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Chapter 5
Parallel Justice

In history's long sweep, the state eventually asserted its prerogative to maintain order on its own. It imposed its monopoly on violence by banning parallel means of resolving disputes that had long coexisted with the official machinery, both predating it and often persisting even today. Civil society adjudicated its own disputes long before the state was in a position to intervene and continued to do so long after it became a competitor. The state's claims to monopoly were not as absolute as it often pretended. Sometimes it enlisted private efforts on its own behalf, as we will see later with policing. Other times it tolerated a continuing role for civil society.

In the state's judicial role, its primary rival was the family. The family's head, the paterfamilias, ruled supreme within it, largely autonomous of statutory interference. Over wives and children, treated as property, his was the final word. In the earliest eras, he could sell his offspring or adopt them away, treating them—and his spouse(s)—largely as he pleased. Only gradually, under the Romans, was killing children or slaves forbidden.[1] Roman fathers built prison cells in their homes for disciplining. In the eighteenth century, the Bastille was filled with errant offspring locked up at their families' request—the Marquis de Sade among the most notorious. Physical abuse of children was likely the most frequent form of assault in this era.[2] The father also chose both his sons' and his daughters' spouses.

Only gradually did the state make inroads on this patriarchal preserve. With Solon, children could no longer be sold into slavery;

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with Christianity they were no longer exposed. By the eighteenth century, women began to be allowed to own property and conduct themselves as legally independent of their families, and they were eventually allowed to vote. In the modern era, children were emancipated from absolute paternal power, too. The state required fathers to let them be registered at birth, drafted, educated, vaccinated, and inspected. It began meddling in inheritance, forbidding primogeniture, enforcing equality of offspring. It took over divorce from the church. It sought to determine how many children families bore—more or fewer depending on its needs. The young were emancipated from their fathers at an ever earlier age, becoming full subjects and then citizens in their own right. In Roman law, a father's power lapsed only with his death. Today, the children's late teen years are usually the cut-off. Such changes came late and often remain incomplete. Marital rape was outlawed only recently and not everywhere. Spousal abuse remains widespread—officially forbidden but tolerated nonetheless. Parents can still waive statutory-rape protections for minors in some US states and elsewhere by consenting to child marriages. Even today, parents determine more than half of all marriages globally.[3]

Beyond the family as a judicial institution, however, more specific mechanisms of adjudication have also vied with the state's pretension to sole power. Vigilantism is a general aspect of this self-administration of justice, duels a more specific instance. Both sought to implement justice, as locally defined, by sidestepping the state's claims to omnipotence. Both therefore had to go, and both eventually went. Of course, all justice began as vigilantism, civil society administering itself. The spontaneous stoning of criminals in ancient Greece and Rome is an example.[4] The logic of ostracism was much the same, though not lethal—a vote taken against those who had aroused enough ill feeling among their fellow citizens that they were voted out of society for a decade. Only as the state

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successfully established its monopoly was vigilante justice disparaged as unworthy.[5]

The duel was founded on consent—that both parties thus agreed to resolve their differences. Why should something consensual be forbidden them? Consent removes some actions from the law's purview, making them a matter of private negotiation. At a certain age, sex consented to is making love. Without permission, it is rape. With the proper forms signed, someone who violates your body with sharp instruments is not committing assault but performing heart surgery, inscribing a tattoo, or piercing your ears. Consent does not always sidestep the law's prohibition, though. Even agreed to, certain sexual acts—involving physical damage, for example—remain assaults, not just sadomasochistic foreplay.[6] Female genital mutilation cannot be agreed to; male circumcision is contested. A surgeon who cuts off your fingers could probably be charged with mayhem or assault even if you had agreed.[7] Neither murder nor assault can be mitigated by the victim consenting to be harmed.[8] You cannot sell yourself even willingly into slavery, though becoming an indentured servant was once interpreted as expressing individuals' right to control their own affairs.[9] Whether you can hawk your sexual services depends on the jurisdiction, as it does for selling or renting your organs or gametes.

Invoking consent, the duel also sought to exempt its particular violence and death from illegality. Duelists sought to be spared sanctions, as other legal killings such as justifiable homicide and self-defense were exempted. But the state would have none of it. True, the duel helped tame aristocratic brutality, refining and replacing the vendetta in the Renaissance.[10] In that sense, it helped lessen violence. Yet because duelers aimed to fashion their own sphere of private law, the state ultimately could not tolerate their combat, any more than it could vengeance or feud. Duelers were, as one seventeenth-century critic put it, lawless condemners of authority.[11]

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Duels were ancient. David and Goliath fought one, and in the medieval trial by battle God himself intervened to indicate guilt or innocence in cases where the evidence was ambiguous and truth difficult to discern.[12] Yet Augustine inveighed against gladiatorial combats, and the medieval church rejected the shedding of Christian blood in duels.[13] Eric Haakonsson, governor of Norway in the eleventh century, outlawed duels.[14] The Council of Trent in the mid-sixteenth century excommunicated dueling Catholics, and Protestants followed suit. Though the duel was found in the Germanic codes, Roman law knew it not. Judicial battle, with its appeal to God's intervention, was undermined with the rise of Roman law in the twelfth century and rare by the fifteenth.[15] Duels instead shed their supernatural aura to become yet another means of feuding and a test merely of skill, bravery, and luck. In Njál's saga of the thirteenth century, when Mord is challenged to a duel, his friends point out that he is likely to lose since Hrut is strong and brave.[16] By the sixteenth century, the modern secular duel had arrived: a vindication of honor, not an evidentiary technique, and no longer an element of the judicial system but deliberately outside it.

From the state's vantage, the modern duel actually had much to recommend it. Unlike feuds or vendettas, duels were first limited to aristocrats and restricted in scope. Duels were fought between equals over points of honor, which were slippery to legislate, prosecute, and punish. Challenges could not be issued up the social scale and were wasted if aimed down.[17] Compared to full-scale feuds, duels were orderly and conducted with discretion. Only two men fought, their interaction ritualized, with few chances of drawing others in and thus expanding the conflict. Duels also ended, once and for all, disputes that might escalate. Even if both parties survived, the duel settled their conflict.[18] Yet its aristocratic pedigree made it appealing to other social groups. With the middle classes emulating their betters, dueling democratized to become all the rage in eighteenth-century Germany.[19] Dueling scars became male

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adornment. The dueling associations of the Central European universities issued leather masks with strategically placed slits so that facial scars could be decoratively inflicted as fashion dictated. In eighteenth-century England, workers, too, settled conflicts with ritualized fistfights.[20] Even the democratic New World enjoyed such aristocratic vestiges. The American South was naturally fertile soil, but the habit also spread farther north. In 1804, Aaron Burr killed Alexander Hamilton in New Jersey shortly after Hamilton's son had died in a duel.[21]

The duel's popularity threatened the state's pretensions to monopolize adjudication. The absolutist state pacified unruly nobles in part by suppressing duels. Louis XIV managed to eradicate the duel among his courtiers, drawing them into the gilded panopticon of Versailles and undermining their raucously independent lives in Paris or the provinces.[22] The English upper classes abandoned duels early on. James I forbade challenges in the early seventeenth century. In the 1840s, officers who encouraged duels were court-martialed, and widows of duelists were stripped of their pensions. The last known duel with a lethal outcome in England was fought by two Frenchmen in 1852.[23] In eighteenth-century Massachusetts, judges were required to sentence duelers to death and then dissection. Peter the Great ordered the bodies of both the slain duelist and the winner hanged alongside each other.[24] In the 1830s, Alabama made aspiring lawyers affirm they had never dueled. To this day, would-be Kentucky state legislators must swear that they have never partaken in a duel.[25]

Statutes against dueling were but one facet of the state's attempt to suppress vigilante justice more generally. Vigilantism can be thought of in at least two ways. Before the state was able to administer justice, vigilantism improvised it. But once the state staked its claim, vigilantism competed with it. The benign view of vigilantism, as the provision of what the state eventually would do, sees it as delivering services the authorities failed at and relying on volunteer labor

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drafted only as required.[26] The English hundreds were one form of such self-administered justice, as were the twelfth-century Sicilian *Vendicatori*, the *Vehm* in early modern Germany, and today's many mafias. *Samosud* in Russia was the popular justice administered by peasant communities in the absence of much official policing. With *maling* in eighteenth-century Holland, crowds manhandled thieves caught red-handed, who were often spared only by being arrested.[27] The Regulators in eighteenth-century back-country South Carolina provided law enforcement where the state failed. "Jeddart justice" refers to Jedburgh, a Scotch border town where raiders were hanged without trial.[28] To this day, even well-policed states such as France and Germany allow private citizens to bring flagrant offenders to justice.[29]

Vigilantism not only enforced neglected laws but also often prescribed behavior dictated by sentiments of justice and morality that were popular though not on the books—and, indeed, often illegal. Because vigilantism competed with the state, it was inherently a relapse as citizens briefly took back the sovereignty they had otherwise yielded to the authorities. Long-standing vigilante movements were a contradiction in terms.[30] Vigilantes broke the law to achieve what they deemed just. Rough music, charivaris, and shivarees were of this ilk: humiliating those who had violated custom and tradition, such as old men who took young brides or henpecked or cuckolded husbands or wife beaters.

Vigilantism sometimes served broadly sympathetic causes: prosecution associations bringing felons to heel in eighteenth-century England; citizens uniting to bring order to lawless territory in the nineteenth-century American West; Guardian Angels patrolling inner-city neighborhoods ignored by the police; communities banding together to drive out drug dealers or flush out hoarded food during shortages; Queer Nation helping curb discrimination against sexual minorities; and the so-called Regulars in eighteenth-century New York State who—dressed in women's clothing—flogged abusive

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husbands.[31] Fictional accounts stand in this line: Robin Hood, the Three Musketeers, the Virginian, Zorro, the superheroes of comic strip, screen, and digital game.[32] In this spirit, vigilantism was often romanticized as expressing popular sovereignty, a form of temporary self-rule, like other social movements. If law were ultimately made by the people, so this logic went, why should they not also enforce it?[33] Vigilantism was democracy or self-rule in its rawest, least-mediated form.

Yet lynch justice often ruled instead. Hate-filled mobs bayed for blood while the state stood aside: when Protestants were massacred in the sixteenth century, Jews were slaughtered in pogroms, Native Americans were killed like wild animals, Blacks were hanged to teach them their place.[34] Orgies of violence, overpowering whatever the authorities may have done to quell them, vented savage hatreds.[35] Mob justice occasionally accompanied widespread social breakdown, as in St. Petersburg following the revolution of February 1917.[36] But it has equally been part of otherwise stable and functioning systems and often even a means to achieve goals the authorities tacitly accepted. The mob's motives could at times arguably be unobjectionable: when child molesters were publicly ostracized and driven out of communities; when a woman who refused to clean up after her dog on the subway in Korea was hounded by a massive harassment campaign.[37]

Named after Charles Lynch, a justice of the peace who supervised extralegal executions of Tory sympathizers during the revolution, lynch justice in nineteenth-century America marked the limits of the state's pretensions to enforce law on its own terms.[38] Lynching expressed a rough popular justice, with white crowds meting out vastly more severe punishments than the law foresaw on despised, often innocent, and almost invariably Black victims. Black men showing a sexual interest in white women unleashed the white vox populi's extraordinary savagery.[39] In the American South, lynching was a de facto parallel system of "justice" for much of the 1900s. In

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part, lynching filled a gap in the state's enforcement, but it equally gave voice to a different conception of law altogether, one that—neither legalistic nor universal but brutally retributive—upheld the property, racial, and sexual hierarchies defended by rural whites. More justice and less law, was how one Wyoming lyncher put it in 1902.[40] In the late nineteenth century, even the recorded number of such killings—and many lynchings likely went unrecorded—far surpassed official executions.[41] At a snail's pace, the state eventually suppressed this regime of terror. Lynchings declined from more than 150 annually in the 1890s to half that at the turn of the century and into single digits by the 1940s.[42]

But rather than being stamped out, southern whites' baying for blood was then arguably institutionalized within the state's judicial machinery. State executions increased as extralegal killings were eliminated, the authorities themselves thus satisfying the popular demand for retribution. The American South and Southwest, lynching's heartland, today have the highest execution rates in the country. The death penalty's popularity here gives voice to a form of community justice, now inflicted not directly by lynching but indirectly as the authorities respond to popular demand.[43] The continued popularity of capital punishment in China similarly sustains the Maoist doctrine of whipping up popular hatreds against enemies, slaking a widespread demand for revenge.[44]

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Crime, Law, and the State across History

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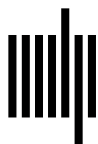

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