Chapter 11
From Retribution to Prevention

Punishing was one thing, preventing another. If the state could head crime off at the pass, it would save itself enormous bother. But how to do that? Deterrence was the oldest of the state's preventive tools. Although it remains in steady use, it is blunt, unwieldy, and unpredictable. More promising were the authorities' hopes of forecasting the criminal character, thus anticipating who might offend, where, and when and acting to prevent this. But that raised its own issues. Despite hopes for more, it turned out that the authorities were almost entirely unable to get inside offenders' heads to make useful predictions about crime—except based on their past behavior, on the assumption that what had already happened would continue in the future.

Heretics and political dissidents were often rational, well-meaning, stubborn people at odds with the official ideology. The dissident mindset was indicated by a verbalized thought, an act, or a ritual. The authorities sought to punish and thus to change not any one act or idea but the person who could think and behave in a certain way. They aimed at the underlying personality and its core of belief. Over time, beliefs were increasingly relegated to the private sphere. Religious divergence mattered only if it disturbed public order. Political dissent was channeled into the appropriate machinery of controversy in systems growing evermore democratic. So long as it steered clear of sedition and treason, it was not a crime.

That left certain offenders as the primary concern. The easiest to deal with were opportunists, weak-willed but not evil people who fell for temptation. Deterrence might hope to persuade them to stick to the straight and narrow. But habitual offenders, inherently likely to transgress, were tougher nuts. With ideological crimes, the state had aimed at belief systems that underpinned acts. With more conventional offenses, its focus remained on an underlying behavioral stratum, the character of the criminal, the personality that prompted such offenders habitually to offend.

Only the state could prevent crime. Private parties seeking vengeance or compensation for particular offenses had no concern to anticipate others. True, the bodies of the dead were often displayed to publicize the resolution of feuds, to halt further vengeance, and possibly to discourage potential transgressors.[1] But, by and large, kin groups had little concern to head off crimes more generally. Prevention was a public good that only the state could deliver.[2] As with disease, prevention beat cure. For crimes feared as endangering the entire community, prevention was an urgent necessity. Charlemagne's ninth-century capitulary defined adultery not simply as sin but also as a crime against the Christian community, to be punished so that "others may have fear of doing the same: so that uncleanness may be altogether removed from the Christian people."[3] And for crimes that were inherently hard to discern, prosecute, and convict—such as simony and clerical concubinage—prevention was the best tack.[4]

"Have you ever been punished before?" the Danish comedian Storm P. is asked. "No, always afterward." That was historically the nub of the matter. Preventing crimes, not just punishing them post facto, was complicated. Making an example of offenders by sanctioning them severely and publicly might deter others. Hardening the environment to make it more resistant to crime (locks, lights, cameras) impeded all forms of offending, whatever their motives, but beyond such rudimentary tactics, preventive action by the

state meant identifying potential offenders and stopping them in their tracks. The authorities had to penetrate more deeply into subjects' lives and thoughts, anticipating wrongdoing, and intervening before it was realized. Law enforcement had begun as a private matter, the authorities only gradually assuming the task. With the ambition to prevent crime, an interventionist state actively plunged into civil society, aiming to manage it.

The preventive enterprise focused on communal harms, seeking to provide a public good. It therefore raised once again the classic utilitarian dilemma: Are individuals mere ends to a larger goal? A man should be hanged, as the dictum had it, not because he had stolen a horse but that horses might not be stolen.[5] Even as rudimentary a preventive strategy as deterrence was not necessarily just. It often made a harsh example of offenders who happened to be unlucky. "Altho' *one* suffereth, *numbers* are protected and relieved," an eighteenth-century Philadelphia judge explained the logic; "the punishment of a few is the preservation of multitudes." In the eighteenth century, capital punishment was intended less to sanction the immediate culprits than to warn off others. The proper end of punishment, William Paley wrote in 1785, is "not the satisfaction of justice, but the prevention of crimes." Asked how to treat the Gordon rioters in 1780, Edmund Burke recommended hanging only six of them, but with maximum publicity.[6]

Initially, when the state had little power or capacity, deterrence was its best preventive tool. The few offenders it got its hands on were publicly and savagely punished to warn others. In China, the Legalist school elevated this logic to a maxim: strict and brutal laws might sound abhorrent, but precisely their stringency meant that once having had their initial deterrent effect, they would not require enforcement any longer.[7] Life for most people was nasty and brutish; punishments had to be worse. The scaffold delivered a theater of horror, and prisons were made even more ghastly than offenders' everyday lives. Civil society still only imperfectly

socialized subjects to moderate their impulses, curb their appetites, and discipline their most unruly instincts. Life was horrid; the state had to be even more so. To deter, punishments also had to be public to broadcast the message. Savagery in the town square caught everyone's attention. Medieval Germanic law punished crime after the fact, imposing compensation. This deterred only indirectly insofar as potential offenders preferred avoiding having to restitute. Roman law, however, had used exemplary public punishments deterrently, and this practice was revived in the Middle Ages. In his capitulary, Charlemagne aimed for deterrence in punishing murder and adultery with death.[8] Medieval canonists advised hanging bandits in the neighborhoods they had haunted to dissuade their peers. Hostiensis, the thirteenth-century bishop of Ostia, noted that "the infliction of punishment creates terror and deters others from sinning."[9]

For lesser crimes, shame helped prevent, too. In *1001 Nights*, being paraded disparagingly (sitting backward on a donkey, for example) was the commonest sanction. During the Western Middle Ages, offenders were publicly humiliated by marks that proclaimed their offense: branding on the thumb or cheek for those spared the gallows via benefit of clergy, red tongues sewed on false witnesses' clothing, yellow crosses for Cathars. Those condemned to penitence attended church carrying rods, which the priest used to beat them in front of the congregation.[10] In seventeenth-century Scotland, fornicators were seated on tall repentance stools. After such offenses were decapitalized in late seventeenth-century Massachusetts, adulterers and the incestuous were mock executed, forced to stand in the gallows for an hour, then branded with the letter of their crime. Women who had consorted with the Nazis had their heads shaved in postwar Europe.[11] In our own era, public sex-offender registries are officially intended to allow neighbors to protect themselves, but shaming perpetrators is a motive for their existence, too.[12] Chinese sentencing rallies, sometimes attended by huge crowds, inflict mass humiliation.[13]

Yet shame worked only insofar as the targeted actually suffered the emotion. Only offenders who were tied into social networks whose values they shared and whose censure they felt acutely were likely to be affected. In effect, shame punishments presupposed what they hoped to achieve. Those who felt shame were already motivated to behave. The brazen—or anomic—were less likely to be pained by publicity. The shame of receiving public alms, for example, did not necessarily spur the poor to industriousness. In 1697, England made poor-law pensioners wear badges. When this failed to discourage all but the neediest, paupers had to enter unpleasant and demeaning workhouses.[14] Harshness was required, the Poor Law Commission agreed in 1834, because the effect of shame was "quickly obliterated by habit."[15] Punishment and shame in effect worked at cross-purposes. As Durkheim pointed out, being sanctioned desensitized recipients and weakened their moral backbone, making them more likely to reoffend.[16] Relying too much on prison thus undercut hopes of having a reformative effect, leaving its function as primarily to incapacitate. That, in turn, opened the question of what to do when sentences expired and inmates rejoined society.

Death was the most useful deterrent—for others. Other harsh punishments could also prevent. John Stuart Mill favored the death penalty precisely because it delivered the same deterrence as life imprisonment but less cruelly.[17] Enlightenment philosophes who opposed capital punishment proposed a lifetime of hard labor as an alternative. In 1907, French prime minister Aristide Briand considered lifelong solitary confinement equally deterrent.[18] The Tuscan penal code of 1786 replaced death with *ergastolo*, a life of solitary confinement in chains, which many considered worse.[19] But these expensive solutions were beyond the administrative ken of early modern states. Public shows of force were among states' few means of rattling cages. "Killing a chicken to scare the monkey," was the Chinese slogan.[20] Death was made agonizingly spectacular to trumpet the message that crime did not pay.

Imperial Rome asserted the state's might through grotesque public death. Offenders were condemned to gladiatorial combat or thrown to the beasts in public games. They were burned alive or crucified to prolong the agony.[21] For offenders, death was often the least of their woes, a welcome relief from horrific tortures: burning alive as in Rome or boiling alive as in eleventh-century Spain or being sliced to bits as in China.[22] If lucky, the condemned were dispatched early in the process. Breaking on the wheel could proceed from the head down if the authorities wanted to be merciful, but it could also go from the feet up to prolong the agony. Arsonists in early modern France were rewarded for naming accomplices by being strangled before burning, as were women torched in eighteenth-century England. Even then, such mercies were performed surreptitiously so as not to dilute the deterrent effect of the public spectacle. In 1749, Frederick the Great of Prussia instructed executioners to strangle criminals secretly before breaking them on the wheel, thus preserving the deterrent effect while minimizing pain.[23]

Punishments became increasingly public and spectacular. The pillory was an early public sanction. Criminals were exposed while the crowd hurled insults and worse. In England, Ann Marrow lost both eyes when pilloried in 1777 for having impersonated a man in marriage to three different women.[24] Recidivists were punished ever worse—an ear sliced off in the first instance, a foot in the second, hanging for a third offense. Public whippings were added. The wheel was mentioned first in France in 1385.[25] Following the Roman example, the absolutist monarchies of the eighteenth century again staged spectacular deaths to demonstrate their might and glory. Gruesome public punishments reached their apogee perhaps in 1757 when the would-be regicide Robert Damiens was broken, eviscerated, and drawn and quartered in Paris—the scene immortalized for a modern audience by Foucault's prurient pen portrait.[26]

In the course of execution, such unfortunates were of course killed many times over, and death was often specifically added to

death. For good measure, Peter the Great had the corpses of viricides (women who killed their husbands) hanged after their execution. In many European nations, executions were made even more painful by breaking offenders on the wheel first.[27] Criminals' corpses were often also desecrated. Plato argued for parricides to be stoned after execution.[28] In 1751, the English decided not only to execute murderers but also to dissect them afterward.[29] Not until 1949 did Scotland formally abolish drawing and quartering traitors posthumously.[30] Into the nineteenth century, executed bodies were publicly displayed for weeks and months as they rotted.[31] Though less adept at spectacular punishment than the continental regimes, the English stood out for sheer numbers. They applied the death penalty to a dismayingly large range of offenses. Homicides, arson, rape, and major larceny were givens, but they also executed for felling trees, attacking deer, stealing hares, hunting at night, buggering men or beasts, practicing witchcraft, and committing all manner of petty thievery. Defrauding the mail remained a capital crime until 1835.[32] In the early nineteenth century, England had 223 capital crimes in its statutes, France 6. The English sentenced to death proportionately five hundred times as many as the Prussians, executing sixty times more.[33]

At some point, however, this rudimentary deterrent lost its luster. Eighteenth-century reformers were appalled at its barbarity, whether it achieved its goal or not. The rowdy, unruly crowds at executions seemed to be enjoying themselves immoderately, their worst instincts stoked by raw violence.[34] Intended to demonstrate the state's awful majesty, public executions had instead turned into carnivals—both literally as mortification of the flesh and metaphorically as bacchanalia. Even worse, the mobs were often feeling sympathy with the condemned, undermining brutality's deterrence.[35]

By the eighteenth century, then, sheer brutality was no longer thought to deter. That change in attitude shifted—without undermining—the logic of deterrence. Beccaria and the Enlightenment philosophes argued that deterrence could be achieved

without immorally making an example of some criminals for the public good. Certainty of punishment was more preventive than its cruelty.[36] Knowing that most offenders were likely to be caught, convicted, and punished would do more to dissuade than random savage affliction of a few misfortunates. In fact, as we have seen, the utilitarian reformers advanced an ethical argument for their own position. Whereas retributive punishments were just the state taking vengeance, thus wreaking more havoc, only punishments that deterred future offenses could be justified.[37] Medieval canonists had already argued that efficient prosecution and sanction were good deterrence—without the need for bloodshed. In the 1760s, Adam Smith agreed that preventing crime was done best by enforcing just laws rigorously.[38] More recent reformers have concurred. Knowing that a well-functioning system delivers equitable justice impartially in itself deters without the immorality of making some offenders serve the public purpose of scaring others off from crime.[39]

Enlightenment reformers did not object to public punishment so long as it was not too brutal. Putting criminals to hard work in public in special uniforms or in mines where the public could visit was considered deterrent. Beccaria thought lifelong slavery deterred more than death.[40] In the long run, however, publicity went the same way as brutality. Punishment moved out of the limelight. In 1783, London magistrates abolished the procession to Tyburn, though not the actual hanging, which still drew large crowds. Public hangings in England ended in 1868, six years after public whippings.[41] The French revolutionaries were at pains to avoid the spectacles of the old regime. The guillotine's semiclinical efficiency was intended not only to democratize death but also tone down the circus atmosphere, marrying deterrence to decency. Torture was ended as part of executions, and decapitation was permitted as the only technique, though beheadings were still performed in public.[42]

But after the excesses of the revolutionary Terror, any publicity proved too much. Executions were shifted from the town square

to the prison courtyard and were now attended by only a few officials, not the rabble. In 1851, the new Prussian penal code brought executions within the prison walls. By the 1830s, most northern US states executed only inside prisons, England three decades later. The last public execution in the United States occurred in 1936 in Kentucky, in France on the eve of war in 1939.[43] And already by the late eighteenth century, public punishments were falling out of favor more generally. In England, the pillory was abolished in 1837. In the 1830s, the last old-style public punishment ended in France when convicts sent to the prison ships at Toulon or Brest began being conveyed in closed carriages, no longer paraded through the streets.[44] Spectacular deterrence persists in some nations. Prisoners are still killed publicly in the Middle East and in China, where mass executions are scheduled on public holidays and festivals.[45]

Administered away from the public eye, how could punishments still deter? In the absence of brutal spectacle, would potential offenders understand crime's consequences? Legislators in Washington State forbade published accounts of executions in 1909, thus eliminating even the vicarious experience.[46] Foucault echoed Beccaria by claiming that concealing sanctions shifted them from everyday experience to the realm of abstract consciousness. Punishment's effectiveness now resulted from its inevitability, not its visible intensity. The certainty of punishment, he thought, discouraged crime.[47] But that glossed over the inherent contradiction that hidden penalties could not deter crime. Punishment did not become more certain by virtue of being carried out in private. Punishments that were both certain and public were equally thinkable. And if the public did not know that sanctions were administered, how could its ignorance influence its behavior? The Norwegian government in London exile during World War II reinstituted the death penalty to discourage Norwegians from collaborating with the occupying Nazis. But how would those who were meant to be deterred from treason hear of this threat in a legally effectful manner when the

only means it was conveyed were clandestine BBC broadcasts that few were likely to hear?[48]

More likely to be deterrent was the severity of sanctions. But that could also brutalize society, implicating the authorities in the same kinds of actions they were punishing and promoting further violence as offenders realized they had little to lose. Speedy justice swiftly administering punishment might also deter, but it threatened the rule of law, whose gravitas could not be hurried. In their periodic "strike hard" (*yanda*) campaigns starting in the 1980s, the Chinese—much like Europe's absolutist rulers—assumed that harsh public punishments swiftly carried out especially deter.[49] But on the whole, deterrence was never more than a crude first approximation of what the state really sought—the ability to discover and punish but even more so to predict, anticipate, and thus head off crime.

Intent and Mens Rea

Using the law to prevent crime, even with rudimentary means such as deterrence, presupposed first of all that potential offenders knew what was forbidden so that they could choose to avoid it or not. Next, it assumed their free will, the conscious choice whether to transgress. More precisely, it rested on the presence of an interval separating the intent and planning of an offense from its execution, during which an intervention might work. If crime were an automatic reflex produced by social conditions (the Marxist view of it as inherent in capitalism) or biological impulse (Cesare Lombroso's theory of the innate offender and its countless variations), it could be prevented best by social engineering: reforming society to improve criminogenic conditions or eugenically tinkering with human nature to breed out antisocial impulses. Socially or biologically determined crime could be prevented only by wide-scale reform of society or its members.

At the other end of the spectrum, if crime were spontaneous—committed by weak characters succumbing to temptation—then social reform promised little relief. Wholly opportunistic offenses were hard to anticipate and deter. At best, you could target-harden the environment against offenses—whether impromptu or planned.[50] Between such extremes of total determinism and utter fortuity, deterrence and prevention relied on potential offenders pondering their options before executing them and, it was hoped, concluding that—all in all—the anticipated crime did not pay.

Intent, liability, responsibility, and prevention were intertwined. Crimes heavily determined by strong natural urges (incest, sodomy, debauchery, baby snatching, sometimes bestiality) were often considered less blameworthy than those committed with intent.[51] Blaming social, biological, or other deterministic forces for crime lessened individual responsibility. Nor could such crimes be prevented except by modifying the underlying causal mechanisms. Conversely, one-off, spontaneous events were unpredictable and unpreventable. But in between these two extremes, individuals could be held liable—evermore so as their motives were deliberate and intentional. Peter Abelard, the medieval theologian, thought that all actions, without a consideration of their motives, were morally indifferent (*adiaphora*)—even violations of the Ten Commandments.[52] Their intent thus determined their nature. A focus on the intent, the mens rea, behind offenses made them more like sins. To be meaningful and thus worth punishing, sins had to be voluntary and deliberate acts. No will, no sin, said Bartolomeo Fumi, the scholastic philosopher, in 1547.[53]

Many, possibly most, debates over crime have concerned whom or what to hold responsible. At one extreme, at least in the common law world, strict liability punished all harm caused regardless of why or how it came about. That was social utility speaking. At the other, only harm that was both intended and actually carried out was penalized. That was justice making itself heard. But many actions

lay in between: the accident befalling in a moment of inattention, the killing that resulted even though just a beating was meant.[54] Intent, strengthening responsibility for acts at one extreme, and the insanity defense, removing responsibility altogether at the other, were opposing pendants, stretching the continuum of behavior—willed and involuntary—in opposite directions. A focus on mens rea sought to mediate the two extremes, punishing transgressions, but only when the requisite intent revealed moral culpability.[55] Was society liable for crime, as the Enlightenment philosophes argued, because it created the poverty that sparked delinquency? Or were vagrants the authors of their own misery, spongers on society, and therefore to be treated harshly by the law?[56] Most agreed that no one was liable for actions they had been forced to perform under duress, therefore not their volition. Yet what counted as compulsion? Being physically compelled was clear. But what was the psychological equivalent? Legal codes have long tolerated men killing spouses or lovers caught in flagrante. Only recently and not everywhere have the supposedly irresistible imperatives of the honor code no longer trumped the law.

The insanity defense amplified such considerations: In what frame of mind were offenders not culpable? Incapable of intent, neither the young nor the mad nor eventually animals were guilty. Roman law assumed that insanity exculpated crime.[57] In the thirteenth century, the English jurist Henry of Bracton exempted infants and the mad from culpability, and insanity became grounds for granting felons royal pardons. By the mid-1700s, acquittal by plea of insanity was becoming common in England.[58] In 1800, after George III was attacked by an obvious lunatic, the law was changed to ensure that defendants who successfully pled insanity were committed to an asylum, not released, as they formerly were.[59] Having been a get-out-of-jail card, the insanity defense now led to life-long lockup. Over the following years, the burden of proof shifted back and forth between prosecution and defense. The M'Naghten rule in the 1840s

was the result of Queen Victoria's displeasure when the assassin of her prime minister's private secretary pled insanity. It required the jury to assume the defendant was sane unless proven otherwise. The US Model Penal Code of 1962 shifted the burden to the prosecution, which had to prove a defendant *not* insane if the issue were raised. That decision was reversed in 1984 after public outrage when John Hinckley, President Reagan's would-be assassin, was judged not guilty because insane.[60] Today the insanity plea is used only sparingly, and those who succeed rarely see freedom again.

Intoxication ran a similar course. The Greeks increased fines for drunken assaults, but the Romans considered intoxication reason to punish less harshly.[61] Yet overinebriation could also be a double-edged sword: both a crime on its own and an exacerbating factor in other offenses. In the Penitential of Theodore, written by the archbishop of Canterbury in the late seventh century, someone who killed while drunk was twice guilty: of the self-indulgence of intoxication and of homicide. Yet half a century later in the Penitential of Ecgberht, the archbishop of York gave drunken murderers the same moderated punishment as those who killed in anger. Early in the nineteenth century, the enhancing effect of intoxication had vanished from English jurisprudence, replaced with the mitigating influence it retains today.[62]

As intent was increasingly taken into consideration, the range of offenses broadened from acts to inclinations. A crime intended rendered the offender clearly blameworthy. Even a dog, as Oliver Wendell Holmes put it, can tell the difference between being stumbled over and kicked.[63] Intent distinguished such actions from accidents and from acts that—though not fortuitous—were not premeditated or planned. The offender's mens rea, the intent, determined the nature of the act. Without a culpable mens rea, an act could not be a *malum in se*.[64] At the other extreme, intent alone—even without much of an overt act—could be a crime in itself, as with treason, conspiracy, and inchoate offenses. Someone who had no motive for

a crime or refused to admit one became an enigma.[65] A concern for the mens rea behind the act thus deepened the problem raised by Locke and Kant on how inner and outer states corresponded. Being good meant more than acting lawfully. It required also wanting to do so. Taking mens rea into account, offenses arose when an inner bad intention correlated with an outer transgression. Without bad intent, the act—though harmful—might be legally irrelevant or even innocent. Conversely, with evil intent an otherwise legal act could be actionable.

Absent an intent to commit a crime, often none had occurred. With the concept of holy sin (*aveirah lishmah*), Jewish theology recognized that intentions decided the nature of the act, which could be blameless however seemingly heinous. Jewish women staked their honor to save their people: Lot's daughters became impregnated by him in order to save the human race as the world seemed doomed; Tamar pretended to be a prostitute to entice Judah, her father-in-law, to impregnate her, thus continuing the family line; and Yael seduced Sisrah before killing him and saving the Jews.[66] In the modern era, receiving stolen goods was unlawful only when you knew their provenance. Treason in US law was committed only by those who intended to harm their country, not by those who inadvertently aided and abetted an enemy even though their motives were patriotic—Jane Fonda in Hanoi or Edward Snowden in Moscow.[67] Of course, some crimes were inconceivable without intent. Rape, burglary, waylaying, fraud, and treason could not be committed by mischance. An attempted crime definitionally involved intent. Unlawful assembly meant joining a group in public intending to commit an offense. An insurrection aimed at public goals was treason but aimed at private ones merely a riot.[68] Many acts were defined by the perpetrator's motives. Killing someone could occur with or without intent, by mistake, in self-defense, or on purpose. The victim was dead regardless. But whether you were guilty of murder, manslaughter, or negligent homicide depended on the

intent with which you had, say, run the red light. Burning down the neighbors' house could be arson or an accident.

Larceny was once defined as the simple possession of stolen goods, whether the accused had stolen them or not. But in the thirteenth century, Bracton, inspired by the Romans, insisted that there be an *animus furandi* as well, an intent to have stolen. In the late eighteenth century, larceny began to be conceptualized in terms not of having the goods, but of having intent. Those who took lost money thinking that the owner was unidentifiable were innocent, but if they believed the owner could be traced, they were guilty of larceny.[69] Depending on what transpired in the offender's mind, the very same act was criminal or innocent. Theft came to be parsed into a variety of actions: borrowing without consent, taking with intent to repay, taking for temporary use, taking with the intent of returning to gain a reward, and so forth. Each hinged on the culprit's mental state.[70] Someone who offered child pornography or drugs for sale could be charged even if turned out that the goods were in fact innocuous.[71] In these cases, it was the intent that was sanctioned. Someone who stirred sugar that he thought was poison into another's tea could be guilty of attempted homicide. Offenses are today punished more severely if motivated by hatred of certain categories of legally protected people (based on race, sex, age, homeless status)—in other words, according to their intent.[72]

Like modern strict liability, early law tended to punish the act regardless of its motives, if any.[73] In the Homeric epics, a homicide's intentionality did not influence the treatment of the killer. The same restitution or punishment applied, regardless of motive.[74] In a case of death by javelin at a fifth-century BCE Greek sporting event, much effort went into explaining how the victim, by running into the javelin's path, caused his own death and none on distinguishing between accidental and intentional acts. Roman law punished attempts as though they were accomplished crimes.[75] Focused on compensation for harm, early Germanic law was likewise uninterested in intent or

in deterring future offenses. Regardless of why, the act had caused damage, and that had to be made good. No more composition was paid for an intentional harm (instigating a serf to kill someone) than for one caused negligently.[76] The authorities sought above all to quell blood feuds, persuading defendants to accept compensation instead. They also hoped to present themselves as firm enforcers of laws applicable to all. Not surprisingly, they were reluctant to get caught up in the niceties of intent. Ensuring restitution for victims, who would otherwise be avenged, was their immediate concern.

Before the twelfth century, criminal intent was not the main focus of law enforcement. The Leges Henrici Primi, a compilation of English law from the early 1100s, stated that even if an archer killed inadvertently, he should pay, for "he who commits evil unknowingly must pay for it knowingly."[77] In the sixteenth century, English common law punished only acts, not intent. "The imagination of the mind to do wrong, without an act done, is not punishable in our law, neither is the resolution to do that wrong, which he does not, punishable, but the doing of the act is the only point which the law regards; for until the act is done it cannot be an offense to the world, and when the act is done it is punishable."[78]

This disregard of intent came out in that feature of early law perhaps most perplexing to modern sensibilities: the punishment of animals. In the Code of Hammurabi, oxen that gored people were stoned. Ancient Persian laws specified amputation of ears, legs, or tails for dogs that bit. Hebrew law condemned homicidal wild animals to death.[79] Plato's laws prosecuted animals that shed human blood. Even inanimate objects that harmed (lightning bolts cast by gods excepted) were treated similarly.[80] Deodands were things that having caused death were forfeited to God via the king—carts, boats, mill wheels, cauldrons, and the like. Since the act, regardless of intent, was what mattered, why not hold liable a pig that ate a baby or a horse that threw its rider? Or block up a well in which

someone had drowned?[81] Even here, however, intent at times crept in. For damages done between fighting animals, the Romans punished the one that started the scrap. The Roman jurist Ulpian considered animals subjected to men's sexual advances partly culpable if they had not run away. And raped animals were duly punished—a burro in sixteenth-century Seville was hanged, his sodomizer burned.[82]

And yet the distinction between the accidental and the intended was intuitive enough to have long been given voice in statute. Though early law may not have distinguished clearly or consistently between deliberate and accidental acts, it did so often. In the Old Testament, someone who killed accidentally could seek refuge in one of three cities, but intentional murderers could not.[83] Both the Old Testament and Middle Assyrian law treated extramarital sex differently according to intent, depending on whether it was adultery or rape. Both were killed if willing adulterers, but if the woman had been coerced, only the man was.[84] Ancient Chinese law also classified crimes according to motivation and recognized intentional murder.[85] Both Plato and Aristotle distinguished between premediated and unplanned homicide, but Plato demanded that the attempted murderer be tried like those who succeeded.[86] Athenian law separated premeditated from accidental killings, with intent required for murder and unintentional homicide punished only by exile.[87]

Roman law distinguished *culpa* (unintentional harm) from *dolus* (intentional harm). The Twelve Tables singled out numerous intentional acts for sanction.[88] A thief caught trespassing at night, his intent to rob thereby evident, could be killed on the spot. Unintentional acts were discounted: if a weapon "escaped from the hand" of the offender rather than being thrown, sacrificing a sheep sufficed for expiation.[89] Sharia law distinguished willful from accidental homicide. Germanic law, too, changed in this direction. Seventh-century Visigothic law had moved beyond early precedents

to distinguish between culpable and other killings. And in ninth-century Wessex, someone who killed a man inadvertently with a spear carried over his shoulder paid the wergeld but not a fine.[90]

The resurgence of Roman law in the early Middle Ages helped emphasize intent as constituent of crime, as did canon law. Medieval theologians assimilated crime once again to the concept of sin, where both act and its motivation mattered. In the fourteenth century, the Neapolitan jurist Lucas de Penna argued that just as sin could be merely a thought, so the crucial element of an offense was its intent, which the act itself merely indicated.[91] Canonists agreed: without intent, no guilt. With Bracton in the thirteenth century, intent became integral to defining crime. Someone who killed by misadventure was to be acquitted. New techniques adjusted the legal outcome to the criminal's intent by expanding the royal pardoning powers. Even if offenders had acted without intent, the law still found them guilty, and they forfeited their goods. But the king could now pardon them, sparing their lives.[92]

That not every similar act was also legally equivalent became broadly accepted. Those who killed inadvertently or by accident differed from those who acted on purpose, deserving less punishment, if any. But to show mercy where it was due, the authorities had to probe the accused's psychic state. Scandinavian law of the twelfth and thirteenth centuries distinguished conscious "acts of hand" from unintended "handless risks."[93] Taking jurisdiction over homicides in the early twelfth century, the English Crown categorized them as culpable, excusable, and justifiable. Killing without intent or in self-defense (though defined very restrictively) was excusable or justifiable.[94] Juries often acquitted defendants who did not, they thought, merit death for killing. Conversely, as of the late fourteenth century, the English king was forbidden to pardon killings committed with malice aforethought. Nor, as of the fifteenth, could he pardon *mala in se*.[95] Not just the act but an evil intent, too, was now required for a felony to have occurred. By the late sixteenth

century, the distinctions had emerged between murder and manslaughter and between voluntary and involuntary homicide—dependent on the motives animating the act.[96]

Intent as Offense: Inchoate Crimes

The concern with criminal intent continued apace as the development of inchoate crimes greatly expanded the law's reach. Inchoate (or nonconsummate) crimes were offenses of intent. They were actions designed to lead to another substantive offense, even if the latter did not occur. If an act was dangerous enough to forbid—so ran the logic—surely the state should also criminalize attempts at it. Many offenses had inchoate aspects. In the common law, burglary was defined as trespass with the intent to steal. Thrusting a finger through a window sufficed to make someone a burglar. Criminal assault was an attempt to commit battery combined with the present ability to do so.[97] The US Model Penal Code defined bribery to include those offering money or soliciting or agreeing to accept it from another even before anything had changed hands.[98] British law defined fraud in terms of making false representations intending to cause gain or loss. The Italian penal code of 1889 made it a crime to associate with others in order to commit a crime as well as even to declare an intent to offend. These inherently preparatory actions occurring before any actual harm had been inflicted were punishable.[99]

Crimes of preparation were inchoate offenses. Possessing otherwise harmless items might be illegal if it indicated criminal intent: implements of forgery, counterfeiting, arson, or burglary (screwdrivers, pliers, crowbars, and other tools found in most cellars); narcotics and their paraphernalia; certain kinds of arms (sawed-off shotguns, automatic weapons, tear gas, even toy weapons); gambling devices; and pornography.[100] New York law eventually recognized

153 distinct possession offenses. In 1998, one in five prison sentences there was for possession. A highly flexible charge, constructive possession, a form of second-order offense, could be leveled against even those who happened to be in the car or house where the implicated items were found.[101]

Lying in wait, searching, following, and enticing were crimes of preparation. Belonging to criminal organizations or associating with known offenders was penalized.[102] Loitering for purposes of prostitution, enticing minors to secluded places for nefarious reasons, transporting females across state lines for immoral ends: all were in themselves anticipatory crimes. British law punished sexual grooming of minors, defined as meeting or traveling to meet a child with whom one had communicated at least twice, for sexual purposes.[103] Otherwise innocent actions were punished as proxies for likely offenses. In seventeenth-century England, possessing shipwrecked goods with the identifying marks painted over was, in itself, punishable—whether they had been obtained legally or not. Today, those who import more than a certain amount of cash without declaring it can be prosecuted as likely drug dealers or money launderers, whatever the truth of the matter. Possession of a certain quantity of illegal drugs is taken to indicate an intent to sell, not just to consume. Even an innocent conversation with someone planning an offense can be proof of conspiracy.[104] The intent behind an act could heighten the severity of the offense committed. Trespass becomes burglary if done with further offenses in sight. Simple assault can be aggravated if carried out with the intent to rape, kill, or maim.[105]

Pursuing inchoate offenses was integral to the state's hope of preventing crime. The earlier the authorities intervened, getting out in front of the act, the less damage ensued. Attempts, solicitation, and conspiracy were inchoate crimes—acts aiming to bring about another offense. Criminalizing even unsuccessful efforts at crime, penal codes developed separate provisions for attempts. Conspiracy

reached back even further than attempts into the preparatory chain of events leading from intent to commission.[106] Solicitation and incitation, in turn, delved still earlier than conspiracy, criminalizing what may have been only hot air. They were second-order inchoate crimes—attempts to conspire to offend. The US Model Penal Code penalized attempts to solicit, punishing even solicitors who had failed to communicate their criminal scheme.[107]

Yet intervening earlier in the causal chain threw up problems. Was an intent to commit a crime itself an act? If so, was it culpable? Or were intentions merely states of mind that accompanied the legally pertinent behaviors?[108] Either way, how did one know of intent except as expressed in acts? How far up the causal nexus of events could one reasonably assign guilt? Was a daydream, a fantasy, or a stray thought of causing harm culpable? Which thoughts were actually dangerous, which harmless musings? How far down along the progression from conception through planning to execution did the offender become guilty? Most agree that, having fired a shot, even if it missed, the would-be assassin was guilty at least of an attempt. But what about renting the hotel room with the necessary sightlines, buying the gun, taking target lessons, discussing the killing with others, hatching the idea, or even just at first forming a dislike of the victim? At what point did intent move from wishful thinking, fantasy, or desire to become the beginning of the act?[109]

Conversely, how far down the chain of events did renunciation or repentance still absolve the inchoate offender? Having occurred, few ordinary crimes were expunged by an offender's change of heart. A thief who returned a stolen object, even before its absence was discovered, was still guilty of larceny.[110] Some jurisdictions exonerated those who voluntarily broke off and thus prevented a crime that was being conspired about, prepared, or attempted.[111] With crimes of intent, renunciation could in practice exonerate, so long as no one else knew about it. But up to what point did renunciation get the potential offender off the hook? The closer to mere intent

the law intervened, the more a change of heart had to be allowed for.[112]

What if the intended crime was conditional on other events that affected its likelihood? Did that diminish liability? Agreeing to murder someone if you won the lottery: Was that an attempt, regardless of the vanishingly small chances?[113] Since actual harm was not required for culpability, ambiguities multiplied. Was trying to murder someone with a voodoo doll an attempt? Was putting sugar in a potential victim's tea, thinking that it was poison?[114] When Dorothy Sayers's fictional detective Lord Peter Wimsey self-immunized against arsenic in *Strong Poison* and then ate Turkish delight powdered in it, he caught the would-be murderer Urquhart in an attempt even though he was not in fact poisoned.

Was intent itself culpable? Inchoate crimes punished not the final offense but the intent to commit it or something close to that. Anglo-American law has tended to require an act, refusing to punish mere intent. Whether a treasonous intent alone, as suggested in the English treason act of 1351, was punishable without an overt act has been hotly debated. In the fourteenth century, on rare occasions when defendants were convicted on the doctrine of *voluntas reputabitur pro facto* (the intention is to be taken for the deed), in fact a completed deed was also required.[115] The US Model Penal Code required proof of an overt act to show that a conspiracy was not just in the minds of the participants. More recent European law, in contrast, has not generally required overt acts to prove conspiracy.[116] German law regarded attempted treason as tantamount to its consummation. The Napoleonic penal code held much the same. But in 1832 this interpretation was moderated to cover only the attempt and its execution, lessening the punishment for the preparatory stages.[117]

Either way, even if the first dawning intent was not punishable, very closely subsequent acts were: incitation, solicitation, conspiracy, attempts. That still distinguished even the inchoate crime from sin,

which could be committed by intent alone. In the Sermon on the Mount, Christ warned that those lusting after women had already committed adultery in their hearts.[118] In the fourteenth century, Lucas de Penna located the nub of the crime in the intent. The act was an incidental, practical feature, an external manifestation that revealed the criminal's state of mind.[119] But how could intent be known except through act? This dilemma was touched on by the story of the schoolmaster who warned his charges, "Boys, be pure of heart or I'll flog you."[120] Inchoate crime resembled sin in its focus on thoughts and not just acts. Aquinas argued that humans could judge only external acts, not inner thoughts. Divine law alone could ensure both internal and external goodness.[121] Hobbes argued that the intent to steal or kill was a sin known only to God. It became a crime apparent even to mortals only when manifested in an act.[122]

Without any other way of knowing intent, acts betrayed a state of mind. The law made use of them for that purpose. Nighttime trespass, for example, automatically signaled an intent that permitted offenders to be punished on the spot. In eighth-century England, a stranger who left the road without signaling his presence by shouting or blowing his horn was assumed to be a thief and could be slain. In sixteenth-century Nuremberg, anyone on the street after dark could be locked up for suspected burglary. An English act of 1851 imprisoned those caught at night with lockpicking or other burglary tools.[123] Yet sometimes it was frustratingly difficult to prosecute even those whose nefarious intent was clear. According to fourteenth-century English law, someone who ambushed another seemingly with intent to kill and left him for dead had committed only a trespass, subject merely to a fine. The same was true for someone who attacked with intent to rob, wounded his victim, but took nothing (probably because there was nothing to steal). However obvious his intentions, someone who had as yet done nothing but lurk menacingly was indictable only as a disturber of the peace or a nightwalker. In a case in 1859, a defendant lit a match near a

haystack but extinguished it once he was spotted. He was acquitted of attempted arson, though convicted of extortion.[124]

Treason, as we have seen, was arguably the first inchoate crime, patterning the law of criminal attempt.[125] Treason had to be tackled preventively since, if successful, it allowed no second chance to prosecute. Attempting, planning, discussing, possibly just thinking treason—all were punishable.[126] Dionisius, the fourth-century ruler of Syracuse, executed a captain for having dreamed of slitting Dionisius's throat—for surely he contemplated assassination while awake, too.[127] The seventh-century Visigothic code punished not just overt acts against the ruler but also intent and opinion, expressed as maledictions, insult, and slander. Both the Edict of Rothar (643) and the ninth-century laws of King Alfred made plotting against the monarch high treason.[128] Whether the English treason act of 1351 punished the mere imagining of the king's death is debatable, but the statute of 1354 outlawed disloyal words.[129] Richard II's statute of 1397 did sanction compassing the king's demise even without an overt act, but it was quickly repealed for punishing mere intent. Nevertheless, at the trial of the duke of Buckingham in 1521 words alone were held sufficient to prove treasonous intent.[130]

Attempts were classic inchoate crimes. Taking part in the run-up to a crime, anticipating its committal, thwarted offenders remained as guilty from intent as their more successful peers. A fumbler who missed the shot was arguably as much an assassin as the expert marksman who hit his target. The threat that attempters posed to society was as great—possibly more so as they tried again—as that from successful offenders. However unfair it was to punish offenders and attempters equally, the same sanctions for both made sense for a society seeking to protect itself. And if mere intent was culpable, then morally speaking would-be and actual offenses deserved equal punishment. The Nazi regime punished attempts the same as crimes, reversing the mitigation built into the imperial penal code, and this position lasted well into the postwar period. The US Model

Penal Code, too, proposed punishing attempted and executed crimes the same.[131]

Early states did not at first consider attempts to be crimes. Ancient China's Ten Abominations, developed in the sixth century, included plots against authorities and parents, but other systems took longer to include attempts.[132] Ancient Egyptians recognized the intent to commit crime, regarding it a moral fault, yet punished only the act itself.[133] Greek law considered plotters, contrivers, and instigators of murder as willful killers but treated them leniently by allowing their burial after execution. Planning homicide was distinguished from killing with one's own hand, and the planner could be guilty of planning alone. Yet Roman law lacked even a term for attempt and prohibited only completed acts.[134] Nor did early Germanic law properly recognize attempts. Drawing a sword or knife was punished as an attempt, and instigating a crime was forbidden, like the actual carrying-out. But the more general concept was absent.[135] In medieval France, someone who intending to murder managed only to wound was prosecuted merely for blows and harm. The outcome remained more important than the impetus. The penal charter of Brussels in 1229 charged archers who managed to kill with homicide, but merely fined them if they missed.[136]

Slowly, however, intent became a determinative element. Both the Carolina in 1532 and the Ordonnance de Blois in 1579 recognized criminal attempts. In the seventeenth century, the Star Chamber in England busily punished attempts, whether poisoning or waylaying to murder.[137] By the late eighteenth century, the formal doctrine of criminal attempt existed. Defendants had earlier been convicted even where an offense had failed, but not on the basis of a generalized theory of culpable intent or attempt. In 1784, however, a defendant who had set a lit candle amid flammable material was convicted of arson even though the house had not burned down.[138] By the early nineteenth century, solicitation was also formalized as a concept in common law. Someone who incited

servants to steal from their master, for example, was guilty even if the servant refused.[139]

From here, inchoate crimes were pushed back up the causal chain of events. In the mid-nineteenth century, the common law nations punished someone for an attempt only when they had performed the last proximate act to the crime itself—firing the gun, for example.[140] Over time, courts began to grant authorities more leeway to catch offenders before it was too late. The standards employed today are those of proximity: the dangerousness of the offenders' behavior and how close they come to accomplishing their aim. More recently, the equivocality standard has been added, gauging how dangerous offenders are by what they have already done.[141]

The doctrine of legal impossibility once curtailed too lush an efflorescence of inchoate crimes. A case in 1865 involved a man accused of stealing, but from an empty pocket, so that no theft had occurred or was even possible.[142] Other cases involved abortions given to women who were not pregnant, bribes to sway court cases offered to those not actually jurors, shooting a stuffed deer out of season, guns fired into empty rooms, and the peddling of what proved to be uncontrolled substances.[143] The would-be offenders were let off the hook because they had been mistaken about what they were doing. In the twentieth century, however, legal impossibility was whittled down. It was thought unfair to exonerate culprits who had clearly intended to offend.[144] The definition of inchoate crime thus expanded as crime grew increasingly subjectified. Even if someone merely thought they were doing something illegal, then they had committed a crime.[145]

The number of inchoate crimes has in the meantime mushroomed. Conspiracy has become more broadly defined. In England, it dated from the thirteenth century but became commonly used after the seventeenth. Already in the Middle Ages, unlawful assembly—defined as three or more people congregating for nefarious purposes—was

outlawed.[146] The seventh-century laws of the Wessex king Ine determined the type of criminals by the size of the group and escalated the punishments accordingly: thieves if up to seven, a band of marauders if up to thirty-five, and a raid if more. Modern antiloitering laws, targeting gangs, prostitutes, or teenagers, follow this venerable tradition.[147] In the thirteenth century, those who defended and supported heretics were also considered and punished as such.[148] Conspiracy was an elastic category. Behaviors that were legal when done alone were outlawed when undertaken collectively. No criminal action had to result; the preparation sufficed. Large-scale conspiracy charges were first leveled against workers who were using collective action to wrest concessions from employers.[149] Today, the US federal code specifies at least twenty-eight different forms of conspiracy. They range from agreement to commit or attempt a crime to rather more tangential connections to the offense: agreement to solicit or aid in a crime or its solicitation, attempt, or planning; aid in planning an attempt; and agreement to aid in the planning of a solicitation of a crime.[150]

Double-inchoate offenses were once considered a conceptual tautology: attempts to attempt, conspiracies to conspire, and so forth. But penal codes have expanded to actions otherwise not criminalized. Attempted assault, for example, which can be legally deconstructed as an attempt at an attempt at battery, is a double-inchoate crime in several US states. A Wisconsin man who invited a child into his car for sex was not guilty of enticement since the boy did not enter the vehicle, but he could be prosecuted for attempted enticement.[151] If possession was already a double-inchoate crime (an attempt to use), then conspiracy to possess was a triple-inchoate offense.[152]

More and more statutes came to focus on intent. Making it an offense to cross state lines or to enter a building with certain goals in mind criminalized otherwise innocent actions. The offense of enticing a minor over the internet allowed intervention even prior to a

crime of intent, conspiracy, or solicitation.[153] Even substantive crimes have come to be phrased in inchoate terms. The British Fraud Act of 2006 criminalized the dishonest making of false representations for gain. It replaced the traditional result crime of obtaining property by deception. In the new formulation, no property need have been obtained, no loss or gain created. All that was required was the dishonest making of a false representation that intended to cause harm.[154]

In the new age of terrorism, inchoate offenses have been punished even when they did not go beyond preparation. Terrorists willing to strike even though they will die are unlikely to be deterred. Suicide killers date at least to the Assassins of the eleventh century—trained and motivated Shiites who attacked Sunni variants of Islam and sometimes Christians.[155] But as the tactic has become more common, the need to deter has increased. Preinchoate, preparatory, facilitative, associative, and other offenses only distantly connected to the act have been made actionable. Since successful suicide bombers cannot be convicted, the planners have been targeted. Indeed, even those who have not provably planned terror have faced sanctions. Britain imposed preventive detention on merely suspected terrorists. As due-process objections were raised, the rigor with which it was applied decreased. But the restrictions on possible terrorists remain far more drastic than for any other suspected offenders. Non-British terror suspects have been detained indefinitely. When that proved legally objectionable, control orders on house arrest restricted the potential terrorists' movements, communication, association, and other activities. At times, they were forcibly relocated to remote regions.[156]

The UK Terrorism Act of 2006 prosecuted anyone preparing to give effect to an intention to commit terrorism or helping others do so.[157] In other words, it criminalized conduct before it even became an attempt. It also forbade giving or receiving training and being present where it took place. Such statutes went beyond making it illegal to help commit actual or attempted offenses. They prohibited

activity even without a crime (a terrorist act) and where the targeted behaviors were unrelated to any specific act: buying maps, getting railway timetables or computer manuals, or asking the price of certain chemicals. Responsibility was thus imposed at a very early stage, when would-be offenders had not yet decided precisely what they intended and before the agreement required for conventional conspiracy charges.[158] Defining offenses widely and vaguely, the range of indictable actions has expanded. Recent British antiterrorism legislation has punished statements that are likely to be understood by some of the public as direct or indirect encouragement of commissioning, preparing, or instigating terror.[159] Possession of money or of unspecified other property, including documents, has been criminalized if the accused intended terroristic uses of it or even thought that others might do so.[160] Even for other serious crimes, recent British legislation has grown studied in its deliberate vagueness. Those "involved" in such acts are liable: not only anyone who committed or facilitated the offense but also someone who merely "conducted himself in a way that was likely to facilitate the commission by himself or another person."[161]

The legal net has recently expanded further into inchoate crimes of omission. Laws on crimes of omission punish those who have performed no act, on inchoate crimes those who have caused no harm. The two intersect to define what would seem to be the absolute minimum form of an *actus reus*: harmless inaction. Inchoate crimes of omission statutes target those who fail their duty of responsibility to dependents even when, as chance would have it, no lasting harm resulted. Guardians have been prosecuted who housed dependents in filthy and unsafe conditions, who left them alone in freezing or overheated cars, who neglected to provide medical care. Other instances include those who failed to report illegal activity, even though fortuitously no lasting harm ensued: money laundering, environmental offenses, treason, domestic violence, or the like.[162]

Preventing Crime

Defining intent, not just acts, as criminal was one early move in the state's larger game of preventing crime. We have seen that deterring through public punishment was rudimentary at best. Ritualized brutality in the town square worked poorly. Nor did pursuing inchoate offenses deter as such. Having ignored sanctions for committing crime, potential offenders were unlikely to fear punishment for attempting it. But outlawing inchoate crimes did seek to prevent by intervening early. All deterrence prevents, but not all prevention deters—that done covertly, for example. As countless embroidered samplers attest, prevention beats cure. Indeed, preventive law was likened to preventive medicine.[163] The analogy from disease to crime holds only partly, though (retrospective punishment of offenses is not remotely as good as a cure), so the advantages of prevention for crime were arguably even greater than for illness.

The virtues of prevention could be argued at various levels. At the most general, social conditions caused crime. The immediate offenders could be deterred, incapacitated, or rehabilitated. But the ultimate culprit was society. Social conditions—whether poverty, inequality, exploitation, familial breakdown, or anomie—caused crime. Social reform therefore promised to diminish offending. The belief in the virtues of social engineering is ancient and has become evermore pervasive. Crime in this view is like disease, to be cured not punished. The prevention of crime aimed at by most active policy makers has, in contrast, been narrower and more modest. It has sought not major social reform, much less revolution, but techniques to nab offending in the bud.

Offenders form their intent, prepare to carry it out, and finally commit the act. Laws sought to interrupt this causal chain at various points: closer to the intent or to the act. Penalizing the act, laws have been retrospective, dealing with faits accomplis. Aiming at intent, they have hoped to prevent. Post facto punishment of

already committed acts remained blind to incipient offenses and—purely reactive—contributed little to lowering the overall incidence of crime except insofar as it deterred. Preventive interventions, aiming at intent, investigated, judged, and punished mental states that might not have led to results if left alone but foiled crime in those instances where the intent would have been followed by act.

Prevention thus moved the philosophical basis of punishment away from the idea that offenders should make good the harm done and that retribution righted society's moral balance. With prevention, justice ceded pride of place to a victorious utilitarianism, concerned primarily with order and tranquility. The Enlightenment principles commonly thought to govern sanctions faded. Punishments no longer fit the crime. Nor were they announced clearly and determinately in advance for precisely specified behaviors so that, as sovereign citizens, potential offenders could calibrate their own conduct. Sentences grew increasingly indeterminate and discretionary, tailored to offenders, not to crimes, and fine-tuned for rehabilitation more than for justice.[164] The clear relationship between offense and sanction was severed. Once the goal shifted from just retribution to effective prevention, the crime did not necessarily determine its punishment.[165] A crime might not be punished at all if that promised to spare society an offense to come. Or the state might impose punishment even on someone who had committed no tangible act. Prevention overturned many of justice's usual assumptions. Criminals were defined not by what they had done but what they might perhaps do. Attending to intent broadened the state's remit.

Preventing crime meant identifying criminals before they acted. The easiest prediction was based on past behavior. Many criminals committed more than one offense. That criminal tendencies were not evenly distributed across society was not a new insight when fear of dangerous classes gripped the urban bourgeoisie in the nineteenth century. Nor was it when Lombroso formulated his theory

of habitual offenders or today when statistics on recidivism inspire three-strikes and other serial-offender laws to clamp down hardest on those who commit most crime. Already in ancient Athens, a third conviction for perjury led to loss of citizens' rights. Rome kept registers of suspicious and dangerous individuals. The *infamia* doctrine punished those whose character was blemished by moral turpitude.[166] In eighth-century Wessex, repeat thieves had feet or hands amputated. The imperial Chinese added the *cangue*, a kind of portable wooden stocks around the neck, for repeat offenders. The Carolina, the first German penal code from 1532, had a graded scale of increasingly harsh punishments for recidivists. Death as an incorrigible followed a third burglary offense in colonial Connecticut, after two rounds of branding. Whipping was the rule for a third incident of drunkenness.[167]

Modern methods of identifying people, undercutting their ability to game the system by using aliases and the like, have allowed contemporary statistics to pinpoint just how much crime is committed by how few.[168] Since the 1970s in the United States, 6 percent of offenders have committed half of all crime. In 1986, 3 percent of Minneapolis street addresses were the destination of half of all police dispatches. For robbery, criminal sexual conduct, and auto theft, fully 100 percent of dispatches went to 5 percent of all locations.[169] Conversely, 95 percent of urban space is altogether free of predatory crime.[170] By targeting crime hot spots, the authorities could anticipate and prevent crime. By policing St. Giles, as a London police commissioner put it early in the nineteenth century, they were policing St. James.[171]

Prevention targeted not the offense but the kind of person who might commit it in the first place. It punished character more than crime. This approach had a venerable pedigree. Roman law allowed judges to accept as proven any information about offenders allegedly known by everyone to be true.[172] Among the sixth-century Franks, someone identified as a criminal by upstanding community

members could be convicted on that basis alone. Under Charlemagne, the Rügeverfahren permitted judges to begin an inquest on the basis of an offender's reputation.[173] Early medieval law allowed only those of good reputation to swear oaths to clear themselves. For others, it demanded compurgators to stake their reputations alongside the suspect, many of them if the accused's character was not spotless. On occasion, more than a thousand were assembled. As the Roman law inquisitorial process was reintroduced in twelfth-century Europe, ecclesiastical courts accepted the doctrine of *mala fama*, "bad reputation."[174] An ecclesiastical judge could now try a suspect without a specific accusation or accuser.[175] Freemen were sorted according to their reputations, leaving the bad eggs with less legal standing. Twelfth-century German courts could prosecute on repute (*Leumund*), with officials swearing to the blemished standing of the accused.[176] A notorious suspect could be accused without other evidence, required to swear a purgative oath, and punished on failure to do so. Priests suspected of living in sin and eventually heretics, too, were targeted by such techniques.[177]

Prevention targeted the offender more than the offense. To get out in front of the act, the state had to grapple with the actor. But how? Blackstone lauded preventive over punitive justice as superior in all respects. The matter, he thought, was simple: preventive justice merely meant obliging those persons whom there was "probable ground" to suspect of future crimes to assure the public that they would not offend.[178] Rarely had a seemingly innocuous phrase glossed over complications so glibly.

How to anticipate the future offender? Two approaches promised help: psychology and sociology. Offenders might be predicted psychologically if discernable traits revealed a propensity to crime. Lombroso's theory of the born criminal was influential in the late nineteenth century, harnessing biology and its degeneration to explain how the criminal psychology was formed. Countless other now discarded theories such as phrenology also claimed to discern

transgressive proclivities through somatic or psychological indicators.[179] More recently, criminology has sought to predict dangerousness, identifying those who threaten to become offenders. In the 1960s and 1970s, measures targeting dangerousness, apart from any actual offense, were introduced in response to shocking crimes committed by released inmates. Sociopaths were identified as those who inflicted suffering and injury for fun, lacked compassion and impulse control, saw themselves as victims, and resented authority. Nonetheless, having failed in the past reliably to identify the criminal mind, now chastened psychiatrists also cautioned that testing for dangerousness was almost impossible and that standard psychiatric diagnosis was largely irrelevant. A major study of a large group of the supposedly criminally insane in 1966 in New York revealed them to be sad old men far more often than predatory psychopaths.[180]

Besides magic and witchcraft, torture has been the most venerable attempt to probe the soul's secrets. The psychological sciences sought to follow suit more methodically, yet their promise disappointed. Fearful of false positives, clinicians tended to forecast conservatively who among their patients might offend, thereby hobbling their predictive acumen.[181] Excepting the seriously mentally ill and perhaps drug abusers, few psy-forecasts managed accurately to predict future offending.[182] Even new technologies have done little to improve this track record. Psychological testing has recently claimed to reveal subconscious attitudes by measuring microsecond differentials in answering questions that confirm or challenge prejudices or assumptions. Minute gestures indiscernible to the naked eye, when agglomerated by the thousands, allegedly reveal characteristics such as sexual proclivity. Penile plethysmographs and their vaginal equivalents unmask involuntary sexual arousal—imperceptible in some cases even to the subjects being tested—to detect potentially reoffending pedophiles, rapists, and sadists.[183]

Hopes of reading others' minds likely only shortly postdated Eve's encounter with the serpent. The correlation between lying

and arousing the sympathetic nervous system was operationalized already in ancient China. Suspected liars had to take a mouthful of rice and spit it out.[184] Those with dry mouths found the task harder than normally salivating innocents. It was a trope of racist ideology that Blacks and Jews—both allegedly incapable of blushing—were inferior because their interior states were less visible to others.[185] Mechanized lie-detection technology began with Lombroso's hydrosphygmograph to measure pulse rates, followed by John Larson's polygraph in the 1920s, correlating deception with increased blood pressure. The polygraph was sold to police and public as a means of getting at the truth that sidestepped the need for more primitive and violent techniques.[186] Other methods followed, all sharing the assumption that somatic reactions revealed inner states through a Pinocchio response, whether respiration rates, epidermal conductivity, voice stress, heat around the eyeballs, fleeting facial micro expressions, or millisecond hesitations.[187]

MRI scans and electroencephalography went further, measuring something seemingly closer to the inner workings of the brain, though still merely a heightened metabolic activity in certain cerebral areas.[188] Such technologies assumed that lying was more arduous (a greater cognitive load) than telling the truth, thus stimulating the responses detected. They all were unable to distinguish dissembling as such from other brain activities. Nor were they able to locate deception in specific and specialized areas of the brain. Moreover, liars could also game the system, all the more so when they knew what investigators were looking for. On the basis of no particular evidence, it is, for example, widely believed that liars avert their gaze, so those hoping to appear truthful now catch and hold their interlocuter's eye.[189] Perhaps we are entering a new era of predictive investigation, but attempts to discern individual thoughts by involuntary physical responses have yet to prove very successful.

If the psy-sciences did not fire prediction's magic bullet, that left sociology. Potential offenders could also be identified by extrapolating

from statistically characteristic behavior of groups they belonged to. Regularities were identified to induce forecasts of conduct, using the logic of social science developed by the nineteenth-century Belgian astronomer Adolphe Quetelet, who thought that society followed patterns as discoverable as nature's.[190] Offending was linked statistically with various characteristics to develop a sociological criminal type. Membership of a group was associated with certain behaviors, which in turn could be used to define the group.[191] The group could thus be targeted, and individual members deemed potentially culpable—though merely for sharing the features for which the collective name was shorthand. Armed with—at best—probabilistic social science, prevention thus focused on the criminal more than on the crime. Did offenders belong to high-risk groups? Were they recidivists? Did they have a propensity for certain crimes? A penchant for repeated transgressions? A disposition for specific victims? Most generally, were they dangerous, posing an ongoing threat? The answers determined the appropriate punishment more than did the nature of any (eventual) offense, thus weakening retributive justice's link between act and desert. Retributionists' focus on culpability for the act treated each offense alike, even those committed subsequently by the same person. Targeting some people as especially dangerous and even treating recidivists more harshly, in contrast, meant punishing the person as much as the act.

In this logic, those predicted to recommit were to receive different sentences from onetimers.[192] Kleptomaniacs and drug addicts should be treated more harshly than one-off opportunistic offenders even though, acting under a psychological compulsion, they were—according to a retributive logic—less culpable. Sentences of treatment rather than punition also made sense if they promised less crime.[193] Inchoate crimes were by definition those that had not been consummated. Of interest, therefore, was perpetrators' intent and what it revealed about their state of mind, inclinations, and personality. Someone who would attempt, conspire about, solicit,

or incite a crime posed a threat. Anyone willing to attempt an offense was likely to repeat it. Punishing attempts aimed foremost to neutralize threatening individuals and only secondarily to deter their offenses. That offenders were dangerous mattered more than whether they were guilty.[194]

Sociological or actuarial prediction raised particular problems. It was static. The characteristics that defined someone as likely to offend—poverty, unemployment, residence in certain neighborhoods—could at best predict lifetime, not imminent, risk.[195] Conversely, predicting lifetime offending on the basis of recidivism, as three-strikes laws claimed, was hampered by the tendency for transgressing to drop off with age. Former serial offenders were locked up just as they lapsed into crimogenic senescence.[196] To avoid unacceptable false negatives—releasing some apparently harmless persons who then went on to offend—meant tolerating many false positives, which kept innocents behind bars.[197] The former set off political fireworks; the latter were rarely heard from again.

Not only did actuarial forecasting overpredict, but its logic was also circular: those who had stolen were likely to have been unemployed; the former unemployed were therefore potential thieves. Not-yet offenders thus had their future behavior forecast on the basis of demographic, economic, and social traits they shared with already offenders. They were held accountable for characteristics that had proven correlative for past culprits, though not yet shown to be causally determinative for them. In effect, they were punished for the crimes of others. Even sophisticated sociology could not surmount the dilemma famously identified by David Hume: how to break out of correlation into causality. However refined the actuarial calculations, they still took a leap of faith from past behavior to future actions.

Since the popular mind confused correlation with causality, crime prevention reinforced the conceptual shorthands we call stereotypes. That the overwhelming majority of rapists are men does

not mean that all men are rapists, except perhaps in the fevered imagination of Val in Marilyn French's pathbreaking feminist novel *The Women's Room*. But that African American men are charged with crimes disproportionately to their presence in the population has been used to justify the racial profiling that subjects them to more than their fair share of preventive encounters with the police. Similar discrimination confronts Middle Eastern travelers at airports. Such prejudices have been conceptually cemented throughout history, leaving traces in our vocabulary. *Vandals*, *barbarians*, *philistines*, *peons*, *banshees*, *troglodytes*, *plebians*, *Huns*, *sycophants*, *thugs*, *villains*, *beggars*, *buggers*, *coolies*, *bohemians*, *berserkers*, *boors*, and the other n-words of yore—all were used at one time or another for ethnic, national, or (quasi-) occupational groups now immortalized for their pejorative traits. In 1682, Louis XIV banished all "Bohemians" and "Egyptians" from France, by which he meant Roma.[198]

The inherent unfairness of this sociological logic meant that laws based on it faced obstacles. That many women, not just prostitutes, were swept up in police dragnets and inspected for venereal disease in nineteenth-century England helped marshal opposition to the Contagious Disease Acts. Vagrancy laws are ancient, permitting police to harass or jail largely anyone found in public.[199] Antiloitering laws give police broad discretion to target otherwise legal activity, such as "wandering or strolling around from place to place without any lawful purpose or object."[200] Broadly speaking, any car driver is fair game for police attention.[201] In recent years, courts have struck down some such statutes as too vague, all-inclusive, and broad, thereby justifying the targeting of racial, ethnic, and sexual groups only tangentially correlated to the relevant crimogenic characteristics. In response, the statutes have been refocused on more specific behaviors, such as loitering with various intents. Or they have been aimed at crime hot spots rather than at entire cities—all to avoid violating the rights of innocent bystanders who happen to share certain characteristics with the gang members or other groups being targeted.[202]

Psychological and sociological techniques of predicting and preventing crime alike raised problems. Modern law enforcement has therefore tended to retreat to the simplest means of forecasting of all: past behavior. Past actions were empirically and morally a more solid foundation for predicting future acts than actuarially based demographic or sociological correlations.[203] How often and how seriously someone had already offended have become the most heavily weighted factors in predicting future transgression.[204] Absent a belief in atonement or remorse (hard to test for its sincerity), past offenders were assumed likely to repeat their crimes, thereby condemned to a vicious circle.

However prevention formulated its predictions, it thus focused more on the criminal than on the crime. Unlike reactive policing, with culprits who could in theory be identified, prevention did not know who was going to offend. Yet it had to narrow its focus to only some citizens. Even before any crime had been committed, it too needed suspects. Bad characters, habitual offenders, dangerous classes, social parasites, objective enemies, recidivists: through the ages, such designations were shorthand for characteristics considered indicative of likely criminality.[205] *Profiling* is today's word for this use of extrapolation from demographic, social, ethnic, economic, behavioral, or other indicators to identify likely offenders.

Rehabilitation and Discretion

Opportunistic crime could be prevented by target hardening the environment, not by altering the offender's nature. Both rehabilitation and prevention instead focused on the character of the criminal. Rehabilitating offenders meant going beyond retributive infliction of bodily pain to an attempt to change them. It assumed that offenders' transgressions expressed a character flaw. Rehabilitation has usually been presented as an ameliorative and even humanitarian

approach. But as Foucault famously noted, rehabilitation means that the state no longer just inflicts discomfort; it now seeks to transform the soul.[206] Already in 1835, Alexis de Tocqueville had argued something similar. Absolutist monarchies chastised their subjects physically, he held, while republics left the body alone to delve straight for the soul.[207]

When did the state adopt a rehabilitative ambition? Foucault located this sea change in the late eighteenth century with the aspiringly all-powerful absolutist state and then the French Revolution. Yet ambitions to change, not just to chastise, offenders have long been with us. Shame punishments in ancient China aimed at moral improvement or "self-renewal." The Greeks, like the Chinese, banished criminals to improve them and allowed their return once they were purified by absence. Plato suggested rehabilitating the impious by isolating them in prisons far from home.[208] Once the Roman Empire Christianized in the fourth century, it persecuted heretics in part to convert them. Augustine, as we have seen, insisted on the duty to convert otherwise damned heretics.[209] Saul the persecutor of Christians became Paul the apostle. God wants sinners to repent, not die, as Wazo, bishop of Liege, preached in the early eleventh century.[210] Inspired by Aquinas, the interrogators of medieval heretics insisted that their willful errors were reversible. Converting them was the goal.[211] Seventeenth-century Dutch houses of correction aimed not to punish but to reform. Transporting criminals to the colonies from seventeenth-century England was thought to offer a second chance.[212]

As Foucault pointed out, rehabilitative outcomes were expected from prisons when they were first constructed on a large scale in the early nineteenth century. Finely parsed techniques of solitary confinement were meant to mold inmates' souls. The very words used for prisons indicated the ambition: *houses of correction* and *penitentiaries*—the latter derived from *penitence*, or the guilt and remorse that medieval inquisitors sought from heretics. Sixteenth- and seventeenth-century

European states already sought to rehabilitate vagrants and the idle, prostitutes, unmarried mothers, street urchins, and the like.[213] But conversely, already by the mid-nineteenth century, as prisons grew overcrowded, rehabilitative ambitions faded quickly.

In the twentieth century, however, rehabilitation was rehabilitated. Indeterminate and individualized sentencing attempted to rope prisoners into their own improvement.[214] Nonfixed sentences allowed authorities to reward good behavior and punish bad. Inmates remained inside for times that depended less on how they had offended than on their subsequent behavior. As reformers in 1870 put it, the prisoner would be redeemed "through his own exertions" or not at all.[215] In the 1880s, the German reformer Franz von Liszt argued for the virtues of preventing future harm by sentencing according to the danger the convicted posed, not the offense they had committed or the punishment they might deserve. Sentences had to be individualized and discretionary, tied to behavioral outcomes, and not just an arbitrary duration. Failing to change, prisoners would have to remain inside. Incapacitation was the necessary corollary of unsuccessful rehabilitation.[216] Pushed to its logical extreme, indefinite and discretionary sentencing assumed that being incarcerated was the normal condition, release exceptional. All citizens were on parole.

Parole and probation implemented this approach. Release was contingent on prisoners behaving themselves. For preventive reasons, one prisoner might be kept in jail for longer than another, despite their having committed the same crime. Institutionalizing indeterminate sentencing through parole and probation started in the early nineteenth century, first in colonial Australia, then in the United States, shortening the sentences of well-behaved inmates. At midcentury, US states experimented with good-time credits for juveniles in reform schools and by the 1890s for adults. By the 1920s, most US prisons had indeterminate sentencing or parole.[217] Germany followed suit in 1935, but Britain not until the 1960s.[218]

Rehabilitation remained penal orthodoxy through the 1970s, before losing ground to neoretributionist reforms. Especially in the US and Britain during the 1960s and 1970s as crime increased, the response was harsh and retributive. Prison sentences were lengthened, jails were filled, and public shaming was once again used punitively. Rehabilitation was declared a largely bankrupt ideal, giving way to just-deserts punishment, and penal ambitions were limited to incapacitating offenders. Victims clamored for retribution, grabbing the spotlight from offenders and the state's hopes of resocializing them. Certain victims (of rape and domestic violence, for example) managed to turn retribution into an appealing goal even for the Left, which was normally resistant to what counted as a conservative cause.[219]

Sparked by rising crime rates in the 1960s as well as by shocking individual cases of savage acts committed by offenders on parole, retributionism certainly had a conservative slant, but it was encouraged also from the Left by reformers worried by the discriminatory potential of individualized punishments. The Right insisted on harsh determinate sanctions for brutal crimes. The Left rediscovered the Enlightenment egalitarianism of a clear moral bookkeeping that specified the consequences of transgression, not permitting class or status to differentiate punishments, imposing no demands of behavioral conformity beyond serving the sentence, and allowing sovereign citizens to make their decisions accordingly. The rehabilitationist project was also eroded by the widespread belief that a permanent underclass was forming and by cultural relativism's undermining of the bourgeois self-confidence required to set the norms to which offenders should be schooled.[220] In the late twentieth century, the goal increasingly became to punish criminals in proportion to their deeds, regardless of any effect on their subsequent behavior.[221] Sentences were determined at conviction; parole was ever less available. Even Sweden cut back on its use.[222] Mandatory-sentencing guidelines prescribed minimum durations,

including fixed terms, and required that prisoners serve most of their time ("honesty in sentencing"). Punishments were increased for recidivists, and prison was evermore seen as merely incapacitating inmates, with few ambitions to help them change.[223]

This punitive turn was taken especially in the English-speaking world, whereas Europe retained more of the rehabilitative ideal. So did this turn upend Foucault's theory that the authorities' concern to mold their subjects' interiors was a permanent sea change and not just a secular oscillation?[224] The shift to determinate sentencing may have undercut early release, but the same retributive current also introduced civil commitment and other means of individualizing and extending sentences. Sex offenders were often kept inside if it was feared they would recommit. In Britain, offenders were sometimes sentenced to life with periodic review even for small crimes in cases of past sexual offenses or mental derangement. In Germany, *Sicherungsverwahrung* (preventive detention) allowed the authorities to keep prisoners deemed dangerous locked up beyond their sentences. In Italy, "security measures" achieved much the same.[225] In most nations, the mentally ill could be institutionalized for as long as deemed advisable. The decline of indeterminate sentencing made such measures necessary, permitting authorities to adjust prison terms to prisoners' attitudes and progress.[226] In other words, individualized sentencing actually continued despite neoretributivist reforms, but it was now harnessed to more, not less, punitive ends. Sharpened sentences for repeat offenders were similarly a form of upside indeterminate sentencing, the mirror image of parole. When punishments determined purely retributively seemed inadequate for still-dangerous offenders, they were extended.

Whatever its oscillating fortunes, rehabilitation required individualized punishments. Reforming offenders meant taking account of their specific circumstances. Rehabilitation was in effect resocialization or socialization come too late. The state undertook late in life what family, school, church, and community had evidently failed

at. Not surprisingly, it was work done by the psy-sciences and their practitioners: psychologists, psychiatrists, therapists, social workers.[227] As we have seen, individualized sentences undermined the Enlightenment ideals of predictable and standardized punishments for specified offenses that treated all citizens equally, allowing them to know and anticipate the consequences of their actions. When the United States began experimenting with individualized sentencing in the late nineteenth century, the French regarded its indeterminacy as cruel and unusual.[228] Many critics today agree, noting that ethnic and class prejudice condemns minorities and the poor to disproportionately harsh sentences.[229] But cookie-cutter punishments, although abstractly fair, also ignored particulars of the offender who was to be rehabilitated.

The Enlightenment reformers had advocated consistency and equality before the law, but treating all who had committed the same offense in the same way could also be unfair. A theft prompted by necessity and one committed on a lark did not merit the same punishment—nor did perhaps a first offense and a repeat by a practiced thief. Were the law not just to react blindly but punish according to offenders' guilt and chances of resocialization, then it had to discriminate, treating superficially similar acts according to their varied motives, background, and context. Sanctions had to fit the criminal, not the crime.

How did the authorities know whether someone had been rehabilitated? As with sin, at stake was the congruence between inner state and outer act. The worth of human beings depended, John Stuart Mill argued, not only on what they did but also on what manner of people they were who did it.[230] Rehabilitating criminals, the state was in the business of producing good humans. Remorse was often demanded. Juries, judges, and parole boards looked for it. Convicts prepared to turn over new leaves were well advised to make a show of it.[231] Inmates who convinced their keepers of a change of heart were rewarded. When some proved to have gamed

the system, offending again after release, the communal feeling of betrayal helps explain the backlash against probation in the 1970s. But, short of knowing interior states, the only outward measure of inner conformity was recidivism. If the state could not produce morally good former convicts, then perhaps it could at least turn out ones who did not run afoul of the law again.

Strict Liability, Negligence, Risk

Not only did the law elbow its way into citizens' heads, criminalizing their intent to harm before any actual offense, but it also broadened its remit to punish acts without any intent at all. In theory, a crime involved both the intent to do wrong and the carrying out of that wrong act—both mens rea and *actus reus*. As we have seen, the law came close to punishing the mens rea alone, and we return to this situation with respect to sex crimes in the next chapter. But it also punished acts alone, regardless of their motivation. The earliest laws often did not differentiate between purposeful acts and those that were unintentional or accidents. Only later did the law take intent into consideration. That initial approach, of punishing the act regardless of why it occurred, returned with the concept of strict liability.

Strict liability punished actions society wanted to eliminate wholly, regardless of why they had happened. Starting in the late nineteenth century, it was adopted widely as dense urban civilization's precariousness reinforced the necessity of discouraging harmful behaviors outright.[232] In theory, punishing on the basis only of negligence led to a socially inefficient underpricing of risk. If those engaged in potentially dangerous activities followed only the standard of due care required, they would escape liability for harm caused nonetheless. In contrast, holding them accountable in every instance—negligent or not—forced them to price in the true cost of harm.[233] The development of strict liability placed the

burden of risk on those best able to reduce it, the cheapest-cost avoider—in the case of product liability, for example, on producers.[234] A spate of flooding disasters involving mines and reservoirs in the mid-nineteenth century spurred on the use of strict liability in the United States.[235] Manufacturers were later held accountable for product defects (food adulteration), and highly hazardous enterprises, such as nuclear power and aviation, were governed by strict liability.[236] Statutory rape and bigamy were also strict-liability offenses. Regardless of how good a reason someone had for thinking a child was of age or that their partner had been properly divorced, sex or marriage, respectively, was verboten. Bartenders who served the underaged were liable no matter how mature the customer appeared, how convincing their fake ID. Having to prove culpable intent for each such act would harm the public more than unfairness to the occasional innocent offender.[237]

Vicarious liability extended this logic, holding the head of a corporation responsible for the actions of underlings. The aforementioned bartender would be strictly liable; the absentee owner of the establishment vicariously liable.[238] Regulatory offenses were often of this nature, too. They brought the penal code to bear on offenses such as the sale of adulterated food or drink, child labor, and environmental violations.[239] As of the mid-1980s, the statutes regarding such violations dramatically expanded in the US. Violations of federal agency rules were now routinely punished as felonies, with more than three hundred thousand federal regulations thus enforced. Accomplices, too, were held accountable for the acts of their co-offenders, even though they themselves had neither done nor even intended to commit a crime.[240]

Not only was intent criminalized, but the number of other mental states that rendered actors culpable also expanded. Offenders were increasingly held liable for negligence, not just for deliberate harms.[241] Though offenders had not intended harm, they were guilty if they had not sufficiently anticipated its likelihood. They were punished not for

intent but for not having the knowledge of the potentially dangerous situation or the insight they should have had.[242] A certain standard of conduct was expected from law-abiding citizens, and those who failed to achieve it were penalized.[243] The concept of negligence thus punished offenders not for their intent but for their ignorance. It discounted the mens rea normally required for a criminal offense, thereby broadening the range of punishable acts.[244]

Negligence had long been prosecuted. In Hebrew law, a bull known to be dangerous that gored again was to be stoned, and its owner killed, too. Roman law punished negligent behavior that might lead to injury.[245] If a beast's owner refused to curb it, Wessex laws of the eighth century allowed those whose crops it damaged to kill it. A century later, owners of animals that repeatedly caused harm were punished on a sliding scale.[246] By the nineteenth century, however, animals were acknowledged to lack intent and ceased being punished. They were no longer treated as purposive actors, but now largely as property. Their owners were culpable if they had acted negligently, allowing their charges to harm.[247]

Though of venerable concern, negligence was increasingly put to work as technological sophistication multiplied the consequences of inattention far beyond the realm of dangerous domestic creatures. From the 1870s in Europe, laws began holding liable those who increased risks of harm to others.[248] By the 1920s, criminal negligence was being identified as separately punishable. Reckless-endangerment statutes later in the twentieth century took matters a step further. Negligent offenders did not realize the danger they put others in, but reckless offenders ignored it; they were consciously negligent.[249] Ignoring the potential consequences of actions also became punishable, as did bringing about even the possibility of danger. If an act or omission by someone who did not mean to endanger another created a risk, that person could still be punished.[250] British law did not punish endangerment as such. But the US Model Penal Code included a general offense of recklessly engaging in conduct

that placed others in danger of death or serious bodily harm. German law punished not only the endangering of life and property but even abstract endangerment, including slander that might stigmatize someone.[251]

Moreover, general endangerment offenses did not require proof of actual or likely danger. They criminalized activities that raised unacceptable risks. Even nations that did not criminalize endangerment generically did so in practice, heading harm off before it occurred by punishing those who put others at risk. Speeding and dangerous or drunk driving were offenses everywhere, so the laws against them were in effect preventive measures that punished the posing of risk.[252] As even risk was criminalized, only few actions now escaped the authorities' interest. After all, almost every behavior or action posed some danger. Likely offenders could be considered threats even if they did not actually commit a crime.[253] Was not the mere act of being put at risk not also a harm in itself: a driver speeding, a surgeon operating after drinking, a pilot flying without enough sleep? Even if the harm did not materialize, these actors could be offenders. Being exposed to heightened risk might be considered a harm as such.[254]

The law thus narrowed from its earlier blunderbuss approach. It now left many behaviors to the private sphere, where citizens made their own decisions, largely unencumbered by official attention. But in those areas still subject to law and in those newly brought under its umbrella, the authorities both broadened and deepened their remit. At first, most harms had been punished regardless of intent. The requirement of a mens rea then narrowed crimes to intended acts, sanctioning only those that deserved it. At the same time, the concern with intent also prompted the authorities to delve into citizens' minds, punishing them for their thoughts and ambitions, not just for their acts, and padding the roster of possible offenses. Meanwhile, negligence and recklessness also reversed the focus brought by the mens rea requirement, once again punishing acts regardless

of intent.[255] Civil law nations were happy to prosecute even acts presupposing no intent, such as negligent arson, while the common law countries upped the ante with strict liability, where the act alone, regardless of intent, was actionable. More behaviors than ever thus fell under the authorities' purview, and the state also drilled into its subjects' minds, seeking to ferret out intentions and anticipate crimes in the making. The ever-expanding law may have provided the blueprint, but the boots on the ground belonged to the police, the sharp end of the state's enforcement stick to which we now turn.

Command and Persuade

Crime, Law, and the State across History

By: Peter Baldwin

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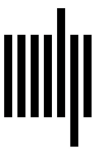

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