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## **The Potential Use of Legitimate Force for the Preservation of Order: Defining the Inherent Role of Public Police Through Policing Functions that cannot be Carried out by Private Police\*\***

### **1. Introduction**

When dealing with policing in contemporary society, criminologists would probably agree that they disagree on what policing is, who the police are, and what the police do. Although both the definition of policing as well as its *raison d'être* thus remain blurry, academics and practitioners concur that the role of public police, that is, the police established by the state, has been changing for the past thirty years.

Although it is debatable whether this trend is due to a sudden 'pluralizing'<sup>1</sup> of policing or to an ongoing process of the 'formalization of social control',<sup>2</sup> the number of private policing institutions and informal agencies has been rapidly increasing parallel to it. Since public police have begun marching into the market at the same time, it is becoming harder to distinguish their role from that of private police and *vice versa*.<sup>3</sup> This begs

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<sup>1</sup> Bayley, Shearing, *The Future of Policing* (1996), p. 585.

<sup>2</sup> Jones, Newburn, *The Transformation of Policing?* (2002), p. 130.

<sup>3</sup> Bayley, Shearing, *The Future of Policing* (1996), p. 589–591. See also Brodeur, *THE POLICING WEB* (2010), p. 257–258.

the question of whether there is a policing function that cannot be carried out by private police and if so, what it is and why it occupies such a particular position.

In this paper, I show how Rousseau's social contract theory<sup>4</sup> helps explain the transmission of the right to preserve order from the individual to the state and illustrate why understanding this transference is important for defining the inherent function of public police. I also demonstrate the connection between social contract theory and the British concept of 'policing by consent'<sup>5</sup> as well as their linkage to the role of public police. I integrate Bittner's definition of police functions,<sup>6</sup> Brodeur's reasoning on the use of force<sup>7</sup> and the first element of Loader and Walker's 'state-policing nexus'<sup>8</sup> to argue that the legitimate use of force for the preservation of order is *the* function intrinsic to public police.

I then show why this function cannot and should not be carried out by private police and consider the remaining three elements that Loader and Walker use to construct their notion of 'policing as public good'<sup>9</sup> in a 'community of attachment'.<sup>10</sup> I proceed by stressing that this ideal-type community does not become self-evident once established and outline how its preservation, along with the exposed inherent function of public police, depends on police legitimacy. I also demonstrate that public police legitimacy is a function of different expectations in Western democracies as opposed to states in transition.

Lastly, I illustrate how we can imagine both a dystopian and a utopian version of (dis)order after the social contract will have been terminated due to a new understanding of police accountability in an era of increased 'secondary visibility'.<sup>11</sup> I conclude by indicating that, even after an abstract rethinking of public-state-police relations, the potential use of legitimate force to maintain order remains in the realm of public policing.

## 2. Defining Public Police

### 2.1. *The Legacy of Social Contract Theory and the Notion of Policing by Consent*<sup>12</sup>

Before focusing on specific elements that define the intrinsic function of public police, I outline how the mandate for their activity is rooted in the social contract theory. I

<sup>4</sup> Rousseau, *THE SOCIAL CONTRACT* (1994).

<sup>5</sup> Reiner, *THE POLITICS OF THE POLICE* (2010), p. 69.

<sup>6</sup> Bittner, *Florence Nightingale in Pursuit of Willie Hutton* (2005).

<sup>7</sup> Brodeur, *THE POLICING WEB* (2010), p. 175–180.

<sup>8</sup> Loader, Walker, *Policing as a Public Good* (2001), p. 9–11.

<sup>9</sup> *Ibid.*, p. 25–28.

<sup>10</sup> *Ibid.*, p. 28–29.

<sup>11</sup> Goldsmith, *Policing's New Visibility* (2010), p. 914.

<sup>12</sup> Reiner, *THE POLITICS OF THE POLICE* (2010), p. 69.

also demonstrate why Britain's 'policing by consent'<sup>13</sup> can be seen as the social contract, manifested in practice, and how violence and reason have been linked through the notion of consent to authorize state coercion.

According to Rousseau, the 'original stage'<sup>14</sup> of mankind can only last until 'the obstacles of men's self-preservation [...] are [not] too great to overcome'.<sup>15</sup> To assure their continuation, people establish a 'form of association which will defend and protect with the whole of its joint strength, the person and property of each associate'.<sup>16</sup> In return, they give up their 'natural freedom'<sup>17</sup> to exercise self-defence, resolve conflicts and retain security. They pass it on to 'a moral and collective body'<sup>18</sup> which replaces their individual wills with the 'general will',<sup>19</sup> namely that of the state. The clauses of the social contract are 'the same everywhere and everywhere tacitly recognized and accepted'<sup>20</sup> unless or until they are violated to the extent that represents a breach of the contract and results in its termination as well as in a return to the natural state.<sup>21</sup>

Social contract theory has served as an explanation and justification of sovereign authority in modern states since the age of Enlightenment. It is also crucial for understanding how the consensus of people, who perceive themselves as a unified society, legitimizes a body that is a supplement for and a representative of their individual free wills, to use coercive force for the provision of order and security. Using force to pursue particular interests would negate the *ratio* of the social contract and the state as a sovereign authority. The legacy of social contract theory is therefore important for recognizing that the 'coming together of violence and reason'<sup>22</sup> is only possible through the notions of consent and consensus. Thus, the state that represents all people is exclusively authorized to use force on their behalf.

As public police are a state institution, justified to preserve order through the use of force, the 'tacit contract between police and public [...] drawn [in Britain] between the 1850s and 1950s',<sup>23</sup> namely the notion of 'policing by consent',<sup>24</sup> cannot be under-

<sup>13</sup> Ibid.

<sup>14</sup> Rousseau, *THE SOCIAL CONTRACT* (1994), p. 54.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid., p. 54–55.

<sup>17</sup> Ibid., p. 55.

<sup>18</sup> Ibid., p. 56.

<sup>19</sup> Ibid., p. 55.

<sup>20</sup> Ibid., p. 56.

<sup>21</sup> Hobbes, *LEVIATHAN* (1998), p. 111–112.

<sup>22</sup> Loader, Walker, *Policing as a Public Good* (2001), p. 13. It must be noted that I only adopted the term 'coming together of violence and reason' itself. The authors explain this occurrence differently than it is explained in this paper.

<sup>23</sup> Reiner, *THE POLITICS OF THE POLICE* (2010), p. 78.

<sup>24</sup> Ibid., p. 69.

od only as ‘universal love of the police.’<sup>25</sup> Nor can it be attributed solely to the specific social conditions of 20<sup>th</sup> century Britain, when the stabilization of conflict due to the incorporation of the working class led to tranquillity.<sup>26</sup> Although these circumstances help explain what enabled the British police to preserve public support and remain a ‘Teflon service’<sup>27</sup> despite all of the controversies that they are believed to have been involved with since, the notion of ‘policing by consent’<sup>28</sup> is parallel to the tacit consent given to the sovereign authority on grounds of the social contract, and is thus a sign of the enactment of this contract in practice.

After having shown why social contract theory helps explain the mandate of public police and the origins of their legitimacy, I lean on Bittner’s definition of public policing functions,<sup>29</sup> Brodeur’s reasoning on police use of force<sup>30</sup> as well as Loader and Walker’s concept of ‘policing as public good’<sup>31</sup> to identify the potential use of legitimate force to preserve order as an inherent function of public policing and, *a contrario*, a function that cannot be carried out by private police. I illustrate this by outlining the differences in the use of force by the police as opposed to other state officials. Once I have demonstrated why this function is intrinsic to public police within the state apparatus, I will continue by explaining why it cannot and should not be carried out by agencies in the private sector.

## 2.2. *The Inherent Function of Public Police*

It was Bittner who exposed the potential use of legitimate force as a distinctive feature of police work.<sup>32</sup> While it could be argued that in a modern state police share this power with, at a minimum, military and prison services, this is only seemingly the case. Namely, the *potential use of legitimate force* by the public police cannot be understood separately from its purpose, which is preserving order. In defining the inherent function of public police, both *preservation* and *order* are therefore equally important additional features.

To give preservation a particular place in this definition, I follow Brodeur’s observation that police ‘succeed in upholding social order only when it has previously been

<sup>25</sup> Ibid.

<sup>26</sup> Ibid., p. 70.

<sup>27</sup> Ibid., p. 67.

<sup>28</sup> Ibid., p. 69.

<sup>29</sup> Bittner, Florence Nightingale in Pursuit of Willie Hutton (2005).

<sup>30</sup> Brodeur, *THE POLICING WEB* (2010), p. 175–180.

<sup>31</sup> Loader, Walker, *Policing as a Public Good* (2001), p. 9–11.

<sup>32</sup> Bittner, Florence Nightingale in Pursuit of Willie Hutton (2005), p. 165.

established through other means and is not questioned as such'.<sup>33</sup> This indicates that the police hold the power for legitimate use of force 'under a presumption of general compliance',<sup>34</sup> that is, 'in the narrow context of particular incidents',<sup>35</sup> but still in a 'generally peaceful public space'.<sup>36</sup> The army, on the other hand, intervenes only after order has been disrupted by 'asymmetrical conflict'<sup>37</sup> to the point that '[territorial] lines [between groups of people] are being drawn'.<sup>38</sup> Simply put, while it is the role of the army to produce order, it is the role of the public police to reproduce it once it has been established. After highlighting the aspect of preservation, it is also important to address the aspect of order to show why its definition makes its preservation an exclusive domain of the public police.

The type of order that public police are preserving can best be determined by the circumstances in which they are expected and competent to intervene. These extend to 'every kind of emergency, without any exception whatever',<sup>39</sup> which illustrates that public police work is defined 'entirely without regard to the substantive nature of the problem'<sup>40</sup> and thus differs from all the other (public) services in this respect. The essence of public police work is well captured in Bittner's assertion that patrolmen are called upon any situation involving 'something-that-ought-not-to-be-happening-and-about-which-someone-had-better-do-something-now!'<sup>41</sup> It appears that public police functions can only be defined as a 'response to citizen demands'.<sup>42</sup> While prison officers are expected to use force in predictable situations, the situations in which police officers have to exercise their power are unpredictable. What is undefined in public police work is thus not the way force is to be used, but, rather, when the police will be called upon to use it.

Loader and Walker also acknowledge the link between the legitimate use of coercive force and order maintenance as a key function of public police. They recognize coercive force as necessary, but insufficient, for defining what the functions of public police are. According to them, it is the fact that public police are able to use coercive force in an indefinite number of situations that makes their function exclusive. They are thus the only '24-hour emergency service, which in turn provides the organizational and ideological resource base to reinforce the claim to an extensive mandate – an omnibus role in the

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<sup>33</sup> Brodeur, *THE POLICING WEB* (2010), p. 182.

<sup>34</sup> *Ibid.*, p. 179.

<sup>35</sup> *Ibid.*, p. 182.

<sup>36</sup> *Ibid.*, p. 179.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Bittner, *Florence Nightingale in Pursuit of Willie Hutton* (2005), p. 150.

<sup>40</sup> *Ibid.*, p. 161.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

preservation of general order'.<sup>43</sup> Since Loader and Walker also include a logistical, economic and cultural element in their definition of 'policing as public good',<sup>44</sup> I address these separately as I explain why the preservation of order through the use of legitimate force *cannot* be carried out by private police. I also demonstrate why it *should not* be exercised by private police, and focus specifically on the context of contemporary market society and urban city.

### 3. Defining private police

#### 3.1. *Why private police cannot do it?*

Since the 1980s, we have been experiencing a paradigm shift from "what happens" to "what works"<sup>45</sup> in policing as well as in academic research on police functions.<sup>46</sup> Due to the perception of living in a 'risk society',<sup>47</sup> police work has started focusing less on maintaining order and crime-related tasks and more on 'lowering the incidence of crime and the level of public insecurity'.<sup>48</sup> In addition, the number of private agencies that deal with minimizing risk has grown,<sup>49</sup> which has led to a co-habitation of traditional public police and the newly established private police. Although private policing is constantly being redefined, it nowadays usually takes the forms of paid private security and unpaid community crime prevention,<sup>50</sup> as identified by Bayley and Shearing, whereby other authors also include new equipment and technological systems (e.g. CCTV) in their definitions of private police.<sup>51</sup>

However, since only order maintenance and law enforcement have been identified as the essential tasks of public police throughout their history, their effectiveness in risk-management is often being questioned.<sup>52</sup> As a consequence, we are currently witnessing a process of 'privatization'<sup>53</sup> of public police in the realms of security and prevention. At

<sup>43</sup> Loader, Walker, *Policing as a Public Good* (2001), p. 14.

<sup>44</sup> *Ibid.*, p. 9–11.

<sup>45</sup> Brodeur, *THE POLICING WEB* (2010), p. 164.

<sup>46</sup> *Ibid.*

<sup>47</sup> Ericson, Haggerty, *POLICING THE RISK SOCIETY* (1997), p. 83–133.

<sup>48</sup> Brodeur, *THE POLICING WEB* (2010), p. 164.

<sup>49</sup> Garland, *THE CULTURE OF CONTROL* (2001), p. 16–19.

<sup>50</sup> Bayley, Shearing, *The Future of Policing* (1996), p. 586–587.

<sup>51</sup> Brodeur, *THE POLICING WEB* (2010), p. 256.

<sup>52</sup> Reiner, *THE POLITICS OF THE POLICE* (2010), p. 147.

<sup>53</sup> Brodeur, *THE POLICING WEB* (2010), p. 256–258.

the same time, public police have started outsourcing some of their activities to private agencies and third parties to improve their performance.<sup>54</sup>

Nevertheless, although the lines between the public- and private police have been blurred, the legitimate use of force to preserve order remains a function of public police even when the latter has outsourced all of its activities to private organisations. Considering the legacy of social contract theory in Western thought, private police still have to rely on public police for the legitimate use of force to preserve order as they lack public consent or mandate to exercise it. Accordingly, private police, like any other agency or specialist,<sup>55</sup> always depend on this role of public police if coercion beyond citizen arrest has to be used in their line of work. It is therefore a function that cannot be carried out by private police without redefining the state's responsibility towards all members of the public under the social contract.

As a consequence, what is intrinsic in public police functions has remained unchanged in contemporary society, despite the fact that private police have become numerous and more visible. Security personnel have indeed expanded and their uniforms do bear a stark resemblance to those of public police officers, but the service of public police officers, according to Bittner, still 'involves the exercise of a unique competence they do not share with anyone else in society'.<sup>56</sup> This competence is therefore their inherent function, which is exclusive, as private police cannot 'coerce a provisional solution upon emergent problems without having to brook or defer to opposition of any kind',<sup>57</sup> as can the public police.

The power of private police derives from contracts that they sign with the clients that hire them, which means that it does not stretch beyond that of either property owners or regular citizens, so they would also have to 'brook or defer' to public police officers if they required them to do so. It thus becomes apparent that, regardless of how many additional private services emerge to tackle potential security issues, the need for public police services stays constant at least *in abstracto*, and will remain so until the threat of force has to be used to preserve order or, in Bittner's words:

"[A]s long as there will be fools who can insist that their comfort and pleasure take precedence over the needs of firemen for space in fighting a fire, and who will not move to make room, so long will there be a need for policemen."<sup>58</sup>

Loader and Walker also recognise this function of public police as their 'logistical virtue'.<sup>59</sup> By mapping it in the continental understanding of policing, they show that

<sup>54</sup> Ibid.

<sup>55</sup> Bittner, Florence Nightingale in Pursuit of Willie Hutton (2005), p. 162.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid., p. 150.

<sup>58</sup> Ibid., p. 166–167.

<sup>59</sup> Loader, Walker, Policing as a Public Good (2001), p. 28.

public police have always been performing the role of the ‘agents of civic governance’<sup>60</sup> that were expected to ‘act in coordination with, or to direct, support or “stand in” for, other agencies in the supply of state-guaranteed goods and services’.<sup>61</sup> However, relying on Ericson and Haggerty,<sup>62</sup> Loader and Walker go on to expose how, in the contemporary context of emphasized risk, the logistic aspect of public policing has been isolated, so the perception of public police as merely ‘brokers of information’<sup>63</sup> for other agencies has become identified as their single and most appropriate role. Nevertheless, it is important to outline the reasons that the authors give against this view because they seem relevant for understanding why public police should focus primarily on their inherent role, that is on offering the use of legitimate coercive force for the preservation of order.

Loader and Walker expose ‘lack of theory of police limits’<sup>64</sup> as the first danger likely to occur if public police were to perform the role of the moderator between different organizations and agencies. In this case, public police practices could diffuse into fields, where they have no place, and spread uncontrollably, as no limits of police power will have been set. Secondly, this would lead to blurred accountability. Lastly, as a consequence of such ‘securitization of social life’,<sup>65</sup> police could start addressing social problems that would be better solved in other realms.

After exposing the reasons why private police cannot carry out the identified inherent function of public police and why public police will continue exercising it in the context of the social contract as we know it, it is important to outline why the potential use of legitimate force to preserve order should also remain exclusively in the hands of public police as a matter of principle. It is to this task that I devote the next section.

### *3.2. Why private police should not do it?*

Private police, especially in the forms of manned security and new technologies, feed on the ‘culture of fear’,<sup>66</sup> which has pervaded Western society since incidents like 9/11 and 7/7. Moreover, the commercial nature of private police makes it accountable to paying clients, not to public interest, as is characteristic for public police under democratic principles.<sup>67</sup> This seems like an appropriate foundation to think about why the role

<sup>60</sup> Ibid., p. 14.

<sup>61</sup> Ibid., p.15.

<sup>62</sup> Ericson, Haggerty, *POLICING THE RISK SOCIETY* (1997), p. 83–133.

<sup>63</sup> Loader, Walker, *Policing as a Public Good* (2001), p. 16.

<sup>64</sup> Ibid., p. 17.

<sup>65</sup> Ibid.

<sup>66</sup> Furedi, *CULTURE OF FEAR* (2002), p. 15–18.

<sup>67</sup> Bayley, Shearing, *The Future of Policing* (1996), p. 596.

that I have identified as inherent to public police should not be provided by the private police as a matter of principle.

Namely, if the function of the potential use of legitimate force for the preservation of order were to be contracted-out to the private sector, security and general order would become market goods and would be provided only to those that could afford them, whereby their generality, i.e. their intrinsic belonging to society as a whole, would be diminished. This could lead to a ‘spiral of amplification of risk’,<sup>68</sup> which would make urban space even further divided into zones of risk-management<sup>69</sup> and unprotected zones of social disorder. Not only would this contribute to further social inequality through crime displacement and increased vulnerability of the excluded, but it could also have paradoxical consequences for the included, as this kind of strategy would ‘provid[e] a constant, and potentially debilitating reminder of the self-limiting, costly and contingent quality of the version of security to which it subscribes’.<sup>70</sup>

The outlined reason, why the provision of order through the legitimate use of force should not be a private police function, even if it could be, is also considered by Loader and Walker as the ‘economic virtue’<sup>71</sup> of how they define the role of public police. They see this virtue as a ‘guarantor of collective provision’,<sup>72</sup> namely as the one supplying the ‘*public* good of security’.<sup>73</sup> As security, according to them, is ‘most *efficiently* provided in a compulsory collective manner’,<sup>74</sup> *private* security is actually a contradiction-in-terms.<sup>75</sup>

This could also explain why the narratives of people, interviewed by Girling, Loader and Sparks in one of the prosperous provincial British towns, were imbued with anxieties about crime, but they, nevertheless, intuitively opposed the ‘idea of market in policing’.<sup>76</sup> Public police are, traditionally, part of national identity and a ‘symbol of state and nation’.<sup>77</sup> This is also the fourth and last element that Loader and Walker perceive as essential for the formation of policing as a ‘thick public good’.<sup>78</sup>

Since only the state can combine the coercive, logistic, economic and cultural virtue into a ‘community of attachment’,<sup>79</sup> imbued with the value of equality, only public po-

<sup>68</sup> Rose, *Government and Control* (2000), p. 194.

<sup>69</sup> Davis, *CITY OF QUARTZ* (1998), p. 223–263.

<sup>70</sup> Loader, Walker, *Policing as a Public Good* (2001), p. 19.

<sup>71</sup> *Ibid.*, p. 28.

<sup>72</sup> *Ibid.*, p. 18.

<sup>73</sup> *Ibid.*, p. 18–19.

<sup>74</sup> *Ibid.*, p. 18.

<sup>75</sup> Loader, *Private Security and Demand for Protection in Contemporary Britain* (1997), p. 143–155.

<sup>76</sup> Girling, Loader, Sparks, *CRIME AND SOCIAL CHANGE IN MIDDLE ENGLAND* (2000), p. 154–159.

<sup>77</sup> Loader and Walker, *Policing as a Public Good* (2001), p. 20.

<sup>78</sup> *Ibid.*, p. 25–28.

<sup>79</sup> *Ibid.*, p. 28–29.

lice can preserve order through the use of force. As the latter is therefore a *conditio sine qua non* for a viable democratic society based on the social contract, this function could not be undertaken by the private police without a redefinition of state sovereignty and a reconfiguration of order as such in democratic societies.

However, the ‘state-policing nexus’<sup>80</sup> is always, at the same time, ‘historically contingent’.<sup>81</sup> I therefore continue by showing how the role of public police, and therefore its inherent functions, depends on its legitimacy as well as how legitimacy depends on different aspects of police work in Western democracies as opposed to pre-democratic states in transition. I conclude by indicating that, in a time of increased ‘secondary visibility’<sup>82</sup> of police practices, two alternatives to state sovereignty, and hence two additional ways of thinking about public and private police functions, arise.

#### 4. The legitimacy of public police as a precondition for its inherent function

In a democratic state, public police can only exercise their inherent functions if they are perceived as legitimate and if they can be held accountable for their actions. Tyler defines legitimacy as a ‘psychological property of an authority [...] that leads those connected to it to believe that it is appropriate, proper and just.’<sup>83</sup> Furthermore, Jason and Tyler’s study of police legitimacy in the US has shown that police legitimacy relies mostly on procedural justice.<sup>84</sup> Fair treatment of citizens by the police is essential, as it strengthens the bonds between individuals and authority as well as increases citizens’ intuitive duty to obey.<sup>85</sup> In the UK, results of a study conducted by Jackson et al. have shown that legitimacy is not only internal recognition of power, but also a justification of power as a sense of moral alignment. Both of these aspects have been proven to increase public cooperation and identification with the police in a country with a strong historical ethos.<sup>86</sup>

As the cited studies illustrate how police legitimacy and public cooperation rely on procedural justice, it is apparent that, in a democratic state, police can influence the way in which the public perceives them by controlling how they treat its members.<sup>87</sup> In addi-

<sup>80</sup> Ibid., p. 9–11.

<sup>81</sup> Ibid., p. 28.

<sup>82</sup> Goldsmith, *Policing’s New Visibility* (2010), p. 914.

<sup>83</sup> Tyler, *Psychological Perspectives on Legitimacy and Legitimation* (2006), p. 375.

<sup>84</sup> Sunshine, Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing* (2003), p. 513 and p. 523–524.

<sup>85</sup> Ibid., p. 514.

<sup>86</sup> Jackson, Bradford, Stanko, Hohl, *JUST AUTHORITY?* (2012), p. 12–13.

<sup>87</sup> Sunshine, Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing* (2003), p. 535–536.

tion, neighbourhood characteristics also influence police legitimacy, as the latter is found to be higher in neighbourhoods with increased levels of collective efficacy and lower in socially disordered neighbourhoods.<sup>88</sup>

Nevertheless, it is important to note that legitimacy can depend on different components of police work in a community in which police practices have a 'legacy dating back to the pre-democratic era',<sup>89</sup> where there is either no general consent for public policing or where this consent has been withdrawn. According to Steinberg, in the context of disorderly South Africa, legitimacy does not only depend on fair intervention in emergency situations, but also on instrumental goals, namely the effective investigation of violent crime.<sup>90</sup> Relying on Bittner's work, he concludes that a 'precondition of democratic policing is that there is demand for it among the general population'.<sup>91</sup>

The role of preserving order through the legitimate use of force, which I have described as inherent to public policing and excluded from the realm of private police thus seems to depend on the 'place of security in urban life'<sup>92</sup> of a particular setting. Where order is yet to be established, the status of this role is relativized. In other words, when the bond between the people and the state is weak due to a lack of consent, the role of public police to use force for order maintenance is not absent, but it is not exclusive either, and is subject to permission of 'the crowd'.<sup>93</sup> Although 'localized [...] problem-solving'<sup>94</sup> can be, in such a setting, carried out by individuals and private agencies that are better 'placed to *prevent* crime and disorder',<sup>95</sup> public police can, nevertheless, start increasing their legitimacy, although differently than in a democratic setting. They can gain trust not only through procedural justice, but also through their effectiveness in monitoring private police and 'promoting democratic life and freedoms'.<sup>96</sup>

Highlighting the difference between public police legitimacy in a democratic state as opposed to a state where democratic principles are either hindered or have not yet evolved is important for two main reasons. Firstly, it shows that legitimate use of coercive force for the preservation of order is intrinsic to public police that has the consent of the people. Secondly, it makes clear that public police with consent is intrinsic only to an orderly and trustworthy setting, based on the social contract and imbued with democratic

<sup>88</sup> Jackson, Bradford, Stanko, Hohl, *JUST AUTHORITY?* (2012), p. 15.

<sup>89</sup> Steinberg, *Establishing Police Authority and Civilian Compliance in Post-Apartheid Johannesburg* (2012), p. 481, 487.

<sup>90</sup> *Ibid.*, p. 490.

<sup>91</sup> *Ibid.*, p. 482.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, p. 484.

<sup>94</sup> Marks, Wood, *South African Policing at a Crossroads* (2010), p. 311 and p. 317.

<sup>95</sup> *Ibid.*, p. 321.

<sup>96</sup> *Ibid.*

values. I have shown why the function, inherent in public police, cannot and should not be carried out by private police, but also how the functioning of public police depends on their legitimacy. Once legitimacy has been established, it is only the public police that can preserve order and security *equally* by exercising its intrinsic function.

## 5. Discussion

Social contract theory may seem like a relic of the past, but it is still essential for understanding how the security of each community member can only be maintained in social conditions of general order. Especially in a time when most aspects of social life in Western societies are profit-driven and subject to the managerialist ideology, the state as sovereign authority can preserve this order for all its citizens equally only through an institution of public police. While preventing inequality is the main reason why this function cannot and should not be transferred to private police, public police should not take it for granted, since the mandate that they were given to exercise it depends on their legitimacy and is an extension of peoples' tacit consent under the social contract.

However, in an era of increased 'secondary visibility',<sup>97</sup> public police, both in Western democracies and in pre-democratic states, should not only strive for legitimacy, but should also consider their accountability. As they are undoubtedly the most exposed state institution,<sup>98</sup> they may have to start defending themselves in the 'court of public opinion'.<sup>99</sup>

Even though territoriality remains central for defining the limits of state authority, globalisation has extended the 'arena of expectation[s]'<sup>100</sup> within territorial borders. Furthermore, opinions are more often being voiced publicly both through media as well as through rapidly multiplying social networks. This makes way for a new form that cannot easily be placed within the dyad of either public or private, but can still account for what is known as *policing*. Citizen-based initiatives of individuals 'armed' with mobile phones and digital cameras therefore predict a new era of public police accountability.

Footage of police brutality and malpractice, similar to that in cases of Rodney King and Ian Tomlinson to name a few, as well as their possible rapid circulation across the internet might escalate the 'controversy about police use of force.'<sup>101</sup> As the 'Dirty Harry[s]'<sup>102</sup> within police forces may therefore become the most visible representatives of public police, they might start symbolising how the state, as a sovereign authority,

<sup>97</sup> Goldsmith, *Policing's New Visibility* (2010), p. 914.

<sup>98</sup> Chermak, Weiss, *Maintaining Legitimacy Using External Communication Strategies* (2005), p. 501, 502.

<sup>99</sup> Goldsmith, *Policing's New Visibility* (2010), p. 916.

<sup>100</sup> Silver, *The Demand for Order in Civil Society* (2005), p. 19.

<sup>101</sup> Reiner, *THE POLITICS OF THE POLICE* (2010), p. 102.

<sup>102</sup> *Ibid.*, p. 101.

exercises its mandate to maintain order through the use of force. Consequently, public consent could be withdrawn and the social contract could be terminated. On an abstract level, it is possible to imagine two outcomes of this termination – a dystopian and a utopian version.

The first is a post-democratic return to the natural state of ‘war [...] of every man against every man’,<sup>103</sup> in which there is no general order, so both private and public police cease to exist and become irrelevant until order is yet again produced. The second is a hyper-democratic society, which refuses institutionalized authority, but nevertheless manages to preserve general order through respect of diversity. While common in many ‘irrational creatures’,<sup>104</sup> in humans, this kind of social organization would only be possible in conditions of high horizontal and vertical collective efficacy, where people maintained order through effective and fair self-policing. Although it may seem unreasonable at first glance, imagining this utopian world is not wholly unimportant when rethinking the functions and definitions of public and private police.

In contemporary Western society, in which the state is the sovereign authority that represents all of its citizens and has their mandate to use force, order is preserved through public *police* as its agent. In the utopian version of society, there would be neither a sovereign authority nor the use of force, but order would still be preserved by the collective engagement of all people, exercising what could thus be recognized as public *policing*.

The precondition of any viable society is the existence of general order, which is preserved with the contribution of all its members. Preservation of order is therefore always intrinsic to the public realm. Since it is obviously ‘*policing* [that] is a universal feature of social relations, [not] specialized *police* institutions’,<sup>105</sup> the way in which society is organised will determine whether preserving order will be carried out by an uninstitutionalized body, or an institutionalized entity. In a democratic social organisation, where its members have passed the right for legitimate use of force to preserve order on to the state under the social contract, this function can only be carried out by public police and thus cannot and should not be carried out by private police.

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<sup>103</sup> Hobbes, LEVIATHAN (1998), p. 84.

<sup>104</sup> Ibid., p. 113.

<sup>105</sup> Reiner, THE POLITICS OF THE POLICE (2010), p. 39.

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**Grožnja z uporabo prisile pri zagotavljanju javnega miru:  
opredelitev policijske funkcije, ki je lastna javni policiji, in funkcij policije,  
ki jih ne morejo izvrševati zasebniki**  
(povzetek)

Kriminologi, ki se ukvarjajo s proučevanjem družbenega nadzora in policije (angl. *policing*), imajo pogosto različna mnenja o tem, kaj je policija, kdo so policisti in kakšne so funkcije policije v sodobni družbi. Čeprav sta opredelitev *policinga* in njegov *raison d'être* zato nejasna, se teoretiki in praktiki strinjajo, da se naloge javne policije, ki jo je ustanovila država, v vseh pravnih redih danes hitro spreminjajo. Po eni strani se povečuje število zasebnih policijskih institucij in varnostnih agencij, ki opravljajo nekatere tradicionalne naloge javne policije, po drugi pa je v marsikateri državi tudi javna policija svoje storitve začela ponujati na trgu. Zato velja raziskati, ali kljub temu obstaja policijska funkcija, ki je lastna javni policiji in je ne morejo izvrševati zasebniki, ter, če obstaja, zakaj ima tak položaj.

Politična oblast v modernih državah se že od razsvetljenstva naprej pogosto razlaga s teorijami družbene pogodbe. Odločilne so tudi za razumevanje političnih procesov, prek katerih se skupnost ljudi zaradi zagotavljanja javnega reda odpove popolni osebni svobodi in pooblasti suverena oziroma drugo avtoriteto za uporabo prisile v njenem imenu. Ker je javna policija državna institucija, ki je pooblaščen za uporabo prisile zaradi zagotavljanja javnega reda, tesnih vezi med javnostjo in policijo v Veliki Britaniji ni mogoče pripisati le posebnim okoliščinam ob koncu 20. stoletja, ko so se družbeni konflikti stabilizirali zaradi vključitve delavskega razreda. Čeprav je britanski policiji zaradi teh razmer verjetno uspelo ohraniti javno podporo kljub številnim kontroverznostim, je treba z njo povezani slogan »*policing s soglasjem*« (angl. *policing by consent*) kljub temu interpretirati širše, in sicer kot soglasje, ki ji ga je dalo ljudstvo na podlagi družbene pogodbe. *Policing by consent* je zato znak udejanjanja družbene pogodbe v praksi.

Za Egona Bittnerja je *grožnja z legitimno uporabo prisile* poglobitna funkcija javne policije. Čeprav si policija v modernih državah na prvi pogled to nalogo deli z vojsko in upravo za izvrševanje kazenskih sankcij, grožnje z legitimno uporabo prisile ni mogoče razumeti ločeno od njenega namena, ki je ohranjanje javnega reda. Pri poskusu opredelitve policijske funkcije, ki je značilna za javno policijo in je ne morejo izvrševati zasebniki, sta zato tako *ohranjanje* kot tudi *javni red* enako pomembna dodatna elementa.

Jean-Paul Brodeur zagovarja stališče, da javna policija pomaga ohranяти red, ki je bil prej vzpostavljen drugače. Bittner opozarja, da red, ki ga javna policija ohranja, vsebinsko opredelijo šele okoliščine, na katere se odzove. Ker policija mora in je upravičena ukrepati v vnaprej nedoločljivem številu in vrsti urgentnih situacij, imata Loader in Walker prav takšno legitimno uporabo prisile za funkcijo, ki je lahko značilna le za javno policijo. Iz spodaj navedenih razlogov te funkcije *ne morejo* in *ne smejo* opravljati zasebne policijske institucije.

V Veliki Britaniji se javna policija od 80. let 20. stoletja naprej ne posveča le odzivanju na kriminal, temveč se osredotoča tudi na njegovo preprečevanje in na zmanjševanje tveganja. Hkrati se povečuje število zasebnih varnostnih agencij, tako da tradicionalna javna policija in na novo ustanovljena zasebna policija v Veliki Britaniji danes sobivata. Ne glede na to, da so se meje med nekaterimi nalogami javne policije in zasebnikov zato zabrisale, zasebniki kljub temu ne smejo legitimno uporabiti prisile za zagotavljanje javnega reda, razen pridržanja do prihoda policije, saj nimajo javnega mandata za izvrševanje te funkcije. Zato gre za nalogo, ki je *ne morejo* opravljati zasebniki.

Če bi javna policija funkcijo grožnje z legitimno uporabo prisile pogodbeno prenesla na zasebnike, bi varnost in javni red postala tržni dobrini, ki bi bili dostopni le posameznikom z zadostnimi sredstvi, kar bi izničilo njuno splošnost oziroma pripadnost skupnosti kot celoti. To ne bi privedlo le do poglobljanja neenakosti zaradi prestavitve kriminala in povečane ranljivosti izključenih in marginaliziranih posameznikov ter skupin, ampak bi lahko imelo paradoksalne posledice tudi za vključene, saj bi jim zagotovilo le omejeno različico varnosti. Ker je zasebna varnost pravzaprav protislovna, samo javna policija pa lahko *enakopravno* zagotavlja red z grožnjo z legitimno uporabo prisile, je to funkcija, ki je *ne smejo* opravljati zasebniki.

Funkcija grožnje z legitimno uporabo prisile za ohranjanje javnega reda je zato *conditio sine qua non* za demokratično ureditev, zasnovano na podlagi družbene pogodbe, in je v sedanjih razmerah ter brez spremembe konceptov državne suverenosti in javnega reda ne bi mogli in smeli izvrševati zasebniki. Ne glede na to pa javni red ni samoumeven in sta tako njegovo ohranjanje kot tudi inherentna funkcija javne policije odvisna od legitimnosti policije in njene odgovornosti. V preddemokratičnih družbah, v katerih je red šele treba vzpostaviti, je omenjena funkcija javne policije omejena.

Kadar je vez med ljudstvom in državo šibka, ker oblast nima javnega soglasja, javna policija pooblastilo o uporabi grožnje z legitimno uporabo sile za ohranitev javnega reda

sicer ima, ni pa dodeljeno izključno javni policiji, zato to funkcijo, čeprav neenakopravno, izvršujejo tudi posamezniki ali zasebne entitete. Iz tega izhaja, da je funkcija grožnje z legitimno uporabo prisile za zagotavljanje javnega reda inherentna le javni policiji, ki ima soglasje ljudstva, taka policija pa je značilna le za družbo, ki temelji na veljavni družbeni pogodbi in demokratičnih vrednotah. Šele ko je javna policija *legitimna* (angl. *legitimate*), lahko enakopravno skrbi za javni red z izvrševanjem svoje funkcije.

Navsezadnje je mandat, ki ga ljudje podelijo javni policiji za izvrševanje njej lastne funkcije, odvisen tudi od *odgovornosti* (angl. *accountability*) policije do javnosti. Danes je javno mnenje pogostejše glasnejše in bolj množično slišano zaradi digitalizacije medijev, svetovnega spleta in družabnih omrežij, zato je javna policija postala najbolj izpostavljena državna institucija, povečana prepoznavnost njenih napak in zlorab pa bi v kratkem lahko pripeljala do umika javnega soglasja in preklica družbene pogodbe. Na abstraktni ravni si je mogoče zamisliti dva razpleta takega scenarija – distopičnega in utopičnega. Pri utopičnem funkcije grožnje z uporabo legitimne prisile za zagotavljanje javnega reda ne bi izvrševala javna ali zasebna *policija*, temveč bi bila zagotovljena z družbenim nadzorom in policijo (*policing*), ki bi kljub vsemu pripadla sferi *javnega*.

