

Chapter 7

How to Punish?

Punishments have varied along with the motives prompting them. Exchanges of value—whether in specie or goods—made atonement a transactional arrangement. Offenders paid the costs they had imposed. With vengeance, death was the currency of justice. Feuds were often long and sanguinary. Nonetheless, the logic of restitution limited overly bloody revenges. A dead goose laid no golden eggs. Most of the punishments of the past are no longer used: mutilation (though male sex offenders are sometimes chemically or physically castrated), branding, shame, and humiliation (though public registries of sex offenders and chain gangs still exist), torture (in many nations), banishment (in most nations), and death (in many nations). The punishments that remain, at least in the West, are imprisonment and an endless array of fines.

Banishment

Most simply, criminals have been rendered harmless by getting rid of them, either by death or by banishment, outlawing, deportation, or exile. The Incas made many crimes capital for this reason. They never fined or confiscated goods since what was the point of allowing a poorer but still dangerous criminal to remain?¹ The etymology of the term *exterminate* suggests a combination of execution and banishment—death as the ultimate bringing beyond the

boundary: *ex terminus*. Execution separated the criminal once and for all from society; exile served the same purpose less absolutely. Plato envisioned a form of imprisonment far from human habitation. The Greeks practiced ostracism, a popular vote to banish dangerous citizens for a decade.² Both Greek and Roman law allowed a choice between death and banishment.³ Exile could be temporary, as among the Greeks, who regarded it as a form of purification. Or it could be perpetual, as in ancient Egypt, where an ultimate punishment, debaptism, also eradicated criminals' names, obliterating offenders in both this world and the next.⁴ For serious crimes, such as parricide, the Greeks cast the offender's body out of the city, denying it burial and any postmortem home.⁵ The Chinese both banished—physical removal—and excluded, a kind of internal isolation in shame. With excommunication—a form of spiritual banishment in the Middle Ages (“God’s outlaw”)—exile acquired a new dimension.⁶

Banishment followed a certain topological logic that made it suitable in some times and places but largely useless elsewhere. It worked well in a sparsely populated world with abundant destinations for exiles—ungoverned spaces.⁷ But as the nation-state, with its territorially defined sense of sovereignty, arose in the early modern era, most spaces belonged to someone. Frontiers became borders, and formerly liminal territories were now apportioned.⁸ In such denser and more clearly delineated circumstances, your neighbors implicitly had to cooperate in any banishment meted out as punishment and might indeed display their hostility precisely by giving your internal enemies refuge. In small tribal societies, banishment could mean physical as well as social death. Among the Jews, *karet* was to be cut off from the people, and so flogging was considered preferable.⁹ Bereft of their property, exiles from ancient Athens lived hard-scrabble lives.¹⁰ At first, exile made a virtue of necessity—to escape vengeance a killer had to flee. In ancient Greece, *atimia* was a form of outlawry. Anyone might kill or plunder those so sentenced, thus encouraging distance. In largely unpoliced

societies, outlawing offenders was the best that could be done with those who escaped apprehension.¹¹

Nonetheless, in antiquity exile was a well-regulated condition. Rules governed, for example, how shipwrecks cast up on forbidden shores should conduct themselves. If they kept one foot in the water, they were spared until they could depart again. Recidivists, tried in territories they were banished from, mounted their defense from a boat, with the judges sitting on the beach.¹² In the Old Testament, exiles went to one of six designated and signposted cities of refuge, where they were protected from avengers and lived rent free until their case had been resolved.¹³ Cain, though threatened with wandering the earth, was in fact taken under God's protection, as indicated by a mark put upon him (but protected from whom given that the only other humans alive were his parents, Adam and Eve?). He settled in neighboring Nod, east of Eden, where he founded the city of Enoch and a dynasty, including a great-great-great-great-great grandchild Jubal, father of all who play stringed instruments and pipes—not a bad outcome for the first fratricide.¹⁴

Before modern nations patrolled their borders and transported offenders, outlawing, banishing, or exiling criminals helped keep them from one particular place, without necessarily specifying where they should be. Outlawing was less precise and possibly less effective than banishment or exile. The ancient Chinese spelled out in sentencing how far defendants had to remove themselves. In medieval Iceland, a small island nation, outlawry in practice meant banishment. Along with fines, it was the most common sanction.¹⁵ Medieval exile could mean having to go live in a certain place, such as a monastery, or being forbidden to linger anywhere for more than a few days and thus sentenced to perpetual wandering.¹⁶ The early modern Spaniards often removed those sentenced to hard labor to Africa. The eighteenth-century Parisian police gave first-time petty offenders the option of returning to their native provinces—banishment lite.¹⁷ Other than killers, exile was often used to remove

political enemies for whom normal penalties seemed inappropriate. Ovid was banished from Rome, and this function remained well into the Middle Ages.¹⁸ The Bourbon monarchs sent nobles who had fallen out of favor at court abroad or, for lesser offenses, to their provincial estates. The French revolutionaries made clear that old-regime refugees were never welcome back. The Napoleonic penal code banished political criminals, but until midcentury the lack of suitable French territories left this exile a largely theoretical option.¹⁹ The English began transporting ordinary criminals to the colonies in the early seventeenth century. In an era when prisons were porous and inefficient, banishment was a more reliable incapacitation—excarceration instead of incarceration. A century later, having tallied up the exorbitant costs of domestic prisons, they started deporting convicts to Australia.²⁰

In medieval England, vastly more convicts were outlawed than hanged. In the seventeenth and eighteenth centuries, almost all (97 percent) noncapital criminals in Amsterdam were banished. Banishment from Paris was also far more common than imprisonment.²¹ With the revolution, the French began exiling political prisoners to Guiana in South America, and then after 1848 and the Commune of 1870 they set in motion waves of expulsion to other places as well, such as New Caledonia. After 1885, they transported hardened criminals to colonial penal settlements—the bloodless guillotines, so called because of their high mortality. Having once begun, the French continued this practice long after others had ceased, well into the 1930s.²² Before the American Revolution, three-fifths of all English male convicts were transported. Even in the 1830s, about one-third of convicts went to other colonies.²³ The English convict transports arguably fell victim to their own success. New South Wales became a prosperous colony with a largely free population. As of the 1840s, the residents grew reluctant to admit more transportees.²⁴

On a larger scale, groups defined as enemies, whether religious, ethnic, or political, were banished. Jews were expelled from England

in 1290 and from Spain in 1492, followed by Moriscos (descendants of Muslim converts) in 1609. French Protestants, the Huguenots, were forced out of the country after 1685. Native Americans were expelled from their ancestral lands across the nineteenth century, as were other first peoples in the English settler colonies. The Turkish genocide of Armenians in 1915 occurred in the guise of forced population transfers. Greeks and Turks expelled each other in mutual population transfers in 1923. The Madagascar Plan, proposed in June 1940 by the Nazis as a means of ridding Europe of Jews, was a last delusional fantasy of large-scale banishment. The mass killing of Jews in death camps began in mid-1942 when it became clear, as the German advance into the Soviet Union bogged down after Stalingrad, that merely pushing them eastward out of Europe was no longer an option.²⁵ Such “excisionary violence,” with banishment and extermination the endpoints on a continuum, has arguably characterized not only totalitarian regimes but also the colonial policies of otherwise modern liberal states. In the relatively moderate guise of ethnic cleansing, where deportation but not death was the aim, excisionary violence has been practiced over the past two centuries in most European nations, in the partition of India, and in British-ruled Palestine.²⁶

Internal exile was used instead of prison. In the sixteenth century, the Florentines sent convicts to malarial areas around Pisa and Livorno. Corfu—now the playground of yacht owners—was a Venetian penal colony. More generally, *confino* was a form of internal exile to remote locales.²⁷ Carlo Levi wrote memorably of his time in exile to a small village in Lucania under Mussolini in *Christ Stopped at Eboli* (1945). The Russians put Siberia to use. Because the tsars exiled political prisoners, a stint in Siberia became a Communist badge of honor, Vladimir Lenin taking his nom de plume from the Lena River. The Soviets, in turn, adopted both internal and external exile, using domestic passports to eliminate freedom of movement. Large swaths of the country were turned into de facto penal

colonies, with harsh terrain hampering escape as surely as barbed wire.²⁸ In imperial China, exiles from one province were always sent to a particular twinned province. Only in the early twentieth century did internal exile begin to be dismantled here.²⁹

However common in the past, banishment has largely ended today. Pursued too vigorously, it created its own problems, as when the Chinese discovered in the nineteenth century that they had banished so many prisoners to Ili in Xinjiang that the local governor worried they would ally with “outside barbarians” to foment rebellion.³⁰ Prison and camps took over the incapacitation that banishment had once achieved. Exile today is a polite fiction, allowing peaceful regime change in autocracies. Former dictators flee prosecution, taking themselves off on last-minute flights to friendly neighbors, trailing mistresses, wardrobes, and suitcases of cash. The Ugandan dictator Idi Amin was emblematic of modern exile—a well-upholstered pariah, holed up as guest of the Saudis on the top floors of the Jeddah Novotel.³¹ Exiles today tend to be ideological refugees, given shelter in sympathetic nations—such as the Allende Chileans, the Tanzanian socialists, and the Kurdish independence fighters in Sweden during the 1970s. Today’s sanctuary cities in America protect undocumented immigrants, who are viewed sympathetically as victims of circumstance and harsh federal immigration legislation. Embassies, too, at times give sanctuary to prominent dissidents abroad, and churches continue their role as places beyond secular law.

But in other respects exile has become morally impossible. Banishment assumes that transgression in one place is inconsequential elsewhere, that no common legal and moral standards hold everywhere. Though having committed serious offenses, criminal exiles were tolerated abroad. That is no longer possible. Though Socrates drew the opposite conclusion, he put his finger on the problem when he refused an offer of exile, preferring compulsory suicide: Why would foreigners put up with his ideas if his fellow Athenians did not?³² Real criminals can no longer be banished. Far from

accepting exported miscreants, a vigilant abroad requires they be kept at home. Australia has recently drawn the logical consequence, preventing pedophiles from traveling abroad by refusing them passports.³³ A universal moral codex by and large holds globally, and a violator of it in one place would only exceptionally be tolerated elsewhere. The banished have vanished.

That shift in turn has led to a revival of domestic exile. The residence of sex offenders in the US, for example, is regulated much like the Soviet system of internal banishment. They are required to register, and their neighbors are notified, free to draw their own conclusions. The restrictions on their housing (proximity to schools, parks, and the like) are often so expansive that nowhere suitable remains.³⁴ In New York City, only 14 of 270 homeless shelters can receive released sex offenders. Those who cannot find a bed in these overcrowded facilities often remain in prison.³⁵ Thanks to GPS monitoring, not just residence but movement too can be restricted.³⁶ Domestic banishment also continues in another sense, at least in the United States and Britain. With the increased use of true life sentences, either multiple or without parole, prison has become a means to remove offenders permanently from society, with no expectation of rehabilitation. In 2012, a third of all Americans serving life sentences had no prospect of parole.³⁷ Sentences in the United States also sometimes explicitly remove defendants from their local communities, as in the aptly named Project Exile.³⁸ In addition, European countries are increasingly deporting foreign criminals after they serve their sentences, back to homelands they often never or only long ago lived in.³⁹

Fines

For millennia, imposing payments as compensation for offenses was the most common sanction. But it wasn't until the state began

collecting such payments that they became fines. With the rise of the prison in the eighteenth century, compensation was partly eclipsed, for serious offenses at least. Nor has it received anything like the scholarly attention lavished on incarceration. But in the modern era, monetary restitution, now in the form of fines, has again become a widespread sanction.⁴⁰ Precisely how common is hard to measure. In absolute terms, the sheer volume of levies, such as parking tickets, probably makes fines seem more important than they are. Some nations, such as the US, or the East Bloc in its time, used fines less than others.⁴¹ For indictable offenses in Britain, fines peaked at almost half of all punishments in the 1980s, falling subsequently to half that. But they almost definitionally make up the bulk of punishments imposed on organizations.⁴²

With vengeance and restitution, the disputing parties agreed on an exchange of value or death to resolve matters. Two millennia before Christ, Eshunna's code in Sumeria threatened fines and death as its only sanctions.⁴³ At first, monetary compensation was paid directly by the offender to the victim. Only later did the state insist on its cut, eventually imposing pecuniary sanctions as an alternative to more direct bodily chastisement.⁴⁴ The word *fine* itself comes from the final settlement (*finalis concordia*) negotiated by the offender with a medieval king so that he could be released from prison. Prison was not the punishment as such but merely the means by which the criminal was encouraged to pay the fine.⁴⁵ In medieval England, felons' property reverted to the king. If accused felons refused to plead one way or the other, they were subjected to *peine forte et dure*, being pressed to death with weights. But if they endured this torture, thus dying without being convicted, their estates were saved for their heirs.⁴⁶ In Norman England, amercements were penalties payable to the Crown for misdeeds.⁴⁷ Among the early Germans, part of the mulct went to the king. Scandinavian rulers started collecting their part of wergeld in the Middle Ages.⁴⁸ In eighteenth-century America, fines imposed for biting, gouging, or maiming were paid half to

the victim, half to the state.⁴⁹ The authorities ultimately took everything, transforming compensation into fines in the modern sense. Restitution was now due the community, no longer to the individual victim. Today, only civil fines and judgments for damages recall the original sense of victims being compensated.⁵⁰

Once fines in the modern sense had emerged, the state faced a choice. It could levy them to make offenders pay for externalities, pricing their behavior through what in effect was a tax baked into the cost of doing business. Fines on polluting industries or for workplace accidents have been of this ilk—forcing offenders to pay some part of the costs of their actions without necessarily halting those acts altogether.⁵¹ The Factory Act of 1844 in Britain required employers to fence in dangerous machinery and enforced this by imposing fines. In effect, it remained the employers' decision whether to fence or to pay the fines.⁵² Fines on the nineteenth-century sex trade raised revenue, presupposing that prostitutes would continue business in order to pay.⁵³ Fines on those who shirked civic duties similarly taxed the negligent. Eighteenth-century Londoners could buy their way out of their required participation in the watch by hiring a substitute. In the American colonies, citizens who refused or failed their tasks as constables or sheriffs were fined. Traffic and other everyday fines, too, are much like post hoc licenses.⁵⁴

But fines have also been used to compel. If raised to exceed the value of the offense, fines can be an indirect means of coercion, compelling offenders to change behavior. Were acts the state wished to discourage to be priced or penalized?⁵⁵ Sometimes pricing could be used to punish. Though not obliterating the person, fines could extinguish someone economically. The Romans exorbitantly valued damaged goods when they wanted to compel restitution of the actual objects rather than just have damages paid.⁵⁶ Henry VII used bonds and recognizances to coerce his nobility, four-fifths of whom were at some time indebted to him. When Lord Abergavenny was fined £70,000 for unlawful retaining, it was not with the expectation

that he would pay but as leverage to relieve him of £500 annually. Convicted of blasphemy in 1676 and fined 1,000 Marks he could not pay, John Taylor was effectively jailed for life.⁵⁷ Up through the 1940s, prisoners in the southern US, fined several times their possible annual earnings, were in effect ensnared by being leased to mines, railroads, quarries, and farms.⁵⁸ Under China's one-child policy (recently relaxed), fines for a second baby, set at thrice parents' annual earnings, rendered their offspring de facto stateless, bereft of rights to housing, school, and work.⁵⁹ In the early 1990s, the US government began to impose corporate fines that were actual punishments, not just retrospective licensing fees. Once merely slapped on the wrist, polluters were now often compelled by unaffordable fines to obey environmental legislation.⁶⁰ Punitive damages follow a similar logic, intended not just as compensation but as sanction for wrongdoing.

Unpayable fines as a means of coercion contradicted the state's interest in revenue. Steep fines to compel obedience were less lucrative than small fines routinely imposed for minor offenses. In the third century BCE, Romans built a temple to Venus from the fines paid by adulteresses.⁶¹ The medieval state derived much of its income from minor fines. In the thirteenth century, judicial fines generated one-eighth of the English monarch's revenue. Wessex law doubled fines for stealing on Sundays or religious holidays. In sixteenth-century Shetland, feudal lords imposed fines for meticulously specified actions and varied them by time and place, so that bloodying a shopkeeper's nose on a Sunday night rather than a Monday morning could be an expensive proposition.⁶² Today, financially strapped US and UK municipalities treat speeding tickets in a similar spirit, as profit centers.⁶³ So did the East Germans when they fleeced Western drivers passing along the transit routes to Berlin, and so do Chinese localities when they fine prostitutes.⁶⁴

Since large coercive fines were but an indirect means of compulsion, as the state grew better able to twist arms directly, the need for

them faded. Fines could be diminished without weakening the state's overall ability to compel. Already the Romans limited how much magistrates could fine. In the seventeenth century, the French Parlement restricted fines to a quarter of the defendant's estate.⁶⁵ English courts of the same era hewed to a rule deriving from Magna Carta of fines not being so high that defendants had to sell the tools of their trade. Rather than impose a heavier fine, which in effect meant lifetime prison, Blackstone advised, the courts should physically imprison or whip the defendants.⁶⁶ When in 1687 for political reasons the duke of Devonshire was fined £30,000 for striking someone near the king's palace (a median fine for assault was two shillings, six pence), the Lords judged this fine oppressive and illegal. In 1689, England prohibited excessive fines, followed a century later by the US Constitution's Eighth Amendment on cruel and unusual punishments.⁶⁷

Whether treated as tax or a means of indirect compulsion, fines relied on the already existing machinery of sanction without which they lacked bite. In fact, fines were only a quasi-sanction. Even as restitution to society, not merely to the individual victim, fines were often not seen as punishments in the fundamental sense of pain equitably inflicted for retribution or deterrence. For offenses that are gravely immoral—such as rape and murder—payment strikes the modern mind as a wholly inappropriate punishment. Restitution between individuals undercut the state's ambition to enforce laws applicable to all. In a similar way, fines ran in parallel and sometimes at cross purposes to the regular system of retributive sanction. Above all, they were hampered by their social inequity.

Bodily pain was the state's primary leverage over the poor, either directly by inflicting distress or alternatively by prison's slow confiscation of their mortality. The rich also had property on the line, but they could more easily shrug off a loss of property than the poor could forfeit years. Inequalities of money dwarf those of chronology. The starkest disparity between the time-wealthy teenager who stands to lose a life in jail and the ninety-year-old would rarely be

more than six to one. As property themselves, slaves owned none. Unable therefore to be fined, they were instead whipped, castrated, or otherwise mutilated according to early medieval codes. Freeman unable to afford a fine were flogged.⁶⁸ In the thirteenth century, rich offenders able to pay compensation were more likely to be prosecuted for tort violations, but the poor, who could offer nothing but their pain, more likely for crimes. A New Hampshire statute in 1682 had those below a certain poverty line whipped rather than fined.⁶⁹ Deep into the nineteenth century, workers—with little to offer the fine collector—were jailed for violating labor contracts.⁷⁰ Since a rich person could effectively buy the right to slander others if fines were the only punishment, Kant suggested that they be obliged to kiss the hand of the poor whom they had insulted.⁷¹

Judiciaries through the ages have wrestled with the inherent unfairness of punishments premised on property. The Romans happily fined the gentry and beat the poor. The Greeks, in contrast, substituted prison in place of fines for those who could not pay.⁷² Talionic sanctions have at times been considered an egalitarian alternative, preventing the wealthy from buying their way out. However harshly, they treated rich and poor alike.⁷³ Sixteenth-century Florence trumpeted the egalitarian virtues of direct corporeal punishments for all citizens, rich or poor. The absolutist monarchies, asserting their power through spectacular public punishments, could scarcely be bothered to impose the merely indirect suffering of fines.⁷⁴ Only if they could not afford the five-shilling fine were drunks in colonial Massachusetts locked into the stocks for three hours. Russian peasants feared fines and (if they could not afford them) prison more than they did bodily pain, which could be endured. Whipping remained a common punishment in Russia far longer than it did in the West.⁷⁵ In the 1930s, fines were rarely used in nations such as Italy, Bulgaria, and Poland, where most people lived outside a cash economy.⁷⁶ Reformers imposing smallpox vaccination in the nineteenth century pondered the unfairness of allowing wealthy resisters to pay fines instead

and appreciated the equality of directly compelling all to contribute to herd immunity.⁷⁷ Because fines favored the affluent, they were regarded warily in socialist nations, though they were happy to seize assets.

Like bail, fines raised problems of fairness. If others paid on the offenders' behalf, they allowed them to avoid atoning. Early on, fines permitted the well-off to escape. A wealthy Roman, slapping the faces of passers-by as he perambulated, was followed by a servant, who paid on the spot the requisite fine for his indulgence.⁷⁸ But in a money-based economy, if fines were correctly calibrated and perhaps paid in installments, most people could afford them, and they were not strikingly unfair. In ancient Rome, women, children, and slaves could not be fined since they owned nothing.⁷⁹ Yet medieval English law assumed that even slaves could pay fines, and by the eighteenth century fines were a ubiquitous punishment.⁸⁰ Today fines have become the commonest sanction. Even allegedly socialist China punishes half of all criminal offenses by fines.⁸¹ Sanctions have become more moderate, and most citizens are sufficiently well-off to be punishable in their property, no longer just in their person.

Yet the inequality problem has not vanished. In the early twentieth century, the first motorists, who had to be wealthy to enjoy this new sport, happily paid a succession of £10 speeding fines. Rich motorists were occasionally sentenced to jail to make sure they did not just pay their way out of trouble.⁸² To account for this fundamental inequity, fines have sometimes been reengineered as a fairer and tougher coercive device.⁸³ They have increasingly been tailored to the offender's circumstances. Plato suggested fines graded by wealth for his ideal community.⁸⁴ Following the Scandinavians in the 1920s, income-staggered fines were adopted also by others, such as the Swiss and the Cubans. In northern Europe, fines are often set in relation to daily wages.⁸⁵ Finnish millionaires have been slapped with five-figure speeding tickets. Estonia has trialed giving speeders a choice between cash fines and forfeiting their time by

the roadside under police supervision—both more equal and possibly more deterrent for drivers in a hurry.⁸⁶ Maximum penalties for insider trading—a rich man’s offense—leapfrogged in the US from \$100,000 in the 1960s to \$1 million in the 1980s to \$5 million in the new millennium.⁸⁷ Corporations have faced the same logic. The European Union has threatened to fine information-technology and social media businesses in relation to annual revenue. For a company such as Google, a 10 percent fine of annual revenue would be \$9 billion.

Finally, fines pose the issue of fungibility. As restitution, fines have priced almost every action, even those that the modern mind resists considering compensable—such as Sharia law’s acceptance of payment for murder. If nothing else, this pricing of everything undermines the facile idea that only the modern market economy alienates humans by attaching a monetary value to all things. Wergelds, due for killing someone, expressed the social hierarchy of the early Middle Ages in precise monetary terms. In seventh-century Kent, Æthelberht required only that a man who had stolen someone else’s wife pay her wergeld and supply a new woman, much as if he had run over his neighbor’s dog while backing out of the driveway.⁸⁸ Medieval law was the equal of today’s actuarial tables in its subtle distinctions among harms and their cost. Marxist legal theorists, such as Evgeny Pashukanis, in effect agreed, arguing that punishment in bourgeois society and more generally law and morality are founded on the idea of exchange, whose logic reaches historically much further back than the origins of capitalism.⁸⁹ With the introduction of specific performance, it is modern law that arguably has sought to retain a sense that some actions cannot merely be compensated. Instead of just paying damages, offenders are forced to restore matters to their pre-harm state. Already early Roman law set aside victims’ claims that stolen items be restored to them and offered only restitution in money.⁹⁰ The Anglo-Saxon systems limited specific performance to equity law, especially for land

and other singular goods. Specific performance achieved its high-point in the nineteenth-century civil law codes, which took as their default making damages whole again, not just paying for them.⁹¹

Death

Forward-looking motives prompted even more different sanctions than backward-looking ones did. Before mass media, deterrent punishments had to be brutal and public. Carried out in secret, an execution only incapacitated. But a hanging in the town square was thought to concentrate the subjects' minds, not just amuse the rabble. Early states could caution their subjects against transgressing mainly through theatrical cruelty, amplified by word of mouth. The mass public trials held by the totalitarian regimes in the Soviet Union and China served similar purposes.⁹²

As crimes were recognized to have broad implications for society as a whole, punishment both retributed for wrong and aimed to prevent its reoccurrence. Death has historically been the most consistently used penalty, still on the books in one-third of all nations today. Vengeance commonly demanded it, and the state, with its first forays into adjudication, in fact curtailed capital penalties as it sought to reduce mayhem and bloodshed. But as the state itself took over punishing, it wanted to demonstrate that it, too, could administer justly harsh penalties. Death quickly became among the truest arrows in its quiver. By the standards of its day, the Old Testament decreed death comparatively sparingly, for perhaps some thirty types of crimes. Islamic law knew only three capital crimes: robbery, adultery, and apostasy.⁹³ But of the 359 articles in the Chinese emperor Wu's code, 409 statutes related to the death penalty.⁹⁴ And Dracon's code (seventh century BCE) used scarcely any other punishment. Dracon thought small offenses deserved it, and he knew of no worse punishment for the serious ones. The Greeks considered

capital punishment insufficient for deliberate parricide, the worst form of murder, so they stoned such killers' corpses at a crossroads at the city's edge, then hurled the body beyond its boundaries.⁹⁵

Death, in fact, came as a welcome relief from the preliminary tortures inflicted on many criminals. William the Conqueror abolished the death penalty, judging it overly lenient. He preferred to treat his enemies as slaves, blinding and castrating them.⁹⁶ Even today, the logic of retribution suggests that some crimes—such as genocide—perhaps deserve more than simple death.⁹⁷ Beccaria put his finger on the problem: since the human body could suffer only so much, the most enormous crimes were not adequately punished by pain alone.⁹⁸

As we have seen, when defending against a common danger, the state readily assumed the authority to punish drastically on society's behalf. Having once regarded death as merely an efficient method of incapacitation, Roman law began to aim higher, hoping to set a deterrent example. Under Tiberius (d. 37 CE), it sought to prevent those sentenced to death from committing suicide before the state exacted its due.⁹⁹ In the fifteenth century, the Russian state spoke for the communal interest, even at the expense of crime's victims, by forbidding compensation (by money or enslavement) for especially heinous offenses, insisting instead on death. In 1537, Christian III of Denmark demanded capital punishment for all homicides (other than accidents or acts of self-defense) because kin's ability to pay restitution was undermining deterrence.¹⁰⁰ This spirit of capital punishment serving the common cause infused the commission reforming German penal law in 1906 when it described capital punishment as an act "in which the majesty of the state achieves its most powerful expression."¹⁰¹

But death has been more than just another sanction, and its use contentious. Its origins were theological—a sacrifice to appease the gods.¹⁰² Its finality lent it gravity and moral import. The state

illegitimately assumed God's role in deciding life and death, said the death penalty's opponents. But the authorities were just using their most potent weapon to protect the community, came the riposte. After all, the state sacrificed soldiers in extremis for the common good.¹⁰³ Why did it not have analogous moral authority to battle and kill internal enemies? Did capital punishment undermine the broader goal of reducing crime? Did the state contradict itself by killing to punish killing? Such have been the debates.

However much we pride ourselves on our humanity and compassion, capital punishment has faded as much because the state no longer needed it as thanks to any groundswell of popular revulsion. Quite the contrary: in most countries, the death penalty was and remains popular. In ancient Rome, capital punishment asserted republican freedom: a citizen could be executed only after trial by his assembled peers.¹⁰⁴ When death sentences were first restricted starting in the nineteenth century, reformers were acutely aware of bucking public opinion. The French revolutionaries, who otherwise changed so much, kept the death penalty. Massive public campaigns resisted its abolition when that was proposed in France in 1906. The death penalty was finally ended in 1981 despite continued support from two-thirds of the public.¹⁰⁵ Capital punishment remains in effect in many nations—in some as an instrument of state terror, in others thanks to its popularity. Having been all but abolished in America during the early 1970s, the death penalty made a comeback, especially in the South and the West. Unlike for other punishments, juries rather than judges pronounce sentences in capital cases, and officials who advocate capital punishment are often elected by a public eager for retribution.¹⁰⁶

In Western nations, capital punishment has been abolished largely at the instigation of the professionals involved and allied elite opinion. In recent times, social elites have only rarely favored capital punishment—in twentieth-century Germany up through

the 1950s and in contemporary China.¹⁰⁷ Iran may be on the verge of flipping, though elsewhere among the Middle Eastern autocracies capital punishment remains widely used. The death penalty became a human rights issue in Europe only long after it had been abolished, sometimes for self-serving reasons, such as sparing former Nazis, but also in revulsion at the Third Reich's mass murders.¹⁰⁸ Niklas Frank opposed the death penalty for everyone except his father, Hans Frank, chief jurist of the Nazi Generalgouvernement in Poland, who was hanged at Nuremberg.¹⁰⁹ And, indeed, the Allied imposition of death at Nuremberg complicated efforts to abolish it subsequently at home—in Britain, for example.¹¹⁰

Even so, which higher principle took precedence? The state not killing or the state justly punishing evil? Whose lives mattered most—victims' or criminals'? By the 1840s, British proponents of retaining capital punishment had turned the sanctity-of-life argument in their own favor, arguing that by not executing murderers, the state was not taking victims' deaths seriously.¹¹¹ "Treating criminals humanely is in effect tolerating the inhumanity that they have shown their victims," was how a Chinese pro-death activist recently put it.¹¹² That is the standard argument, fighting fire with fire. Yet even those who oppose everyday death sentences ponder the extremes. Urged on by strong popular and press demand for retribution, the Norwegian Parliament overwhelmingly reinstated the death penalty after World War II for traitors and collaborators with the Nazis. "Humanism and mercy for traitors betrays the people" read the banners in massive demonstrations in Oslo in 1945. After the genocide in 1994, Rwandan authorities were dismayed to discover that only the Hutu killers tried at home could be sentenced to death, whereas those tried before the International Criminal Tribunal were spared. Saddam Hussein was never brought to an international tribunal because the Iraqis and Americans insisted on the possibility of capital punishment, and, indeed, he was eventually executed.¹¹³

Prison

In China, prison became a primary form of punishment already during the Han period, two centuries before Christ, though at other times it was not.¹¹⁴ In Europe, however, before the seventeenth century prisons were generally places to warehouse those awaiting trial.¹¹⁵ Exceptions included the Greeks, who used prison in some instances as a punishment, and in Rome an indefinitely postponed execution might leave a prisoner languishing in jail for life. In medieval England, oath breakers and thieves could be locked up for forty days. In thirteenth-century Languedoc, the Catholic Inquisition imprisoned heretics, hoping for confessions.¹¹⁶ Monastic orders often shut in rogue monks.¹¹⁷ Debtors were imprisoned in ancient Rome and medieval Europe to persuade them to pay up. In early modern England, they made up easily half of all inmates. But since they were held as part of a civil process, they were not felons or punished as such.¹¹⁸

Prison gradually became a sanction in itself, not just the helpmate of real punishments. From the late thirteenth century, both the number of prisons and the crimes that landed offenders there increased. In the early sixteenth century, the English common law listed 180 imprisonable offenses.¹¹⁹ As of the eighteenth century, prisons were finally a punishment in themselves. The first to abolish death entirely, Tuscany's criminal code of 1786 left imprisonment as serious crime's main sanction. Largely financed and often run by the inmates themselves, early prisons were porous holding pens that barely separated miscreants from society. Prisoners were expected to pay for their own upkeep, entitled to better conditions for extra fees, and reliant on charity if unable to pay.¹²⁰ As late as the early twentieth century, when the suffragettes were jailed, Britain's prisons had three classes, like its trains. The bottom two are easy to envision. First-class inmates enjoyed books, newspapers, visits, and

mail as well as better food, drink, and cells, permission to wear their own clothes, and the right to hire other prisoners as servants.¹²¹

Prisons were expensive to build and to run. Revolutionary France cut corners by converting nationalized church properties.¹²² Mutilation, torture, death, exile, and flogging had been cheaper, but inflicting pain and even death eventually lost favor. Banishment worked only if penal colonies or expansive territories were at hand. Using male prisoners for military ends, as galley slaves, for example, raised questions of motivation and reliability—much like for mercenary troops. The Chinese practice of enlisting criminals in military exile to defend the country's borders suffered from obvious inherent contradictions.¹²³ The nineteenth century reshaped the armed forces on a universalistic nationalist basis—the male citizen's self-interested duty. With exceptions, such as the French Foreign Legion, it was now thought nonsensical to entrust the nation's defense to society's outcasts. The refinement of sail in the eighteenth century and the end of the need for oarsmen turned galleys into hulks that now housed prisoners whose muscle power was put to use elsewhere.¹²⁴

Already in the 1700s houses of correction aimed to reform the recalcitrant poor—vagrants, the idle and disorderly, obstreperous servants, unmarried mothers, and the like. As of the mid-seventeenth century, convicts who earlier would have been killed were now imprisoned.¹²⁵ The English were ahead on the prison curve. After 1853, as transportation to Australia ended, prison became the main punishment for serious offenders.¹²⁶ By the early 1800s, 60 percent of those sentenced were imprisoned; by the 1860s that portion was 90 percent. In late eighteenth-century Paris, only 10 percent of sentences were for jail. But in the revolutionary penal code of 1791, prison became the most common punishment. By the early nineteenth century, imprisonment had become the standard punishment for noncapital crimes in Germany, too.¹²⁷

To cut costs, inmates were put to work. Prisoners built the pyramids, and the Romans used them on public works or in the mines.¹²⁸

Workhouses were an early iteration of what was to become the prison. Galleys made criminals part of the nation's defense. Labor was central also to nineteenth-century prisons, both for what it brought in and for its disciplinary effects. The Chinese and Soviet camps often worked prisoners to death. Inmates in the American South, Blacks a majority among them, were worked ruthlessly.¹²⁹ To this day, the American prison-industrial complex remains a large corporate presence.¹³⁰ But inmates were rarely a first-class labor force: work shy, asocial, unmotivated, uncooperative, and hence uncompetitive. Like eighteenth-century workhouses for the poor, prison labor rarely paid for itself.¹³¹ At the same time, prisons' subsidized labor competed with the free market.¹³² Already with the first workhouses, nonincarcerated workers and private employers complained of publicly subsidized goods sold on the open market.¹³³ US law specifically forbade prison labor from competing with the free market. That labor has therefore been tolerated largely to make products consumed by the state itself—license plates, uniforms, and the like—or for public works.¹³⁴

Prison was in effect a fine levied in terms of time. By itself, it could not guarantee a change of behavior. Just as someone might regard a fine as the price of offending, so too an inmate might consider a stint behind bars the cost of doing business, especially if he could pay a fall guy to take the hit. In early modern Europe, debtors often preferred prison to settling their accounts: sometimes they had no choice; at other times they did. When debtors were no longer imprisoned in Britain as of 1869, those who refused to pay up, though they had the means, could be jailed.¹³⁵ Conversely, in Sharia law, debtors could be imprisoned to determine whether they had the funds to meet their obligations; if not, they were released since what was the point of coercing them to do something they could not? More recently, plaintiffs hoping to conceal substantial assets in divorce cases have been willing to suffer jail.¹³⁶ A similar trade-off between time and money held for fines. In the 1950s, more than half of US jail inmates were atoning for unpaid fines, as remained true in Scotland in the

1980s.¹³⁷ Further complexities lurked. The state had long inflicted pain on offenders. Inmates' lives could of course be made a living hell, too, but if torture were the goal, prison was an inefficient and costly way to go about it. Jail incapacitated offenders in an era when banishment was no longer possible. Why not then rehabilitate them, so that prison did not become a breeding ground for further criminality? Prisons, in other words, were inefficient means of inflicting pain and an expensive and possibly dysfunctional form of incapacitation. Why bother locking up criminals if prisons did not improve them?

From such considerations sprang the rehabilitative turn incarceration took in the eighteenth century. Since prison without rehabilitation was basically torture, and since inmates were the state's for a long time, why not attempt to redeem them?¹³⁸ By itself, prison promised to discourage certain bad habits: drinking, gambling, concubinage, whoring. A regular schedule of meals, sleep, and work—even if just the treadmill's make-work—inculcated industrious discipline. Enforced solitude at least isolated inmates from bad influences and might encourage them to ponder their crimes.¹³⁹ Prison was to be a spiritual ordeal from which inmates emerged purified. The Philadelphia system of extreme isolation therefore became popular. Prisoners lived and worked wholly alone, hooded when they left their cells, receiving only a single visitor and letter annually. England's Petworth prison had stalls built to keep them apart even in chapel. In Pentonville, the guards wore padded shoes so as not to break the silence.¹⁴⁰ Yet total isolation was costly and took a heavy psychic toll on inmates, who often committed suicide or went insane. From such failures emerged a moderated approach, pioneered at Auburn prison in upstate New York, where inmates were isolated in their cells only at night, working communally during the day.¹⁴¹ Yet all such ambitions for rehabilitation have failed. Today's prisons—overcrowded, understaffed, replete with society's least favored—perform what is at best incapacitation and at worst—in maximum-security institutions—a form of torture.

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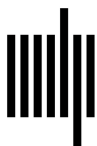
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