

## Chapter 9

# Crimes of Thought

Punishments were moderated as the state expanded its power. Enforcement's brunt bore down ever less on its citizens' bodies, both in outright physical pain and in the psychic anguish of time lost in prison. Yet the state did not step back from probing and controlling its subjects' lives. Quite the contrary. It moved beyond mere transgressions by act to delve into citizens' inner lives, their thoughts, inclinations, proclivities, and—most intrusively—the likelihood that they might offend in the future. So far we have looked at crimes as tangible acts committed: killing, stealing, burning, cheating. But thoughts, ideas, beliefs could also offend—if they were prohibited. And so eventually could intentions, plans, and conspiracies, even inclinations and proclivities to do what the state forbade.

The state had little ability to plumb its subjects' true state of mind. By torturing, it could elicit confession or repentance but never know how sincere. How far into the individual psyche could the state penetrate, and why should it bother? The state could hope for outward conformity, and it often rested content with that. But even in secular modernity, the state has shown an interest in what goes on in citizens' minds, seeking to penetrate and influence that.

With overt, tangible offenses, human law could and eventually did handle matters. But thought crimes—not easily known—tested secular law's limits. Speech and writing expressed underlying thoughts and beliefs and, by being public, could influence others in unwanted ways. But because subvocal, thoughts were definitionally without

effect on others, their very presence unknown. Why pursue such an offense? And how? The Fourth Lateran Council in 1215 specified that unknown crimes should not be subject to inquisition. Only those publicly charged with heresy were to be pursued, not offenders accused in secret, much less those who kept their thoughts private. In 1484, the Spanish inquisitor Tomás de Torquemada decreed that those whose heresy was unknown to others be allowed to abjure and do penance in secret, too, thus never being exposed as heretics.<sup>1</sup> “The thought of man shall not be tried, for the devil himself knoweth not the thought of man,” said Chief Justice Brian at the end of the Middle Ages.<sup>2</sup> Given the impossibility of penetrating the black box of any human mind, were such pronouncements just the state making a virtue of necessity?

How could the state or church police an interior state of mind when it knew only outward signs—acts or words? Even if it knew of an interior transgression, what could it aspire to? Punish the thought or conviction retroactively? Ensure that whatever heterodox believers really thought, they at least mouthed the right opinions? Or seek to change the offender’s actual beliefs and thus future acts as well as thoughts? With conventional transgressions by act, no one expected offenders to become good and never offend again. Retribution cared only that they suffered. Deterrent punishments naturally sought to prevent future crimes, but more by terrifying potential offenders into obedience than by necessarily changing their dispositions. From society’s utilitarian vantage, whether citizens behaved out of fear or goodness mattered less than that they toed the line. In modern parlance, society was a behaviorist—concerned with outward acts more than with inward beliefs. Yet rehabilitation at its starkest, as in totalitarian brainwashing, did in fact seek to change past offenders into a future law-abiding and right-thinking citizens.<sup>3</sup> Citizens’ inner and outer states were to correspond, both acting and being good or at least in conformity to the law. Such attempts to penetrate deeply into citizens’ psyches

therefore provoked opposition as violating human autonomy, or—overreaching—they simply tended to fail.

Retributive punishment for thought offenses made little sense, given that no one had been harmed by purely private ideas. Punishing to deter or incapacitate heterodox thinkers might warn others off entertaining similar deviations, but it also publicized the presence and possibly even the popularity of precisely the ideas to be stamped out. To punish thoughts meant to seek to convert or persuade the offender. If successful, the influence would lead to a genuine and lasting change of mind. Or it might mean merely outward assent to a position still rejected at heart. How would persuaders know?

In Islamic law, male apostates were jailed for three days in hopes of reviving their faith. If they did not then reaffirm it, they were to be executed. In the Middle Ages, Dominicans tortured suspected heretics less to find out what they thought than to make them recant.<sup>4</sup> At the end of their travails, the monks remained equally ignorant of the heretics' true convictions. In seventeenth-century Virginia, the authorities' inability to do much beyond eliciting outward signs of conformity was laid painfully bare. Those who absented themselves from twice-daily prayer were first punished by loss of wages, whipping, and the galley, and those who spoke against the Christian faith were executed. These measures, however, judged only on external indications. Ministers therefore also interrogated suspected heretics on their faith and knowledge of it. Those who refused to submit were whipped and made to confess to the congregation. For a third infraction, they were flogged daily until they confessed, asked for forgiveness, and sought instruction from the minister.<sup>5</sup> Despite this escalation, the religious authorities still remained uncertain what their victims actually believed.

Authorities have always found it hard to know who entertained heretical ideas, how firmly they held them, and if they could be dissuaded. Crimes of thought were inherently harder to detect, much less eradicate, than conventional offenses by act. Much normal

crime is opportunistic, succumbing to a momentary weakness. Offenders of thought have rarely been motivated by what would be the equivalent—a whim or passing fancy. Unlike conventional criminals, they have usually been moved by conviction. The heretodox have often been educated, conscientious, well-meaning people, idealistic and unbribable, too. Of course, some have sought to reform a religion or bring down a political system. But they have equally seen themselves as the only ones truly understanding the thought system in question, seeking to return it to its roots, core, or true mission.<sup>6</sup> Attacked as heretics or traitors, they claimed to be true believers or patriots. Many statesmen started as traitors; many religious leaders as heretics. Christ was accused of blasphemy for insisting before the Sanhedrin that he was the Messiah.<sup>7</sup> George Washington would have hanged for treason had England won the Revolutionary War.

Since their religions made no exclusive truth claims, polytheistic regimes of the pre-Axial age could most easily accommodate variant beliefs. The Romans folded deities from conquered cultures into their pantheon of cults and gods. Not every belief was taken equally seriously, but they all could be accommodated so long as they tolerated one another. A single god, demanding unwavering adherence, however, undermined polytheism's workaday toleration. The Abrahamic monotheisms made exclusive and mutually incompatible claims to absolute truth, all while refusing to consider polymorphous beliefs worthy competitors. For the Jews, Jupiter was not just a foreign god, but no god at all.<sup>8</sup> Christianity was even more universalizing than Judaism, less attached to any particular nation. Universalizing ideologies—whether religious or, later, political—saw ideological dissent in binary terms. They were ecumenical in the sense that anyone willing to believe was welcome as an adherent but intolerant in insisting on the sole truth of their way, the falsity of any other.

Many more people would ultimately be killed for political principles than for theological beliefs. But outside the totalitarian regimes,

the secular powers would never match the intensity with which religious heresy was pursued. The stakes were higher for heretics than for political dissidents—eternal damnation, not just death. Nor could political persecutors assuage their consciences with the belief that the pain they inflicted was for the sufferer's own good in the next life. Augustine insisted the church must compel the true faith. Heretics had been led astray. Christians should force them to see the light, not indulge their errors with a misplaced sense of mercy, thus losing them forever.<sup>9</sup>

Heretics also had the advantage over many political dissidents in appealing to ultimate authority. A common claim of religious transgression was that it understood the truth, which—as orthodoxy—had become encrusted by institution and ritual. Only the heretic tapped straight into the godhead.<sup>10</sup> The heresies that eventually became Protestantism shared a belief in their direct access to God's truth. Hence, they rejected many sacraments, the cult of saints, pilgrimages, salvation by good works, and above all the clergy as intermediaries between the laity and God.<sup>11</sup> The most extreme sects lost even a sense that sin was possible, allowing them to believe that unbridled sex, including incest, would restore their lost purity.<sup>12</sup>

## Religious Unorthodoxy

The first thought crimes were theological. Disobeying God was the original sin. When crime and sin were largely the same, worshipping deities other than your own people's god was among the first offenses. At first, such transgressions had little to do with the state as such, nor did gods need the state's laws and powers to punish them. The ancient Greek gods sometimes administered justice, though these spiteful and all-too-human deities mostly quarreled among themselves, wreaking occasional havoc on human society.<sup>13</sup> In Euripides's play *Bellerophon*, Zeus dispatched the main

character with a thunderbolt for his atheism.<sup>14</sup> When Gideon pulled down the altar of Baal and desecrated the other local gods whom the Jews had begun worshipping while in Canaan, his father saved him from his people's wrath by insisting that were Baal a god, he could defend himself.<sup>15</sup> Why the God of the Jews needed mere mortals to take up his cause when blasphemed was left unexplained.<sup>16</sup>

Sin, irreligion, immorality, and crime were at first largely indistinguishable. *Crimen* could mean both "sin" and "crime."<sup>17</sup> Both sins (in the broad sense of being irreligious and immoral) and crimes violated laws given by god(s) and enforced either directly by them supernaturally or indirectly through authorities, whether religious or worldly. Attacking the leader, who was also god's earthly representative, transgressed both religious and secular authority. Heresy and treason were thus much the same offense—attacks on leaders. In ancient Greece, sacrilege and treason were closely related, the temple being the home of the state's protector.<sup>18</sup> Sins such as blasphemy were treated like secular transgressions such as murder or theft, as violations of the divine order, and enforced by the authorities. Blasphemy in Greece was a portmanteau offense, including speaking ill of the gods, disturbing the peace, and dishonoring principles of government. Sacrilege was punished with death in the Lex Julia, along with embezzling public monies. Adultery was considered a sacrilege in Roman law, a defiance of marriage's inviolability.<sup>19</sup>

Sin and crime were eventually separated out. The transcendent religions of the Axial Age—Buddhism, Confucianism, Jainism, then Judaism, Christianity, and Islam—desacralized this world. God and the divine were elevated to a higher plane, no longer interacting much with the mortal and certainly not on a daily basis.<sup>20</sup> By the nineteenth century, the legal reformer Anselm von Feuerbach was able to argue that God could not be insulted and that he certainly would never stoop to exacting revenge for injured honor.<sup>21</sup> The Greek and Roman gods had constantly meddled in human affairs. The Western Christian world was eventually, after kings and popes

had sorted their relations, ruled by secular law, with religious precept only at a remove.

If the divinity did not intervene, religions themselves could only persuade. They could censure and influence believers. Excommunication had an effect only insofar as the spiritually banished remained sufficiently adherent to agree that it imposed a cost on them. If used too often, as among seventeenth-century Jewish communities against Sabbatian heresies, its effects were shrugged off.<sup>22</sup> Only those who still accepted the orthodoxy could be punished by it. For similar reasons, religion's most effective leverage, hell, failed to work for those whose faith had changed or faded. Besides such voluntarist measures, religion could enforce its precepts only when it allied with the state, turning sin into crime.

Religious orthodoxy and the state therefore intertwined. A language, as the old joke goes, is a dialect backed by an army. So, too, a sect becomes religion only once it can enforce itself. Once a persecuted faction, the Christian Church eventually promulgated its doctrine by law. With the Roman Empire converted under Constantine, the church could determine the content of faith in this world with more than just threats for the next. Christianity came in variants, so in 325 the Roman emperor chose among them, calling the Council of Nicea to formulate the first creed.<sup>23</sup> The Theodosian legislation of the fourth century made Catholic Christianity the religion of the empire. Other Christian faiths were now branded as heresy. Heretics and pagans were stripped of the right to worship or hold civil office and fined for their beliefs. Trinitarianism was Christianity's central theological dispute, an attempt to reconcile monotheism with Christ's peculiar status as partly human, partly divine. It did not become orthodoxy until the Council of Chalcedon in 451.<sup>24</sup> In 453, the constitution of the emperors Valentinian III and Marcian subjected pagans and heretics to confiscation and death. After 376, imperial constitutions forbade secret meetings of heretics. From the sixth century on, those who failed to denounce heretics were also condemned.<sup>25</sup>

Long persecuted, Christians now went after each other. After Nicea, Constantine issued an edict against heretics aimed at Novatian schismatics and Gnostics.<sup>26</sup> A millennium later, that cycle repeated itself with the Reformation. Just as treason wipes the slate clean by its own success, so victorious heresy becomes orthodoxy. Though hounded to near extinction, Waldensians, Hutterites, and other sects sowed their seed in those areas where Protestantism later flourished.<sup>27</sup> Severely persecuted by Catholics, mainstream Protestantism in turn went after many of its own bewildering array of sects. Luther had at first rejected coercion in matters of faith. As he gained power, however, worried by the excesses of Anabaptists and other schismatics, he changed his position. John Calvin's vicious hounding of Michael Servetus to a gruesome death in 1553, who had already been persecuted by Catholics for his views on the Trinity, was among the worst examples.

So long as religion was considered society's cement, belief was a public issue. Incorrect thoughts threatened order and stability. If God insisted on human society's purity, individual deviations became a collective problem. Heresy could spread like disease and had to be stamped out. The threat of divine wrath at sin obligated human authorities to police themselves. Chinese rulers anxiously scanned the heavens for omens and signs of supernatural displeasure that required a recalibration of their policies.<sup>28</sup> Romans were largely indifferent to theology so long as order was maintained, but Christians feared that wrong thinking affected the entire community. Heresy threatened God's wrath through famine, earthquake, and pestilence. Theologians of the eleventh and twelfth centuries insisted that a universal, uniform faith alone won God's favor for the Christian world. Emperor Maximilian issued the first imperial law against blasphemy in 1497 because he feared epidemics, famine, and natural disasters.<sup>29</sup>

As we have seen, both treason and heresy were first regarded as defiance of collective religious and political authority. In 1199, Pope



Innocent III treated heresy analogously to treason. Both were crimes against the ultimate authority, whether secular or religious.<sup>30</sup> Heresy was not just an individual crime but, like treason, also offended against the community of faithful. Only subjects or citizens could be traitors since foreigners were definitionally unable to betray a ruler to whom they owed no allegiance. Foreigners could be enemies, of course, but not traitors. Believers may quibble whether Søren Kierkegaard was right that pagans could not sin. But atheists probably cannot sin—unless it turns out they are wrong, and God exists.<sup>31</sup> Similarly, only believers could become apostates and heretics.

But non- and other-believers could blaspheme or verbally assault sacred values. Early Christianity drew such distinctions imprecisely. Pagans were routinely lumped with heretics in the Roman Empire. Religion, sorcery, magic, superstition, and witchcraft were interlaced. Christians took witchcraft very seriously as a competing faith, necessary to root out. “For rebellion is as the sin of witchcraft,” says the Bible.<sup>32</sup> As of the fourteenth century, black magic and pagan rituals were considered heresy, which thus elevated superstition to a theological challenge.<sup>33</sup> In medieval France and England, necromancy aimed at the royal line was treason. In the early seventeenth century, James I of England drastically punished witches.<sup>34</sup> The Ming Chinese outlawed private ownership of celestial instruments to predict the future. In sixteenth-century Muscovy, both witchcraft and religious dissent were serious crimes, along with treason and revolt. The Massachusetts Bay Puritans made witchcraft a capital crime.<sup>35</sup>

Resonances of such hierarchies persist. Few today see sorcery as a valid competitor to religion. When in the Republican presidential primaries of 1980 George H. W. Bush called Ronald Reagan’s supply-side policies “voodoo economics,” the description was regarded as an uncontroversial commonplace, even as Vodun’s practitioners accused him of slander.<sup>36</sup> Nations with official state religions decide which variants they recognize as legitimate competitors. In Germany, both the Society of Friends (Quakers) and Scientology

are classified as sects, not religions. European authorities question whether such would-be religions qualify for state subsidies (or can collect religious taxes). In the US, tax exemptions have been the main issue: whether to grant Scientology standing as a religion has been the remit of the fiscal authorities.<sup>37</sup>

Transgressions against the faith eventually became crimes against the state. In the fifth century BCE, the Greeks began punishing the impious and those who refused to recognize the gods.<sup>38</sup> Plato argued that even well-meaning citizens who committed impieties should be put to death if after being instructed and admonished for five years in a house of correction, they had still not repented.<sup>39</sup> Socrates was only the best remembered of such victims. The Romans cared little for religious orthodoxy. Good citizens engaged in the cults, but Roman law knew few theological or sacral crimes. Transgressions were punished largely if they were also a public offense, such as theft from the temple. Unauthorized revelation from the Sibylline book of oracles was a capital crime, and neglecting private shrines was actionable. As the Romans began persecuting Christianity, they sometimes made sacrifices to their gods obligatory. But they regarded religion mostly as a matter of public order. Citizens were expected to go through the motions of adherence, but their actual beliefs were of less concern. Roman syncretism, assimilating the foreign cults swept up by imperial expansion, hampered any narrow orthodoxy.<sup>40</sup>

Christianity's challenge to the state cults threatened public order even as the Romans took little interest in its theological claims. They viewed Christians as another annoying, standoffish sect that shunned public festivals, sacrifices to local deities, and homages to the emperors' statutes. Neither the Christians' portentous prophecies of unbelievers' fates nor rumors of secret bloody and sensual rituals helped their image. Rome firmly regulated and occasionally suppressed Christians along with the Bacchantes, the Druids, and followers of the cults of Isis and Serapis.<sup>41</sup> Christians, however,

proselytized effectively, universalizing Judaism's monotheism and its unwavering claim to the truth. They ignored the Roman state, which, besides persecution, had few tools to deal with a belief that despised worldly power. Once the emperors converted to Christianity in the fourth century, religious and political power aligned. The state now policed orthodoxy, and heresy and blasphemy became among the most commonly prosecuted crimes.<sup>42</sup>

Church and state together battled heterodoxy through the Middle Ages. Pope Gregory IX decreed that blasphemers undertake public penance in church, while secular authorities fined them. Secular laws against blasphemy followed in the early thirteenth century.<sup>43</sup> Forbidden to shed blood, clerics farmed out heresy's punishment to the state. In England, Henry VIII combined political and religious power in the same hands, and the two forms of dissent became indistinguishable. Objecting to his variant of the Reformation was both heresy and treason.<sup>44</sup>

Religion began to be exempted from the state's concern in the Elizabethan era. Francis Bacon promised that the authorities did not seek to "make windows into men's souls." And in 1570, the queen agreed that all subjects who were obedient to her laws would be free from "any molestation to them by any person by way of examination or inquisition of their secret opinions in their consciences for matters of faith, remitting that to the supreme and singular authority of almighty God, who is only the searcher of hearts."<sup>45</sup> The right to remain silent was invoked in this era to protect religious dissidents from persecution, indirectly allowing them freedom of conviction by not having to testify to their variant beliefs. That innermost thoughts need not be divulged to secular authorities was invoked by Thomas More in his trial in 1535.<sup>46</sup> Extremists such as the Arians and Anabaptists were persecuted, but Catholics and Puritans only if also their activities threatened political dissent. Though adopting the Thirty-Nine Articles as official doctrine in 1571, the Elizabethan church did not rigorously enforce them. Catholics

attended established churches or paid fines for recusancy and went to mass in private. The state demanded only outward conformity and pro forma obedience.<sup>47</sup>

Insofar as the state wanted heretics to repent or convert, it could not just execute them. With thought crimes, capital punishment indicated failure, so heretics were often imprisoned and tortured in hopes of conversion. Used to extract the truth, torture also served to persuade. Dead heretics, Thomas Aquinas pointed out, could not do penance.<sup>48</sup> The Spanish inquisitors repeatedly urged the accused to examine their consciences, identify the charge against them, and confess. Only then were formal charges brought.<sup>49</sup> Because particular thoughts were not an ineradicable part of humans—as ethnicity would later be considered—they could be changed and did not seal their thinker's fate.<sup>50</sup> Only those who valued their convictions above all else faced death. Luther came to consider Anabaptists, who rejected the state and its coercions, blasphemers and seditionists, calling for them to be killed. Not everyone was cut out for martyrdom, however, and many convicted heretics lived after recanting.<sup>51</sup>

## From Theology to Politics

Over time, faith grew private, no longer a threat to the state. Dissidence moved to politics instead. We have followed this development with treason. Threats originally posed to the person of the ruler were later aimed at the system as politics ceased being a dynastic matter. With the spread of representative government and later democracy, some degree of political dissidence was baked into the system as reform, with only outright attempts to destroy it outlawed. Only in the totalitarian regimes did political dissent retain a theological aura, with even trivial acts regarded as mortal threats. Nonetheless, liberal democracies, too, took an interest in citizens' political thoughts. Nationalism sometimes presupposed an adherence to the

community that prompted the state's concern with its members' beliefs, not just their conduct. The faithful congregation found its counterpart in the patriotic nation.

Political dissidents could be traitors or revolutionaries, more dangerous than ordinary criminals. Just as assassination was not merely another murder, so politically motivated crimes were "less reprehensible morally but more dangerous to society than the same act would be if due to revenge or some other personal motive," as the British police said of the suffragettes in the early twentieth century.<sup>52</sup> The French revolutionary penal code of 1791 made political crime an offense against the state, not the ruler: *lèse-nation*, no longer *lèse-majesté*. Seeking to change the system was treason. Those undermining the state attacked their own people and so ultimately themselves. Opposing the people's will, they stood outside the community.<sup>53</sup> Democracy's opponents were enemies of the people. This was the logic taken to its extreme in the totalitarian populisms.

But dissidents could also seek to improve, not overthrow. In this guise, they were considered political criminals. In recognition of their social status and benevolent intentions, nineteenth-century Europe punished them more leniently than ordinary offenders. Starting in the 1830s, France softened its treatment of opponents. Both Left and Right despised Louis-Philippe, the bourgeois monarch. Legitimists hated him for overthrowing the last Bourbon king, republicans for his narrowly upper-middle-class backing. The Orleanist regime responded with comparatively moderate laws, though robust by modern standards. It curbed free speech and writing, required authorization for associations, and controlled weapons. The July Monarchy's reforms marked the growing lenience of laws on political crime. Political opponents were now regarded as honorable, sincere citizens, not as criminals.<sup>54</sup> Madame Germaine de Staël, the *salonnière* and writer, was allowed to remain in France, though not in Paris, and visitors to her home near Auxerre were monitored but not prohibited. Napoleon III, though authoritarian,

treated opponents of his coup moderately, exiling some, allowing others to remain in France under surveillance.<sup>55</sup>

The suffragettes of the late nineteenth century were emblematically political criminals. They advocated violence yet often hailed from prominent families. Unlike the Chartists and Fenians, earlier working-class political prisoners in Britain, suffragettes were radicalized insiders. They exploited that position, daring the authorities to treat them like drunks and other low-level offenders.<sup>56</sup> Using cat-and-mouse tactics, they pushed the authorities to respond forcefully, hoping to win public sympathy. They heckled, demonstrated, threw stones at meetings, broke windows, disrupted religious services, burned mailboxes, slashed paintings, rushed the House of Commons, picketed politicians' homes, held hunger strikes, and committed public suicide. Even assassination may have been discussed.<sup>57</sup> Fined, they did not pay. Ordered to provide sureties, they refused, requiring the government to keep them in jail.<sup>58</sup> On hunger strikes, they obliged the police either to undermine their own authority by releasing them or to force-feed them, with the attendant bad publicity.<sup>59</sup> Hunger strikes had long been one of the truest arrows in the political criminal's quiver. Strikers in effect took themselves hostage, leaving the authorities with bloody hands by requiring them either to let the strikers die or to torture them by force-feeding. Even God had been the object of a hunger strike by Saint Patrick.<sup>60</sup>

Yet lenient treatment of political offenders had its limits. The more authoritarian, the more twentieth-century regimes have treated political prisoners akin to ordinary criminals, refusing them the courtesy of a special status.<sup>61</sup> And even liberal democracies have shown their harsh side. Unlike on the continent, the Anglo-Saxons generally did not recognize political crime as a special instance or grant leniency for such offenses, however well intentioned.<sup>62</sup> Nor did they regard ordinary crimes as in any sense justified through being provoked by political oppression. Historians may regard crimes committed by

Blacks in the United States, whether slaves or their descendants, as protests against a deeply unfair system, thus political. But at the time they were met with lynching and oppression, certainly not treated with any understanding.<sup>63</sup> The rise of nationalism and the ideological conflicts of the interwar and Cold War decades posed quasi-theological political conflicts once again, undermining the nineteenth century's lenience toward political offenders.<sup>64</sup>

British prime minister Margaret Thatcher held out against Irish Republican Army hunger strikers in 1980. She refused to recognize their political status or to force-feed them. Almost a dozen starved to death.<sup>65</sup> Contemporary terrorists, who have been willing to commit mass murder by suicide, have failed to win status as political criminals or its attendant sympathy. If anything, they have provoked the state to treat them worse than ordinary offenders—held, interrogated, tortured, and sometimes sentenced without benefit of due process, as at Guantanamo. Ransoms for release can be paid for victims of criminal kidnap, but under United Nations regulations and in some countries, such as Colombia, under threat from the Revolutionary Armed Forces of Colombia, it is a crime to do so for politically motivated abductions. “If it’s criminal, it’s legal,” was one British bureaucrat’s laconic summation.<sup>66</sup> In such respects, terrorists have been treated much like anarchists in the late nineteenth century and fascist collaborators after 1945, as enemies beyond the pale.<sup>67</sup> The lenience with which the nineteenth century treated political prisoners evaporated in the following era.

## Ever Inward

Ideological systems, whether religious or political, punished thought, not just deed. Why? So long as subjects acted lawfully, did it matter what went on in their minds? Did orthodox behavior require orthodox belief? Were not laws enforcing church attendance or party

membership enough? And why were the authorities so curious about their subjects' thoughts? To ensure that everyone was truly virtuous, both thinking and acting correctly? Or were the authorities utilitarians, worried that wrong thoughts undermined society's cohesion? Knowing what was in people's heads, let alone changing it, was an intractable problem. Identifying, reforming, or at least incapacitating heretical thinkers, in contrast, was a practical proposition.

Acting lawfully merely means obeying rules. Being good, however—whether in a religious or a secular moral sense—requires a correspondence between interior and exterior states. Sin and morality look to the motivations behind the act, the law to the act itself and to the attitudes impelling it only if they indicate its character.<sup>68</sup> To avoid sin, according to Locke, inner conviction must correspond to outer behavior; lawfulness only means acting correctly.<sup>69</sup> In Kant's distinction, morality rests on human autonomy, the law on external compulsion. The law can make people behave correctly, but only morality or belief can make them good.<sup>70</sup> States reached the outer limits of their powers at this distinction. Perhaps they could compel subjects to act lawfully, but making them good was doable, if at all, mainly through institutions that were only partly under the states' sway: churches, families, schools.

Authorities have always been keen to know the inside of their subjects' heads. In a fragment of an ancient Greek play, possibly by Critias, King Sisyphus speculated that divine omniscience had been hatched as a concept because mortals could not know each other's minds. People who feared that gods knew their innermost thoughts would be good, prompted by a kind of universal panopticon principle.<sup>71</sup> This logic underlies recent theories of how large, complex societies, uniting unrelated strangers, emerged under the auspices of omniscient "big gods."<sup>72</sup> Gods were often all-knowing. Janus could look two ways at once, Buddha four; the Egyptian god Horus appeared as a sharp-eyed falcon; and Greek gods' bodies were often covered with eyes.<sup>73</sup> The monotheistic gods were even better



enforcers: omniscient, omnipotent, and morally infallible. According to the medieval theologian Peter Abelard, God, able to pierce humans' inner minds, punished the sin with no need to await the act.<sup>74</sup> In comparison, even the mightiest mortal rulers were weak. Political and religious heretics could be known only if they revealed their thoughts by word or deed. Otherwise, unorthodoxy remained their secret, its punishment a matter for God—if anyone. Such were the Marranos, forcibly converted Spanish Jews; Moriscos, their Muslim analogues; and the Nicodemites, Protestants who attended Catholic mass.<sup>75</sup> Confession was the best and—other than indirect revelation by act—usually the only way of knowing the black box of the mind.

But even confession, especially if produced by torture, could mislead. The Greeks allowed evidence from slaves only if extracted by torture—even preferring this testimony to the uncompelled offerings of freemen.<sup>76</sup> But was confession under duress authentic? Or a desperate ploy to end the agony? The tortured body was not a reliable conduit to the soul. Medieval torturers solved the problem as best they could by requiring that a forced confession be repeated in the courtroom. Those who recanted off the rack started over again—though, for what it was worth, no more than thrice.<sup>77</sup> In sixteenth-century Seville, one observer thought that women who still did not confess after being stripped naked were probably innocent since why else would they accept such humiliation? But this was a logic that could be applied at any stage. At which level of agony did the tortured finally reveal the truth? Michael Servetus, the antitrinitarian Protestant whom Calvin hounded to a horrendous death, asked to be beheaded before being burned lest the flames persuade him to recant.<sup>78</sup>

The most fervent heretics, convinced of their own righteousness, were especially willing to play fast and loose with the observable truth. Protestants in sixteenth-century England, for example, perjured themselves. Ninety-eight percent of Lollards, an early

Protestant sect, who were tried as heretics abjured. Many of them then relapsed, so their initial recantations were likely insincere. Even Joan of Arc recanted at first. Hearing saints' voices rebuking her, she rescinded her recantation and was burned alive.<sup>79</sup> Giovanni Valentio Gentile, an Italian Protestant in Calvin's Geneva, was arrested for heresy in 1558. Concluding that he had recanted out of fear rather than conviction, the judges voted for his execution.<sup>80</sup> The sentence was commuted, but the point remained. Ultimately no one could know the authenticity of a forced confession, and those doing the confessing or recanting might well still retain their heretical core beyond reach of their suffering.

Torture was of course often used as punishment in its own right. Ancient Persians tortured not to extract confession but to intensify suffering.<sup>81</sup> But its main role in Western law was evidentiary, to reveal truth in the absence of better sources. Greek and Roman authorities tortured only outsiders, including slaves, but not citizens, over whom they had other leverage. Slaves, beholden to their masters, would tell the truth to others only under duress.<sup>82</sup> Citizens, however, were valid witnesses in court. If they lied on the stand, they risked being charged with perjury, pronounced legally infamous (*atimos*), and fined.<sup>83</sup> That perjury eventually became a serious crime is the price we have paid for avoiding torture. During the Middle Ages, ordeals and other divine interventions brought resolution to trials.<sup>84</sup> When in 1215 the Fourth Lateran Council forbade ordeals for ecclesiastical trials, it left a yawning evidentiary gap. Through ordeals, God had revealed the guilty: their hands blistered, their bodies buoyant. Without the ordeal, the Roman-canon law's standard of evidence was hard to meet: two eyewitnesses or a confession. With death as the likely punishment, few confessed voluntarily. To force a confession, torture therefore became crucial for conviction.<sup>85</sup>

Medieval courts tortured to unveil innermost thoughts but also to solve crimes without witnesses. In Europe's inquisitional systems, confession became the queen of proofs. Not only did

the defendant's admission seal the case, but for crimes that were unknowable in any other way confession was the only access to them. With offenses such as simony and concubinage, the only witnesses were themselves implicated and unlikely to sing.<sup>86</sup> Other offenses, such as heresy, might be unknown to anyone other than the offender, though blasphemy, like slander, required an audience of at least one. How then to make suspects confess? Torture was required because the inquisitional system demanded firm proof. Abolishing ordeals had moved God out of the judicial process. Torture was meant to reassure that the standard of proof remained exacting. With mere mortals now sitting in judgment, confession—even if elicited by torture—became the capstone of evidence.<sup>87</sup> Where judicial torture remained uncommon, as in England, it was largely because the standard of proof was lower. English authorities tortured, too, but unenthusiastically. Persecuting the Templars in 1310 and unable to find competent Englishmen for the task, Edward II imported continental torturers.<sup>88</sup> Not English humanity but the legal system explains the difference. By Roman law standards, the jury system applied lax standards of evidence—whatever would convince a dozen compatriots. It did not need torture.

New crimes were formulated that were not capital and therefore required less-definite proof for conviction. When seventeenth-century Germany began to punish those who were merely suspected of offending (*Verdachtsstrafe*), the standard of proof was adjusted accordingly, and torture to confession (inherently unlikely with a crime of suspicion) was no longer required.<sup>89</sup> Circumstantial evidence was taken evermore seriously, displacing confession. As the quality of the evidence required to convict was lowered and the range of both offenses and sanctions expanded, torture was less fit for purpose. An increasingly powerful state, punishing subjects for more acts in more ways, could afford to abandon such blunt instruments. Fundamental to torture's eventual demise was also that certain interior crimes—religious and many political heresies—fell out of the state's remit.

The authorities no longer had to plumb souls, though that still left broad scope, as we will see, for other occult crimes.

Torture in the West today is used largely on outsiders but now mainly in a forward-looking interrogational mode, aiming to extract information about anticipated events rather than confessions about past transgressions.<sup>90</sup> Having supposedly banned torture, our own era (ignoring totalitarianism) has seen it revived. Some democracies have developed techniques of “clean” torture that tacitly acknowledge their illegality by inflicting pain without leaving physical traces.<sup>91</sup> The state has repeatedly confronted supposedly existential threats from actors it regards as outsiders, beyond the protection of due process: outcasts and organized criminals subjected to “third-degree” interrogations by American police (legal until 1936); Algerian nationalists taking the independence struggle to French soil in the 1950s; Islamic extremists waterboarded—or worse—at covert rendition sites, beyond the law’s protection.<sup>92</sup> Ticking-bomb scenarios have been invoked to convince skeptics that torture was necessary, despite the damage to institutions and morality.<sup>93</sup>

Torture to elicit confession was among the first, crudest, and commonest techniques the state used to penetrate its subjects’ interiors. It was the flip side of the voluntary laying bare of souls that the church also began demanding of the faithful. Confession and inquisition arose simultaneously as mirror aspects of the church’s attempt to illuminate and mold the soul. When the Fourth Lateran Council abolished ordeals in 1215, paving the way for torture’s reintroduction, it also made sacramental confession a routine element of lay religiosity, an annual obligation of all Christians.<sup>94</sup>

At first, confession was a public event, Christians seeking forgiveness collectively through the church’s intermediation.<sup>95</sup> Sinners who made peace with the church contritely endured its penitential punishments: praying, fasting, undertaking pilgrimages, paying fines, chastising themselves, wearing clothes that indicated their faults, and the like. In return, they expected the church to intercede for

them with God.<sup>96</sup> As of the mid-sixth century, beginning in Ireland, confession was also held privately, penitent to priest. In this form, it was required as of 1215.<sup>97</sup> Public confession had channeled the sinner's redemption through the church, which intervened with God. Private confession put the sinner in more direct relation to the divinity, though still through a priest. Canon lawyers called confession the *forum internum*, the "internal court," to distinguish it from their own external court of law.<sup>98</sup> Absolution resolved sin, while crime was left to the secular authorities. Protestants eventually denounced Catholic confession as a wheeze, promising redemption through mere ritual. They emphasized true confession and contrition's ability to bypass established authority as sinners pleaded directly with God.<sup>99</sup>

Confession's privacy was reinforced with the sixteenth-century invention of a place for it to occur, the confessional. Confessions were now both private and at least nominally anonymous, encouraging penitents to reveal all. If confession had earlier dealt with the frictions of rural life, the tensions and violence of local communities, it now concentrated on interior sins, often sexual, with masturbation a particular church preoccupation.<sup>100</sup> Sinners were reconciled to God, no longer to the community. Even before the Reformation attacked penances as mere empty ritual, confession focused on interiority. Early medieval confessions involved two meetings with the priest, the sinner first confessing and then after penance returning for absolution. But as absolution was extended to the laity starting in the late tenth century, confession was compressed to a single meeting where penance and absolution were dispensed together. Attention thus shifted to the sinner's attitude at the time of confession, the contrition expressed even before having undertaken penance.

A presumably apocryphal story illustrates the change. Having raped his daughter, a man asked for severe penance in confession. Given seven years, he demanded more. The priest instead reduced his penance, and this downward haggle continued until it arrived

at but a single Paternoster. By this point, the man was so mortified by shame that he died on the spot, going straight to heaven.<sup>101</sup> The Reformation turned confession even more inward.<sup>102</sup> Luther distinguished between acts that harmed the community (adultery, murder, theft, usury, slander, wrath, enmity), which were to be handled by public or sacramental confession, and “the secret sins of the heart,” or sexual fantasies. The latter could be dealt with between individual sinners and God. Insofar as they wanted the comfort of confession, they could also confess to any Christian, ordained or not.<sup>103</sup>

Neither forced nor voluntary confession provided certain knowledge of interior states, however. Only a truthful confessant aligned interior conviction with outward profession. Others were conflicted. Neither priest nor torturer knew whether conversion or confession or repentance was meant wholeheartedly. The problem with torture lay epistemologically not with those who had in fact offended. They resisted the pain—or not. The innocents, in contrast, saw no reason to suffer for deeds they had not committed, and so they served up whatever they thought the interrogators wanted to hear, and often much more. Soviet police, for example, became alarmed during the late 1930s as torture stimulated detainees’ imaginations, and the evidence suddenly suggested that subversion was even more widespread than the authorities feared.<sup>104</sup> On the scaffold, the executioner never really knew whether he was killing a stubborn heretic or a genuine innocent.

Imposing orthodoxy, religious or political, some regimes welcomed public confession or recantation as a ritual of allegiance by which dissenters acknowledged their reentry into the fold, affirmed the official creed, warned potential transgressors, and reinforced the official message of ideological unity—all regardless of what the heretic actually thought. The authorities often settled for the mere appearance of a change of heart. The Inquisition threatened to torture Galileo unless he recanted his heliocentric beliefs. They forbade him to write more about them and kept him under house

arrest for the rest of his days, which suggested they were under no illusion as to his true thoughts.<sup>105</sup> More cynically, the forced self-criticism of the Soviet mass trials turned confession into an empty exercise in abject humiliation that could scarcely have convinced even the most credulous true believer. When interrogating suspects, Chekist secret-police officers were advised not to seek evidence but to ask first what class the suspect belonged to. From that all else followed.<sup>106</sup> Chinese Communists, in contrast, seem to have continued the Confucian tradition of self-criticism, seeking to change their enemies' convictions.<sup>107</sup> Either way, totalitarianism's insistence on alignment of inner and outer states, belief and act, meant that confession again took on a role akin to that in the post-Lateran world. Objective proof of guilt or innocence based on third-party evidence paled in comparison to extracting an admission from the sinners themselves as part of their forcible rehabilitation. Bereft of any real proof of guilt, the mass show trials of the 1930s were often based on confession alone. In the post-Stalinist 1960s, confession was downplayed, and proof reinstated in importance.<sup>108</sup>

Short of confession, the authorities had only external signs of thought offenses to go on. Specific acts, indicating forbidden attitudes, were treated as offenses: following certain ritual practices (or refusing them), owning particular writings, or tuning in to specific media.<sup>109</sup> Refusing to swear an oath or pledge betrayed internal attitudes. When the church began requiring annual confession, it gained insight into parishioners' ideas, such as those of heretics too guileless to lie, and also flushed out dissenters, such as Cathars, who shunned such sacraments.<sup>110</sup> Even moderate Protestants rejected many of Catholicism's rituals, sacraments, and liturgy. Eating meat on Fridays or refusing to fast during Lent, they gave themselves away.<sup>111</sup> In ideological systems, otherwise commonplace transgressions became fraught with new significance. Once Stalin had declared socialism achieved in 1933, petty offenses such as begging threatened to undermine the new system and were considered

political crimes.<sup>112</sup> A bribe is the price of doing business in a conventionally corrupt system. In an ideologically saturated one, bribery often became a crime against the state. Economic crimes were counterrevolutionary in Maoist China. In the 1980s, they were depoliticized as normal offenses. Nonetheless, even today smuggling, foreign-currency speculation, public-property theft, and bribery remain political offenses in China. As actions against socialism and thus the state, they are punished by death.<sup>113</sup> And assassination, as we have seen, is not just murder. Even in secular, allegedly unideological Western nations, it is difficult to shake the residue of such sentiments and to treat the killing of a leader as mere homicide.



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# Command and Persuade

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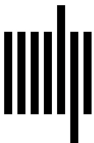
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