Introduction

Societies differ both in their perception of public order and in the methods of its enforcement that they consider appropriate, and, of course, both may change over time in any given society. Modern societies have become accustomed to specialized law enforcement agencies called police that are authorized to regulate social conflicts, if need be, by employing physical force. They represent the state's claim to the 'monopoly of legitimate physical violence' (Weber 1972: 29, 183, 516) with respect to internal relations, whereas the army does the same with respect to the outside world. The establishment of a police apparatus that is supposed to guarantee impartial enforcement of the rules of public order and become functionally differentiated from the military forces is, however, a rather recent achievement from the perspective of universal history. The breakthrough to this solution during the eighteenth and nineteenth centuries arose out of new demands on public order but met with considerable objections as to the political dangers and the repercussions upon societal self-regulation that it would imply.

One of the leading proponents of police reform in late-eighteenth-century England, Patrick Colquhoun, called 'police in this country . . . a new science; the properties of which consist not in the Judicial Powers which lead to punishment, and which belong to Magistrates alone, but in the prevention and detection of crimes, and in those functions which relate to internal regulations for the well ordering and comfort of Civil Society'. An anonymous opponent criticized Colquhoun's proposal, however, as calling for 'a new engine of Power and Authority, so enormous and extensive as to threaten a species of despotism and inquisition hitherto without a parallel in this country'.[1] All of the police reformers argued,

[1] Colquhoun's tract, *A Treatise on the Police of the Metropolis*, first published in 1796, was by 1800 already in its sixth edition; the anonymous critic quoted takes issue with this edition. The quotations are taken from Philips (1980: 155).

with John Fielding, that 'the government of a City or Country, so far as regards the Inhabitants ... must always be suited to the Nature of the Government and Constitution of the Country', and that 'the police of an arbitrary government differs from that used in a Republic, and a Police proper for England ... must always be agreeable to the first nation of the Liberty of Subjects'.[2] This did not, however, dispel the fear that the example of French absolutism might be followed in England.

These quotations should suffice to stress that the case of ancient Rome should not be approached from a point of view that assumes not only the existence of a police force, but also a degree of public order analogous to that which (in theory at least) is achieved in modern developed societies. To detect the rationale that may underlie the Romans' attitudes and methods, we must instead look for the correspondence of these attitudes and methods with fundamental features of their political and social structures and values. We must also consider how 'functions which relate to internal regulations for the well ordering and comfort of civil society' can be fulfilled without employing any substantial governmental apparatus.

A most conspicuous difference between the ancient and the modern experience is illustrated by Colquhoun's argument about the 'prevention and detection of crimes'. That (apart from cases of high treason) the state itself should assume such a task and not leave it to the vigilance of its citizens was a notion quite foreign to the Romans, at least during Republican times (Mommsen 1899: 297). Not only did the authorities as a rule decline to engage in prevention, detection and public prosecution of everyday criminality, but Roman criminal law itself covered a much more restricted scope than that of modern societies: theft, damage to property, assault and slander were considered torts and subject to civil proceedings, which, however, issued in fines in addition to the property value concerned (Strachan-Davidson 1912: 1, 39). We do not even know to what degree (if at all) the Roman authorities undertook the prosecution of murder. It is unclear whether in ordinary (not politically dangerous) cases in the Early and Middle Republic such crimes were really prosecuted by magistrates before

[2] *Extracts from such of the Penal Laws as particularly relate to the Peace and Good Order of this Metropolis* ... London (1768) 3.

the popular assembly or if even that was left to suits on private initiative, or whether the jury courts of the Late Republic, whose action presupposed charges brought by a citizen, were the only place in which criminal proceedings occurred.

As is so often the case in ancient history, the selectivity and bias of our sources are serious problems. There are only a few chance or indirect references to the treatment of everyday conflicts, and down to the first century BC we know almost nothing about public order in the municipalities which became part of Roman Italy. There is of course ample evidence with respect to the issues of public order connected with the political turmoils of the Late Republic, but we can only broadly compare this evidence with that for earlier periods. The annalistic tradition provides for the Middle Republic only a few details on decision-making processes, and (whatever their merits for the outlines of constitutional history) the embellished accounts of the Early Republic are probably furnished with projections from Late Republican scenes. Liveliness and love of detail are inversely proportional to authenticity. We can learn more from comparison with the situation of Imperial times, which shows that the emergence of important governmental agencies only to a certain degree implies an increase in the objective level of public order; rather, decisions whether action should be taken and what means were appropriate had become subject to the often erratic discretion of individual rulers and governors.

We cannot fill the lacunae of our evidence with comparative materials, but comparison can indicate the range of possible solutions to structurally similar questions. This helps us to avoid the modernist fallacy of assuming governmental response instead of societal self-regulation, and to indicate which of the features that we encounter were concomitants of unique Roman political and social structures and which have nothing at all to do with Roman peculiarity, much less Roman failure. Finally, comparison should also help us guard against a certain overestimation of our subject: problems of law and order are a basic component of the crisis of the Republic, and they also reflect the achievements and (old and new) deficiencies of the Empire, but they cannot be held responsible for the fall of either. That the subject deserves close study for its historical as well as current interest should, however, become clear from the following pages.

CHAPTER 1

Republican principles of policing

THE DISPLAY OF MAGISTERIAL AUTHORITY

In the political order of Republican Rome, the higher magistrates, because of their overall responsibility for the *res publica*, had at their disposal means of enforcement that were only to a limited extent available to the magistrates specifically entrusted with particular police duties. Furthermore, a fundamental principle of the Republican constitution was the distinction between the city and the world outside (Rüpke 1990: 29–51). The sacred boundary (*pomerium*) constituted the city of Rome (*urbs*) as a pacified sphere from which military power was excluded (Gell. *Noctes Atticae* 10.15.4; 15.27.5; Varro, *De re rustica* 3.2.4); the *auspicia* taken for the field became invalid once the returning magistrate had crossed the *pomerium*. Keeping the army out of the city was understood as an aspect of political freedom (Cic. *Philippicae* 5.21). Thus the higher magistrates, although possessing both civil and military responsibility, were not allowed to use military means to maintain law and order within the city. In this the Roman Republic was fundamentally different from many other pre-modern states, which, although lacking a police force in the strict sense, could still mobilize military force as a last resort (Finley 1983: 18–23).

Rome in fact had no standing army, only a militia that (probably until the mid-second century BC) was dissolved and newly recruited annually (Gschnitzer 1981). The distinction between the military and civil capacities of the magistrates precluded any recourse to conscripts within the city, subject to military discipline by virtue of their oaths (Dion. Hal. *Antiquitates Romanae* 11.43.2; cf. Livy 7.16.8; Tondo 1963; Nicolet 1976: 141–9). Instead, in a crisis the Roman authorities were dependent on volunteers, who were likely to appear in sufficient numbers only if they were convinced of the reality of the danger.

There was also no specialized magistracy chiefly or exclusively responsible for maintaining public order. During the first centuries of the Republic, the system of magistracies became progressively more differentiated as new offices were created to perform particular functions once entrusted to the highest magistrates. The differentiation of functions was more a matter of a routine division of labour than of a clear-cut allocation of legally defined competences, and the chief magistrates retained their overall responsibility. It was they, too, rather than the lesser magistrates, who commanded the most powerful means for enforcing obedience.

Coercitio

The special instrument of enforcement which a magistrate possessed was what is called *coercitio*, a coinage of modern scholarship designed to cover the various measures a magistrate could apply to enforce obedience without instituting legal proceedings.[1] Included under it were scourging and execution (exclusively associated with the *imperium* of the chief magistrates: that is, their comprehensive military and judicial power), arrest and imprisonment, and the imposition of fines up to a certain maximum. Higher fines could result from a formal trial before the People in which the magistrates assumed the role of accuser. It was understood that only magistrates with *imperium* could issue orders to a citizen, summon one or have one arrested without the magistrate being present in person (Varro quoted by Gell. *NA* 13.12.6; Giovannini 1990: 432–3).

This catalogue of possible measures is not an enumeration of legally defined powers: a magistrate might impose any other measure he thought appropriate but in that case would face the possible objection that he was acting without precedent. For instance, the consul Gabinius' deportation order against a Roman knight in 58 was sharply criticized by Cicero as without foundation in previous practice (*Epistulae ad familiares* 11.16.2; on expulsion of foreigners, see Mommsen 1871–88: II, 139, n. 4). Even more extreme was Mark Antony's ploy as consul in 44, when he threatened Cicero with the destruction of his house if he refused to attend a

[1] See, however, Cic. *De legibus* 3.6 and, for technical usage by jurists, *Digesta* 1.2.2.16; 1.16.6pr.

Senate meeting (Plut. *Cicero* 43.7). In certain cases, for example, with respect to the public water supply, the use of *coercitio* could even involve intrusion upon the property rights of private persons.[2]

The most severe measures, scourging and decapitation, were banned once the plebeians had succeeded in establishing the right of appeal to the popular assembly (*provocatio*), instead of being subjected to the arbitrary action of the magistrates. This is not the place to deal with the vexed question of the development of *imperium* and *provocatio* during the so-called Struggle of the Orders (Martin 1970; Lintott 1972; Humbert 1988). It will suffice to state that from the Middle Republic onward – say, from the passage of the *lex Valeria de provocatione* in 300 – a ban on scourging and execution within the city was formally recognized and that later, with the *leges Porciae* of the early second century, it was supported by the introduction of a penalty for the violation of *provocatio* and the exemption of citizens from these measures in Italy and the provinces as well, the tendency of some provincial governors to ignore claims notwithstanding (Cic. *2 In Verrem* 5.163; *Fam.* 10.32.3; Lintott 1993: 68). Exemption from the humiliation of corporal punishment underlined the distinction between citizens and Roman subjects (including Italian notables, as some scandalous second-century cases show: see quotations in Gell. *NA* 10.3), as well as between citizens and slaves (Saller 1991). Thus, *provocatio* had become an essential aspect of *libertas* (Livy 3.45.8; Cic. *2 Verr.* 5.163).

Decapitation with the axe was preceded by scourging with rods, probably a sacral rite serving to expel the delinquent from the community and avoid polluting citizens (and the scourging lictors) with his blood (Gladigow 1972: 311–12). Some well-known cases in which this sort of capital coercion was applied show that its primary purpose was to enforce military discipline (Val. Max. 2.7.6).[3] This was the case with mutinous soldiers (e.g., in the Spanish theatre of war in 206: Livy 28.29.11), and in a spectacular way when an example was made of a member of the aristocracy itself. The famous story of the execution of his son by T. Manlius

[2] As a rule the magistrates would, however, arrange for adequate financial compensation (Pennitz 1991).

[3] Cf. the suggestion by Timpe (1990: 379–9) that the original purpose was to impede private warfare. On *disciplina militaris* as complementary to *imperium*, see Lind (1986: 61–7).

Imperiosus Torquatus in 340 (below p. 31), and the tradition of political conflicts in which a *dictator* threatened to use *coercitio* against his *magister equitum*, reported for 325 and 217 (Livy 8.32.8–10, 22.27.3), provide conspicuous illustrations. There are also some cases of exemplary punishment in which the property of citizens was confiscated or even the persons themselves sold into slavery for having refused to respond to a levy or to declare their property at the census or for having deserted the colours (Livy, *Periochae* 14, 55; Varro quoted by Nonius p. 28 L; Val. Max. 6.3.4; Dion. Hal. *Ant. Rom.* 4.15.6). The first recorded instance is in 275; magistrates probably had developed this practice as a sort of substitute for the measures banned by the laws of *provocatio* (Drummond 1989: 221).

Additional power to enforce military discipline against groups of citizens lay with the censors, who could demote persons charged with neglect of their duties; for example, four hundred knights were deprived of their public horses in 252 (Val. Max. 2.9.7; Frontin. *Strategemata* 4.1.22), and two thousand ordinary citizens were reduced to the status of *aerarius*, which probably meant loss of voting rights and/or liability to increased taxation, in 214 (Livy 24.18.7–8). In 204 one censor even threatened to treat in this way the members of all but one of the thirty-five tribes (Livy 29.37.13). In other cases censors enforced rules concerning public land and water supply by fining trespassers (who probably belonged to the higher social classes) and removing buildings which had been illegally erected.[4]

In the great majority of cases reported from the Middle Republic onward involving measures such as temporary imprisonment, fining or seizing a pledge (*pignoris capio*), it was a matter of conflict within the ruling élite: a higher magistrate opposing a lower one (Livy 42.9.4) or debarring a candidate for office who was not properly qualified (Val. Max. 9.7.1), a consul disciplining a senator who refused to appear (Varro quoted by Gell. *NA* 14.7.10; Stroux 1938), or a consul in the chair confronting a senator who tried to obstruct the proceedings (Ateius Capito quoted by Gell. *NA* 4.10.8).[5] Examples include the clash between the consul L. Marcius Philippus and the former censor L. Licinius Crassus in 91 (Cic. *De oratore* 3.4), and Caesar's attempt in 59 to stop Cato's filibuster

[4] E.g., in 184 (Cato, *ORF* no. 8, fr. 99–105; Livy 39.44.4) and in 169 (Livy 43.16.4–5).
[5] For cases in which the *sella curulis* of a praetor was smashed by order of a consul or tribune, see David and Dondin (1980).

by having him imprisoned (Suet. *Divus Iulius* 20.4). As a rule, these political demonstrations were quickly abandoned either voluntarily or upon the intervention of tribunes. Although the enforcement of general rules by way of *coercitio* was subject to highly erratic decisions arising from conflicts between individual officials, even their rather idiosyncratic employment underlined their general validity.

The censors similarly supervised morality (*regimen morum*), whether formal rules such as the sumptuary laws or simply the generally accepted standards which the Romans liked to ascribe to ancestral tradition (*mos maiorum*) (Polay 1971; Astin 1988; Baltrusch 1989). Public morality in the Roman Republic was not (or not primarily) a matter of disciplining the bulk of the citizenry. In practice, senators and knights were the chief objects of censorial punishment, which took the form of loss of membership of the Senate and of public horses respectively (see Livy 4.8.2). Apart from the dramatic cases mentioned above, these measures would as a rule be applied to small numbers – an individual senator or a few dozen knights – and only at intervals of five or often more years. The underlying assumptions were that the upper classes ought to control themselves and that their proper conduct, on the one hand, and the loss of honour for some of their members, on the other, would set an example for the citizenry as a whole (Cic. *Leg.* 3.28–9). Thus the story went that during the censorship of Tiberius Sempronius Gracchus in 169 people put out their lamps when the censor returned home after supper in fear of being suspected of indulging in drinking bouts (Plut. *Tiberius Gracchus* 14.3). Some censors are known to have addressed the general public on public morals (for example, Gell. *NA* 5.19.15 on Scipio Aemilianus).

There was no defined catalogue of offences which the censors might punish, and there were no theoretical limits to the spheres of conduct which they might review. Greek observers were amazed that not even the most private spheres were excluded from censorial scrutiny – that censors' authority, as Dionysius of Halicarnassus (*Ant. Rom.* 20.13.3) put it, extended even to the bedchamber. The Greeks (with the possible exception of the Spartans) knew no real equivalent: freedom from intervention in the private realm had always been characteristic of Athenian democratic ideology and practice (Thuc. 2.37.2). Even institutions such as the so-called *gynaikonomoi* (supervisors of women) as they are known from Athens under the autocratic régime of Demetrius

of Phalerum (317–307 BC) and from other Greek cities, though they were apparently used to enforce specific rules regarding banquets and the public appearance of women, did not, as far as we know, violate the boundary between public and private spheres in the way the Roman censors appeared to do (Athenaeus 245a–c; 521b–c; cf. Arist. *Politics* 1322b37–23a5; Wehrli 1962; Gehrke 1978). This impression had obviously been created by certain incidents which, though unusual, had become part of the stock of examples associated with the censorship, for example, the elder Cato's expulsion of a senator for having kissed his wife (or having embraced her more intimately) in broad daylight in front of his daughter (Plut. *Cato Maior* 17.7). Erratic decisions and, indeed, measures primarily motivated by political or even personal concerns, could be considered part of the rationale for the institution provided they were presented as based on generally accepted standards.

The censors could not, however, systematically scrutinize the private and public conduct of senators and knights. Compliance with the sumptuary laws, with their detailed rules about numbers of guests, annual outlays for dinners, etc., was unverifiable (Gruen 1990: 172–3). As a rule the censors would respond only if illicit behaviour had become a matter of common knowledge or at least rumour, or if fellow-citizens had denounced it (Macrob. *Saturnalia* 3.17.1). It was for the censor to decide whether to act on his own initiative or wait for a member of the public to come forward with a specific accusation (Val. Max. 6.2.8). Scipio Aemilianus declared in 142 that he would not proceed against a knight suspected of perjury if no one was prepared to accuse him (Cic. *Pro Cluentio* 134; Val. Max. 4.1.10); this was apparently an unusual proceeding, again demonstrating the range of discretion that the censors could exercise. They would, as a rule, give the accused person a formal hearing, but could proceed without one (Tatum 1990a: 38). Like that of *coercitio*, the public effect of censorial punishment depended not on its blanket application to the greatest possible number of violators of public order, but on its exemplary and unpredictable use especially against members of the upper classes.

The same pattern recurs with respect to the tribunes of the people, who could also have recourse to a sort of coercive action (see catalogue of cases in Thommen 1989: 187–91). These powers, however, like their function as public prosecutors (Bleicken 1968: 106–49), stemmed from the sacrosanctity which had allowed them

to usurp rights during the Struggle of the Orders (when in their confrontations with the patrician magistrates the tribunes had been backed up by the plebeians' oath to slay anybody who touched a tribune). As a consequence, they could employ their equivalent of *coercitio* only directly and in person; for example, they could arrest citizens on the spot but were not entitled to issue summonses (Labeo and Varro cited by Gell. *NA* 13.12.4, 6). The most spectacular actions – throwing someone from the Tarpeian Rock or consecrating his goods to Ceres, the goddess of the *plebs* – revealed most clearly the origin of these powers in the tribunes' primitive function of defending individual plebeians, as well as the rights of the plebeian community as a whole, against encroachments by the then exclusively patrician magistrates (Dion. Hal. *Ant. Rom.* 7.17.5; Cic. *De domo sua* 123–5). From the Middle Republic onward, the tribunes had also undertaken to curb obstinate members of the ruling élite on behalf of the Senate (Bleicken 1968: 83–94). Thus in 109 a censor whose colleague had died in office was persuaded to abdicate only by the tribunes' threat to imprison him (Plut. *Moralia* 276F), whereas the same course of action against the censor Ap. Claudius Caecus in 310 had failed because three tribunes had accepted his appeal (Livy 9.34.26). In most cases the use of coercion by tribunes was simply a component of conflict within the political élite; as a rule its ultimate consequences were avoided, if need be, by the intervention of another tribune. The intercession of colleagues, even if there had been no formal appeal to them, was the only remedy available against a tribune who exceeded the specific competences of this peculiar magistracy. Thus, for example, in 131 C. Atinius Labeo was restrained from carrying out the archaic ritual on the Tarpeian Rock against the former censor who had declined to appoint him to the Senate (Livy, *Per.* 59; Pliny, *Historia naturalis* 7.143).

The tribunate performed an ambivalent role as at once the defender of the people's rights and liberty and the arm of the Senate. Tribunes were entitled to prevent any coercion (even in connection with private law suits) of a citizen initiated by another magistrate (Thommen 1989: 233–41). Helping the individual citizen, even in cases in which the magistrate's action was not excessive and the tribunate as a whole would not be prepared to intervene, was the rationale for the institution. Thus, apparently, ran the argument of the tribune of 58 who supported a henchman of