Chapter 3
Crime as a Social Problem

That crimes were ultimately offenses against the community, not just against individual plaintiffs, was perhaps the most important conceptual breakthrough in law's development. Individual harm was self-evident but only tangentially the state's business. For millennia, such torts were therefore left to the parties involved to handle. The idea of a public crime, however, required both a sense of social damage—a tear in the communal fabric going beyond any individual's stake in the matter—and recognition that the state, as society's most plausible representative, was the proper actor to punish it. That insight took centuries to emerge.

With the state seeking to stamp out vengeance and restitution, a broader issue arose. If crimes merely pitted kin groups against each other, then private resolutions sufficed. But what about victims without family or others to speak for them?[1] More interestingly, what about actions that damaged not just the victim but also society? Many crimes targeted individual victims: theft, rape, murder. For them, private solutions were obvious and for centuries the only ones available. Yet other offenses, sometimes with no specific individual victims, were inherently attacks on society. Offenses against authority and religion were obvious examples of such public crimes.[2] But more mundane violations could also harm something beyond the individual victim. Embezzlement, tax fraud and evasion, espionage, perjury, perversion of justice, coining and counterfeiting, food adulteration, sedition, pollution, failure to school or

vaccinate children: all such acts inflicted collective harm where restitution did not suffice. Even individual crimes had social consequences. Philo of Alexandria, a contemporary of Paul, considered adultery worse than murder because it harmed the soul, not just the body, and left behind victims among families, children, and the state.[3] Though suicide was seemingly the ultimate individual act, Durkheim argued, in fact it gnawed at the social principle of each person's inviolability.[4] Anything that undercut public trust in the currency long remained a capital crime—even in Quaker Pennsylvania of the eighteenth century. Clippers of coins, John Locke thundered in 1696, not only removed some silver but also undermined the public faith in government, turning robbery into treason and meriting death.[5]

Dante Alighieri regarded fraud and betrayal—betraying public trust—as socially more harmful than mere violence.[6] In a collectivist system ruled by religious caste (theocracy) or dictator (autocracy), an individual action might violate the communal order—privately worshipping false idols, say, or stealing property that by definition belonged to the collective. But the idea of purely individual transgressions wilts under scrutiny also in secular and politically liberal societies. They, too, enforce a common code of ethics. Citizens may be left to make decisions privately that earlier were publicly defined and enforced. Mores may have changed and relaxed. Yet inviolable moral precepts ground every society, even ours today.

Both Roman and then Germanic law focused on individual retribution and retaliation.[7] Yet the insight gradually spread that if society suffered damage, then it could take revenge. If society had been harmed in ways unrepairable by individual action, the state would stand in for its claim to restitution. Christianity's emphasis on forgiveness and on redeeming sinners shifted attention away from making criminals pay: not taking an eye for an eye but turning the other cheek.[8] Nonetheless, sins remained understood as actions

against God, offensive not just to him but to all faithful. Sin had collective consequences. Crime went beyond individual malfeasance.

Religious law first broached the idea of an offense that trespassed against something higher, not just the immediate victim.[9] In early times, crimes foremost violated God's order. Sin and crime overlapped, and everyone—not just the miscreant—might end up suffering. The offended gods might punish or forgive. Hebrew law was divine, emanating directly from God. Cuneiform laws (of Babylonia, Egypt, etc.) were mediated by the ruler, who was their author. Adultery illustrates the difference. In cuneiform law, a husband could decide whether to punish his wife and her lover. But in biblical law the offense was against God, not the spouse. Death was the unavoidable sanction, with the religious authorities vouchsafing God's role as the offended party.[10] Genesis demanded that wild animals who killed humans be put to death—not because of the harm done but because they had violated the higher law that human life, made in God's image, is sacred.[11]

The state's stake in punishing crime thus went beyond individual justice to protect the common interest by enforcing the law. "All suffer injury when someone wrongs the state," Plato insisted. Demosthenes regarded deeds of violence as public crimes committed also against those who were not directly involved.[12] The Greeks saw some crimes as polluting all society, with individual actions taking on collective consequences. Like traitors and committers of sacrilege, murderers offended the community as a whole, not just victim and kin.[13] Crimes involving matters of public concern, such as charges against government officials, were processed in special jury courts (*dikasteria*).[14] In the Old Testament, rituals were prescribed to cleanse a community of the collective guilt arising from an unsolved murder.[15]

Most apparently, desertion or loss on the battlefield endangered the entire community and was collectively punished from early on. By the Roman *fustuarium*, a disgraced military force divided itself

into tens, picking by lot one man from each group to club to death. The Germanic tribes hanged deserters in trees.[16] Other offenses that violated the community in early law included treason, incest, bestiality, and witchcraft leading to death.[17] In ancient Greece and Rome, aborting a healthy fetus was a crime against state and society for eliminating an economic and military resource.[18] In common law, maiming someone was illegal not so much because of the harm done the individual as for depriving the king of an able-bodied subject to defend the realm. Self-maiming was felonious for much the same reason.[19] As was homicide.[20] Murder had its obvious victims, but the social order also suffered when homicide proliferated. Fraud undermined the security of all financial transactions, not just the one in question. Thieves, as Kant explained this logic, hurt themselves as much as their victims. Undermining everyone's ownership, they hollowed out their own, too.[21] Individual crime inherently affected all of society.

Crimes with public consequences could thus not be left to individuals to handle. Private prosecution of public crimes misaligned the incentives. Why should victims pursue offenders if they would receive no restitution? Or, conversely, they might undermine public trials by defaulting to informal plea bargains or even by dropping (or only half-heartedly pursuing) a prosecution if paid off by the defendants.[22] Outlawing such side payments, known as "compounding" (in effect a circuitous form of restitution), the state sought to force dispute resolution into public forums. In sixth-century France, Merovingian kings forbade private settlements for theft.[23] In the thirteenth and fourteenth centuries, robbery victims who got their goods back from thieves and agreed to keep quiet could be prosecuted for *theftbote*.[24] Private deals to settle misdemeanors remained legal, but for felonies they were forbidden in eighteenth-century Britain. Courts fined those who sought to sidestep the judicial machinery by offering rewards for the return of stolen property rather than prosecuting theft officially.[25] Even today, police and

retailers are at odds over whether shoplifters should be prosecuted or merely arm-twisted into making restitution.[26] In the US, offering to accept restitution for a felony itself became a felony. The state could prosecute on victims' behalf even without their consent.[27] Public crimes demanded public punishments.

Vengeance and restitution would no longer do since both took an individual approach to crime. Restitution grew incompatible with public punishment once the state began taking at first a cut and then soon all of compensatory payments, directly competing with the victims. From the vantage of vengeance, restitution's basic assumption—that money resolves every conflict—was profoundly amoral. Higher principles had been violated that money could not assuage. Do not accept restitution for a murder, the Old Testament commanded, but kill the killer.[28] Even where compensation was customary, vengeance lurked offstage. Medieval Icelanders happily restituted most offenses, but not the killing of family. "Kin should not be carried in one's purse," they cautioned.[29] How could money make good murder, rape, or assault—or adultery, defamation, and other loss of honor? How could restitution pay the price of living in fear of crime or for seeing other public goods violated?[30] For crimes that could not be compensated, early Germanic law demanded whipping or enslavement. Later, life itself became the tribute paid.[31] In the long run, excepting a few vestiges, as in Sharia law, the inability to compensate for certain offenses and the need therefore for public punishments became deeply embedded in our moral sense.

Vengeance in turn threw up a different dilemma. It refused any compensation other than an equivalence of pain and suffering. Like compensation, vengeance was pursued by kin groups, yet it gave voice to a collective system of value alternative to and competing with the state's pretensions to speak alone for society. Wounded honor was an inherently collective affront, an injury that both was created and had to be restituted socially. Dishonor injured its victims' social personae, affecting how they were seen by others.

All of society, not only the immediate victim, was involved. Vengeance was so pressing a motive and was so hard for the state to quell precisely because—tapping into the burning insistence on retribution—mere restitution could not assuage profound injury.

In the long run, neither restitution nor vengeance could master crime's social consequences. Public offenses demanded public punishments, and only the state could mete out such sanctions. Even those hoping to reintroduce restitution to modern penal codes admit its limits. Allowing restitution for rape, for example, would legalize sexual inequality, nor could crimes against humanity be restituted.[32] Some crimes are ultimately irreducibly public. As the state gradually assumed the adjudication earlier left to the implicated parties, it emphasized crime's collective nature. The shared moral codex underlying any society presupposed that violating its norms endangered everyone, not just immediate victims. Shouldering responsibility for punishing public wrongs, the state thus took over the role first played by God.

Most religions have penalized sins as offenses against the gods.[33] That collective offenses endanger all has been a leitmotiv across cultures and ages. In the Old Testament, crimes against God threatened all of Jewish society, requiring death for the offender.[34] After the Homeric period, the Greeks grew convinced that criminals' presence polluted society, endangering everyone and requiring the state to punish on behalf of the gods.[35] In *Oedipus Rex*, a plague looms because a killer remains at large. Once the Roman Empire converted to Christianity, heresy became an offense against the state, an aggression against everyone. Pagan sacrifice was made a capital crime as of the fourth century. Justinian's code of 529 CE held blasphemy responsible for famine, earthquake, and pestilence.[36] The Aztecs feared drunkenness as a violation that opened a portal for sacred wrath to enter mortal society. Peruvians were certain that violating Inca commandments hurt everyone, not just themselves.[37] Sodomy was thought to have provoked God to unleash

the plague on fifteenth-century Venice.[38] In early modern Europe, swearing and blasphemy were considered dangers to all, not just to the individual sinners, as was bankruptcy by Dutch Calvinists.[39] English Puritans feared God punishing all for the presence of sin. Austrians of the same era were convinced that vice, frivolity, and wrongdoing had angered God, bringing on the Turks and inflation. Cotton Mather, the New England Puritan divine, told a convicted murderer he had to die lest the nation be polluted.[40] In our own day, the AIDS epidemic and other catastrophes have been blamed on sin.[41] The logic of collective affront is familiar and persistent.

In Hebrew law, public offenses demanded collective punishment. For idol worship or the serving of other gods, the entire community had to expiate. Stoning—definitionally carried out by the group—was often used for crimes considered a collective threat. Moses was commanded to bring out a blasphemer to be stoned by the congregation.[42] Banishment, found in Dracon's code in the seventh century BCE, was also common in early German and Nordic societies. It was collectively enforced: anyone was at liberty to kill a returning exile. Tacitus noted that the tribes of Germany still settled murder privately, but those who offended against the collective (by retreating in battle or deserting to the enemy) merited public punishment. Six centuries later, the Carolingians imposed public punishments, not just private restitution, for inherently collective offenses such as counterfeiting, false witness, and perjury. In Anglo-Saxon England, incest, witchcraft, and bestiality were treated as crimes punishable by the community, not just by the victims.[43] In eighteenth-century England, two-thirds of those convicted of forgery were executed. Other than murder, no crime was more severely punished.[44] For the Incas in the Andes, removing a bridge was a public offense on par with adultery, murder, or blasphemy, much as stealing bee hives was a capital offense among the Germanic tribes, whose only source of sweetness they were.[45] At the end of the Roman republic (ca. first century BCE) offenses earlier considered private (*delicta*) came to

be seen as public. The concept of *iniuria* (a wrong or outrage) was expanded to include violating private homes or corrupting minors and women. Laws now outlawed adultery, electoral corruption, the bearing of arms, public violence, criminal gangs, and interference with the administration of justice.[46]

This logic of collective offense was also extended to crimes that on the face of it did not affect the entire community, homicide above all. Among the ancient Jews, a murderer's blood was needed to expiate this crime against both God and humans.[47] In Homer, however, homicide concerned only the victim's family, who pursued the matter. If the dying man forgave him, the killer could not be charged, and the victim's relatives were released from the obligation to prosecute. Despite his other reforms, the Athenian statesman Solon left homicide a private offense. But in the sixth and seventh centuries BCE, murder began to be considered a crime not just against the victim but also against the gods, who might be angered if it went unpunished.[48] The Roman state in turn made pursuing murderers its duty, no longer left to the victim's kin. Murder gradually became seen as an offense as much against king as against kin.[49] Even before the Conquest of 1066, the English monarch directly prosecuted weighty crimes, such as homicide by stealth. By the early twelfth century, the Crown had assumed jurisdiction over homicide and other serious crimes generally, forbidding private settlements. Killings and other felonies that had earlier been atoned for by restitution were now punishable by death.[50]

As caretaker of common interests, the state also began to decide whether to prosecute at all. In the early accusatory systems, victims challenged offenders and might themselves be punished in the same manner if they failed to prove the case. Later, third parties not directly implicated in the offense were allowed to file charges, too. As Solon reformed Dracon's code permitting any citizen to avenge the wronged, he institutionalized the sense that certain transgressions harmed the whole community.[51] The *graphe* allowed any male

citizen, victim or not, to prosecute public offenses, such as military desertion, political bribery, temple robbery, idleness, theft, perjury, hubristic conduct, and sycophancy. One notable reform was to forbid parents to sell their children into slavery. Such rights had to be enforced by third parties since minors could not act against their parents?[52]

Roman public law increasingly upheld common standards that could not be set aside by an understanding between the parties. Under Augustus, whether to pursue adultery ceased being the decision only of the woman's husband or father. He could take the initiative, but so could third parties. A husband who took no action against his wife caught in flagrante could be punished as a procurer (*lenocinium*).[53] In seventh-century Visigothic law, the king could prosecute adultery if the husband, children, or other relatives refused to, and they, in turn, could be penalized for negligence. Charlemagne's capitulary of 802 punished adultery as a crime against the Christian community.[54] In the same spirit of forbidding offenses even in the absence of a direct victim, a woman who voluntarily aborted could be punished. Accessories to suicide could also be found guilty.[55]

Public crimes developed apace during the Middle Ages. Public utility, Pope Innocent III argued in the early thirteenth century, demanded that crimes be interdicted.[56] Charlemagne's tribunals had already ordered and enforced a peace rather than just mediating between warring parties, who might comply or not. Besides excommunicating the disputants, the medieval peaces mooted the idea of crime and disorder harming the "common utility."[57] Even restitution was harnessed to atone for collective damages. The proximate victims received their bit. But church and state increasingly also got a part—since the larger community too had been harmed. Sin offended God's honor, Anselm of Canterbury insisted in the eleventh century, and a miscreant's payment must reflect that additional damage.[58] An offense did not vanish just because the victim died or refrained from prosecuting. Judges had an obligation to persist,

the fourteenth-century Italian jurist Bartolus argued, so as to defend the community.[59] From the thirteenth century on, witnesses could be compelled to testify. Otherwise, the canonist Hostiensis argued, the innocent would be damned, the guilty absolved, and crimes go unpunished.[60] As of the Sachsenspiegel (1221–1224), the most important compilation of law in the Holy Roman Empire, a general public proscription of offenses was absorbed into customary law.[61] Half a millennium later, when the French revolutionaries proclaimed that all offenses were attacks on the public, the idea of crimes as inherently social events had been long in the making.[62]

The Judiciary as Voice of the Public Interest

Out of the state's growing responsibility for punishment grew the now common distinction between torts and crimes—torts as harms that individuals restitute among each other and crimes as acts of collective concern. The Greeks only incipiently distinguished crimes from torts but did allow any citizen to bring charges on matters of public interest, such as treason, desertion, and embezzlement. This rule also applied where the victims were unlikely to speak up or where larger issues were at stake: maltreating orphans or seducing free women.[63] In the fifth century BCE, Solon allowed anyone to take legal action on behalf of a victim. Everyone helped enforce the law, especially where society was the injured party. Acting with hubris (obnoxiously and self-indulgently) was considered so offensive to the state that it was actionable even by a slave.[64] Among the fourth-century CE Goths, serious offenders were compared to wolves: outsiders to society and enemies of king, people, and God, to be killed on sight.[65] Crimes where the culprit was not immediately known or where the offenders—once identified—belonged to no group able or willing to punish them as one of their own could also not be left to private resolution. They required state intervention.

Theft, for example, early on became the state's business.[66] In England, with its accusatory judicial system, any citizen could pursue any offense, acting as a public prosecutor. The prosecutor, when that position eventually developed, had no powers beyond those of every male citizen.[67]

As crime became regarded as an offense against the public, the courtroom emerged as the arena where law prevailed. Three snapshots from larceny's evolution illustrate the development. In Roman law, the nocturnal thief (whose evil intent was presumed manifest) could be killed on the spot. In early medieval England, victims were obliged to sound the hue and cry, thereby enlisting the public's aid and alerting it that the criminal would be executed so that the accusers would not be mistaken for killers as they carried out the sentence. But by the thirteenth century, the right of private execution had given way to the duty of public trial.[68] Courts evolved from arenas of mediation in the ancient world to independently prosecuting institutions. Their task was now adjudication, no longer arbitration. Trials eventually emerged as the primary forum for administering justice.

After collapse of the ancient world, courts slowly developed once again in the Middle Ages, extending the state's investigatory and adjudicatory powers. Feudal lords dispensed justice over their subordinates. Emerging as the primus among lords, the king did the same to them—in England after the Conquest of 1066 and in France two centuries later. Settling disputes in his court, the monarch became the first quasi-professional judge, the place lending its name to the institution.[69] Eighth-century English statute warned subjects against taking the law into their own hands instead of going through courts. By the thirteenth century, French courts had changed from locals mediating among themselves to royal power imposing verdicts increasingly based on abstract concepts of justice and legality.[70]

Extrajudicial, indeed extraterrestrial, mechanisms of judgment such as oaths, ordeals, and combat were eliminated across Europe by the thirteenth century.[71] The jury system that then developed

in England allowed what—from Roman law's perspective—must have seemed wildly capricious: letting bystanders decide weighty issues of guilt and innocence in private deliberations. Max Weber compared juries to oracles, neither of them required to give rational grounds for their decisions.[72] With the twelfth-century revival of Roman law on the continent, combined with canon law, the old accusatorial process pitting plaintiff against defendant gave way to the reintroduction of an inquisitorial approach. Inquisitional techniques had biblical backing. When word of Sodom and Gomorrah's sins reached heaven, God himself investigated.[73] The state, including at first also the church, now took over this role, acting through judges and prosecutors to pursue transgression. Germanic law had earlier been based on accusation, with the victim's kin initiating matters. In the inquisitorial procedure, in contrast, the state took the lead. Individuals might still start the process, but judicial officials then took over.[74] The state assumed the role of society's plaintiff.

Crimes had earlier been prosecuted only when someone had been harmed. Twelfth-century legal reforms now identified a public interest. An individual might not have a specific concern in a given crime, Hostiensis argued in the thirteenth century, but all had a general interest in every crime.[75] English criminal law shifted from largely private agreements on monetary compensation to royal courts and justice, with death as the usual punishment.[76] By the early fourteenth century, France had institutionalized the prosecutorial function in the person of the *procureur du roi*, who could act even without a private complainant. Two centuries later, he alone could seek serious criminal sanction, even given a plaintiff. By this time, the German lands were following suit. In the Carolina, the first German penal code from 1532, private parties could still initiate prosecution, but then an official public investigation took over.[77] Queen Mary's mid-sixteenth-century reforms in England decreed that plaintiffs could no longer terminate actions at will. Once a case

was initiated, the authorities prosecuted it to its conclusion. Russia, too, shifted from private to public law, with harsh punishments instituted from the sixteenth century.[78] As late as the sixteenth century, extrajudicial settlements were still common in Poland and Hungary, and they remained so in Bourbon France and colonial North America in the eighteenth century. But the number of "bootless" crimes, those that private parties could not settle, gradually expanded, and the courts ruled supreme.[79]

The accusatorial system in England and parts of northern Europe relied on juries. Like the inquisitorial method, juries provided an alternative to oaths, ordeals, and other appeals to divine intervention. The defendant's peers instead decided the outcome.[80] Though less dramatically than in inquisitorial courts, where judges ruled, juries, too, extended the state's reach. Prominent local men, they served as the central authorities' proxies. Under Charlemagne, they had to answer the judge's questions about local crimes.[81] In tenth-century England, the leading local nobles were obliged to accuse and arrest those suspected of crimes. Two centuries later, under Henry II, this responsibility was given to a presenting jury, a forerunner of the grand jury, which reported crimes committed locally. By the thirteenth century, two-thirds of murder trials in England were initiated by the authorities, not by appeal from the victims' families.[82]

In other respects, too, England's accusatorial system concentrated initiative in the state's hands, following the continental lead. From the mid-fifteenth century, juries ceased being self-informing, and Crown officials instead collected the evidence presented to them.[83] Reforms in the mid-sixteenth century made the process more public. Plaintiffs continued to prosecute cases, but they were now obliged to testify. If there was no accuser, the justice of the peace became more like a public prosecutor. He actively investigated the crime, organized the case, and rounded up the accused and witnesses.[84] In the eighteenth century, the plaintiff still had to press the authorities to indict, prepare the trial, assemble witnesses, and

present the evidence in court.[85] But by the nineteenth century, the English authorities finally took full responsibility for apprehending and prosecuting criminals.

As a further arrow in the authorities' quiver, the legal revolution of the twelfth century revived the Roman doctrine of *infamia*, now called *mala fama*. Ecclesiastical courts could prosecute notorious suspects in the absence of an offense, accusation, or accuser. Even without a harmed party, the community's sense of violation was actionable.[86] To avoid baseless accusations, plaintiffs had earlier "subscribed" to the potential punishment by undertaking to suffer the same if they failed to prove the accused's guilt. With victims understandably reluctant to become plaintiffs, a fully-fledged accusatorial system was hobbled. But from the twelfth century, a new system of denunciation before ecclesiastical courts allowed plaintiffs to accuse without having to prove they were right or to risk being punished if they could not. Judges could now proceed on the basis of denunciation or other evidence of notorious offending, gathering testimony and prosecuting on their own.[87] By the fifteenth century in Italy, prosecution on the basis of bad reputation, *malum famum*, was commonplace.

As the state became the primary punisher, sanctions were no longer carried out by victorious plaintiffs but by professionals acting for the court. In fifth-century Athens, the victims' families executed murderers. In Visigothic law, accusers sometimes tortured the plaintiffs but were liable should they die.[88] Stoning, as in Jewish law, meted out punishment by the community as a whole or at least by a representative sample.[89] But Plato already described a parricide's execution by public magistrates, who then stoned the dead body for good measure.[90] And in classical Athens, executions were carried out by a professional known as the "public man."[91] With the Romans, the public executioner became a fixture—arguably the second bureaucrat, after the tax collector, though of course even more socially ostracized. The Middle Ages, too, saw official executioners,

sometimes moonlighters from other despised professions but full-time employees in larger towns. To judge the significance of this institution, consider that in China's Warring States era, kin were expected to take vengeance on official executioners who had fulfilled their duties against the family's relatives.[92] However strong our sense of filial piety, the idea that we should kill the executioner has long bowed before the state's authority.

Command and Persuade

Crime, Law, and the State across History

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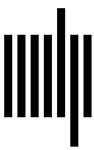
Citation:

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