Chapter 2
Crime before the State

Transgressions were punished long before the state assumed that task as part of its monopoly on violence. Gods were arguably the first police, though they were often indifferent and distracted enforcers. Besides smiting sinners directly, divinities also worked in tandem with the customary regulation that kin groups enforced on their members. Once sin and crime began to be distinguished, the former fell to the church, the latter to the state. But this change took a long time, and only well into the early modern era did the state start performing its role unchallenged by either church or kin.

Before states began to issue statute as the rulebook for their subjects, customary law and social norms formulated guidelines to live by. But above them were the edicts of the gods, binding on all believers. The earliest clan societies, uniting several kin groups, lived in fear of violating the precepts of supernatural entities, which were made known through the intermediation of shamans, witches, sorcerers, and other go-betweens. As societies enlarged, growing more complex, they united multifarious groups among whom less could be taken for granted. Accompanying this growing complexity—whether as cause or effect is hotly debated—religions emerged to enforce codes of conduct, from which morality eventually evolved. This molding of human behavior occurred either at the behest of moralizing high gods, such as the Abrahamic divinity or Allah, or by creeds that dispensed broad supernatural punishment through means such as karma in Buddhism. Policed by omniscient, omnipotent big gods,

these complex societies developed cooperative habits that gave them advantages over less-sociable ones.[1]

God's role in law enforcement raised issues. Technically speaking, divinities had only limited sanctions at their disposal. If the consequences of transgression were overly specified, gods risked being unmasked as shooting blanks. Bad weather, illness, death, and other—in any case—likely events were the most plausible indicators of divine wrath, but their import was often hard to fathom. Nor is it clear why omniscient and omnipotent gods needed mortal justice. Often they did not, instead intervening directly to punish offenders. So annoying did the gods of Mesopotamia find humanity's constant din that they struck back.[2] Roman gods punished oath breaking directly. In sixth-century Gaul, perjurers were paralyzed, their right hand raised in oath, or they contracted gangrene in the offending limb or were struck dumb as God brought justice to earth.[3]

When the gods intervened directly, they also undermined human justice, and temporal authorities risked being cut out of the loop. A sincere confession, which in the early medieval Latin Church could be given to anyone, not just to priests, might set things right with God, eliminating mortal sanction. Twelfth-century Europeans pondered whether if sinners contritely confessed to gain absolution, a subsequent ordeal would exonerate them. A fornicating fisherman from Utrecht, for example, fearing he would be accused at the next synod, confessed to his priest. Having resolved to sin no more, he carried the hot iron without being burned. Repentant offenders, who had settled their affairs with God, were often miraculously saved from the gallows.[4]

The nature of their divinity influenced gods' relation to the law. Though the earliest gods demanded and appreciated tribute, they were often uninterested in making humans toe some moral line.[5] Polytheistic religions' confused command structure muddled who issued laws on what. Chinese gods could work against human purpose.

Greek gods countermanded each other, making unclear or contradictory demands. Gods often paid humankind no mind. Sometimes human prayer could compel them to react.[6] Other times secondary divinities (such as Prometheus) sided with humans and were punished for it. Pantheists worshipped gods whose influence was local and circumscribed. How did humans then know what divinities expected of them? The hierarchy of gods meant a ranking of edicts, too—some more pressing than others. Multiple near-omnipotent beings—such as the Greek gods—acting on no discernable basis of justice or morality unsettled their subjects.[7] Monotheism helped clarify matters. A single power issued commands binding on all members of the faith everywhere. But even such pronouncements required interpretation and could be mutually incompatible. Matthew contradicted and revised Moses's commandments.[8] And the Christian God could also be petty, or so humans thought. Renaissance Italians assumed that God, just like everyone else, pursued vendettas.[9]

Hoping to assert their exclusive connection to the supernatural, religions branded their rivals as mere sorcery. Secular authorities, too, mercilessly persecuted witches and sorcerers, competing claimants to power who had failed to assume the aura and trappings of true divinity. In Hammurabi's code (Babylonia, ca. 1750 BCE), the worst crimes were witchcraft and offenses against the administration of justice and religion. The Chinese penal codes hounded sorcerers.[10] Monotheism accentuated this tendency. Though enlisting miracles to persuade converts, Judaism and Christianity distanced themselves from the welter of competing doctrines that used what they dismissed as mere magic. Two forces reigned supreme, God and Satan, with only secondary room for demons, saints, wonder rabbis, and holy objects. The medieval church persecuted witchcraft and sorcery as pagan delusions, even as it considered that its own miracles proved God's existence.[11] Eventually it handed off punishing witchcraft to secular courts—in England, Scotland, and

Germany as of the sixteenth century. Heretics, too, were turned over to the secular powers for execution.[12]

The Jews' covenant with God promised them prosperity so long as they followed it or disaster if they did not.[13] In Leviticus, God detailed what he would inflict on disobedient Israelites: plague, famine, savage beasts, cannibalism.[14] The Old Testament forbade immorality, blasphemy, murder, usury, witchcraft, theft, seduction, bestiality, assassination, manslaughter, assault, kidnap, slander, bribery, perjury, treason, and riot. It treated all largely as offenses against God. Death was the punishment for many offenses, though it was often unclear whether God or human authority was to do the enforcing.[15] Those who afflicted widows and orphans, however, could be sure that God himself would kill them with a sword as punishment.[16] In the ninth century, Charlemagne invoked divine law to warn murderers that both God and he would punish them. As late as the sixteenth century, Martin Luther insisted that authorities enforcing the law acted on God's behalf.[17]

The gods punished directly but also at human behest, as when magistrates at Teos and Sparta invoked curses at offenders.[18] Oedipus pronounced a curse against the unknown killer of Laius, but, as it turned out, Oedipus himself was that killer. Roman law distinguished between *ius* (profane criminal law) and *fas* (sacral criminal law), the latter dealt with by the pontifex, the chief high priest. Early Germanic law codes may have distinguished between sacral offenses (violating the peace of gods and people alike by arson, homicide, fornication, and so forth) and profane, less-serious breaches of the peace of the people.[19] In the first century CE, Tacitus wrote that German priests, standing in for the gods, punished warriors.[20] Sacrifices—including of humans, as among the Egyptians, Nordics, Germans, and Incas—revealed how eagerly believers aimed to please their gods.[21] For Aztec gods, human blood was their nourishment.[22] Hopes of propitiating angry gods long remained a motivating force. The country-wide fast ordered in England in 1832

to atone for whatever sins had caused that year's cholera epidemic was only one such national self-flagellation that the British Parliament hoped would catch the Almighty's eye.[23]

Besides intervening in this world, gods could threaten punishment in the next. Only some religions imagined the afterlife as atonement. The Aztec and related Mesoamerican religions foresaw nothing but total extinction for all, good and bad.[24] For non-Axial religions—immanentist, not transcendent—which often saw postmortem life as but an extension of this one, no great shift was required. But Hinduism and Buddhism, where the law of karma punished this life's wrongs in the next incarnation, may have enjoyed a deterrent bounce.[25] Though the ancient Chinese did not link law to the divine, the Confucian ruler represented the gods, and good and evil were expected to be treated accordingly in heaven.[26] The Christian doctrine of purgatory, completed in the thirteenth century, added a wrinkle by blurring the gulf between the now and the thereafter. Sinners gained a second chance at postmortem redemption through penance. Others could intervene on their behalf through indulgences, the shaving of time off purgatory through monetary payments rather than through good works.[27] Excommunication—exclusion from the religious community—also blurred now and later. Hell loomed eventually, but in life, too, the excommunicant became a nonperson, the living dead. For believers, eternal damnation was an incomparably worse sanction than anything meted out on earth—not to mention the certainty of being found out. To the medieval mind, God's omniscience penetrated far deeper than Jeremy Bentham's panopticon, and straying led to consequences more severe than any possible secular punishment.[28]

Secular lawgivers piggybacked on transcendent sanctions, trading off between this- and other-worldly punishment. The church's power over the next life added muscle to its punishments in the here and now. Wihtred, the eighth-century king of Kent, threatened foreigners who refused Christian marriage with banishment, the

English with excommunication.[29] Physical punishment was costly, so invoking supernatural policing relieved hard-pressed secular authorities. Sanction after death may have lessened the state's need for immediate intervention, while its subjects' belief in strictures in the afterlife encouraged obedience in this one. Assuming that past attitudes can be extrapolated from the reactions of today's undergraduates in psychology lab experiments, humans who believed that gods would eventually punish transgressions felt less impelled to ensure that offenders received their just deserts now. And stern gods were better regulators of behavior than kind ones. A belief in hell's transcendent accounting, punishing sinners who had sidestepped this-worldly retribution, may thus have helped the state.[30]

At first, most offenses were sins, contraventions of divine will. Gods were therefore the ones to mete out sanctions. Vengeance is mine, the Lord warns in the Old Testament. Secular crimes scarcely existed independent of divine offense, oversight, and intervention. Sin and crime were separated from each other only gradually, and even today the distinction between law and morality throws up similar problems. Offenses could therefore have both legal and ritual consequences. Among the ancient Greeks, accidental killings required purification but no penalties. Involuntary manslaughter meant exile as a means of purification. Deliberate killings, in contrast, brought down both law and religion on the offender's head.

With the state's emergence as caretaker of secular order, crime was distinguished from sin. Churches pursued sin, states prosecuted crimes. Much sin became defined as crime. The Greeks punished arrogance and extravagance as criminal offenses. In 1650, England changed adultery from a church court offense to a felony without benefit of clergy.[31] In our own day, adultery has reverted to—at most—mere sinfulness, though technically it remains illegal in many US states. Usury went from sin to crime to big business, with only a faint echo of its disreputable past still audible in laws that set putative upper limits to allowable interest charges.[32] In medieval England,

infanticide was treated as a sin, and church courts imposed penance.[33] The state later took even the youngest under its wing, though the dire straits faced by mothers who resorted to killing their offspring was often taken into account. A third of women indicted for infanticide in seventeenth-century Scotland were banished instead and never brought to full trial.[34] But in seventeenth-century Denmark and Norway, giving birth in secret (thus facilitating infanticide) was a capital offense. In Germany, sixteenth-century law reform increased the likelihood that infanticides would die, too. And in France at the same time, infanticides made up a fifth of all those executed by the Parlement of Paris.[35] Sin and crime still blended. The concern was not just with the killing as such but also with how it endangered the child's soul by depriving it of baptism.[36]

As crimes and sins separated out, so too did the respective modes of proof it took to be convicted in the West. Religious and secular parted ways during debates over trial by ordeal in the twelfth and thirteenth centuries. Ordeals called on God to indicate guilt or innocence and thus to intervene directly in human affairs. Compared to feuds and other private dispute resolutions, trials by ordeal had two great advantages: they were public decisions taken once and for all, and, in theory, they tapped into a supernatural source of certainty, allowing a definitive outcome.[37]

Though foreign to Roman law, ordeals existed globally, from Europe to Japan. Archaic Greece knew them, as did Palestine of the Bible.[38] The accused swore oaths invoking gods and their own reputations as reason to believe their claims to innocence, and they were backed up by compurgators—allies who staked their own reputations on the defendants' behalf.[39] Whereas oaths involved God indirectly as the ultimate character witness, ordeals (by battle, water, or fire) roped him in directly. Humans obliged God to testify through the ordeal's outcome as to the guilt or innocence of his wretched creations. Ordeals promised certainty, but practical problems still remained. If God determined the outcome of judicial combats, why

seek out the best fighter? Why were women more often subject to trial by fire rather than by immersion, where the buoyancy of their adipose tissues compounded the likelihood of a guilty verdict?[40] How to explain miscarriages of justice, when ordeals gave patently false verdicts?[41]

Ordeals were eventually abandoned as people were persuaded to reason on the evidence of their senses to determine guilt, but first they were attacked for religious reasons. Medieval theologians worried over the tension between worldly proof and divine gravitas. Of course, an omnipotent divinity could intervene in human affairs. But why would he want to upend the laws of nature and perform miracles to settle petty disputes—and at human demand?[42] Ordeals were God intervening into nature, thus miracles, but they were not his free choice. His act had to correspond to an outcome dictated by human will—guilt or innocence. God should not be tempted or tested—that was the theological objection to ordeals.[43]

Ordeals eventually gave way to physical evidence and the jury. But even as the secular state's concern for religious transgressions ended and the supernatural's role in the judicial process was marginalized, God's calling card remained on the tray in the hall. The intertwining of divine and secular continues even today in the oath.[44] By swearing, we invoke a higher power while promising certain actions or attesting to the truth of our assertions. That humans thought they could oblige God to help keep them honest is what made oaths suspect to the apostles.[45] But the judicial system in the Latin West took a more robust Old Testament view of God's willingness to backstop mortal truthfulness. In taking an oath, we curse ourselves, calling down supernatural wrath if we lie. In seventeenth-century England, anyone violating the oath taken in a binding-over action risked God's anger.[46] Today a jail sentence for perjury is at stake, not our immortal souls. But the logic of trembling before a higher power remains.

The State Emerges

As divine and secular law gradually separated, crime fell to the state, leaving sin to church and conscience. Since the state came to handle punishment alone, hell—as a place of deterrent torment—played a less necessary role in mainstream theology.[47] Yet, seen in history's long scope, the state only recently awoke to what we regard as among its primary duties: laying down the law, punishing transgression, maintaining order. Law—natural, divine, customary—was, of course, older than statute. Outside the ancient empires, enforcing it was long left to religion and civil society. China, Greece, and Rome policed their citizens, but not until the early modern era was the state again able to do so in Europe. Recognizably modern policing arrived only in the late eighteenth century. Even today, small isolated societies such as the Inuits, or close-knit religious communities manage without overt policing, resolving matters—even homicide—informally between victim and offender's kin.[48]

Only gradually did the state command a role in resolving conflict. Disputes had been sorted by the interested parties, coming to agreement or feuding in its absence. Feuds eventually gave way to a public resolution of conflict in trial-like circumstances. Court procedure was well elaborated already in ancient Babylon, almost two millennia before Christ.[49] From the seventh century BCE, even before law had been written down, men acting as judges set up informal courts in Greece to adjudicate disputes between parties who would jointly choose a venue and agree to adhere to the judges' decision.[50] In the *Iliad*'s trial scene, the disputing sides find judges, a framework of adjudication, and two talents of gold for the best judgment. Such quasi-courts slowly managed to ground their decisions not just, as earlier, on the claims of the powerful to rule but also on laws that were accepted as applying to all citizens.[51]

As the decisions of these early Greek informal courts accumulated and were abstracted, they gave rise to a judicial framework.[52] Rules

were imposed: parties to agree on arbitrators, decisions handed down under oath and binding, a settled issue not to be raised again, and so forth. Meeting regularly, arbitration tribunals developed into an early form of courts. Their decisions could be appealed to the Council of the Areopagus, which may deserve to be considered the first proper court. During the poet Hesiod's time, eighth century BCE, arbitration became public and compulsory. Each male citizen served as a judge in the year after turning fifty-nine.[53] Trials run wholly by the judiciary made a public duty out of formerly private matters. As of the seventh century BCE, the early Greek codes of Drako, Solon, and Zaleukos specified penalties rather than leaving them to the judges' decision. Forbidding victims' kin from seizing the accused and taking matters into their own hands, the Great Code of Gortyn (fifth century BCE) instead offered regularized procedures of public adjudication.[54] Communal negotiations were now subordinated to the authorities. Whether from self-interest or compulsion, the parties agreed to abide by rules imposed from above. The law gradually emerged as a body of strictures, independent of kin, with the state as enforcer.[55] Under the Romans, improvised public tribunals grew permanent in the second century BCE, authorized to punish serious crimes affecting the whole community. During the later empire, judges presided as state representatives, able to act independently of any charge brought by private parties.[56]

But even as the authorities promulgated laws, much remained left to self-help. Awarded a settlement in ancient Greece, defendants themselves still had to enforce it. Cases were heard before courts, but Roman plaintiffs acted as their own prosecutors.[57] In medieval common law, victims' widows and children personally dragged killers to the gallows, and a violated woman herself castrated and blinded the rapist.[58] Justifiable homicide is the polite fiction whereby a weak state agrees that certain killings are legitimate. Ancient Greek and Roman law defined justified homicide expansively, as did most Western legal codes for the next two millennia. A highwayman in the

act, a robber using force, anyone stealing at night, someone robbing clothes at the public baths, a man having sex with another's wife, mother, sister, daughter, or concubine, a rapist of free-born women or boys: according to various codes, all could be justifiably killed on the spot.[59] The killer of a manifest felon would likely not be prosecuted in medieval England, or he would be protected against retaliation from the criminal's kin. Someone burning down a house in medieval Iceland could be instantly killed in the act, as could trespassers.[60] Absent reliable intervention by the authorities, self-help remained the victim's most likely source of satisfaction.[61]

Only gradually did the state grow able to define, police, and punish homicide. Early Chinese emperors might pardon murderers, but, recognizing that victims' families would still seek to avenge their kin's death, in the fifth century they began compelling the pardoned to move far away.[62] In medieval England, a husband could no longer kill an adulterer having sex with his wife, but as a trespasser the cad was still a sitting duck. In the late seventeenth century, catching a wife in adultery remained sufficient provocation to reduce a charge of murder to manslaughter.[63] Yet by the thirteenth century killing outlaws and obvious felons on the spot was considered frontier law in England, no longer allowed in most localities. Justified killings were eventually permitted only in self-defense. In the thirteenth century, a thief caught in the act could be killed with impunity only if he also posed a danger. And self-defense grew limited in turn. In England by the mid-thirteenth century, even if in danger, those able to flee committed a crime if they instead struck and killed in self-defense.[64] The duel, which we return to later, was also part of this story of restricting justifiable homicide. It allowed certain sorts of people to kill each other by following particular rules. But by the nineteenth century, it too was largely stamped out.[65]

Yet, as so often, the law here bears continuing traces of its past even in contemporary statute. Violent self-help remains tolerated today.

Several US states allow mere manslaughter charges for killing spouses caught in flagrante.[66] Until 1975, a French husband catching his wife in the act at home could justifiably kill both her and the lover. So could a Texan husband.[67] In Italy, sentences were reduced under similar circumstances until 1981.[68] Even severe assaults today are still less likely to lead to arrest, prosecution, and conviction if between related people—practically speaking, husbands against wives.[69] Temporary-insanity pleas are used as technical work-arounds to treat violence against women leniently.[70] Stand-your-ground laws permit citizens to take the law into their own hands to defend themselves. In many nations, such as Britain, such laws have been whittled back. The state jealously guards its monopoly on violence, forbidding citizens to act as their own avenging angels. But in the United States, the citizen's duty to retreat rather than to fight is defined narrowly, sometimes allowing lethal self-defense.[71] A similar logic is used when abused women invoke battered-wife syndrome to expand the parameters of the imminent threat they need to plead self-defense.[72]

Before the nineteenth century, the fundamental reality of enforcement and punishment was the state's absence. Some crimes, as we will see, did concern the state from the start—especially treason, where it was the target. But most violations were left for the interested parties to handle. Until the state imposed its judicial monopoly, offenses were dealt with largely in two ways: vengeance and compensation.[73] Compensation was the overarching concept because in effect restitution was provided by both methods, measured either in blood or in material value.[74] Restitution and vengeance alike righted the moral imbalance created by harm, either in the eye-for-an-eye logic of the lex talionis or by means of fungible values—money, oxen, slaves—that were considered equivalent.[75]

If all parties agreed, compensation resolved the issue once and for all. But feuding kin groups often fought on for generations, the original offense ever amplifying and expanding. In the seventeenth century, the Scottish authorities hastened to intervene immediately

after the first killing, before feuds could snowball, each subsequent round of slaughter harming anew, stoking further revenge.[76] Since the offender's entire kin was accountable, feuds ratcheted upward. The stronger the kin, the longer the feud.[77] A single spared opponent threatened yet further revenge. Pushed to its logical extreme, a feud was truly resolved only once the opposing clan's last male had been killed. The family of Milovan Djilas, the Yugoslav Communist partisan and politician, for example, was almost wiped out in feuds with agents of the Montenegrin prince Nicholas I in the early twentieth century.[78]

Vengeance was a major obstacle to the state's hopes of pacifying its territory internally. During the Warring States period in China (ca. 400 BCE–200 CE) unbridled vengeance challenged the state's grip, with officials forced tacitly to condone it.[79] Feuds, in effect, negated the state—with kin groups treating each other as the primary political units and refusing to recognize any higher authority than honor. Hopes of taming vengeance's savagery encouraged the state to expand its role in administering justice.[80] Once embarked on the business of adjudicating disputes, the state therefore sought to curb vengeance while promoting and institutionalizing compensation instead. In the Hittite edict of Telepinus (ca. 1620–1600 BCE), a victim's family chose between retaliation and restitution. But later laws ruled out retaliation.[81] By the time described by Homer, half a millennium later, the Greeks had largely managed to stamp out blood feuds. In the *Iliad*, blood is never exacted for blood.[82] The Romans, too, suppressed vengeance early. And Sharia law restricted blood feud in part by permitting retaliation only after judicial authority had determined the culprit's guilt.[83] In the Old Testament, David rejected the vengeance taken by two of his followers on the son of his enemy Saul. He killed the killers who, mistakenly expecting to be rewarded, had brought him Ish-Bosheth's head.[84]

Slowly, wherever it could, the state wrested control away from kin. Compensation and vengeance ran parallel for many centuries.[85] By

the seventh century CE, the Visigoths had followed the Greeks and Romans by taking disputes into the courts. In hopes of keeping the peace, the early Germans allowed restitution even for homicide.[86] Medieval kings offered restitution as an alternative to vengeance, in the Swedish Helsinge law in the early fourteenth century, for example. Merovingian laws ordered compensation for assault and robbery, set out procedures to clear those accused of homicide, and stipulated restitution so as to prevent feud. Charlemagne admonished the kin of killers and their victims to seek quick settlements, thus squelching dispute.[87] Over a thousand years, from the late Roman Empire to the imposition of a semblance of regularized policing in the early modern era, European states sought to suppress feuding.

England, with its centralized state and developed court system, was among the earliest to match the ancient empires' achievement. By the thirteenth century, feuds among the nobility had been brought under control.[88] On the continent, that took another two centuries. The medieval peaces—a church initiative—sought to multiply the holy days on which killings were forbidden, thus pacifying more of the year. A Saxon edict from around 1221 ruled that revenge could be exacted only on Monday, Tuesday, and Wednesday, but the rest of the week was to remain free of conflict.[89] Renaissance Italian families' savage vendettas were controlled only slowly by emerging absolutist states. In sixteenth-century Florence, peace treaties among warring families, enforced by posted bonds, sought to end feuds. In the fifteenth century, the Spanish monarchs Ferdinand and Isabella imposed the Santa Hermandad to enforce royal justice against their warring aristocrats.[90] The Imperial Peace Statute of 1495 in the Habsburg lands similarly outlawed feud and private warfare. And honor crimes were brought under court control in Russia.[91]

By the 1500s, feuding had largely been replaced by the official judiciary, at least in the European core, where the state was strongest. Even in a largely pastoral country such as sixteenth-century Castile, where only a quarter of males could read, lawyers litigated

on behalf of a menagerie of plaintiffs over quotidian disputes.[92] Conflict resolution had shifted from bare knuckles to the courts. But in the peripheral worlds, where the state's sway was weaker, feuds continued: the Scottish Highlands, Friuli, Liguria, Valencia, not to mention islands such as Sicily, Corsica, and Sardinia. For more than five hundred years after its ninth-century founding, Iceland refined its elaborate system of law, but it never found a way of enforcing it other than by feud. When the Icelanders finally wearied of cycles of bloodshed in the thirteenth century, they invited the Norwegian king to establish order. Highland Scottish clans grew tired of fighting in the late sixteenth century. They asked the royal authorities to arbitrate disputes and threatened to arrest their own members who refused or reneged.[93] By the time of the revolution, French deputies still worried that if the penal code legitimized killing in defense of others, not just oneself, it would give carte blanche to what were by then considered Mediterranean habits of vendetta, known from Italy and Corsica.[94]

In Giuseppe Verdi's opera *La forza del destino* (1861), the brother of a seemingly wronged woman is delighted ("What great joy!") when her lover is healed of a mortal wound—but only because this affords the brother the chance to kill the lover once and for all, avenging the lover's killing of the siblings' father. Feud was hard to brake, the logic of its momentum unrelenting. Even deep into the nineteenth century, the Japanese government still authorized and rewarded private parties seeking vengeance.[95] Feuds continued unabated across the Mediterranean and Balkans. In eighteenth-century Corsica, with feuding men holed up in fortified houses, only women could till the fields. A century later, feuds endured, half of them lasting at least fifty years. Deep into the twentieth century, such disputes claimed hundreds of victims annually in the Balkans.[96] In Albania, dozens of families remain sequestered in their homes today, too fearful of vengeance to venture out. Clan feuds in Gaza claimed at least ninety deaths in 2006.[97]

Feud, however, was not anarchy. Where centralized authority had yet to impose rules, feud was a means of settling disputes. All—strong, weak, or equals—had to resolve differences knowing that an unacceptable solution would prolong the conflict and that fortune or recrystallizing coalitions might reverse today's outcome. Feuds were stylized rituals whose procedures limited the worst excesses. The talionic principle of an eye for an eye in Jewish, Greek, Roman, and Sharia law was meant to set an outer limit to vengeance. Sharia exempted singular organs—noses and penises—from amputation.[98] Where feud was most institutionalized, as in medieval Iceland, the rules on vengeance killing were incorporated into the law of the land. In early modern Germany, feuding was rule bound, including negotiations before hostilities and a challenge delivered prior to violence.[99] If followed, the feud's fundamental logic was self-limiting: reaction only in proportion to provocation. The feud might continue interminably, but without necessarily escalating. Only men and only adults usually could be killed. Icelandic law spelled out the allowable: immediate killing for sexual assault, say, but acts of vengeance over the subsequent year for less-serious blows. Those who violated truces became social pariahs. Feuds here were a stabilizing ritual that channeled conflict into formalized arenas for arbitration.[100] In Catalonia, prospective avengers registered their claim by letter to their victim, waited ten days, and targeted only the offender himself. Having withstood an all-out assault on its house for three days, a clan in modern Montenegro was considered vindicated. Thereafter, the feud unfolded more moderately as small-group attack and individual ambush. However awful, feuds moderated even worse horrors—the apparent paradox dubbed the "peace in the feud."[101]

Vengeance competed directly with the state's claim to be the only enforcer of order. In comparison, compensation had the advantage of quick and bloodless resolution—so long as all agreed. No wonder authorities preferred it to vengeance. A bull killed someone: the Old Testament recognized the owner's theoretical liability to pay with

his own life but suggested ransom instead.[102] From the beginning, the law eagerly sought to regularize restitution. The earliest extant code (Sumerian from ca. 2050 BCE) tallied the precise cost of infractions: ten silver shekels, say, for cutting (off?) a foot. So did the Twelve Tables of Roman law. The sixth-century laws of the Salian Franks stipulated costs for stealing pigs, depending on their condition and age, and other animals, down to bees.[103]

Wergeld, the restitution paid in Germanic law for injuries or killings, precisely tabulated the cost of mutilation and dismemberment as well as the worth of different lives. Modern actuarial tables are less detailed than these medieval codes. Æthelberht's laws from seventh-century Kent finely calibrated prices, both by damaged body part and by whether the victim was slave, freeman, or priest. Front teeth were worth more than back teeth. Damage to incisors was legally weightier (counting as mayhem) than damage to molars or grinders, not only since it was more disfiguring but also because the loss of incisors disadvantaged victims in a fight. Different fingers and their nails had different prices. Whether ears were rendered deaf, cut off, pierced, or lacerated mattered, as did whether bones were laid bare, damaged, or broken and whether the penis was destroyed or pierced partially or fully. Such detail pertained not only to bodily injuries but also to every conceivable violation of women and other forms of property.[104]

These finely calibrated costings revealed how the law still was only the intermediary between kin groups negotiating what they owed each other.[105] Though less bloody, compensatory law—like vengeance—was ultimately incompatible with the state's ambitions to be the only actor to settle conflict. Restitution was therefore eventually suppressed, too. In ancient Greek and Jewish law, compensation was eliminated altogether.[106] Christianity, however, accepted restitution and thus obliged Christian states to spend the following centuries attempting to eliminate it. The state took its own revenge for being eclipsed by beginning to claim part and ultimately all of

the compensatory payments for itself.[107] Early Anglo-Saxon law already distinguished *wite*, or fines that belonged to the king, from wergeld.[108] In early English law, communities unable to identify a killer paid *murdrum* to the king. Because a homicide breached the collective good of the peace, feudal lords claimed part of the wergeld paid to kin. By the twelfth century, compensation in England was paid to the church, king, or community, not to the victim's family.[109] In sixteenth-century Seville, mothers and widows could still accept compensation from the murderers of their sons and husbands. But highway robbery and treason were not thus atoned. By the seventeenth century, restitution had largely been eliminated, at least in northern Europe.[110] Rather than allowing injured parties to be compensated, the state itself now collected what had in effect become fines.

Restitution was thus largely eliminated from the penal code, its logic now confined to civil law and insurance. And yet reintroducing compensation to the criminal law remains today a widely discussed proposal, sometimes called "restorative justice." Reformers note that the victims receive nothing besides the satisfaction of seeing offenders punished.[111] If criminals restitute victims, it is argued, rather than making amends to and through a neutral state, they will better grasp the evil they have wrought.[112] Allowing offenders to buy themselves out of prosecution by compensating victims, however, is still considered beyond the pale, although it remains possible in Islamic law.[113]

Command and Persuade

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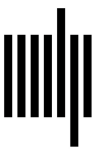

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