

Introduction: Crime and the State through the Ages

Of the state's many tasks, none is more crucial than security. To protect us against foreign enemies, we have the military. Against domestic unrest, violence, and crime, the police and judicial system are the first line of defense. Despite declining rates of offending, fear of crime dominates modern politics—egged on by sensationalist media and politicians of all stripes hoping to appear tough-minded. Under President Bill Clinton and Prime Minister Tony Blair, even the center-Left parties in the United States and Britain joined the hard-on-crime bandwagon.¹ The last two US presidential campaigns have rung out with dog-whistle appeals to law and order. Public surveys routinely identify crime as among citizens' most pressing concerns. Yet at the same time we live in a world that is by any measure better ordered, less violent, and more peaceful than any in human history. Even accounting for the carnage of the twentieth century's world wars, violence has nosedived over the past two millennia.² Compared to the bloodthirsty sacrifices of pre-historic states or the unthrottled savagery of absolutist executions, modern democratic regimes police us with a velvet glove—with more subtlety and ever less force. They discipline us into adopting civilized behavior through the institutions that shape our psyches and instincts to become model citizens—kindergartens, schools, armies, hospitals, workplaces, and, only as a last resort, prisons. Despite the attention lavished on prisons, fines—a mere slap on the wallet—have become the most common sanction in most nations outside the United States and the former East Bloc.

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Most of us pass our lives avoiding serious contact with the law. Even today, with prisons bursting, less than 5 percent of Americans on average will ever spend time there. In other nations, far fewer do. The chances of dying of either cancer or heart disease—the kinds of eventualities we all reckon with—are together eight times greater. For the average middle-class, mainstream citizen, years pass without meeting uniformed officers face-to-face, and policing is something that happens at society's margins: to minorities, the disenfranchised, addicted, poor, and outcast. Nevertheless, the sense that crime is serious and growing hangs heavy in the air.

Punishment may have been moderated since the days of absolutist excess, but has crime really diminished? With the birth of criminology in the late nineteenth century, social science developed a stake in sounding the alarm over inexorably advancing criminality, thus buffing its own sheen. Not only now-forgotten alarmists such as Cesare Lombroso and Max Nordau but even the great sociologist Émile Durkheim assumed that crime advanced in tandem with civilization.³ We are heirs to this cultural pessimism. Whether it is true that crime has grown over time depends on how the question is framed. In some respects, crime has indeed increased. Using the penal code to help regulate the new technology of motor vehicles created the now single-broadest interface between citizen and police—indeed, the large majority of all contacts.⁴ The decision to criminalize inebriants has likely occasioned the second-largest source of prosecutions, with the prohibition of first alcohol and then other substances. American drug arrests climbed twelvefold from 1965 to the end of the century.⁵

These are, however, crimes we inflict on ourselves. They are acts that society has decided to consider and treat as penal transgressions but that could equally well have been dealt with by other means—or not at all. Smuggling was widespread in eighteenth-century England because high tariffs, imposed by a state with few other sources of tax revenue, made it a lucrative enterprise. And it was hard to

combat because smugglers were popular, offering the average person cut-rate goods. When England made primary schooling compulsory in 1870, almost one hundred thousand parents of truants were hauled before courts in the law's first year.⁶ Had crime really increased? Or had it merely been redefined upwards? To lament today that criminality is skyrocketing because prisons are crammed with pushers and users says less about our narcotics problem than about how we have dealt with it. It is rather like worrying that Armageddon must be nigh because the executioner is busy hanging more infidels and apostates than ever.

For other offenses, ones that are indisputably the sort intended for the penal code, reliable statistical answers are hard to come by. Definitions of crime have varied, as has victims' willingness to report. Not every transgression exists objectively out there as an evident offense, even though all crimes are obviously defined in and by the penal code. Novel technologies have created new crimes where once there were none—phishing, say. The most commonly committed crime today is the robocall—180 million daily in the US, half of all phone calls.⁷ Awash, as we are, in a cornucopia of pilferable objects, little wonder that theft is up. Yet stealing an unguarded cell phone in a metropolitan bus terminal is a different act than larceny of a firearm or other prized singular possession from a home in a seventeenth-century village—especially considering how buffered we are from the consequences of theft by our hypertrophied insurance industry. Whether victims of rapes are willing to report them and whether such violations are legally actionable have varied dramatically. Acts once illegal (adultery) are no longer, whereas formerly tolerated behaviors (spousal abuse) have become prosecutable. Whether such shape-shifting offenses have increased or diminished is hard to track.

Homicide—indisputable and hard to conceal—is therefore the most studied crime. Here we see a dramatic decline. In Europe, where the data over long periods are available, killings plummeted from one hundred per one hundred thousand inhabitants in the Middle

Ages to one per one hundred thousand by the early twentieth century.⁸ This bears restating: over the past five centuries, average rates of homicide have declined a hundredfold. Today's English are one percent as likely to be killed as Chaucer's contemporaries. During the early period of frontier violence, the American colonies of the Northeast had rates as bad as those in medieval Europe, which then declined starting in the early seventeenth century. In the mid-eighteenth and again in the early nineteenth century, US homicide rates were comparable to the rest of the Western world. In the nineteenth century, they then rose again. The slave-holding South and the frontier West suffered much higher levels, though the West was long so sparsely populated that its statistics may be misleading.⁹

This happy decline of killings holds over the long run. But in the long term, as Keynes famously lamented, we are all dead. Political debates are not framed against centuries-long secular oscillations but against what happened last year. Crime and then imprisonment did rise during the final decades of the twentieth century as a blip on these larger and longer downward trends. Such temporary reversals of the overall decline have occurred before—for example, in Sweden between the 1790s and the 1840s and in England from the 1580s to the 1610s.¹⁰ The larger trend eventually reasserted itself, as it has again today in the United States. By the early 1990s, crime rates had levelled off and once again began to decline. In the United States, the numbers not only of murder but also of almost all other offenses have drifted downward over the past three decades, with a small uptick for some crimes again starting in 2016.¹¹ The cost of massive incarceration has made itself felt, and Americans now debate how to reverse three-strikes rules and other avenues of overfilling prisons.

Paradoxically, we feel beleaguered by crime at the very moment in history when mainstream citizens objectively have the least to fear. Why? If we take a long historical approach to how the state has dealt with crime, a few conclusions emerge. First, the state took

its own sweet time accepting as its task what we now count among its primary functions—fighting crime and adjudicating disputes. For most of recorded history, crime was left to civil society's members to sort among themselves. If lucky, they did so via informal mechanisms of mediation, paying or accepting restitution for harm done. But if they arrived at no understanding, the disputants took vengeance and fought blood feuds—sometimes stretching over centuries. The Greeks and Romans had the rudiments of a judicial and policing system, but it had to be rebuilt after each of these empires fell. An ancient and continuous empire, China had law and courts, but even it outsourced most legwork to civil society—holding kin and village communities responsible for their members' conduct rather than intervening directly. By the European Middle Ages, administering justice had gradually become the state's remit again. The law codes of the sixteenth century bristled with regulations of urban citizens' behavior, conduct, and deportment, but they were enforced haphazardly by whatever muscle the administrations of the day could muster. Policing, in the modern sense of a uniformed state authority seeking to apprehend and punish misdeeds, had to await the nineteenth century.

The state came late to this crucial function. But once it had accepted its mandate, it never looked back. Dealing with crime became and has remained one of its core tasks. By the sixteenth century, absolutist monarchs tortured their errant subjects in orgies of agony to frighten and thus deter the crowd in the town square. Yet such brutality could not continue. Moralists worried about its coarsening effect on the audience, realists questioned its effectiveness. When first built, prisons were intended as an admittedly costly but also merciful and potentially reformatory alternative to the noose and the blade.

A second conclusion is that the state eventually moderated its punishments—not because it pulled its punches but because it no longer had to be brutal. It was not the state's humanitarian

inclinations that prompted a softening of sanctions but its ever-growing power. Dismembering criminals in the town square was the equivalent of smoke signals in the era before the telegraph: the best the authorities could do. The state had to shout loudly to convey its deterrent threat. As executions were eventually hidden behind walls starting in the eighteenth century, they remained a deterrent. The public did not have to witness them to fear them. The modern state no longer had to swagger in all its grisly brutality. It governed ever more subtly—detecting, prosecuting, punishing, and eventually even preventing crime, all without rattling sabers.

Multiplying its capabilities, the state grew better able to detect and punish transgression. Now that it was more reliably able to punish, its sanctions no longer had to be severe. The Enlightenment philosophes rightly argued that predictability deterred more than ferocity. During the early modern era, the death penalty was reserved for violent crimes and in most nations eventually abolished. Starting in the eighteenth century, torture was officially banned. Offenders were imprisoned rather than banished, executed, or otherwise directly pained. Even prison was eventually regarded as harsh, and alternatives found for misdemeanants and juveniles. Today, the most common punishment is the fine. That marks just how little overtly violent policing and punishing are required of the modern state. Most citizens are law-abiding and prosperous enough to atone through property and not their bodies.

The state moderated punishment from a position of strength. The more it knew about us, the more lenient it could be. The better its information, the stronger and more pervasive its forces, the more effectively and therefore benignly it could police. But the state's growing power was only half the story. Civil society also increasingly policed itself, leaving the state with fewer overt duties. This is the other half of the equation and the third conclusion. Kin, family, community, and church have long been the forces most immediately molding our behavior, especially in the millennia before the state,

too, piled into the act. Civil society's role in controlling its members' conduct is obvious. But this function has expanded. The civilizing process, to use Norbert Elias's term, means we have gradually internalized the behavioral restrictions that were once impressed on us from the outside by social and governmental institutions.¹² The reward for self-control has been to be spared the state's impositions. Democracy rests on self-discipline.

Elias myopically saw this self-discipline as a process that began in fifteenth-century Europe, not one that was more ancient, ongoing, and widespread. And it was a bitter irony that he published a theory of cultural self-discipline in 1939, on the eve of Europe's descent into barbarism. Nonetheless, Elias identified a crucial motor force in history's *longue durée*. Largely ignoring the dark sides of repressing instinct, he sociologized Freud's theory of sublimation, examining on the level of society as a whole how dark and primal impulses that otherwise mar human interaction were channeled into acceptable behaviors. Even allowing for the twentieth century's genocidal barbarities and the persistence of assault, rape, and murder, a broad scholarly consensus concurs that our lives today are far less blighted by interpersonal violence than ever before. The state has largely disarmed us and it polices our interactions. But it would be farfetched to explain this pacification solely in terms of our fear of legal sanction were we to act on our untamed aggressive impulses. A more plausible explanation is that we have curbed our propensity to violence by elevating our thresholds of arousal and anger.

We have learned to control ourselves in ways that would have surprised even our recent forebears. Instead of the burping, belching, farting, spitting, sneezing, snorting, indiscriminately defecating creatures of the early modern era, we are now a people who fastidiously control and suppress our bodily eruptions—more Vulcan than Viking. Consider venereal disease as an example of how we have learned to master our bodies in ways now considered second nature. Strictly speaking, there is no such thing as a solely sexually

transmitted disease. Illnesses spread through sexual contact can equally well be passed along via other blood or mucous-membrane interactions. In the eighteenth-century European countryside, syphilis propagated via daily interactions that today are rare: sharing the use of filthy household implements, spitting in or licking the eye to remove sties, sleeping many to a bed, and following earthy child-minding practices such as sucking babies' penises to calm them, licking clean their runny noses, and prechewing their food.¹³ It is because of our changed habits that syphilis now spreads primarily via sex. Sex is the only infectious route that remains.

In sexual terms, too, we control ourselves better. The sexual stimuli surrounding us today, whether from advertising, styles of dress and deportment, or easy access to pornography, would have strained our ancestors' self-control. In the 1840s, with the first trains, etiquette manuals advised young female travelers to hold pins between their lips as coaches entered tunnels and darkness descended, thus preventing stolen kisses from men in the carriages. It was customary for bedroom doors to be locked. A common trope of novels was the sexual signal of leaving them unfastened.¹⁴ Trying the door to find out was considered normal. Today, stolen kisses are actionable behavior, building codes frown on bedroom locks for safety reasons, and a houseguest rattling door handles might well not be invited back.

Modern society sees itself as sexually less tight-laced than the Victorians, but in fact we have adopted thresholds of male arousal higher than just a century ago. We are insouciant with respect to sex because we mutually agree not to act on stimuli that people earlier would have found difficult to resist. A sense of how things have changed can be had from observing the uncomfortable juxtaposition of differing thresholds of sexual arousal in the multicultural metropolis. While the local males in Scandinavian or German parks resist tumescence as efficiently as hard-baked nudists, tourists from abroad eagerly gawk at and photograph the seminude female

sunbathers there. The mixed saunas and nudist beaches, riverbanks, and parks of central and northern Europe mark an unusual degree of self-mastery.¹⁵

Or consider the automobile. We tolerate untold slaughter on the roads—as many deaths every year in the United States as during the entire Vietnam War. And yet, if anything, it is a miracle that the figure is not many times that. Our everyday assumption that we will arrive safely at our destination is based in part on the road infrastructure provided by government and on regulated automotive safety—brakes, seatbelts, lights. It is the outcome, too, of policing errant transportation behavior such as speeding, tailgating, and road rage. But, above all, thanks is due to the average driver's extraordinary self-control. We navigate pathways plied by what might otherwise be assumed to be inconsiderate, intemperate, distracted, and inattentive fellow voyagers who are maneuvering two tons of steel at high speeds within inches of our vital organs but who are also, in fact, almost as good as we are at reining in their animal spirits behind the wheel and remaining focused, attentive, and alert.

To govern self-mastering citizens is a different task than reigning over short-tempered, choleric, irritable, dyspeptic, impulsive early modern humans. Much of the behavioral control needed for dense urban life has in effect been shifted from the state to civil society. What remains in statutory hands requires less violence and force. Indeed, the modern state trains its powers largely on those citizens least likely to rein themselves in—the marginal, the poor, and other outsiders. The rest of us are policed only gently. Institutions have shaped our psyches and instincts to become model citizens.

Even so, the state has not stepped down. The behaviors considered offenses have changed dramatically over the past millennium. Many actions that once were illegal are now either private matters (such as most sexual behavior, what we wear, where we live, what we imbibe) or regulated by codes other than the penal (employment, public health, zoning, etc.). Yet many other acts have now become

illegal. New crimes respond to new technologies (securities fraud, insider trading), but we have also invented novel transgressions. Inchoate offenses, for example, make conspiring, planning, and intending to commit an offense in themselves crimes. The total sum of the prohibited has grown continuously. More laws now govern our behavior than ever before. And they encompass a broader variety of acts. Indeed, they go beyond acts to criminalize our intentions, thoughts, and proclivities.

In other words, and this is the book's final conclusion, at the same time as we have become more civilized, the state has extended its formal reach, multiplying law and punishing us for transgressions. We have learned to delay gratification, moderate our impulses, resist our instincts, and act with a restraint, forbearance, and self-abnegation unknown in the early modern era. Yet the more we discipline ourselves, the more law the state trains on us. One might have expected a trade-off between self-restraint and the law's impositions. We now master ourselves. So why do we need more formal proscription? Should not the state's legal apparatus be withering away?

On the contrary, seen over a long historical sweep, law and self-discipline have run in tandem: not only more discipline and socialization into correct conduct but also more law forbidding more behaviors and probing further into our minds and intentions. We undergo an increasingly insistent process of socialization to become functioning members of a specialized, sophisticated, dense, complex, metropolitan civilization. Yet we also have an ever-growing law that governs our actions from above. We are caught more and more in an unforgiving forcefield between expanding formal prohibitions and stricter requirements for personal mastery. The law plays a growing role in socializing us into the conduct required by modern society. Although most of us still keep up with this behavioral arms race, those who cannot fall further behind. Our jails are filled with the dispossessed and the marginal. The stark inequalities of modern society are becoming behavioral, not just economic.

The state seems to have no intention of relinquishing its power to forbid and punish, relying instead on informal social control. We may now be socialized into proper behavior, but the realm of the illegal continues to grow. The state not only trains on us the institutions of social discipline but also maintains and expands the law as a powerful tool of socialization. Our prisons are full of social outcasts. But for the rest of us, too, the law hovers ever present. As more acts are forbidden, as the state also delves into our thoughts, law continuously defines the parameters of allowable behavior. It restricts the scope of other arenas of socialization where we learn to rein ourselves in. The state is the socializer of last resort for the dispossessed and defines the terrain on which the rest of us are schooled into acceptable behavior, narrowing evermore the turf on which we are expected to control ourselves.

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