Chapter 1
Crime's Ever-Expanding Universe

Who has prosecuted crime and what they were pursuing have changed dramatically over the course of human history. Gods and kin groups were the first enforcers; religious edict and customary precepts preceded statute and law. But the state eventually took up crime and its suppression as important tasks. The behaviors outlawed have also changed. Acts once forbidden are no longer, but others that were once legally indifferent are now pursued. Whether the total number of offenses has increased is harder to discern. Nonetheless, it seems that even though different acts are now illegal, there are more crimes on the books today than ever.

Crime and authority are joined at the hip. Without official stricture, no crime. As dirt is matter out of place, weeds unwanted plants, and deviance behavior we disapprove of, so crime is action at odds with the law. Yet it took most of human development for this to become true. Of course, law is more than statute. Long before legal codes, custom and religious precept wove fabrics of regulation. Law, as Durkheim pointed out, was formulated only when custom began to lose its hold.[1] Custom had no badges, truncheons, or penitentiaries, but it unleashed collective violence against those who snubbed its strictures. Norms were enforced communally long before laws formalized such obligations.[2]

At first, the supernatural policed this world, whether as mere sorcery or the divine itself. Gods punished offenses before kings did. Four thousand years ago, Egypt's Middle Kingdom brought forth a

concept of hell peopled by sinners. Individuals faced judgment, and punishment became a matter for both this and the next life.[3] Justice in this world is rare. No wonder humanity's longing for a fair shake demanded immortality of the soul and an afterlife. If death were but extinction, or if postmortem life were a morally neutral twilight zone, then evil would rarely be punished, or virtue rewarded.[4] As Socrates says in Plato's *Phaedo*, if death were a separation from everything, it would be a godsend for the wicked.[5] But postmortem punishment could be only retributive, at its worst an eternal suffering for a momentary lapse in the mortal world. If punishment after death were to be just, much less be able to reform or deter, it needed reincarnation or at least some sort of ascendable hierarchy of life after death.[6]

The ancient Chinese did not see law as connected to the divine, though this view may have been as due to polytheism's inherent morcellization of divine power as to any lack of feeling for the supernatural.[7] Conversely, Egyptian pharaohs were powerful enough to feel no need for a source of law beyond themselves. Yet most other major ancient civilizations did connect law and the supernatural: Mesopotamians, Jews, Indians, Greeks, Romans, Muslims, Incas, Aztecs, and, of course, Christians.[8] Their earliest injunctions were religious, or at least supernatural, enforced by higher powers. Taboos were rules imposed by transcendent forces, sins their violation.[9] When there were identifiable gods, sometimes they did the enforcing. In Greece and Rome, those struck by lightning were denied regular burials because they were assumed to have been punished directly by Zeus as perjurers. Since he handled matters, there was no need for human law on the subject.[10]

Yet it remained unclear why Greek gods bothered to punish mortals. They did enforce order and balance, especially curbing our excesses of vengeance. But they acted for the same reason as their human subjects: anger at being wronged, not enforcement of code or principle. Why any specific offenders were punished, for what,

and even that they had been brought to heel—all that was unclear. In early societies, everything happened for a reason—spirits or gods offended, witchcraft invoked, magic gone wrong—nothing by chance.[11] Offenders whom something ill befell therefore presumed they were being chastised.[12] Gods' favorite tool for punishing humans was the weather, which could often be hard to divine.[13] Sin and crime were largely fused since both violated divine will. In the deep past, humans thus found themselves transgressing against norms nowhere spelled out, only vaguely apprehended, and often violated by the gods themselves. Punishments were meted out by (or on behalf of) higher forces. Before the state existed, sacrilege and heresy were the primal trespasses, the defying of transcendent powers. But all crimes, whether an attack on God, such as blasphemy, or on humans, such as murder, ultimately wronged the divinity by violating its commandments or wishes. All crimes were public wrongs, and all were sins.

Yahweh was a lawgiver and enforcer, laying waste to followers who disobeyed him, threatening them with misery sevenfold their transgressions.[14] Violating his covenant with his tribe was sin. Hebrew law was divine because it was God's word. When Cain slew Abel, God, in the absence of any other humans than their parents, was judge, jury, and prosecutor, and the ground where blood had spilled was the only witness.[15] Among the ancient Greeks, law was ultimately given by the gods, with codes submitted to the oracle at Delphi for approval.[16] Yet divine law was also seen, as among the Romans too, as distinct from the gods, an abstract realm of rationality and natural order. Though formulated by the gods, it was also independent of them, not merely an expression of their will.[17] Christianity, in turn, was equally abstract and universal but more magnanimous. It regarded sin in terms of mortal weakness and divine forgiveness, Christ having died to save humans from their own evil. Penitence, not punishment, brought the sinner back into the fold.[18]

Supernatural edicts did not govern all human action in antiquity. Worldly law regulated much everyday behavior even as the divinities watched over what concerned them. But the overlap between edict and law was far greater than it later became. Secular and religious offenses were eventually distinguished, enforced respectively by state and church—though some cultures, notably Islam, continued to conflate the two.[19] The state came to punish acts that violated secular law, which—as the gods were pushed aside—began to define the only enforceable public sanctions. Human law forbade many previously religious offenses: incest, slander, libel, usury, and perjury.[20] Of 119 offenses punished by execution in Sussex in the early seventeenth century, all but two were transgressions of the Ten Commandments.[21] Outside a few theocracies, purely religious offenses were eventually relegated to the private sphere, punished not at all or only within voluntary communities of faith. Yet even the most secular modern societies keep blasphemy and sacrilege on the books as exceptions to this rule—though mainly to ensure public order, not to enforce theology.

The state thus came late to enforcing law and chastising offenders. Even law formulated in statute was in place before the state did any punishing, whether among the ancient Jews or on ninth-century Iceland. Replacing the gods, the state eventually got to decide what crime was and what transgressions were punishable. Yet if the state is five thousand years old, assuming this power took it more than four millennia.

Except for the transgressions that affected it directly—treason, sacrilege—the state lacked until recently the will or ability to keep order and enforce norms. For most of history, disputes were resolved communally among the directly interested parties. Self-help was how conflict was dealt with, as it remains today among sovereign nations. When people harmed each other, kin groups righted the balance, shedding blood as vengeance or transferring value as compensation. Such private justice only gradually fell under the state's remit. A judicial system, with the state punishing violations of collective

norms, was achieved incipiently by the ancient Greeks, Romans, and Chinese, but not again in the West until the Middle Ages. The state eventually defined crime by laying down the law, and it provided the means to deal with it: surveilling, policing, trying, sentencing, and punishing. As the state took on such tasks, broad changes followed. Punishing shifted from resolving conflicts between kin groups to publicly imposing generalized norms whose violation offended the whole collectivity. Rather than relying on civil society's self-help, with families resolving disputes, the state enforced the communal interest by facing down transgression itself. Crimes became public concerns. Victims were no longer allowed to ignore an offense, much less settle it themselves. Since the state represented society as the ultimate victim, whether and how to prosecute became its decision.

Even then, the road stretched out ahead. Echoes of private justice from the deep past could long be heard. In the 1790s, 80 percent of criminal cases in England were still initiated by the victims, who also bore the costs. In the latter half of the eighteenth century, courts finally began paying the expenses of bringing successful felony prosecutions.[22] Not until 1879 did the English establish a national system of public prosecutors, and it took another century for it to be made effective. Even today, prosecutions are sometimes handled privately in Britain. Shoplifters, for example, are often left to retailers to pursue.[23] Authorities elsewhere enjoy a wide range of discretion whether to prosecute or not, ranging from extensive in Japan to almost nonexistent in Finland.[24] In Japan and Germany, some crimes remain prosecutable only if the victim asks for it. Such *Antragsdelikte* in Germany include breach of the peace, domestic theft, exhibitionism, and poaching fish.[25] Islamic law allows the families of murder victims to forgive killers—often for payment—and thus spare them death. And the role of the family, once the main enforcer, still shines through in contemporary disputes over how publicly to prosecute spousal violence, marital rape, and child abuse. But, on the whole, the state now leads in dealing with crime.

As the state came to monopolize punishment, it resented private parties poaching on its turf. Having once been the only means of redress, self-help was eventually forbidden, though vigilantism and other informal means of victims enforcing justice on their own have not vanished even today. Few developments in the history of the law and the state have been more important than the emerging concept of public offenses—the idea that crimes harm not just their immediate victims but also society as a whole. Torts (private damages) were gradually distinguished from crimes (public offenses). Criminal law, or punishable offenses against society, emerged as distinct from civil law, where private parties restituted harms. The oldest mention of this distinction dates perhaps from Roman law in 194 CE, though the Greeks were familiar with it.[26]

As the state came to dominate law's enforcement, punishments grew more moderate and subtle. Two major changes were at work. With emergence of representative government—initially republicanism and eventually democracy—laws no longer needed to be enforced by drastic means. Only despotic governments required severe punishments, Montesquieu observed. In republics (he included also monarchies), citizens were impelled to behave as much by honor, virtue, and fear of disapproval as by punishment.[27] Subjects had to be coerced, but citizens motivated themselves to obey. He might have added that the nature of law also changed, making it less burdensome to follow. Laws emerged from decisions taken ultimately by citizens who, obeying them, conformed to what they had mandated their representatives to pass. Breaking the law now came closer to the self-inflicted harm that Immanuel Kant and G. W. F. Hegel discussed: thieves whose own right to property was undermined by their refusal to respect that of others.[28] Described most generally, laws came to be self-imposed, and obedience was self-will. Legitimate law was voluntarily obeyed.[29] Those regimes that most deviated from this participatory ideal—autocracies and totalitarianisms—also imposed the harshest punishments.[30]

Yet the lesser need for force when there is a political consensus was not the whole story. Yes, the state and society grew evermore symbiotic as political participation widened into democracy. But the state also grew increasingly able to enforce the measures resulting from this participatory process. The more powerful the state became, the less it had to flex its muscles.

In this process, the tools at the state's disposal changed dramatically. The savage brutality of early punishments gave way to a subtler but also more regularized and broader enforcement. Spectacular inflictions of pain in public were less needed to deter as the authorities developed new means of anticipating and preventing crime. Torture was no longer necessary to extract testimony once the burden of proof imposed by Roman law loosened in the late seventeenth century to allow conviction without two eyewitnesses or a confession. Subjects could now be punished on less evidence, as they were in those countries that did not insist on such a high standard in the first place, such as England. Banishment, mutilation, death, and other cheap, cruel punishments were less urgently required once society marshaled the resources to afford the comparative mildness of incarceration. Capital punishment was less pressing once the state successfully suppressed private vengeance. The state, in sum, no longer needed to show who was boss.

A state able to assert its might only intermittently had to hope for powerful deterrent effects from spectacular public demonstrations of it. At 1800, Britain's criminal code was startlingly savage. Well more than two hundred capital offenses were enforced, mainly for forms of theft and often for trivial acts. Yet most violations were without consequence. Offenders went uncaught; if caught, unprosecuted; if prosecuted, unconvicted; if convicted, unhanged. In sixteenth-century England, only 10 percent of those convicted of capital crimes were actually hanged. Even in the first half of the twentieth century, 45 percent of men and 90 percent of women condemned to die had their sentences reduced to life in prison.[31]

Harsh punishments could be imposed only sporadically on anything other than abject subjects without provoking resistance.[32] In any case, such severity absorbed resources otherwise available for other forms of enforcement.[33] The harsher the punishment, the less it served an everyday function.

In contrast, the powerful omnipresent modern state hums away in the background, ensuring compliance less through manifest displays than by regular, predictable, moderate sanctions that it reinforces by a spectrum of behavioral encouragements—all rendered more effective by its subjects' voluntary compliance. The stronger the state, the less draconian it needs to be. The law makes clear what transgressors can expect, and the judiciary metes it out.[34] Moderate, foreseeable law enforcement was a core demand of the Enlightenment philosophes, seeking to reform the early modern state's grisly, sporadic flailing about. The English Reform Act of 1835 illustrates the point: it abolished the death penalty for many of the two hundred existing capital offenses and simultaneously extended to all municipal boroughs the system of policing that London had introduced in 1829.[35] The law became both more lenient and better enforced. As the English state reduced the number of capital crimes in the nineteenth century, its conviction rates rose. Juries no longer resisted condemning defendants to their deserts when the balance between offense and sanction seemed just.[36] Appearing merciful, the state in fact punished more citizens. It was nicer and yet more effective.

Yet more than rationality and humanitarianism were at stake here. Michel Foucault's mantra was certainly true: the point was to punish better, not less.[37] But better also meant less or at least less savagely. The contemporary state's ability to relinquish much of the armamentarium of sanctions demonstrated its growing effectiveness. It once brandished a panoply of pain: branding, flogging, mutilation, banishment, shame, death. Today it relies largely on prison and fines. That fines are the most common sanction shows how moderate punishments have become. In earlier eras, almost no

defendant pled guilty, most were acquitted, and the convicted sometimes were hanged. The law's grasp was intermittent, localized, and sanguinary. Today it is constant, broad gauged, and comparatively low key. In early nineteenth-century England, a quarter of defendants were acquitted.[38] Today, many fewer are. Since prosecutors have done their homework, because offenders are no longer threatened with disproportionately harsh punishments, and because plea bargains grease the rails of justice, most accused plead guilty.[39] Almost 80 percent of defendants before British magistrates' courts enter guilty pleas, as do more than 90 percent of felony offenders in the United States.[40] And of those tried, the vast majority are convicted. The 92 percent conviction rate achieved in the United States compares favorably with the 95 percent under Joseph Stalin's trials in the late 1930s.[41]

Yet It Continues

And yet, for all the state's subtlety, for all the cooperation between the penal code and other means the state uses to modify citizens' conduct (school, market, workplace, family), the number and reach of its laws, the range of the formal and explicit codex of behavioral prescription, continue to expand. The state has not withered away. Quite the contrary, it has grown. It is often noted that were every law punctiliously enforced, all citizens would be criminals.[42] The Kinsey report in 1948 argued that laws criminalizing sexual acts then considered deviant made 95 percent of the (male) population potential criminals.[43] According to a police rule of thumb, a motorist followed for three blocks will end up committing a violation. Already in the 1930s, it was estimated that traffic laws—strictly observed—were violated 2.5 million times daily in the United States.[44] Assuming no recidivism, every single man, woman, and child thus crossed the law seven times annually. Few actions do not trespass one law or another.[45]

Whether the range of criminalized behavior has narrowed or widened is hard to say, but it certainly has changed. As actions once outlawed have been removed from the penal code, new ones have been added. The number of laws in the penal code has massively increased. True, many statutes duplicate or add only nuance to prohibitions already on the books. And many earlier laws accrete, rarely being removed. But even as some acts have been decriminalized, the range of offenses has also expanded. The US republic enforced half-a-dozen federal crimes at its birth, a couple hundred in the late nineteenth century, and more than four thousand today. The federal penal code has expanded massively, from eight pages in the 1875 version to almost nine hundred in the 2018 edition.[46] Illinois has ten types of kidnapping offenses, thirty sex offenses, and forty-eight assault crimes. Virginia has twelve forms of arson and attempted arson, sixteen kinds of larceny and receiving of stolen goods, and seventeen types of trespass crimes.[47] Including regulations, not just penal statute, would add another ten thousand crimes. Perhaps some three hundred thousand US regulations are criminally enforceable.[48]

At first, all manner of actions were punished—crimes, torts, sins, and immorality, not to mention acts that today fall under health, labor, safety, zoning, economic, housing, and many other regulations. Crimes punishable by death in early colonial America included idolatry, witchcraft, blasphemy, bestiality, sodomy, and adultery, most of which are no longer even offenses. Usury was once considered a sin, violating natural and religious law and punishable by death.[49] Today it underpins banking—though only covertly in the Islamic world. Apostacy was once a capital crime in many religions, including Christianity, but is so today only in Islam, where it is not decreed in the Quran.[50] Only gradually were things sorted out. Sin, as violation of God's commands, was left to the church as religion separated from the state. It retains a sense of a collective, enduring transgression rather than of an individual moral lapse, as when slavery is described as a stain that needs cleansing.[51] Penal law once

governed ideological and theological beliefs as well as countless behaviors that we now consider personal choices but that once were the province of sartorial, sexual, sumptuary, or consumption codes. With the Enlightenment, however, authority's role was understood as preserving order, not morality. Only acts that directly harmed others were to be banned. Matters of conscience and private belief ceased being the state's concern. Moral wrongs fell to individuals and their conscience, only rarely did they remain the remit of the penal code. Disputes over individual harms were now sorted by the interested parties within the civil law.

The state also spawned other regulatory instruments to police many activities that were once covered by the penal code: workplace and food safety, public health, labor relations, unemployment, zoning, competition and monopolies, construction, trade, opening hours, and so forth. What we regard as social problems today were earlier handled by criminal law. Vagabonds, vagrants, beggars, Roma, prostitutes, demobilized soldiers, and other marginals, if away from the local community responsible for their upkeep, were shooed off elsewhere by penal sanctions.[52] Credit markets were policed by debt slavery and debtor's prison.[53] The law allowed creditors to target debtors' bodies, not their property. Debtors used to outnumber conventional criminals by far in prison, threefold in early nineteenth-century America. In Islamic jurisprudence, wherein corporal punishments were the primary coercive mechanism, unpaid debt was the predominant basis for imprisonment.[54] The aim was coercive—forcing debtors to pay what they owed. Sentences were indeterminate—until payment or creditors were otherwise satisfied.[55] Modern bankruptcy—with a proper discharge of debt—emerged from reform of this self-contradictory system in the early eighteenth century. Ultimately, it was back-stopped by jail, but—barring fraud—most cases came to be resolved without resort to prison.[56] The problem was moved out of the penal code and into economic regulation.

The actions left behind in the penal code are what we now think of as crimes—murder, theft, fraud, and the like. Offenses in this narrow modern sense have become the province of the state alone: they are acts that not only leave behind victims but also are seen to harm society as a whole. As crime's focus narrowed, many public concerns were relegated to the private sphere. Sartorial rules once punished Romans who wore clothes in imperial purple, Aztec commoners in sandals, and Elizabethan Englishmen sporting felt hats on Sundays.[57] Working on the Sabbath was forbidden, as was sacrilege and drunkenness. With a few exceptions, owning more than one loom was a penal offense in Tudor England.[58] Medieval Iceland and England punished parents who failed to baptize their infants; Austria sanctioned mothers who took babies into their beds at night.[59] Being out and about at night without pressing reason was once illegal, as was sleeping during the day.[60]

The ancient Greeks made stealing the clothes off a person in public (*lōpodusia*) a crime for which one could justly be killed on the spot.[61] In early modern Holland, undressing a child was singled out as a crime—not for the reasons we might imagine, but because the cost of clothing made it worth stealing.[62] Once a broad variety of sexual behaviors was forbidden, including homosexuality, sodomy, fornication, and adultery. Today, only necrophilia, bestiality (with exceptions), and pedophilia are uniformly illegal. Incest was once defined expansively, criminalizing marriage with a broad range of family relations, including in-laws. Until 1907, British widowers could not marry their former wives' sisters. For another fourteen years, deceased brothers' widows remained forbidden fruit. Adultery was once a capital crime, one of the three inviolable sins in the Bible, along with idolatry and murder. By the early nineteenth century, though, Bavaria punished it only if the harmed party insisted.[63] Today adultery has largely vanished from the penal code—outside the remaining theocracies and eighteen US states.[64]

Once illegal and immoral, suicide is now considered a mental-health issue. Abortion, once punished as a variant of homicide, is increasingly treated as a regulatory problem. Euthanasia may be moving in this direction, too. Formerly a pressing public concern, blasphemy has been privatized. The initiative to prosecute it must come from a private party, claiming offense—if, indeed, the act can be pursued at all.[65]

Witchcraft these days is at most a public nuisance (Santería and other practices that include animal slaughter). As a crime, it has fallen victim not only to the general removal of religion from the state's purview but also to a widespread skepticism of its efficacy.[66] Sorcerers are no longer charged with attempted murder however intensely they incant their spells and curses.[67] Indeed, in India, where village witches are still persecuted in their communities, accusations of witchcraft have been criminalized.[68] But the Catholic Church continues to fear the dark arts and trains priests in exorcism.[69] The Bavarian police code had special provisions against occult activities. And in Canada, hucksters who prey on the psychologically vulnerable can still be convicted for practicing dark arts.[70] Cursing, once an invocation of occult powers and thus a serious affront, is now just a harmless annoyance. Scolding, which used to be a major disturbance of the peace, no longer counts as a transgression.[71] Public drunkenness has moved from being the reason for a majority of arrests in the United States in the 1940s and 1950s to causing a small fraction of that today.[72] Public disorders that earlier led to arrest (begging, public sleeping, vagrancy) have been (partly) decriminalized.[73] Slander, libel, and defamation became harder to commit as our ancient honor cultures, with their easily raised insults, faded.[74] (Digital technologies, however, facilitate such offenses, and the rates of their commission appear to be rising, but at the same time they are making slander increasingly archaic.[75])

Crime Expands

Yet this narrowing of offenses has not freed us of the state's impositions. Quite the contrary. Durkheim rightly pointed to how countless behaviors had been shifted from the penal law's purview, but his anticipation that this move signaled the decline and obsolescence of the criminal code and repressive law in modern, complex societies was wide of the mark.[76] In other respects, crimes defined in the law have massively expanded. They have enlarged in response to the growing complexity of human activity, giving us many more ways of harming each other, as well as in response to how the law itself has become increasingly sophisticated and elaborate. In the autocracies and totalitarianisms, this relationship was painfully obvious. Not only did these systems multiply law in response to industrialized technologies, as in all political systems, but also many behaviors that in liberal democracies were transferred to the private realm here remained public and actionable. Fragile and paranoid, illegitimate regimes inherently expanded the opportunities to offend. But even liberal states, with their robust private spheres, have enlarged what is illegal and punishable. States have expanded illegality explicitly and consciously when faced with states of exception, feeling especially beleaguered. From Henry VIII's massive inflation of treasonable prosecutions to the English suspension of habeas corpus during the French Revolution to the Weimar Republic's raft of emergency laws and on to current terrorism-inspired legislation extending the state's surveillance and powers—regimes anticipating crisis have amplified the law's reach.[77]

Liberal democracies, even in their everyday, peacetime functioning, have extended the law's compass, criminalizing ever wider swaths of behavior. Assault and larceny made up 85 percent of all ordinary crimes reported in preindustrial Europe. In seventeenth- and eighteenth-century Massachusetts, fornication was the single most commonly punished offense.[78] Since then, the number and

variety of crimes prosecuted, or the ways of contravening the law, have increased dramatically.

Start with the simplest. New technologies have created behaviors just waiting to be punished. Counterfeiting was not actionable before currency came into widespread use, or check bouncing before banks, not to mention money laundering. And of course the crimes associated with money have changed in tune with technologies of value transfer, from shaving the edges off coins to holding up customers at ATMs and committing digital bank fraud. Public urination could not be actionable before indoor plumbing. Shoplifting became more common as the goods were no longer hidden behind the merchant's counter. Mail fraud attended on the post. Towns policed who could inhabit them in the Middle Ages, but violations of immigration law awaited the development of the nation-state. Before locks became widespread, everyone carried their valuables with them, and theft was largely petty larceny of consumables.[79] Pickpocketing increased with urbanization.[80] The invention of anesthesia brought great blessing, but it also created a class of drugs whose misuse was then made actionable. Traffic policing started as early as the seventeenth century. Furious driving of horse-drawn carriages and even driving without reins were infractions in the nineteenth century, but that today's police would spend much of its time regulating cars was not foreseeable.[81] A large section of the Virginia criminal code covers railroad crimes, which may not be much enforced any longer. But the offenses associated with automobiles (carjacking, joyriding, auto theft) have mushroomed. Driving back and forth in the same area (cruising or "repetitive unnecessary driving") has gone from an innocent pleasure to a crime.[82] Indeed, traffic policing has become a gateway for authority's continued ingress into everyday life. Exercising their regulatory powers over automobiles—stopping cars for moving violations, expired registration stickers, or broken running lights or at inebriation checkpoints—police have assumed expansive abilities to detain and investigate any member of the motorized public.[83]

New business models have led to new crimes: forgery, insider trading, mail-order peculation, breach of trust, wire fraud. The emergence of corporations created new legal personae, which, at least in the Anglo-American realm, could be held liable for infractions of the law. More laws criminalize business behavior, with fewer due-process restrictions, than target the poor.[84] The growth of bureaucracy spawned the vast field of white-collar crime. As a total of federal criminal prosecutions in the United States, such offenses rose from 8 percent in 1970 to 24 percent in 1983. Fraud has continued to evolve and expand, chasing the possibilities for deception permitted by ever new and more sophisticated business practices.[85] The administrative complexity of modern polities allowed opportunities for leverage, corruption, and blackmail that had to be recognized before they could be outlawed. Only in 1863 did the French forbid extorting hush money.[86] Price fixing and other abuses of monopolies, tax and securities fraud, and foreign bribery all eventually were attended by possible prison sentences.[87] Because the United States developed an equities market earlier than most nations, insider trading became a crime there by the 1930s, but not until later elsewhere. To regulate potentially dangerous consumer products, whether baby blankets, ski slopes, or airplanes, liability law mushroomed in the late twentieth century with an orgy of lawsuits forcing manufacturers to internalize the costs of safety.[88]

Formerly private relations have been made public and actionable. We smirk at the minute behavioral regulation of the early modern codes—forbidding sloth and adultery, for example. Yet though sexual relations have been largely turned over to the private sphere, the modern state has again begun poaching on the same turf. The Mann Act, passed in the United States in 1910, allowed federal prosecutors to track down extramarital sex throughout the nation.[89] Although that ability was reined in by the 1980s, sexual relationships with and among the young have become increasingly policed. Raising the legal age of consent expanded the scope of statutory

rape.[90] Sexual relations in the workplace have come to be regulated by law, not by custom. Even among equals—students at university, say—relations are a matter of statute. No longer regarded as a *Kavaliersdelikt*, a petty offense, rape has been prosecuted more frequently and seriously.[91] Its scope has expanded, too. What used to require force and was widely regarded as properly a crime only if a demonstrably virtuous woman was hurt became an offense no matter who the victim. It also became premised on lack of consent, a much wider definition that did not necessarily involve violence. Acts that once would have been considered sexual coercion or assault, such as oral or anal penetration, came to be classified as rape proper.[92] Even wives—long regarded as their husband's property—eventually could be considered to have been raped. Other acts of forced sex were specified in evermore painstaking detail. Oral copulation, for example, was finely parsed and considered a crime if achieved by immediate threats of violence, threats for the future, or threats against others than the victim; if perpetrated on an unconscious or intoxicated person; if presented fraudulently as serving a professional purpose; if initiated and achieved by someone pretending to be known to the victim or by other artifice; or if ordered by someone pretending to be a or invoking public authority.[93]

Behaviors once relegated to the private sphere as part of personal morality have remerged as public concerns. Rather than being outlawed as immoral, they are now punished as harmful. Once considered immoral, pornography is pursued because it objectifies women, encourages rape, and helps spread venereal disease.[94] Where prostitution has been outlawed, similar arguments apply to it. In the 1960s and 1970s, Sweden not only tolerated prostitution but also actively encouraged sex workers to organize, pay taxes, and service the handicapped, old, and others who could not otherwise find erotic satisfaction on their own. In recent years, however, it has clamped down once again on commercial sex as exploiting women and encouraging trafficking. Zero-tolerance policing has used neighborhood

blight as the motive to turn once barely actionable behaviors (loitering, public urination, graffiti, panhandling) into offenses. Public drunkenness has been a long-standing problem, but not until 1873 did it become a crime in France.[95] The wave of drug legislation that swept the twentieth century rendered illegal behaviors that were otherwise widespread and popular. Homelessness may not precisely have been criminalized, but its effects have often been left to the police to deal with.[96]

The paterfamilias's remit has narrowed, with the state extending its wing over many functions that were once the family's purview. Women and children were emancipated into full legal status directly subject to the state, not to the husband and father. Domestic violence against children and spouses became a crime, no longer acceptable or considered somehow natural patriarchal conduct.[97] Tolerated by the Romans, infanticide became prosecuted by the Christian Church for moral reasons, then later by states as they expanded their claims to define who merited legal protection as subjects.[98] Already in the sixteenth century, births in England were registered, signaling official interest in the infant citizen.[99] Schooling was eventually made compulsory, and parents were punished for their children's truancy. Vaccinating children, too, was required in the mid-nineteenth century as more parental responsibilities became legal obligations. As the state narrowed the parameters of acceptable parenting, removal of children from families became an everyday occurrence. Victorian parents would have been surprised to discover that their great-great-grandchildren could lose custody of their offspring for emotional neglect. Today, leaving children unsupervised for almost any time, under any circumstances, is criminalized.[100] Lowering the age at which minors can be tried as adults further limited the family's remit.[101]

As the definition of property vastly expanded, so too did theft. Removing customary gleaning, pasturing, and other collective rights on common lands in the eighteenth century made those

rural poor who continued what had once been legitimate activities now guilty of larceny. Property rights were continuously created in new realms, especially the ethereal. Not until the early eighteenth century did it count as stealing to palm off someone else's ideas or even exact words as your own. But after that, countless violations of intellectual property began to be enforced.[102] The rights of persons to themselves expanded the harms others could do them. Unprotected by free-speech rights, classical age satirists in Greece did not attack their contemporaries for fear of being prosecuted for defamation.[103] Starting in the sixteenth century, slanderous, libelous, and other kinds of attacks on reputation became actionable in common law. Developing rights of personality and publicity allowed prosecution of those who would harm (or use features of) others' individuality.[104] As globalization and multiculturalism increasingly juxtaposed different religions, blasphemy laws that once seemed to be fading with secularization and indifference have been revived.[105]

Legal personalities, those with actionable rights, have also multiplied. Whether unborn children could be plaintiffs and, if so, starting at which point in gestation varied with a given jurisdiction's abortion laws. Singling out attacks on pregnant women that caused damage to their fetuses enlarged or at least deepened the pool of potential plaintiffs.[106] Making femicide a crime in itself (fifteen countries and counting), with especially stringent penalties, increased the number of women victims. The expanding roster of licensed professions (now 18 percent of the US labor force) gave more practitioners a stake in having their uncertified colleagues prosecuted.[107] The status of who or what could be a plaintiff expanded beyond the human, too. Trusts, corporations, municipalities, ships, nation-states, and other inanimate entities have received enforceable rights. Animals used to be pursued for harms they may have committed, but those who hurt them are now held liable.[108] Our relationship to animals more generally has become evermore the law's business, whether forbidding the keeping of pigs in big cities in the nineteenth century

or determining which kinds of dogs are valid pets.[109] And nature itself—rivers and forests, for example—has become a plaintiff.[110]

Technological, social, and economic developments may have driven the law to respond by expanding, but the legal system itself also unfolded luxuriously under its own steam. Long-forbidden actions grew like Jack's beanstalk. As a specific form of theft, embezzlement emerged in English law in 1799, arising from a case where a bank clerk pocketed a customer's cash while noting it as deposited to the account-holder's credit. The customer was no worse off, but the bank had suffered a loss that existing law could not touch since the money had never actually been in its possession. From such humble beginnings, embezzlement expanded from a transgression that only those in certain specific relationships of trust could commit (a crime of betrayal) to a general offense applicable to anyone entrusted with property.[111]

From the sixteenth century on, perjury grew to mirror the increasing use of oaths, now sworn by witnesses to deliver the certain testimony that earlier had been ensured by ordeals and torture.[112] Oaths ceased being reliant on adherence to a particular or, indeed, any religion. At least in the common law nations, they became more commonplace elements of bureaucratic practice, not just reserved for courtrooms. Tax declarations, for example, commonly require an oath to their accuracy. With no less than eighteen sections of the US Code now dealing with perjury, more citizens have become potentially liable to it.[113] In the 1970s and 1980s, fraud expanded to cover circumstances where nothing was foregone or any laws violated, but where victims had nonetheless lost an "intangible right," such as the duty of public officials to provide honest and faithful services. From a narrowly defined action not applicable even when someone kept property entrusted to them, larceny has enlarged and can now be committed even by actions once seen as innocent, such as keeping money paid out to one by mistake. Bribery expanded in the 1990s to encompass also the lesser offense of receiving illegal gratuities.[114]

Laws once intended for specific purposes have grown to include a smorgasbord of behaviors. *Grober Unfug* (disorderly conduct), defined in eighteenth-century Germany for use against noisome street urchins, was extended to include everything from carpet beating after-hours to press offenses to Social Democrats' distribution of pamphlets.[115] Treason broadened from collusion not just with enemy nations but also with nonstate actors, such as terrorists.[116] The right to free speech is certainly more generous now than in the era when most criticism of the authorities was actionable, not to mention the restrictions imposed by blasphemy. But in other ways its limits have stiffened with additional restrictions ranging from hate-speech prohibitions to the broader definition of libel.[117] The right of public assembly has narrowed. The authorities tolerate less chaos than was allowed in eighteenth-century demonstrations and protests. Our earlier right of spontaneous assembly today requires all manner of permits and permissions, applied for beforehand.[118]

Even within their narrowed remit, modern penal codes still punish a panoply of behaviors, ceding little ground to the broad police powers of the early modern period. US states criminalize many acts that few citizens contemplate in the first place: selling untested sparklers, exhibiting deformed animals, leaving animal carcasses on public roads, cheating at cards, provoking dogs to fight, selling perfume as a beverage, training bears to wrestle, and frightening pigeons away from devices meant to capture them. Forbidding the removal of fire-safety tags from mattresses is often given as an example of allegedly excessive criminalization.[119] The concept of police power expressed the early modern state's expansive authority over its subjects but is usually thought to have been superseded by the rule of law with the rise of the modern *Rechtsstaat*, a state based on law. In fact, far from being anachronistic, such police powers continue in parallel to the penal code, now sometimes in the guise of administrative or regulatory law.[120]

Criminalizing proxy behaviors to get indirectly at underlying acts has bloated the penal code. Driving underage, driving while intoxicated, driving too fast, driving with defective equipment, and so forth are all separate crimes (implicit endangerment offenses) intended to punish dangerous locomotion without giving traffic police carte blanche to haul any motorist into court.[121] It took years after automobiles became common for speed limits to be instituted at all since motorists insisted that police worry instead about unsafe—not necessarily fast—driving.[122] That was but a blip on a broader development that has criminalized largely all automotive behavior. With driverless cars and the elimination of noisome human wetware from the transportation process, perhaps such laws will fade. Prohibiting proxy behaviors also motivates laws that forbid the possession of drug paraphernalia, tools useful in burglaries, or knives suitable for attacks.

Because penal codes are hemmed in by due process, authorities have also marshaled civil and other noncriminal codes to prosecute offenses. In California, almost as many acts have been criminalized outside the penal code as within it, including school principals failing to use required textbooks, teachers neglecting to bring first-aid kits on school outings, and citizens gambling on the results of elections. In Minnesota, 83 percent of recent crimes created by statute have been codified outside the penal code, 91 percent in Oklahoma.[123] The civil law requires only a lower standard of evidence, allowing greater flexibility and prosecutorial follow-through. Civil law is routinely used against offenses such as insider trading, terrorism, and pedophilia. Store owners, for example, can prosecute via criminal law for the return of stolen items. Using civil recovery laws, they can also collect up to five times their value.[124] Civil asset forfeiture—the confiscation of property allegedly involved in crime—has long historical roots in English law, not to mention biblical precedence. As of the 1980s, it was put to use again. In effect, it punishes while enforcing, inflicting drastic sanctions on those

not yet convicted of crimes, such as drug selling or money laundering, while forcing them to prove their innocence, bereft of the penal code's protections.[125] More generally, authority has informally expanded the limits of its executory powers by punishing outside the law. Extrastatutory harassment, including death, is an unacknowledged weapon in the state's arsenal. Thousands have been killed in pacifying the favelas of Rio de Janeiro or in fighting drug use in the Philippines. In El Salvador, ten times as many criminals as police die in gunfire with each other, a figure that suggests routinized extralegal executions. In 2015, forty times as many US residents were killed by police than legally executed.[126]

Law has begun to punish formerly legal behaviors. Victimless-crime laws ban perceived moral failings even though arguably no one is harmed. Knowing of a possible crime without reporting it has become an offense in its own right. Misprision of treason, or failure to report plots or political crimes, was criminalized in late eighteenth-century Europe.[127] That offense has now expanded. Crimes of omission or the absence of action would once have seemed a contradiction in terms. Today, not reporting a crime or failing to prevent children in your care from committing one is actionable.[128] Good Samaritan laws punish those who do not help others in distress. Similarly, not protecting someone under our care has become actionable in Anglo-American common law. Such expansion of law's remit is clear in the common law nations, where protecting against harm is the basis of the penal code. In the civil law tradition, the tendency is, if anything, stronger. In Germany, the criminal law protects legal goods (*Rechtsgüter*), which cover—however much the concept harm may have recently expanded—an even wider spectrum: everything from traffic safety to the environment and international peace.[129]

More generally, the law has also expanded its remit by moving from acts to thoughts. It once punished only deeds already committed, hoping for deterrence by inflicting public agonies on perpetrators. It has since begun enforcing law preventively—anticipating and

punishing action not yet undertaken. Intent is thus penalized much like act. New thought crimes have emerged, even as formerly criminalized ideas such as blasphemy and sacrilege became legal. In the seventeenth century, courts began punishing defendants not for the crime itself but simply for being suspected of having committed it (*Verdachtsstrafe*). Since the offense was a lesser one, sentencing was adjusted accordingly to something short of death.[130] Once endangering (posing a risk but not yet actualizing it) became a crime in its own right, the mere possibility of harm became actionable.[131] Inchoate crimes, which target intent, in turn massively expanded the range of outlawed actions. Attempts, conspiracy, and solicitation were added to their underlying acts as new crimes, thus quadrupling the number of substantive offenses. Merely talking about committing a crime, even if nothing came of it, could be punishable. If a transgression did result, conspiracy was added as an additional offense to the act itself. More than a quarter of all federal criminal prosecutions in the US now involve conspiracy.[132] In the United Kingdom, incitement (the British version of solicitation) blossomed into the new wide-ranging offenses of encouraging or assisting crime.[133] People were sent to prison for second-order inchoate crimes, such as conspiracy to solicit. To gather tools usable in burglary could be prosecuted as an attempt to attempt to attempt to commit larceny—three levels of offense.[134] Hate-crime laws increased the penalties for offenses motivated by a dislike of protected categories of citizens. They thus added a punitive premium for the emotion that sparked what would otherwise have been a commonplace transgression.[135]

Along with actual perpetrators, accessories and accomplices to crimes have increasingly been held liable, too—those who participated only vicariously or indirectly in the offense or knew of it without reporting it. Who counts as an accomplice has steadily broadened. Sometimes the intent of this expansion has been to spare perpetrators. In postwar Germany, various levels of accomplice

liability were carefully parsed to relieve Nazi criminals of harsh sentences.[136] But in general the intent has been to rope in a larger circle of offenders. A horrific court case from sixteenth-century England punished the husband who tried to kill his wife with a poisoned apple but saw his daughter die instead as the treat was passed along to her. But the friend who had counseled him on how to murder and supplied the poison went free since the child's death had not been his intent.[137] Such fine distinctions were quickly subsumed. Already during the French Revolution, accomplices were punished as severely as those whom they helped offend. Up to this point, English law had not allowed prosecution of accessories except where the main offender had also been convicted, but as of 1848 they could be charged independently and, indeed, as principals.[138]

Jurisprudence has formulated a spectrum of complicity: direct and indirect participants, solicitors and facilitators, as well as accessories before and after the fact—those who obstructed justice, those who received stolen property, and the like.[139] An ecosystem of criminality developed around the offense. Accomplices could be punished even for trivial and tangential assistance: preparing food for the offender, holding his child, lending a smock.[140] In the common law nations, many counted as accomplices because all killings committed during a felony were deemed murders. Thus, in 2007 a man was jailed for life because friends used his car to commit a murder-robbery while he was asleep somewhere else, dead drunk.[141] Those who threatened but not did commit harm began to be punished. So were those who did nothing. When second offenses flowed naturally from the first, an accomplice to the initial crime automatically counted as participating in the latter.[142] Outlawing conspiracy allowed the authorities to prosecute groups for doing something that if undertaken individually would have been legal. French civil servants were welcome to resign individually but not in groups. A solitary walk was unobjectionable; many simultaneous walks became

an illegal demonstration. Two people would be much more leniently sentenced if each one sold marijuana individually than if they hawked the same amount together.[143]

Law has expanded over the past many centuries. America has begun debating overcriminalization, the bloating of the penal code, and the metastasization of criminal punishments throughout statute.[144] If nothing else, multiplying and dispersing sanctions blur the moral message of right and wrong that law should convey. Indeed, they impede citizens from even knowing what rules they are expected to follow.[145] The survey here shows that evermore law is a long and broad development, not a problem only in contemporary America. Already in the first century BCE, Cicero complained of more law, less justice. Nor has the march toward more laws and more behaviors punished been uniform and inexorable. Occasional reverses have been booked. Early in the new millennium, the US narrowed the definition of government corruption, making it harder to prosecute.[146] White-collar crime—insider trading, for example—may have been circumscribed and therefore prosecuted less tirelessly in recent years.[147] Nonetheless, the overall direction is unmistakable.

This trend poses a paradox. Levels of violence and disorder have dropped dramatically over the past several centuries. The state has monopolized violence, building an evermore efficient apparatus of enforcement and punishment. And citizens have ever better controlled themselves, self-regulating their psyches as required by modern metropolitan life. Yet the number of crimes they are potentially liable for has increased. Even as the state has become a more subtle, regular, and ubiquitous sanctioner, even as citizens are evermore socialized into correct conduct, the number of laws and the range of behaviors they formally punish have also mushroomed. The need for law seemingly declined, yet its amount and sway increased. Why? Before we can answer that, we need an idea of what held true before the state began throwing its weight about.

Command and Persuade

Crime, Law, and the State across History

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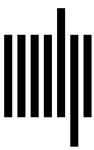
Citation:

Command and Persuade: Crime, Law, and the State across History
By: Peter Baldwin
DOI: 10.7551/mitpress/13482.001.0001
ISBN (electronic): 9780262361507
Publisher: The MIT Press
Published: 2023

The open access edition of this book was made possible by generous funding and support from the author



The MIT Press

The MIT Press would like to thank the anonymous peer reviewers who provided comments on drafts of this book. The generous work of academic experts is essential for establishing the authority and quality of our publications. We acknowledge with gratitude the contributions of these otherwise uncredited readers.

This book was set in ITC Stone Serif and ITC Stone Sans by Westchester Publishing Services.

Library of Congress Cataloging-in-Publication Data

Names: Baldwin, Peter, 1956- author.
Title: Command and persuade : crime, law, and the state across history / Peter Baldwin.
Description: Cambridge, Massachusetts : The MIT Press, [2021] | Includes bibliographical references and index.
Identifiers: LCCN 2020017932 | ISBN 9780262045629 (hardcover)
Subjects: LCSH: Crime—History. | Punishment—History. | Criminal law—History. | Criminal justice, Administration of—History.
Classification: LCC HV6251 .B4273 2021 | DDC 364.9—dc23
LC record available at https://lccn.loc.gov/2020017932