interest to the distribution of risk and opportunities than its role in the maintenance of an existing order.

Initially, before the Thirty Years' War (1618-1648), the police consisted of rather ad hoc reactive interventions in public life.²⁷ The advent of the absolute state after the Westphalian Peace Treaty of 1648 entailed a police power that was "aimed not just at the maintenance or reproduction of order but to its *fabrication*" and "less concerned with *re-forming* . . . and much more concerned with actively *shaping*" the social order.²⁸ Having regulated the issue of external sovereignty in the said treaty, the power of police finally flourished within the confines of an internal sovereignty. This internal sovereignty—dependent on the pacification of a population by means of the monopoly of violence—turned everybody into the subject of a sovereign.²⁹ As the objective of this sovereign was supposed to be the welfare of its people, the *res publica*, the establishment of sovereignty called for an increasing body of enacted laws to be enforced by a growing bureaucracy to ensure the transformation of social order aligned with the dictates of the enlightened sovereign.³⁰ Though it may not be news for historians, it could be elucidating for lawyers to realize that there is a rather straightforward continuity between the eighteenth century police states and the twentieth century welfare states³¹ to be found in the need to create ever more new regulations—the implementation of which requires even more sophisticated monitoring and

27. See Neocleous, *supra* note 1, at 25-26.

28. *Id.* at 26; see also Levi & Hagan, *supra* note 3, at 210.

29. Mireille Hildebrandt, *Trial and Fair Trial?: From Peer to Subject to Citizen*, in 2 THE TRIAL ON TRIAL: JUDGMENT AND CALLING TO ACCOUNT 15-37 (Antony Duff et al. eds., 2006).

30. See SIMONE GOYARD-FABRE, JEAN BODIN ET LE DROIT DE LA RÉPUBLIQUE (1989); see also *infra* Part II (discussing suzerainty and sovereignty).

31. See Neocleous, *supra* note 1, at 35.

sanctioning.³²

Obviously, the productive dimension of the police power has its risks depending on the kind of society it establishes and the kind of checks and balances it incorporates. At the same time, however, this dimension has the potential to empower citizens and to enlarge the scope for their emancipation by means of the creation of specific socio-technical infrastructures. Alan Hunt's *Police and the Regulation of Traffic: Policing as a Civilizing Process?* in chapter six is a nice example of the importance of such mundane activities as traffic monitoring which has in fact been the precondition for the explosion of mobility that developed since the nineteenth century.³³ At this point, the book clearly hinges on two thoughts: one that acknowledges and illustrates the need for the fabrication of social order and is willing to appreciate the constructive dimension of the police;³⁴ and another that is suspicious of the results of this productive dimension, suggesting that such appreciation is, at best, naïve.³⁵

Regarding the illiberal coercive power that seems inherent in the power of police, Mariana Valverde makes a very interesting point in her contribution, *Peace, Order and Good Government: Policelike Powers in Postcolonial Perspective*.³⁶ In describing the peculiar relationship between Canada and the United Kingdom in terms of the transposition of colonial police powers of the former imperial sovereign to the Canadian government, she

32. See JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 82 (1998) (discussing the *construction* of the (nation) state and the welfare state with their monitoring powers); JOHN TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE 116 (2000).

33. Alan Hunt, *Police and the Regulation of Traffic: Policing as a Civilizing Process?*, in THE NEW POLICE SCIENCE, *supra* note 1, at 168. Interestingly, a study has been published on the civilizing process regarding the security that is a precondition for the existence of the (national) state—a highly relevant topic for a new police science. IAN LOADER & NEIL WALKER, CIVILIZING SECURITY (2007).

34. See Hunt, *supra* note 33, at 182; see also Dean, *supra* note 3, at 201; Levi & Hagan, *supra* note 3, at 238.

35. See Tomlins, *supra* note 4, at 252 (warning against uncritical trust in the law's capacity to provide remedies against the power of police).

36. Valverde, *supra* note 19, at 73.

illustrates how this transposition is not necessarily a “zero-sum game.”³⁷ In fact, in describing what she calls the “history of the present” of Canada’s deferential attitude to government authority, she demonstrates a multiplication of police power between different levels of government.³⁸ Valverde thus uncovers yet another way in which police power can be productive; not just generating social welfare or general safety, but also reproducing *itself* at another level of governance.³⁹ This could be a very fertile insight when studying the emerging power of police at the international, supranational, and transnational levels that will be discussed in Part II.D, *From National Sovereignty to Global Empire?* It should prevent us from presuming that new powers of police at the transnational level imply a loss of sovereign power for the nation state. In keeping with Valverde, no general conclusion can be drawn here as she invites lawyers to analyze the actual “flows, exchanges, and transformations of knowledge and power that are the lifeblood of both ‘high’ law and everyday law enforcement”⁴⁰—thus introducing a Latourian way of studying the law.

D. *The Undefinability and the Unlimited Nature of the Power of Police*

Related to the productive dimension of the police is the recurrent claim that it is unlimited by definition and for that reason, cannot be limited.⁴¹ Though its workings can be enumerated—from water management to civil registration, traffic regulation, taxation, social security, etc.—in the end, its scope cannot be determined.⁴² The productive dimension ventures into the future, anticipating potential effects of intended measures—always on the verge of the unknown that must be mastered to prevent mishaps and to create new opportunities. The indefinable nature of the power to

37. *Id.* at 74-75.

38. *Id.* at 100-02.

39. *Id.* at 79.

40. Valverde, *supra* note 19, at 75.

41. See Dubber & Valverde, *supra* note 4, at 1.

42. See *id.* at 4.

police is a starting point for many of the contributions.⁴³ The indeterminacy of the concept of the police may at first seem to be a conceptual issue indicating that what we have here is a vague term, denoting phenomena that have some family resemblance but not necessarily a common core. To artificially construct a common core would hide important aspects of the police by placing them outside the definition. Most of the authors, for this reason, rightly reject a formal definition of what they mean by “police.” This does not imply that anything goes as far as the meaning of “police” is concerned; rather, it suggests that we are dealing with what Gallie has termed “an essentially contested concept”: the term easily evokes evaluative dimensions and its application depends on the context of use.⁴⁴ These conditions are not specific for the police—in fact, the concept of law is equally vague and indefinable. Uwe Wesel once exclaimed that answering the question, “What in fact is law? . . . is as simple as nailing a pudding to the wall.”⁴⁵ To come to grips with the law equally implies evaluative considerations, and its usage will also vary depending on the historical and cultural context.⁴⁶ In relation to the power of police, I would argue that this power is *underdetermined* because of its inherent need for discretion but, therefore, not *necessarily* unlimited as some of the authors claim. The idea that the power of police is unlimited must not be conflated with the issue of conceptual undefinability. The notion of being unlimited draws on the proposition that the law depends on the power to police because it is understood to historically precede the law and because of its supposedly unrestricted

43. See Neocleous, *supra* note 1, at 20; see also Dubber, *supra* note 14, at 109 (arguing that law may limit the use of the power to police but not its scope); Farmer, *supra* note 10, at 154.

44. W.B. Gallie, *Essentially Contested Concepts*, in 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167 (1956).

45. UWE WESEL, FRÜHFORMEN DES RECHTS IN VORSTAATLICHEN GESELLSCHAFTEN 52 (1985) (“Was ist eigentlich Recht? Eine Antwort ist ähnlich einfach wie der bekannte Versuch, einen Pudding an die Wand zu nageln.”). Unless otherwise noted, all translations are my own.

46. Cf. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (2d ed. 2004); DWORKIN, *supra* note 5, at 410 (asserting that as the law does not speak for itself, interpretation is the core enterprise for the judge); CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (1983).

discretionary power. The most sophisticated philosophical argument for this position is Carl Schmitt's notion of sovereignty, of which the power to police seems to be an attribute or even a synonym. According to Schmitt, the sovereign is the one that decides about the state of emergency (or exception), initiating the moment when the law is suspended.⁴⁷ Neocleous and many of the other authors follow the Italian philosopher Giorgio Agamben at this point who wrote a compelling analysis of what he calls the *homo sacer*—a notion of ancient Roman law depicting a person that is outlawed by his fellows and thus placed outside the protection of the law.⁴⁸ Agamben had the—rhetorically—brilliant idea to connect the notion of outlawry with Foucault's discussions of “bio-power”—which is the power exercised over the “naked” bodies of a population unprotected by the legal subjectivity (*persona*) that shields their vulnerable bodies of flesh and blood from the monitoring gaze of disciplinary practices.⁴⁹ To Agamben, the most salient demonstration of the workings of such bio-power is what he calls the “camp”—exemplified in the Nazi concentration camps.⁵⁰ Building on Schmitt's notion of sovereignty, he depicts the *homo sacer* as the naked body that is under the rule of police and outside the domain of law: illegal immigrants, illegal enemy combatants, and other subjects that are in fact objectified to an extent no longer compatible with the notion of the human person.⁵¹ In having the power to suspend the rule of law in states of emergency, the sovereign is both inside and outside the domain of law: the choice to define a situation as an emergency is his own and cannot be contested as this contestation depends on the (re)instatement of the rule of law.⁵² In other words, the law does not rule, the sovereign

47. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5-9 (George Schwab trans., Univ. of Chicago Press 2005) (1922).

48. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 8 (Daniel Heller-Roazen trans., Stanford Univ. Press 1998) (1995).

49. *Id.* at 5; see also Michel Foucault, *The History of Sexuality, in* 1 *THE WILL TO KNOWLEDGE* (1998). Agamben's connection may be rhetorically brilliant but historically and theoretically problematic. See *infra* Part II.D.

50. AGAMBEN, *supra* note 49, at 166-68.

51. *Id.* at 26-27.

52. This is—of course—Schmitt's position elaborated in *supra* note 48.

rules. He can do this by means of law or by other means depending on his arbitrary will; in the police state, the prince rules according to his arbitrary will (*le bon plaisir du prince*).⁵³ Agamben—and most of the authors—seems not to believe in the rule of law or to equate it with a rule by law (legalism). Throughout the book, law and police are claimed to be separate domains, and the reader may get the feeling that those who advocate legal regulation, human rights, and international law are obfuscating the actual workings of the police. The legal discourse is seen as a way to legitimize disciplinary practices that follow a logic inherently opposed to the fundamental principles of law. We may detect some deeply Foucauldian intuitions at this point which I suspect of obfuscating the productive force of the law and the complex interrelation between law and police in constitutional democracy. I will return to this point in the section on *The Core Opposition: Law and Police*.⁵⁴

E. *Police Theory or Police Science?*

One can question the label attached to the studies undertaken in this volume.⁵⁵ Neocleous reminds the reader that the original *Polizeiwissenschaften* (police sciences) of the seventeenth and eighteenth centuries were meant to sustain and improve the powers of the police, consisting of elaborate advice to the bureaucrats of the modern state.⁵⁶ The police science presented in this volume, however, aims to develop a more critical understanding of the scope and exercise of the power to police. Its methodology seems at odds with the rationalism of the cameralist science as developed within the framework of German mercantilism, inclining towards political and social theory with strong critical incentives. Foucault and Agamben have inspired many of the authors while repeated reference to Adam

Agamben refers to Schmitt throughout his book. For example, see AGAMBEN, *supra* note 49, at 15.

53. The notion of *le bon plaisir du prince* refers to the unlimited discretionary powers of eighteenth century absolutism, cf. JACQUES CHEVALLIER, *L'ETAT DE DROIT* 16 (2d ed. 1994).

54. See *infra* Part III.

55. See Neocleous, *supra* note 1, at 21; see also Tomlins, *supra* note 4, at 279-81.

56. Neocleous, *supra* note 1, at 21.

Smith links the project to political economy in a very broad sense, emphasizing the relationship between police, welfare, and the state. Does this imply that the notion of a “police theory” would better indicate the kind of research presented here and should therefore replace the concept of a “police science”? If we follow a strict division of tasks between empirical sciences and discursive humanities, we should indeed prefer to speak of a police theory in line with social and cultural theory. However, such disciplinary distributions are problematic in the light of the project that is at stake here. It may, for instance, suggest that the discussions do not count as scientifically valid and need not be taken seriously by those involved in the construction of scientific knowledge. The whole project would thus fall prey to the monopolistic tendencies of the paradigms of the natural sciences,⁵⁷ discrediting the explicit argument to reinvent a pre-disciplinary—or rather, post-disciplinary—perspective on the police.⁵⁸ One can argue that a police theory, as practiced in a trans-disciplinary academic community of lawyers, social scientists, social and political theorists, historians, and others, in fact requires adherence to *scientific* standards like sound argumentation, accurate and relevant reference to one’s sources, visible awareness of relevant research in the area of investigation, contestability of one’s findings in the sense of being open to relevant counter arguments, and a willingness to explain the assumptions of one’s research. As a matter of fact, such scientific standards would imply that empirical research consisting of large scale statistical surveys does not necessarily produce scientific knowledge. Whether this is the case will depend on whether the research involves serious argumentation—for instance, argumentation regarding the qualifications that precede quantification or argumentation regarding the relationship between statistical significance and scientific relevance in the specific domain that is under investigation. By speaking of a “police science,” the authors seem to have taken a stance

57. For a farewell to outdated paradigms of the natural sciences, including an opening to find middle ground with the social sciences, see ILYA PRIGOGINE & ISABELLE STENGERS, *ORDER OUT OF CHAOS: MAN’S NEW DIALOGUE WITH NATURE* (1984).

58. See, e.g., Dubber, *supra* note 14, at 108; Hunt, *supra* note 33, at 168; Neocleous, *supra* note 1, at 19; Valverde, *supra* note 19, at 102.

in a debate about the nature of scientific research, rejecting empiricist or rationalist monopolies on scientific knowledge production. Considering the claims they make about the uncritical character of the old police sciences, as well as the reductive nature of the present focus on empirical policy studies, this rejection makes sense as central to their project.

II. THE ORIGINS OF THE MODERN STATE: SUZERAINITY AND SOVEREIGNTY

A. From “*Mirrors of Princes*” to *Police Science*

In chapter two, *Spiritual and Earthly Police: Theories of the State in Early Modern Europe*,⁵⁹ Pasquale Pasquino discusses two handbooks of early-modern Protestant Germany, providing an interesting insight into the practical bearings of the emerging police science of the second half of the seventeenth century.⁶⁰ Written by high ranking civil servants with little interest in theoretical exploration such as practiced by Bodin or Hobbes, the authors tried to come to terms with the demands of a Christian polity as a hierarchically ordered territorial state.⁶¹ As Pasquino remarks, these expositions differ substantially from the medieval “mirror of princes” (*Fürstenspiegel*) which basically provided advice to a ruler (prince) to develop the right character (virtues) in order to rule successfully.⁶² Instead of addressing the person who rules, the treatises discussed by Pasquino address techniques of governing and “the first rudimentary elements of an administrative science.”⁶³ This shift, from addressing the personal power to police of medieval times to addressing the more abstract

59. Pasquale Pasquino, *Spiritual and Earthly Police: Theories of the State in Early-Modern Europe*, in *THE NEW POLICE SCIENCE*, *supra* note 1, at 42.

60. *Id.* at 42 (discussing Dietrich Reinkingk’s *BIBLISCHE POLICEY* and Veit Ludwig Seckendorff’s *TEUTSCHER FÜRSTENSTAAT*).

61. *See id.* at 43-44, 53-54.

62. *Id.* at 56; *see, e.g.*, PHILIPPUS DE LEYDIS, *TRACTATUS DE CURA REIPUBLICAE ET SORTI PRINCIPANTIS* (written in 1355 for Duke William, vassal of the German Emperor); NICCOLO MACHIAVELLI, *IL PRINCIPE* (written in 1513 for Lorenzo die Piero de Medici, ruler of Florence).

63. Pasquino, *supra* note 60, at 56.

and distant powers of the police states of the seventeenth and eighteenth centuries, is crucial for understanding the police power in the modern state which cannot be equated with the restricted policing powers of the medieval kings. To explain the difference, we need to briefly explore the move from suzerainty to sovereignty at the threshold of modernity.

B. *The Pater Familias as Lord, Peer, and Vassal*

In chapter four, *The New Police Science and the Police Power Model of the Criminal Process*, Markus Dubber develops the idea that the governance of the modern state can be seen in continuity with the rule of the head of the patriarchal household⁶⁴ which are both concerned with the “public police and economy” of their realm. In the words of William Blackstone:

By the public police and economy 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 behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations.⁶⁵

Dubber has argued this position in *The Police Power*, and takes the opportunity to extend his analysis here with regard to the criminal process. His point has been made by the German legal philosopher Gustav Radbruch and the German sociologist Max Weber who claimed that the origins of the criminal law should not be located in the

64. Dubber, *supra* note 14, at 107-08 (using the term “governance” when referring to the similarity between the government of the modern state and the government of the *pater familias*, speaking of patriarchal governance; this is confusing because the similarity consists in the top-down model of *government* which is exemplary of the powers of a bureaucratic government rather than the mix of peer-to-peer, top-down, and bottom-up models of power that is exemplary of *governance* in a networked environment).

65. MARKUS D. DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT*, at xii (2005) (quoting *Commonwealth v. McHale*, 97 Pa. 397 (1881)); *see also* Christopher Tomlins, *To Improve the State and Condition of Man: The Power to Police and the History of American Governance*, 53 *BUFF. L. REV.* 1215 (2005) (reviewing MARKUS D. DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005)).

private revenge of peers in a non-state society, but in the jurisdiction these peers exercised as lords over the serfs belonging to their estate (household).⁶⁶

Though the relationship between lord and serf was not one of slavery, the lord had a kind of absolute power of police over those belonging to his household including the power to punish according to his own discretion.⁶⁷ Apart from self-limitation, this power of police was subject to no constraints “*except insofar as [the head of the household] proved himself unfit for his post.*”⁶⁸

In the concluding chapter, *Framing the Fragments: Police: Genealogies, Discourses, Locales, Principles*, Christopher Tomlins writes that “Dubber’s reading of the state . . . [as] the patriarchal household enfolding micro households . . . ignores aspects of the Aristotelian representation of *oikoi* that . . . make possible the . . . *polis*, a space not of hierarchy but of equality, freedom, and virtuous civic participation.”⁶⁹ The micro households do not necessarily reproduce a macro household with the same logic.⁷⁰ Tomlins thus suggests that Dubber’s equation of the police powers of the modern state with the *patria potestas* of a *pater familias* is problematic.⁷¹ Though I would agree that constitutional democracy contains constitutive constraints absent in the patriarchal household, to which I will return in Part III, *Law and Police*, I do think that Dubber’s analogy with the police powers of the lord over his serfs makes sense. To clarify why this is the case, we need to make a small historical excursion into the feudal middle

66. GUSTAV RADBRUCH, *ELEGANTIAE JURIS CRIMINALIS* 1-13 (1950); MAX WEBER, *RECHTSOZIOLOGIE* 241-63 (Johannes Winkelmann ed., 1960); see also P. W. A. IMMINK, *AT THE ROOTS OF MEDIEVAL SOCIETY I: THE WESTERN EMPIRE* 9-81 (1958); MIREILLE HILDEBRANDT, *VRIJHEID EN STRAF: ONTSTAAN EN ONTWIKKELING VAN STRAF EN STRAFRECHT IN HET DENKEN VAN P.W.A. IMMINK (1908-1965)* (2005).

67. DUBBER, *supra* note 66, at 44 (“[T]he householder’s power was essentially arbitrary, as well as broad. This meant that it was not susceptible to prior definition.”).

68. Dubber, *supra* note 14, at 110.

69. Tomlins, *supra* note 4, at 260. See Tomlins, *supra* note 4, at 259 for a brief description of “Aristotelian *oikos*.”

70. See *id.*

71. *Id.*

ages.

The relationship between lord and serf to which Radbruch and Weber refer originates in the Germanic non-state society preceding the age of suzerainty. This non-state society had two realms of governance. First, we have the assembly of independent lords who discussed issues of public concern in the Germanic *Thing*.⁷² The assembly convened as peers, since being a lord meant that one did not recognize the authority of any other peer. This public intercourse constituted a political realm of free and equal heads of households.⁷³ This political realm is similar to the *polis*, a “space . . . of equality, freedom”⁷⁴ to which Tomlins refers. Other than Tomlins’s “Aristotelian representation of *oikoi*, that . . . make[s] possible . . . virtuous civic participation,”⁷⁵ the peers of the Germanic assembly did not represent their household and were not involved in civic participation as they were neither civilians nor citizens.⁷⁶ Second, every lord exercised the *patria potestas* over his household, acting as *pater familias* over his subjects (family and serfs). This constituted a realm of police within the confines of the household. The lord was thus at the nexus of politics and police, acting as a free and independent agent within the domain of his peers and acting as the one in authority in the domain of his household. With the advent of the Frankish kingdoms, the non-state Germanic society was transformed into a society in which one of the lords claimed authority over the others as their king, requiring their oath of personal loyalty. This oath provided the king with their *auxilium et consilium* (assistance and advice) in exchange for which they fell within the *mund* (peace) of the

72. See the entry “thing” in Encyclopaedia Britannica Online, <http://www.britannica.com/eb/article-9072133/thing> (last visited Feb. 6, 2008).

73. See DUBBER, *supra* note 66, at 3; HILDEBRANDT, *supra* note 67, at 26 (discussing the *allod* (estate) as the foundation of (1) the public authority of a lord over his serfs and (2) the exercise of his political rights within the Germanic Thing (referring to P. W. A. IMMINK, LA LIBERTÉ ET LA PEINE 30 (1973))).

74. Tomlins, *supra* note 4, at 260.

75. *Id.*

76. *Id.* Also see CORNELIUS TACITUS, GERMANIA 171 (J.B. Rives trans., 1999), written at the end of the first century (remarking in chapter 11 that when the assembly convened, they were armed—this was not a pacified, civilian jurisdiction).

king. In fact, their *allod* (domain, estate) became part of the king's domain, which he, however, lent back to them as a *feud* (a domain held in tenure), turning them into his vassals while they remained lord to their serfs. Thus, a new situation emerged in which the king was the overlord or *suzerain* of the other lords, establishing a very peculiar asymmetrical reciprocity between former peers. Interestingly, initially the suzerain could not claim any authority over the subjects of his vassals who now found themselves at the nexus of two realms once again: (1) a political sphere in which they were *subjects* of a king and (2) a political sphere in which they were *lord* over their serfs. Within the royal sphere, they were subject to the emerging power of police of the suzerain which was initially very limited due to the fragile balance of powers between the king and his often powerful vassals. Within the sphere of the household, they were exercising their own power of police—though at some point criminal jurisdiction was extended to the royal sphere. In non-state societies, as well as in the age of suzerainty, the governmental powers derived, to a large extent, from the adjudicative interventions of the lord or overlord. They ruled by holding court.⁷⁷ In the course of the late middle ages, the suzerain kings used the royal jurisdiction to get a better grip on their vassals (forbidding private revenge) and their vassals' subjects (initiating a royal complaints jurisdiction which gradually took over the adjudication of disputes between subjects of the overlords' vassals). The hallmark of the governance model of the suzerain was adjudication, implying a weak type of government in need of constant negotiations between the suzerain and his vassals. The adjudication in this era was participatory.⁷⁸ To claim that in this situation the king ruled his vassals or their subjects as a *pater familias* with arbitrary powers of police would be missing the point entirely: it is only with the advent of sovereignty that the kings managed to establish a substantial power of police over both the lords and their

77. See BERMAN, *supra* note 17, at 88.

78. See *id.* at 324-28 (discussing participatory adjudication in the manor); see also *id.* at 307-10 (discussing participatory justice in the feudal legal order that constitutes suzerainty). This type of adjudication was exemplary for the limited powers of the suzerain. See, e.g., *id.* at 68 ("The king had to beg and pray, as Maitland put it, for he could not command and punish.").

subjects, *turning them into equals* in relationship to his *plenitudo potestas*.

C. *From Suzerainty to Sovereignty*

To understand sovereignty as a radically new type of power—even if proclaimed to continue the imperial powers of the Roman Emperors—we can take recourse to Jean Bodin's *Six livres de la République* (1576).⁷⁹ In this treatise, Bodin explains the radically new foundation of royal power in the concept of sovereignty which he considers to be the precondition for the management of the *res publica* while understanding the king not as a person, but as the highest office.⁸⁰ His concept of sovereignty is composed of three layers. First, *la puissance publique de commandement* (the public power to command) recognizes the power to legislate as the first attribute of the sovereign (rather than the suzerain's limited powers of adjudication), implying a unilateral competence to command while rejecting the reciprocal relationship between lord and vassal. Second, *la continuité de la puissance publique* (the durability of the public power) makes the power to command dependent on the office of the king instead of his person, thus creating a new type of legal certainty beyond the fragility of a human person. Third, *la puissance absolue* (the absolute power) guarantees the impartiality of the royal office from powerful lords that may distract the king from serving the *res publica* (internal sovereignty) while also referring to the notion of independence with regard to other states (external sovereignty). In fact, after the conclusion of the Westphalian Peace Treaty of 1648, sovereign states were seen to be the only answer to the religious wars that were devastating early modern Europe, establishing the foundations for a realm of public international law. The mutual recognition of sovereign states as mutually independent actors in an international arena in which no state could claim authority over another, was thus made possible by a conceptualization of sovereignty in continuity

79. Cf. GOYARD-FABRE, *supra* note 30, at 159-73.

80. See generally ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* (1957) (discussing the ground-breaking study of the difference between the person and the office of the king).

with the freedom and independence of the former *pater familias*. As in the case of the Germanic assembly of equally independent lords, this realm of international law leads to either war, or consent in the case of interstate conflicts, because the exercise of police power is reserved for domestic affairs presuming a power to command which is absent between peers. Notably, Bodin does not think that the powers of the king are unlimited. Despite claiming royal power to be absolute, Bodin recognizes three restrictions on royal competence: (1) divine and natural laws, (2) the fundamental laws of the monarchy, and (3) respect for private property. However, the sovereign could not be called to account for keeping within these limits by anyone but God—he could not be forced to obey even his own law by another human person. This again signifies an interesting continuity: in the realm of international law we have no supranational authority to enforce the law to which parties have voluntarily agreed. Though states are legally bound by international law, its enforcement depends on their willingness to comply and on existing power relations. This creates a tension evident in Bodin's modern emphasis on absolute powers combined with his medieval reference to certain limitations. This tension is aptly described for modern international relations by Ron Levi and John Hagan in chapter eight on *International Police*. Their aim is to understand “the possibilities and limits of a presently emerging transnational legal field, that of international criminal law.”⁸¹ Their default position is that

[P]rograms for international reform are often imagined as purely a question of police, so that questions of law . . . are displaced in the process . . . [and] programs to promote international law are often invested with a wide array of legal tools and juridical authority but are provided no powers of ‘police’ through which this authority can be effectively mobilized.⁸²

Though I will return to the challenges of transnational violence to the concept of sovereignty,⁸³ it should be clear that the idea of a sovereign state basically rules out transnational interventions of police. In fact, the relations

81. Levi & Hagan, *supra* note 3, at 209.

82. *Id.*

83. *See infra* Part II.D.

between sovereign states demand a rule of law without the power of police, like in the case of the non-state Germanic society of peers.⁸⁴ This is why international public law resorts to punitive interventions like economic sanctions, very much reminiscent of the figure of outlawry typical for legal traditions in societies without a state. Introducing a transnational police would imply that one state holds authority over another, disrespecting the independence inherent in the notion of sovereignty.⁸⁵ Mitchell Dean refers to Schmitt's analysis of the decline of the European-based system of international law⁸⁶ with the return of the notion of a just war, which seems to fit the logic of the pre-Westphalian era in which the aim of a war could well be to establish the power to police over another state after conquering its territory or population.

The point of this excursion into the roots of sovereignty is to trace the origins of the power to police in the emergence of sovereignty over and against suzerainty. With the advance of the power to legislate as the first attribute of sovereignty at the beginnings of modernity, we encounter the concomitant advance of the power to police, from an ad hoc reactive power in the fifteenth and sixteenth centuries to a more systematically developed science of police in the absolute (police) states of seventeenth and eighteenth century Europe. Other than what Agamben suggests,⁸⁷ the notion of police has always been a crucial part of the notion of sovereignty, being the condition of possibility for an

84. See, e.g., WESEL, *supra* note 46, at 52-68 (discussing law in non-state societies); see also E. Adamson Hoebel, *Feud: Concept, Reality and Method in the Study of Primitive Law*, in 1 *ESSAYS ON MODERNIZATION OF UNDERDEVELOPED SOCIETIES* 500 (A. R. Desai ed., 1972); SIMON ROBERTS, *ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY* (1979).

85. A transnational police should not be confused with a supranational police force which would imply some kind of supranational world government. The adventures of United Nations peace-keeping forces seem to build on a complex mix of national authority and international consensus struggling with competing loyalties, ad hoc legal contraptions, and unstable power relations.

86. Dean, *supra* note 3, at 188-90.

87. Cf. Dubber, *supra* note 14, at 109 ("Sovereignty without the power to police is no sovereignty at all"); Tomlins, *supra* note 4, at 259 (indicating that Dubber in fact corrects Agamben's view that "the concept of sovereignty has been . . . introduced into the figure of the police" only relatively recently (referring to GIORGIO AGAMBEN, *MEANS WITHOUT END: NOTES ON POLITICS* 102 (Vincenzo Binetti & Cesare Casarino trans., Univ. of Minn. Press 2000) (1996))).

effective power to legislate which is actually a part of the original notion of the police. We shall return to this point in the next section when discussing the implications of the emergence of transnational governance for the power of police.

D. From National Sovereignty to Global Empire?

In chapters seven and eight, the implications of transnational violence are assessed for the new police science. In the light of the historical move from suzerainty to sovereignty, transnational violence raises many questions. For example, to what extent does international terrorism wipe out the difference between internal and external enemies? Is the system of international law, built on the idea of sovereign nation-states, crumbling under the weight of police interventions by individual states on the territory of other states, or is the system of international law eroding due to an increasing number of failed states that challenge the concept of the sovereign state as a viable instrument to bring order in international affairs? How can a national state defend itself and its citizens against fraud and tax-evasion committed by transnational companies that are not bound to a territory and are focused on capital flows that acquire an ever more virtual nature? Does a concept like sovereignty lose its meaning when concepts like territory and population denote realities in flux that can no longer serve as stable points of reference?⁸⁸ Does it still make sense to speak of a monopoly of violence in the emerging world order, or should we speak of an emerging world chaos that nourishes on crises, the way Naomi Klein has recently suggested?⁸⁹ More to the point, can the power of police survive without the monopoly of violence? What does law mean when the monopoly of violence does not hold? The response to these questions may benefit from the previous analysis because non-state societies are characterized by the absence of such a monopoly and suzerainty balances on the threshold of an emerging

88. MEANS SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006).

89. NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2007).

monopoly of violence.

In chapter seven, Dean discusses *Military Intervention as "Police" Action?* To begin with, he discusses Agamben's claim that the first Gulf War finally introduced the concept of sovereignty into the figure of the police, stating that according to Agamben, "police operates within the 'decision' on the 'state of exception,' which—following Carl Schmitt (1922)—defines the operation of sovereignty."⁹⁰ Agamben argues that

[t]he investiture of the sovereign as policeman . . . makes it necessary to criminalize the adversary Such an operation is not obliged to respect any juridical rule and can thus make no distinctions between the civilian population and soldiers, as well as between the people and their criminal sovereign, thereby returning to the most archaic conditions of belligerence.⁹¹

Dean also notes that Agamben's allusions to police unambiguously refer to "the extralegal use of violence by sovereign authority."⁹² As explained in the previous section, the problem with this position is that the police has always been part of the workings of sovereignty. One could even argue that the power of police can only be found in a sovereign state that has pacified its population, clearing the way for the positive, constructive dimension of the power of police. The necessity to criminalize the adversary must indeed be part of sovereignty because—as Chantal Mouffe has aptly demonstrated⁹³—the difference between an adversary and an enemy is the difference between inclusion and exclusion, which is central to sovereignty. However, the claim that criminalization implies that there are no juridical rules to apply and the claim that criminalization erases the distinction between civilians and soldiers, makes no sense. Criminalization, like policing, presumes that the adversary is within the jurisdiction of the sovereign, meaning that the *normal* juridical rules apply except in the case of emergency. Being indebted to Schmitt, Agamben's point is that we live in an extended state of exception which

90. Dean, *supra* note 3, at 185.

91. *Id.* at 185-86 (quoting AGAMBEN, *supra* note 89, at 105).

92. *Id.* at 187.

93. CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* (2000).

implies that the rule of law is suspended on a permanent basis. This, however, seems an artificial description of what is actually at stake. The problems Agamben describes—contrary to his opinion—relate to the decline of sovereignty. For instance, the renewed prominence of the doctrine of the just war, stemming from an era *before* sovereignty consolidated, implies that the targets of transnational violence against individual terrorists or rogue states are neither adversaries nor enemies: they lack the protection of both the criminal law (internal sovereignty) and the protection of prisoners of war (external sovereignty). Agamben's famous icon of the *homo sacer*, the outlaw, as the subject of Schmittian sovereignty and Foucauldian bio-power is equally flawed because—like the just war—this is a figure stemming from an era *before* sovereignty emerged. Rather than comparing the naked bodies assembled in the Nazi camps to the outlaws in early Roman and Germanic history, we should compare economic sanctions against sovereign states to the Germanic or early Roman sanction of outlawry.⁹⁴ Similar flaws can be found in the position of Hardt and Negri who emphasize the blurring of the borders between the internal and external arms of power (thus blurring one of the most central attributes of sovereignty), while they still find that “[t]he juridical power to rule over the exception and the capacity to deploy police force are thus two initial coordinates that define the imperial model of authority.”⁹⁵ Whereas Hardt and Negri refer to Foucault's description of seventeenth and eighteenth century police science, Dean rightly wonders:

[H]ow might this analysis be related to *Empire's* use of the term to denote the form of exercise of imperial sovereign right? We are nowhere offered a discussion of the trajectory of the notion of police or an attempt to say how current police action is different

94. Agamben does not take the Germanic outlaw as a first point of reference in his rhetorically brilliant discourse. He prefers the more mysterious *homo sacer*, depicting him as an enigmatic figure of early Roman law, without mentioning that the era of the *homo sacer* is the era of the old Roman Kings whose position compares well to the medieval suzerain. Their monopoly of violence was rudimentary if not simply non-existent, calling for other means to sustain the law including participatory justice, outlawry, and ritual execution. AGAMBEN, *supra* note 88, at 104.

95. Dean, *supra* note 3, at 186 (quoting HARDT & NEGRI, *supra* note 18, at 17).

from or similar to the police that existed across different European territories in former times.⁹⁶

Actually, Foucault described seventeenth and eighteenth century police as a pastoral power over a population, emphasizing the productive character of the police of the seventeenth and eighteenth century police science. Dean rightly concludes that such an understanding of police cannot limit itself to military interventions but should “include agencies of global economic intervention (the World Trade Organization [WTO], International Monetary Fund [IMF], World Bank) and humanitarian and moral agencies (nongovernmental organizations [NGOs]).”⁹⁷ I would add that the link between police and sovereignty implies a link with an effective monopoly of violence with regard to a territory or a population which is notably absent at the global level. The rhetorical usage of “police” in international relations—from Theodore Roosevelt’s claim for the need to exercise an international police power as stated in the Corollary to the Monroe Doctrine to the Dutch “police” action in their Indonesian colony to Ignatieff’s call for an international police to implement Canadian Peace, Order, and Good Government (POGG) throughout the world—should not tempt us to mistake power politics for government authority as we have no transnational sovereignty and no monopoly on violence to depend on.⁹⁸ Speaking of transnational violence in terms of police and sovereignty may in fact blind us to the explosive connections between the governmentality of a control society with fuzzy borders and the governance of transnational capital flows. I do think that Hardt and Negri have a point here. The logic of governmentality and that of governance have an interesting similarity even if their objectives differ. However, neither thrives on unilateral sovereign power, both work with “a specific and complex

96. Dean, *supra* note 3, at 186-87.

97. *Id.* at 187.

98. *See id.* at 190-91 (discussing Theodore Roosevelt’s Corollary to the Monroe Doctrine); Levi & Hagan, *supra* note 3, at 207-08 (also discussing Roosevelt’s Corollary to the Monroe Doctrine); *see also* Valverde, *supra* note 19, at 80-81 (discussing Michael Ignatieff’s call for POGG powers in Canada); Levi & Hagan, *supra* note 3, at 229-30 (also discussing Ignatieff’s call for POGG powers).

form of power (institutions, procedures, analyses, tactics) that has as its target population, as its principle form of knowledge political economy, and as its essential technical means apparatuses of security.”⁹⁹ The citation is from Lindsay Farmer quoting Michel Foucault describing governmentality, and this description holds to a large degree for public and private models of governance. They connect easily to what Deleuze has termed “societies of control”¹⁰⁰—the twentieth and twenty-first centuries follow-up of the eighteenth and nineteenth centuries’ “disciplinary societies”¹⁰¹ described by Foucault, which in their turn followed the seventeenth and eighteenth centuries of “sovereign societies.”¹⁰²

Both governance and governmentality are capable of functioning at transnational levels, connecting to the global capitalist empire described by Hardt and Negri. The paradigms on which sovereignty and governance thrive are, however, less interoperable (to use a term that may be of crucial relevance for policing in the information age). The unilateral authority of sovereign power is at odds with the dynamics of a negotiated governance as well as with the intricate techniques, tactics, and institutional flexibility of the governmentality of the “societies of control.”¹⁰³

If, other than sovereignty, governmentality can function at a transnational level, something like a transnational police may be emerging beyond the scope of sovereignty, interconnected with private governance of transnational companies. Such a transnational police may be uncontrollable in its controlling powers, but it could entail the productive force for what Foucault called a little extra life,¹⁰⁴ in this case, for post-citizens in a post-sovereign landscape. To call this post-sovereign transnational

99. Farmer, *supra* note 10, at 149 (quoting Michel Foucault, *Governmentality*, in *POWER 220* (J. D. Faubion ed., 2000)).

100. Gilles Deleuze, *Postscript on the Societies of Control*, 59 *OCTOBER* 3, 3 (1992).

101. *Id.*

102. *See id.* (describing “societies of sovereignty” as aiming “to tax rather than to organize production, to rule on death rather than to administer life”). For a discussion of control societies, see *infra* Part III.D.

103. Deleuze, *supra* note 100, at 3.

104. *See* Dean, *supra* note 3, at 201.

landscape a global empire is problematic for two reasons. First, Hardt and Negri connect the notion of empire to a new concept of sovereignty that is at odds with central notions of sovereignty; and second, the use of the term *global* may suggest an opposition with the local or the national while the global in fact thrives on the local and the national. I prefer using the notion of the “transnational” as used by de Sousa Santos,¹⁰⁵ distinguishing it from both the intrastate (national) and the interstate (international) or even the suprastate (supranational) levels. This is not to say that in a post-sovereign landscape the national state has no role to play or to deny the role of international law, but to emphasize that the emerging ecology of strong and weak states, multinational companies, transnational capital flows, and ICT socio-technical infrastructures cannot be reduced to a single logic as Hardt and Negri seem to suggest.

The uncontrollable nature of an emerging transnational control society would evidently require the reinvention of constitutional restrictions for policing powers that extend far beyond the domestic realm. Despite Tomlins skepticism about the role of law,¹⁰⁶ I tend to agree with Dean that

rather than reducing contemporary modernity to the camp with its police command, it is important to analyze how the practices of the camp can be subject to review and scrutiny—as they have been by not only the liberal press in the United States but the recent decisions of the U.S. Supreme Court.¹⁰⁷

I will return to this point in Part III.D, *Foucault Revisited: Legalism and the Control Society*.

In chapter eight, Ron Levi and John Hagan discuss *International Police*. Interestingly, the focus of Levi and Hagan is on international criminal law which has to function at a fragile nexus of law and police because of the absence of an effective monopoly on violence in the international realm. Levi and Hagan intend to follow up on Tomlins’s *Law, Labor, and Ideology in the Early American*

105. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION (2d ed. 2002).

106. See Tomlins, *supra* note 4, at 252.

107. Dean, *supra* note 3, at 203.

Republic,¹⁰⁸ investigating how law and police function as alternative discourses and finding that “although legal values are at first rhetorically displaced in favor of guaranteeing security through police, the logic of *police* and *good administration* is then posited as fundamental to promoting the rule of law worldwide.”¹⁰⁹ In the case of international criminal law, the lack of an international police constabulary forces the tribunals to “rely on often hostile foreign states to voluntarily cooperate: and this international separation of law from police has built in a systematic limit to the field that, we suggest, likely ensures that the most powerful nations will be exempt from its authority.”¹¹⁰ They conclude that when states refuse to cooperate, the sanctions are diplomatic rather than coercive or boiling down to naming and shaming rather than punishment. This should not surprise us by now as the lack of sovereignty in the international sphere implies that the law depends on participatory justice (and outlawry) like in the age of suzerainty. At the end of their chapter, Levy and Hagan find that law and police have often developed along separate tracks, both in domestic and in international affairs, and they in fact observe a constant alternation of police without law, and law without police.¹¹¹ Surprisingly, they then conclude that police provides a defense to law, and law to police, claiming that this mutual defense is accomplished by the alternation of both.¹¹² This I find a rather confusing conclusion after the extended analysis of the problems that arise when law has to function without police, or vice versa. However, the idea that law and police can develop into interdependent domains, instead of law being necessarily dependent on police, is a refreshing notion in a volume that seems dedicated to skepticism regarding the idea of bringing police under the rule of law.

108. CHRISTOPHER TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993).

109. Levi & Hagan, *supra* note 3, at 232.

110. *Id.* at 233.

111. *Id.* at 238.

112. *Id.*

III. THE CORE DICHOTOMY: LAW AND POLICE

A. *Justice and Police: Fitting Anachronisms*

The New Police Science produces a splitting image of law and police. Before moving into a critique of the opposition of *law as legalism* and *police as an independent power of police*, I will again make an historical detour. The courage to introduce challenging anachronisms, such as the old notion of police as government, involves the need to look into the relationship between the relevant terms and the web of meaning in which they function. To this end, we shall discuss the “other” of police in the time of its inception. This “other” was justice, which according to Farmer in chapter five, *The Jurisprudence of Security: The Police Power and the Criminal Law*, must be “seen as the principles governing the public and private relations between persons (particularly with respect to the security of property)”¹¹³ while standing in a tension with “criminal law, seen as security.”¹¹⁴ Though I am not an expert in the history of Anglo-American law, from the perspective of continental Europe it would be interesting to look into the shifting relationships between justice and police within the framework of medieval, early-modern, and modern Europe.¹¹⁵ Other than what Farmer concludes for eighteenth century England, from a continental perspective the domain of the criminal law originally fell within the scope of justice, which consisted of civil and criminal law, as administered in accusatorial procedures during the middle ages. Justice must be understood here as a concept referring to criminal and civil jurisdiction, taking into account that many public interventions fell within the scope of the civil jurisdiction, requiring governments to go to court to get their way.¹¹⁶ With the advent of the modern state, a

113. Farmer, *supra* note 10, at 146-47.

114. *Id.* (referring to ADAM SMITH, LECTURES ON JURISPRUDENCE 103-40 (R. L. Meek et al. eds., 1978)).

115. See Mireille Hildebrandt, *Justice and Police: Regulatory Offenses and the Criminal Law*, NEW CRIM. L. REV. (forthcoming 2008 or 2009); JAN VOLKERT RIJPPERDA WIERDSMA, POLITIE EN JUSTITIE (1937) (discussing the various shifts in the relationships between justice and police).

116. See RIJPPERDA WIERDSMA, *supra* note 116, at 73.

new domain of government intervention emerged outside the realm of justice—the domain of police. This domain consisted of legislative, and other measures, meant to create and maintain what Valverde so aptly summarizes as the Canadian mantra of “peace, order and good government.”¹¹⁷ Here we have the old notion of police as the core of the new police science. Concurrent with the beginnings of the domain of police, we can observe an increasing importance of the inquisitorial procedure which actually introduced the hierarchical model of the power of police into the domain of justice. Two things must be taken to heart: first, the notion of the police developed outside the domain of justice; and second, its logic infiltrated the criminal trial in continental Europe which nevertheless remained a part of the domain of justice. Interestingly, another shift occurred in nineteenth century continental Europe when civil law was privatized in the sense that public interventions were expelled from the domain of justice. Civil law and private law became synonymous since the French *Code Civil* restricted the scope of civil justice to private law. During the nineteenth century, this meant that governments had an extended separate sphere of unrestricted police power. This freedom to govern was theorized by legal philosophers, like Friedrich Julius Stahl, advocating a strict separation of justice and police which meant that citizens had no recourse to a court of law against government interventions falling within the scope of the police.¹¹⁸ The idea that the power of police is indefinable as well as unlimited seems to derive from this nineteenth century perspective, fitting well in the formal conception of the *Rechtsstaat* as argued by Stahl—heralding a procedural understanding of the rule of law (requiring rule *by* but not *of* law) rather than a substantive notion of the rule *of* law (which implies providing the legal means to contest the authority of the state in a court of law).¹¹⁹

117. Valverde, *supra* note 19, at 73.

118. FRIEDRICH JULIUS STAHL, *DIE PHILOSOPHIE DES RECHTS* (1878).

119. *Id.*

B. *From Undivided Sovereignty to the Paradox of the Rechtsstaat*

The formal conception of the *Rechtsstaat* was, however, complemented by a substantive conception of the *Rechtsstaat*.¹²⁰ The difference between both conceptions compares well to the difference between the French *État légal* and *État de droit*.¹²¹ The formal conception of the *Rechtsstaat* divides the powers of the state between the legislator and the administration: the first sets out the rules for the second to follow. The task of the judge is—like that of the administration—to apply the rules enacted by the legislature. His task is administrative and applies to the behavior of citizens, not to the actions of the administration which is deemed to either follow the statutes or to exercise the power to police (in a domain outside the law).¹²² The *État légal* entails the same legalism; only in this case, the administration has no space outside the will of the legislature. Due to the concept of the *volonté générale*,¹²³ the legislator is the highest power in the state, meaning that the administration must rule in accordance with the enacted law at all times (no separate domain outside the law). The substantive conceptions of the *Rechtsstaat*, as well as the *État de droit*, introduce a new understanding of sovereignty: instead of an undivided sovereign they envision an internal division that allows the judiciary to check the actions of the administration (and even of the legislator). Instead of presuming that the legislator and the administration will always act in the general interest, their actions are made contestable in a court of law. It is only then that legalism is relativized while at the same time the power of police is brought under the rule of law. Interestingly, the end of legalism is also the

120. See ROBERT VON MOHL, *DIE POLIZEI-WISSENSCHAFT NACH DEN GRUNDSÄTZEN DES RECHTSSTAATES* (Adamant Media Corp. 2000) (1832).

121. See CHEVALLIER, *supra* note 54, at 29-35.

122. See JAMES GOLDSCHMIDT, *DAS VERWALTUNGSSTRAFRECHT* (1902) (discussing the saliency of the history of this typically nineteenth century German domain of police, outside the realm of law); see also HANS GERHARD MICHELS, *STRAFBARE HANDLUNG UND ZUWIDERHANDLUNG* (1963).

123. Rousseau's concept of *volonté générale* (the general will) has inspired the French Revolution and political theory. It refers to the political will of the people as expressed by the legislator, see CHEVALLIER, *supra* note 54, at 25.

recognition of discretion, both in law and in the police; the rule of law, however, means that this discretion does not imply arbitrary rule as its use can be contested in the light of the principles of fair play and due process.¹²⁴ Law as well as police are fundamentally *underdetermined*, both conceptually and in their application; this does not equate with *indeterminacy* which would lead to chaos and substantial legal insecurity, destroying the constructive dimensions of both police and law. The paradox of the *Rechtsstaat* develops from this internal division of sovereignty: the state's power of police can be contested in a court of law that derives its authority from the same state.¹²⁵ Obviously, such an arrangement depends on the institutional sustainability of the internal divisions; crossovers will flood the system and result in a return to undivided sovereignty which is equivalent with the police state. The rule of law is not a necessary truth but a vulnerable historical artifact that needs to be sustained in the face of recurring threats to collapse into either chaos or undivided sovereignty.¹²⁶

In the following section, we will have a look at the way the authors defend the separate spheres of law and police. Do they use historical, theoretical, philosophical, or empirical arguments? Do they applaud the separation or simply find it to be inevitable? Do they suggest remedies other than a critical stance? I will discuss two recurring arguments that form a mix of historical and theoretical points. The first concerns the proposition that law simply depends on the power to police which is, for this reason, prior to and separate from the law (a rather Schmittian argument). The second equates law with legalism and challenges its effectiveness in the face of the control society

124. For a comparison of continental and Anglo-Saxon notions of the rule of law, see Rainer Grote, *Rule of Law, Rechtsstaat and État de droit, in CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY: A COMPARATIVE ANALYSIS* 269 (Christian Starck ed., 1999).

125. See MIREILLE HILDEBRANDT, STRAF(BEGRIIP) EN PROCESBEGINSEL 254-71, 429-68 (2002) (discussing the shift from suzerainty to sovereignty to its internal division under the rule of law).

126. I thank René Foqué and Joest't Hart for the way their oeuvre has sensitized me to the fragile historicity of the *paradox of the Rechtsstaat*. See, e.g., RENÉ FOUQUÉ & A.C.T HART, INSTRUMENTALITEIT EN RECHTSBESCHERMING: GRONDSLAGEN VAN EEN STRAFRECHTELIJKE WAARDENDISCUSSIE (1990).

(a Foucauldian inspired argument) understood in terms of sovereignty (mixing Foucault with Schmitt) or governmentality (staying with Foucault's challenge of the actual impact of sovereign power in contemporary society).

C. *Does Law Depend on the Power to Police?*

One of the recurrent points made is the fact that the law actually depends on the power to police. This point relates to the monopoly of violence established during the late Middle Ages which is both the *condition of possibility* for an effective police in the broader sense of the term and the *result* of an effective police in the more narrow sense of the constabulary force. There is mutual causality between the power of police, the monopoly of violence, and the police force. The book gives little or no explicit attention to the monopoly of violence. This seems to me a missed chance. Actually, the monopoly of violence seems to be the missing link between the old notion of the police and its recent reduction. Especially when the monopoly on violence of the national state is challenged from within as well as from without, as the last two chapters in the book demonstrate, it can no longer be taken for granted and the consequences of its fragility must be assessed.

The subjection of peers to the medieval "bannum"¹²⁷ of the king and the concomitant "ban" on vigilance eventually led to the criminalization of actions that implicate taking the law into one's own hands.¹²⁸ This criminalization required the institutionalization of a police force to be effective.¹²⁹ The establishment of an effective monopoly on

127. The "bannum" of the king referred to the competence of the (early) medieval kings to issue regulations as well as to the fine ("ban") imposed on those who violated them. See the entry of the "ban" in the eleventh edition of the Encyclopaedia Britannica, first published in 1911, available at <http://www.1911encyclopedia.org/Ban>.

128. See Agamben's discussion of the medieval "ban" in *supra* note 49, pt. 1, sec. 1.7 and pt. 2, sec. 6. Though he recognizes the medieval character of the "ban," he relates it to sovereignty instead of suzerainty (which stands for an entirely different political structure, as explained above).

129. See BERMAN, *supra* note 17, at 88-94 (discussing the historical construction and emergence of the monopoly on violence in the late middle ages as a result of the new division of tasks between church and secular government); see also DUBBER, *supra* note 66, at 11-21 (discussing the king's

violence, and the ensuing pacification of a population, mark the threshold to a new type of society. The novelty is twofold: first, the pacification relieves the former peers from their *duty* to engage in private revenge; and second, the peers are turned into subjects of a sovereign. This may sound like bad news but this subjectivation also contains the germs of the move from subject to citizen, combining the pacification of society with the positive freedom to participate in the construction of the public sphere. Subjectivation in the sense of objectification, becoming an object of the king's household as Dubber would say, can thus trigger subjectivation in the sense of creating agency in the political sphere: citizenship.¹³⁰ This evidently does not imply a *necessary* move from peer to subject to citizen. The constructive dimension of the power of police that depends on the pacification of a population can in fact be used, as Neocleous rightly indicates, to create a society that produces insecurity and inequality to sustain the objectification of the resources of the household:

Poverty is that state and condition in society where the individual has no surplus labour in store, and, consequently, no property but what is derived from the constant exercise of industry in the various occupations of life; or in other words, it is the state of every one who must labour for subsistence.

Poverty is therefore a most necessary and indispensable ingredient in society, without which nations and communities could not exist in a state of civilization. It is the lot of man—it is the source of *wealth*

Indigence therefore, and not *poverty*, is the evil It is the state of any one who is destitute of the means of subsistence, and is unable to labour to procure it to the extent nature requires. The natural source of subsistence is the labour of the individual; while that remains with him he is denominated *poor*; when it fails in whole or in part he becomes *indigent*.¹³¹

peace as an extension of his *mund* into a “general safeguard of public order” (quoting FREDRICK POLLOCK & FREDRIC WILLIAM MAITLAND, I THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 45 (2d ed. 1898)).

130. See Dubber & Valverde, *supra* note 4.

131. Neocleous, *supra* note 1, at 30-31 (quoting PATRICK COLQUHOUN, A TREATISE ON INDIGENCE 7-8 (1806)).

This is Neocleous's insightful quotation from early nineteenth century police science written by Patrick Colquhoun, an early police theorist in Britain who seems to spell out Marxist theory just before Marx was born.¹³² Colquhoun was the advocate of the metropolitan police and the initiator of the police of the river Thames. He was involved in the deliberate and premeditated construction of a class of poor people that must, firstly, be kept in a state of poverty; secondly, prevented from becoming indigent and; thirdly, repressed when ending up criminal. He has in fact traveled a long way from Adam Smith who is quoted by Farmer to have lectured some thirty years earlier:

[T]hat in Glasgow, "where each one seldom has but one man servant, there are few or no capitall [sic] crimes committed, and those that are, most commonly by strangers; whereas at Edinburgh, where the resort of the nobility and gentry draws together a vast number of servants who are frequently set adrift by their masters, there are severall [sic] every year." The control of crime thus depended as much on the management of the economy and the production of social wealth, which would reduce the number of servants and dependents, as on creating new laws or placing greater numbers of constables on the streets.¹³³

It may seem that Smith's and Colquhoun's diagnoses of the causes of criminality coincide as both are aware that poverty and dependence can lead to indigence and eventually criminal behavior. However, while Smith takes a stance *against* such dependence and argues for the production of social wealth, Colquhoun argues *for* the production of poverty as an indispensable source of wealth. Smith is not impressed with raising the number of constables on the streets, of which Colquhoun was an ardent advocate, as Smith believes that reducing poverty will have a more beneficial effect on crime rates. This sounds like a familiar position, though not often voiced by contemporary believers in the invisible hand of a free market.

The power of police—whether used to promote poverty or to produce social wealth—depends on an effective monopoly of violence, and so does law in the modern state.

132. *See id.*

133. Farmer, *supra* note 10, at 146 (quoting SMITH, *supra* note 10, at 333).

Instead of claiming that the law depends on the power of police, I would argue that both modern law and the power of police depend on the monopoly of violence. This, being a descriptive point, needs qualification if we address the relationship between law and the power of police in constitutional democracy, requiring a normative stance. In that case, the power of police will have to be brought under the rule of law, meaning that the monopoly of violence *on which both depend*, can be invoked against actions (to be) performed within the realm of the power of police. This is—perhaps—turning Carl Schmitt inside out. The sovereign is the one who decides about the state of exception or, in other words, the one who holds the monopoly on violence. In as far as modern law depends on the monopoly of violence, the sovereign seems to be both inside and outside the law. But, as far as constitutional democracy is at stake, the sovereign is bound by the dictates of the law in deciding about the state of emergency. The law will then contain rules about which subdivision of the sovereign prepares the decision, about the criteria that must be fulfilled to declare the emergency, as well as rules about its duration and ex ante and post hoc accountability. These dictates of the law will indeed leave room for discretion: like the power of police, the law is underdetermined, but—like the power of police in constitutional democracy—not indeterminate or unlimited.

D. *Foucault Revisited: Legalism and the Control Society*

Elsewhere, I made an analysis of Foucault's penetrating description of the legal process as a means to produce truth.¹³⁴ One of his well-known points is that the liberal invocation of classical Enlightenment philosophy to celebrate the criminal process as a means against arbitrary punishment did not prevent disciplinary practices from establishing a contradictory logic of surveillance and control at the core of the criminal justice system: the prison. This theme has been further developed by Deleuze in his *Postscripts on the Societies of Control*,¹³⁵ already mentioned

134. See Mireille Hildebrandt, *The Trial of the Expert: Épreuve and Preuve*, 10 NEW CRIM. L. REV. 78, 83 (2007) (referring to Michel Foucault, *La Vérité et les formes juridiques*, in II DITS ET ÉCRITS 538-647 (1994) and MICHEL FOUCAULT, *SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON* (1975)).

135. Deleuze, *supra* note 102, at 3. Cf. STANLEY COHEN, *VISIONS OF SOCIAL*

above, in which Deleuze describes a move from fixed individualization and categorization in confined institutions (disciplinary practices) to real time monitoring and surveillance of the dynamic relationships between flexible, mobile entities (control societies). The emphasis shifts from the production of static identities to the production of relevant difference, always in search of the difference that makes a difference.¹³⁶ Policing, in as far as it builds on advanced risk analysis and on refined criminal profiling, seems to take part in this paradigm shift. In fact, justice itself is said to be infested with this new logic, turning into an actuarial justice that flouts the principles of constitutional democracy and becoming the handmaiden of a power of police beyond the rule of law.¹³⁷ If we stay with Foucault, however, we should *not* conflate the power of police in an emerging control society with sovereignty but associate it with the subtle techniques of a new governmentality: a multiplicity of profiling practices in intermingling private and public spheres; productive regulatory devices with a massive potential for function; and visions of Ambient Intelligence and nano-technological applications that produce and thrive on real time profiling. If law was incapable of resisting the erosion of its core principles brought about by disciplinary practices like the prison, one wonders how it could possibly resist the effects of a power of police that integrates transnational, private, and public control mechanisms into the workings of what Hardt and Negri have called a global empire that has no central point of reference, no intentions, just an unfolding logic of dynamically differentiated control.¹³⁸ Building on Marx, Foucault, and Deleuze, speaking of a capitalist sovereignty that produces deterritorialization and

CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION (1985); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

136. See Mireille Hildebrandt, *Profiling: From Data to Knowledge*, 30 *DuD: DATENSCHUTZ UND DATENSICHERHEIT* 1 (2006); see also Mireille Hildebrandt, *Profiling into the Future: An Assessment of Profiling Technologies in the Context of Ambient Intelligence*, 1 *J. IDENTITY INFO. SOC'Y* 1 (2007), available at http://journal.fidis.net/fileadmin/journal/issues/1-2007/Profiling_into_the_future.pdf.

137. See, e.g., Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in *THE FUTURES OF CRIMINOLOGY* 173 (David Nelken ed., 1994).

138. See HARDT & NEGRI, *supra* note 18.

reterritorialization, turning nation states into instruments of a global capitalism, Hardt and Negri's concept of a global empire denotes a logic that unfolds itself rather than an institution that can be addressed. Their new concept of sovereignty, discussed in Part II.D, *From National Sovereignty to Global Empire?*, seems to denote an anonymous machine from which we cannot expect the kind of institutional support that an internally divided sovereignty could provide.¹³⁹ Precisely because it is not an institution but an anonymous logic, I would argue that the rule of law has no way to come to grips with such "imperial power."¹⁴⁰ As discussed above, I reject the idea that this unfolding logic is aptly described as a new type of global sovereignty, but agree that it may entail a new type of governmentality, playing out in a post-sovereign, transnational landscape that shares many features of Deleuze's "societies of control."¹⁴¹

In my discussion of Foucault's opposition of disciplinary practices and classical legalism, I contended that Foucault saliently described the impotence of classical liberal legalism which fails to come to terms with the police understood as governmentality. However, he seems to equate the rule of law with the nineteenth century French *Etat légal* and German formal conception of the *Rechtsstaat*. In thus reducing law to legalism, he misses out on the ideal type of the *Etat de droit* and the substantial conception of the *Rechtsstaat*, as described above. The paradox of the *Rechtsstaat* is a historical artifact that cannot be taken for granted, and I would agree with Tomlins that "critical inquiry into the production and purposes of *police* that is not at the same time critical inquiry into the production and purposes of *law*"¹⁴² is inadequate. However, if one starts the inquiry with a mindset that equates rule of law with legalism (a term often employed in the book), law will indeed easily turn out to be a *neutral* instrument of the power of police or a rhetorical device to legitimate the operations of a self-sufficient power of police.

139. *See id.*

140. *See id.*

141. *See* Deleuze, *supra* note 102.

142. Tomlins, *supra* note 4, at 252.

In the face of a post-sovereign, transnational governmentality that builds on Deleuze's control society, the paradox of the *Rechtsstaat* would need reinvention. The combination of governmentality and governance—mentioned in Part II.D., *From National Sovereignty to Global Empire?*—could destroy the fragile balance between the constructive power of police and its countervailing “other,” the law. As it is, the post-sovereign landscape offers no point of reference that can lend its authority to the contestation of its operations. In fact, I would claim it has no authority whatsoever, but only flows of dynamic, relational power which can be resisted but not contested on its own ground—like public authority can—in constitutional democracy. With Tomlins, I would be skeptical of easy solutions at this point as we simply have no clue how to organize a formal space for contestation without depending on the state(s). But with Dean, I would think that we must get down to business and invent ways to subject the operations of an emerging “global empire” to scrutiny and review, necessitating the construction of new transnational institutions capable of sustaining a transnational empire of law.

CONCLUDING REMARKS

In *Civilizing Security*, Ian Loader and Neil Walker claim that security must be civilized while at the same time security is civilizing.¹⁴³ This counter-punctual reading of civilizing security comes close to describing the relationship between the rule of law and the power of police in a constitutional democracy:¹⁴⁴ the power of police is a productive power, capable of providing security and of building socio-technical infrastructures to promote social welfare thus civilizing the landscape we inhabit; the rule of law is an equally productive power capable of providing legal certainty and of constructing the constraints that make the exercise of the power of police contestable. To what extent the power of police and the rule of law manage

143. See LOADER & WALKER, *supra* note 33.

144. “Counter-punctual” is not standard English but it is meant to refer to a punctual reading of the phrase resulting in two meaningful phrases that entertain a relation of a counterpoint.

to act in counterpoint, instead of the one overruling the other, is a matter of investigation. In arguing that the power of police must be brought under the rule of law, I do not claim that law should overrule police as this would actually paralyze the law. My point is that the discretionary power of police needs legal checks and balances without thereby destroying the discretion. However, the recurrent opposition of an impotent legalism and unlimited police power, that seems to inform many of the contributions, may be attributed to the authors' justified opposition to the defensive strategies developed by contemporary lawyers in the face of an increasingly unconstrained exercise of the power to police. Perhaps positivist legalism with its charade of legal security is used to legitimize unjustified applications of rules that should have been interpreted differently, implying that the authors are right in their rejection of legalist positivism but not in their equation of law with legalism. Another pitfall of legal positivism is its impotence in the face of the transnational governmentality and the force of non-positive law like the new *lex mercatoria*. Though I have qualified my objections against Hardt and Negri's concept of global capitalist sovereignty, I do fear that a transnational control society as depicted by Deleuze and others is in fact unfolding while we have not yet developed the conceptual and institutional tools to reinvent constitutional democracy beyond the national state. *The New Police Science* offers many arguments to sustain this fear, inviting scholars of a variety of relevant disciplines to further investigate the historicity and the actual workings of the power of police. I hope that lawyers will have the good sense to continue this investigation and to use their legal imagination to invent new checks and balances to sustain the rule of law, which, due to its fragile historicity, cannot be taken for granted.