

Chapter 12

The State as Enforcer: From *Polizei* to Police

Most middle-class white Westerners regard the police as sheep do border collies: something they rarely encounter or need worry much about, so long as they stick to the center of the flock and do not tarry, dawdle, or stray. Such people pass years, decades even, without meeting uniformed officers face-to-face. If they do not drive, the frequency of their already rare interactions diminishes further. If they do not live in neighborhoods targeted by zero-tolerance enforcement, that effect is amplified.¹ Policing happens at society's margins, to the disenfranchised, poor, racial minorities, and the outcast. For them, the police are all-powerful and all-pervasive in their lives. Well-socialized burghers, in contrast, confront the state's enforcement arm infrequently because—policing themselves as part of the behavioral compact that assures their station—they rarely cross the invisible lines that trigger a statutory response.

Yet policing did not always hover at society's periphery. It was once largely synonymous with government itself. The term *policing* shares its etymology, not coincidentally, with *policy* and *polity*, and they in turn with *polis*—or more precisely *politeia*, Greek for “governance of a city.” As we have seen, crime used to encompass many behaviors that are now decriminalized: reclassified under private law, relegated to the private realm, considered merely sins or minor infractions—or redefined as normal, such as being Protestant or gay. In tandem, policing once also intervened much more broadly. The police used to administer activities that today are not regulated

much or at all (sartorial strictures, Sabbatarian rules, morals, religion, usury) or that are now the province of other arms of government (zoning, health and safety, child protection, social services, food and drug safety, transportation, animal control, competition).

In its older, all-encompassing mode, to police was to govern, to supply the basic infrastructure of a well-regulated society. Today, “police states” mean totalitarian dictatorships, unfettered by rule of law or due process. In the early modern era, a police state meant the opposite. It was a tautology, repeating itself, a “state state.” In sixteenth-century France, *police* was defined simply as the government of a republic.² What the political theorists of absolutist government in seventeenth-century Germany called *Polizeiwissenschaft* is best translated as the “science of governing.” To police was to administer. An echo of this tradition lingers in the Anglophone notion of “police powers”—the quaintly antiquated public-order and welfare regulations that were once among the police’s most important duties.³ But, on the whole, the English did not entrust the same sort of broad regulatory powers to their police as did the continent.⁴ In contrast, the Scots, the American colonies, and, later, the US federal states gave police powers a remit more akin to Europe. Nineteenth-century America used morals-related regulations to criminalize behavior of the sort once targeted in Europe by *Polizei* strictures.⁵ In that sense, the English police were both later and more modern—narrowly specialized in enforcing law and maintaining order—when first set up in the late eighteenth and early nineteenth centuries.⁶

On the continent, in contrast, early modern policing combined enforcing law and maintaining public order with a Noah’s ark of regulation. The Romans had already pointed the way. Their city prefects kept order, but they were also responsible for fire hazards, public buildings, religious ceremonies, public meetings, prostitutes, beggars, and foreigners as well as more generally for health, safety, and morality. Only in the fifteenth century, with their first laws on

Polizei, did Europeans get back to that place.⁷ These laws entrusted the police with a groaning smorgasbord of responsibilities: potable water; animal control; regulation of prostitutes, foreigners, vagrants, nonconforming religionists, and other undesirables; sartorial and sumptuary laws; Sabbatarian and opening-hours rules; flood abatement; food supply and adulteration; weights and measures; manufacturing; hiring, firing, and behavior of servants; purchase and sale; guardianship; fire prevention; mendicancy; rubbish and waste removal; price controls and profiteering; usury; embezzlement; pawn brokers; public drunkenness; arms and weapons; cursing; adultery and concubinage; commerce; fairs and markets; street cleaning and lighting; passports; transport; building codes; public works; bridge maintenance; wet nurses; poor relief; illicit publications and censorship; public houses and amusements. The police also enforced regulations to ensure salubrity: against immorality, blasphemy, drinking, cursing, and gaming. Weddings were closely regulated: who could be invited, what to wear, how expensive the gifts could be, how much food, drink, and music was permitted.⁸ When not otherwise occupied, local executioners pitched in to dispatch stray dogs and pigs and to enforce regulations against lepers and prostitutes, sometimes gambling, as well as public defecation and blasphemy. It would arguably be easier to list what did *not* belong to the police's remit, which included largely everything other than perhaps defense and foreign policy.⁹

Nor did this panoply of functions evaporate entirely under modernity's sun. In early nineteenth-century Toulouse, the police still combined the functions of family court and counseling. Officers took evidence from complainants whose daughters had been seduced, whose husbands squandered their earnings, whose jilted lovers had stolen their wardrobes, and the like. The French gendarmerie helped out in times of natural or other disaster.¹⁰ In Denver in the 1860s, the city marshal removed a noxious slaughterhouse and tannery from the town center. Stray dogs occupied much police

attention. Officers lodged the down and out and returned errant children. When the Russian police took care of abandoned children, even deep into the twentieth century, they had little choice but to welcome them into their own families.¹¹ In the mid-nineteenth century, New York police counted cellar dwellers, inspected steam boilers, cleaned streets, and administered elections.¹² The English phrase “If you want to know the time, ask a policeman” revealed that few people owned a watch in the nineteenth century but also cynically assumed that most bobbies had lifted a timepiece off a drunken reveler.¹³

Writing in 1915, an American visitor was astounded at the range of activity still pursued by German police. Prussia had separate police departments for insurance, mining, water and dikes, field and forest, cattle disease, hunting, fisheries, trade, fire, politics, roads, health, and buildings—among other things. Berlin had twelve police departments. Only two—uniformed officers and the detectives—performed functions also handled by their English law enforcement colleagues. The others supervised markets and sale of provisions; inspected foodstuffs; controlled public assemblies; abated nuisances; oversaw lodging houses, cafes, and amusements; regulated druggists, vets, and other professions; and kept watch on certain banks. Division Eight oversaw censorship of theaters, control of concerts and movie theaters, and the employment of child actors. Meanwhile, the Paris police inspected mushrooms as one of their duties, and it remained their task to check on buildings and factories, scrutinize prices, and verify the quality of produce.¹⁴ To this day, the French gendarmerie collects meteorological data and regulates veterinary clinics and abattoirs.¹⁵ The Chinese police, tasked also with public-health matters and census registration, investigated citizens’ homes and backgrounds.¹⁶ Even the London police licensed chimney sweeps, shoeblacks, and messengers; kept tradesmen honest; inspected weights, bridges, and lodging houses; and enforced

nuisance laws. They could even be asked to wake people in the morning for work.¹⁷

Even today, the police continue to provide many services and community functions—if only because no other institution answers the phone 24/7/365 but largely because most police work still involves maintaining order more than solving crime.¹⁸ The vast majority of calls today to the police do not report crimes at all, much less serious ones.¹⁹ Many are requests for help in emergencies that might quickly deteriorate but do not yet involve law breaking: domestic disputes, children on the street alone at night, noises scaring an elderly couple, drug overdoses and miscarriages, and accidents of all sorts.²⁰ The more developed the country, the more police respond to noncrime situations. Arrest is only the third most common outcome of their interventions (after doing nothing and advising how to avoid repeating the incident), occurring some 14 percent of the time.²¹ Even when offenders are arrested, it is mostly over bread-and-butter stuff. Only 10 percent are charged with serious offenses. In the main, police interact with the public over drunkenness, disorderly conduct, assault, drunk driving, gambling, vandalism, and similarly pedestrian matters.²²

Nonetheless, policing has narrowed significantly from its blunderbuss role in the early modern era. The Enlightenment's reformers held that the state was to provide the legal framework, thereby defining the acceptable, and maintain order but not otherwise use its police powers to regulate the particulars of civil society. Citizens were left free to arrange matters as they saw fit within legality's parameters.²³ Ensuring order, not promoting welfare, became the police's new role. In the Prussian general code of 1794, the police's tasks were to maintain public peace, security, and order and to prevent danger to the public.²⁴ Though that remained a broad remit, many of the police's earlier duties gradually either were not regulated at all or fell to other state agencies. The police's main role

became to ensure order, prevent offenses, and solve those crimes not deterred.²⁵ Having once been the state's Swiss Army knife, police became a rapier. Perhaps the closest they come to their earlier duties today is regulating traffic, which brings them into frequent contact with many different citizens. Yet policing as such has not diminished. Yes, it has narrowed its scope to the more precise modern sense of dealing with crime as violations of the penal code, but what this specific definition encompasses has expanded and dramatically deepened.

On its way to this new role, policing changed entirely. In Europe's old regimes, up through the eighteenth century, offending was widespread and common, committed by many, not just by an easily identifiable criminal class, and tolerated in large measure for lack of effective means to counter it. The interested parties themselves, not the authorities, did most enforcement. Cases were often settled informally outside of court. If they reached trial, the unfortunate pendant to lax and indifferent enforcement was harsh deterrent punishment of the few who had been nabbed. Policing was sporadic, localized, and violent.²⁶

With the growth of official policing starting in the eighteenth century and a judicial system able to handle the heightened throughput, enforcement became professionalized. Property-owning volunteer constables or their paid proxies were replaced by uniformed, salaried officers. Detecting crime and maintaining order became routinized, spreading into poor communities, too. Rather than making examples of a few, catching and sentencing as many offenders as possible were the new goals. Punishments were moderated but inflicted more regularly and predictably. Prosecution became the state's duty and the citizen's right, available to anyone who had been victimized, not just to those who could afford to pursue matters.

Policing had earlier enforced the authorities' will, suppressing not just mayhem and disorder but also unrest and revolt. Tsarist police in Russia were notorious in this regard. In early nineteenth-century

Austria, police still beat civilians for showing disrespect to the ruling house.²⁷ The unrest that roiled European cities in the eighteenth and nineteenth centuries doubtless helped spur the authorities' plans for regularized police forces.²⁸ In the French Revolutions of 1830 and 1848, the gendarmerie helped restore order—and was temporarily disbanded thereafter in acknowledgment of the unpopularity that act had won it.²⁹ But in a longer view, in increasingly democratic societies the police could not be partisan. To avoid raising hackles, they had to maintain order and enforce the law impartially. That order and legality benefit those at society's pinnacle hardly needs mention; that they equally and possibly especially favor those with few other means to protect themselves from violence and chaos bears repeating.

From its beginnings in the early nineteenth century, the English police recognized the virtues of being unpartisan. Unlike the older continental European forces, established to shore up dynasties and regimes, English policing was instituted less to take sides than to enforce the king's peace.³⁰ The bobbies were carefully controlled, largely unarmed, trained to win public sympathy, and subject to strict rule of law. They were citizens in uniform, not much more powerful than their civilian peers.³¹ Marinated in an atmosphere skeptical of standing armies and anything in uniform, the American police were at first scarcely an arm of the state at all and more an extension of civil society. Officers were selected to reflect the social, national, and ethnic composition of those they policed. They were closely tied to local machine politics. Second-generation residents of New York City suspected Irish officers of favoritism and investigated to see whether they were arresting their fellow brethren in due numbers.³²

As policing became a regular feature, seeping into society's interstices, an implicit compact was struck between citizens and officialdom. The rule of law applied to police as much as to civilians. Punishing violations of the criminal code was their remit and their

legitimacy rested on keeping to that. Rules on how to collect, process, and use evidence became detailed. *Lettres de cachet* of the sort issued by the French king before the revolution, locking up miscreants indefinitely without specified charges, were no longer tolerated. Most nations eventually forbade coercion, the third degree, unauthorized eavesdropping, and similar techniques.³³ The job of the police was to uphold the law. If the law was fair, all citizens benefited. When the police favored or persecuted some groups, their authority suffered. If anyone other than offenders felt victimized, the deal would be off. What counted as legitimate, enforceable law evolved as the state extended its powers yet took account of custom and habit. Social crimes such as poaching and gleaning ceased being enforced strictly on behalf of landowners. Laws that clamped down on workers' pleasures—drink above all—were policed only sporadically.

Police and citizenry needed each other. Short of an omniscient police state, civilian cooperation was crucial. Police were like fish swimming in the ocean of the people, as the current Chinese authorities have repurposed Mao's analogy of the People's Revolutionary Army.³⁴ The police did not just replace civil society's self-policing but also enlisted that function on their own behalf. Even in the modern era, most crime reporting originated with the public, not with gumshoe detective work. Some crimes, such as domestic violence, were likely to remain unknown if not reported. Tips, sightings, snitching, and reports were needed to resolve cases. According to one study, 93 percent of arrests were the outcome of citizens contacting the police. Unless victims or witnesses helped identify offenders, the likelihood of an arrest fell to 10 percent.³⁵ The most-wanted posters (and their TV variants) that used to festoon post offices were emblematic: appeals to the public for leads. Hotlines to report crimes were widespread. Volunteer patrols helped the police. Even the supernatural pitched in through its mediums.³⁶ And if citizens were not mobilized directly by the authorities, then

they were indirectly by insurance companies, obliging them to lock their homes and cars, report thefts, and register stolen goods. Night watchmen in early modern Europe rattled doors, checking to see if they were locked as required by law.³⁷ Today officers collect data from neighborhood-surveillance cameras to track suspects. Warnings against abandoned luggage alert the public on public transport to possible terrorist bombs. Open registers of sex offenders presume that their neighbors will—if they have not already driven them away—help police them.³⁸

Indeed, self-policing has remained a cornerstone of police work. As far back as the thirteenth century, English subjects were required to report treasonous plans they knew of—not tarrying more than two days or attending to their own business beforehand. Medieval Christians were expected to report heresy on pain of being suspected themselves.³⁹ Indonesia has updated this practice with Smart Pakem, an app allowing Muslims to denounce heretics from their smartphones.⁴⁰ In the West, anyone who knows of crimes such as domestic violence, especially if victims are unlikely to report them, is encouraged to alert the police, “thus marking that these offences are not a private matter between the parties involved,” in the words of a Swedish bill.⁴¹ The German legal code criminalizes knowing of plans for serious crime without reporting it.⁴² The common law nations achieved much the same by defining accomplices broadly. Reporting requirements became standard for professions likely to see child or elder abuse.⁴³ Banks have to disclose large cash transactions, corporations disposal of toxic substances. Those who are not informers are accomplices—that is the logic.

A successful police system is one citizens want more of. Order and security are our first demands of the authorities. True, some forms of enforcement were inherently unpopular. Public support for the English police suffered in the early nineteenth century when they enforced laws that in effect targeted the poor for being poor—being drunk in public or sleeping in the open (thus classified as vagrant).

The working classes resisted bans on their pleasures: drinking on Sundays, street betting, gaming, dog- and cockfighting, hare coursing, rat baiting, and other animal sports (though fox hunting was of course not prohibited).⁴⁴ Attempts to enforce Sabbatarian rules in New York City that had been passed in Albany by provincial lawmakers stretched the police beyond what they could or wanted to do and undermined their popular support.⁴⁵ Today, the sense that ethnic minorities are singled out for unfair scrutiny and enforcement undermines support in their communities, hampering the compliance and cooperation on which successful policing necessarily rests.⁴⁶

But laws that were not inherently biased have generally been popular. When the seventeenth-century English imposed binding-over orders on each other, which required good behavior on pain of punishment, they were yearning for more policing in an era before the state could deliver. Access to the law and its protection of their meager property were what the English poor desired in the eighteenth century. Many of the *cahiers de doléances* (list of grievances) drawn up before the French Revolution complained that small towns and villages hardly ever saw police patrols and demanded enlargement of the *maréchaussée* (local mounted force).⁴⁷ The Prussian habeas corpus law of 1848 forbade house searches at night. Upright burghers protested that when they reported a theft, the goods were long gone by the time the police finally showed up the next day.⁴⁸ Resisted at first, London bobbies soon became popular, the public complaining that they were not doing enough to maintain order. Assaults on police dropped by two-thirds during the late nineteenth century.⁴⁹ At first, bobbies could arrest only for crimes they had witnessed. Londoners pressed for changes, which passed in 1839 and allowed police to take suspects into custody for broader reasons. As theft's main victims, the nineteenth-century poor were eager to prosecute their losses in court.⁵⁰ Even though

they dislike tax increases, citizens have been known to vote to finance expanded police patrolling. Faced with neighborhood disorder and crime, most residents have supported foot patrols and other up-close forms of policing.⁵¹ Minority residents of US cities often receive unwanted and undeserved police attention, yet they have also backed more and stronger enforcement—of drug laws, for example.⁵² Just anecdotes, these stories nevertheless illustrate a truism: in stable modern societies, many more suffer from crime than from police misconduct.

Making the Police

Like the rest of the state's crime-fighting functions, policing was largely a modern invention. True, in ancient Egypt policemen patrolled marketplaces, armed with sticks and baboons trained to chase wrongdoers. In Athens, a troop of Scythian slaves, brandishing whips and small sabers, was marshaled to guard public meetings, control crowds, and make arrests. Yet, their duties were rudimentary at best. In Rome, *aediles* could chastise citizens in specific remits—flogging actors, for example, because their duties included policing performances at the public games. The *tresviri capitales* were magistrates responsible for public jails, executions, and order in the streets, but they lacked their own means of coercion.⁵³ Only in the early modern era did recognizable police appear. Even in an ancient civilization such as China, where the wealthy had kept private guards at least since the eleventh century, state policing is scarcely a century old. Arguably, it began only in the post-Mao period.⁵⁴

At first, the police were largely volunteers, citizens keeping order in their own communities. The sixth-century Frankish king Clothar sought to shift the burden of pursuing thieves from the family to the larger territorial community, punishing those who did

not pitch in.⁵⁵ Thirteenth-century England set watches manned by constables—part-time volunteers who enforced the hue and cry. A crime discovered, the alarm was sounded. Pursuit followed, and if the culprits were caught and arrested, sometimes they were summarily executed.⁵⁶ Local communities in medieval Spain formed *cuadrillas*, town leagues, to guard common pastures against interlopers while also keeping an eye on road traffic. In seventeenth-century London, constables were male householders who served a year at a time, fulfilling the obligations of the Statute of Winchester (1285) to police their communities. By the eighteenth century, the gentry were hiring substitutes to serve their time or paying fines, which were then used to employ others. The system's inherent amateurism was thus mitigated as those who served at length acquired expertise.⁵⁷

Parishes also began imposing taxes instead to salary permanent watchmen. By 1800, the City of London's constables were hired men for the most part.⁵⁸ At the time of the revolution, French policing was not yet entirely a governmental function. As of 1792, Parisian officers of the peace, armed with white sticks, arrested offenders and brought them before justices of the peace. Ordinary citizens could be ordered to help and jailed if they refused. Nor was policing yet professionalized in the United States, where a law in 1789 allowed marshals to compel local citizens to do their part on a *posse comitatus*. Volunteerism lasted even into the era of professional police. Nineteenth-century Toulouse had *dixainiers*, local citizens who broke up brawls and reported disorder, alerting the official police. Unpaid and sporting no outward signs of authority, they were rewarded by exemption from national-guard service and billeting troops. Russian peasants mainly policed themselves, as did largely autonomous communities of Latvians, Estonians, Jews, and other minorities in the East European countryside.⁵⁹

Informal policing remains even in our own day. Volunteer security personnel patrol gated communities, organize block watches,

and escort the elderly at night. And as new crimes have multiplied, ordinary citizens have begun serving as indirect enforcers: tenants who sue their landlords for unwarranted rent increases; the maligned for libel and defamation; consumers who win triple damages for prosecuting antitrust violations; retailers, hoteliers, and restaurateurs who police and enforce offenses against their businesses; citizens who sue fraudsters against the government.⁶⁰ Class-action suits allow groups of citizens who share only their victimhood to enforce the law.⁶¹

Authorities also outsourced the legwork of policing: to knights in medieval Europe, hundreds in England, samurai in Japan, *potwaris* in India, *hans* in China, and vigilantes in nineteenth-century America. In the sixth-century French Merovingian kingdom, those helping track down thieves were given a cut of the goods retrieved. In sixteenth-century Florence, *banditi* killed or captured banned persons. Prussian Junkers administered justice—using the term loosely—on their estates until 1872, Russian landed aristocrats until 1918.⁶² Even when enforcement was authorized by the state, the personnel carrying it out often remained volunteers, with the restrictions that imposed. The justice of the peace in England, *länsman* in Sweden, and *Schultheiss* in Germany: all were legal amateurs acting as judges who had to herd their fellow subjects in the right direction while not poisoning their own reentry to civilian life.⁶³

In eighteenth-century England, thief takers—frequently former criminals—made a lucrative business of apprehending offenders and reaping rewards when they were convicted—often of crimes the thief takers themselves had instigated. Visiting Assisi in 1786, Goethe was shaken down by the *sbirri*, armed thugs who acted as agents of courts and were paid via fees and rewards. In 1798, London merchants prevented pilferage from the docks by financing a marine police force that was so successful it became a public body two years later.⁶⁴ François Vidocq, who ran the Sûreté in the early nineteenth century, was a former criminal hired just for

that expertise. In the American West, gun slingers such as Wild Bill Hickok and Wyatt Earp were employed to keep order as cowboys whooped it up on payday. The difference was often slight between them and proper outlaws such as John Wesley Hardin, Billy the Kid, and Jesse James.⁶⁵ In the early twentieth century, mining companies and other corporations broke strikes and enforced labor discipline with private police. Having started by supplying security for presidents and the army, Pinkertons then worked for the railroads, which as inveterate border crossers were served poorly by territorially organized policing.⁶⁶ Even today, American bounty hunters are privateers fulfilling a public function when they track down bail jumpers.⁶⁷

Indeed, private policing continues in robust health. Far from having been displaced by their official colleagues, such forces are everywhere: university, school, and mall police; private and corporate guards; airline security; even mercenary quasi-military personnel sent into war zones.⁶⁸ Despite the state's massive expansion into enforcement, so unquenchable is the demand for security that private forces today outnumber official police, often several times over—almost three in the United States.⁶⁹ There are ten times as many private investigators and detectives as FBI agents. Twice as much money is spent on private policing in the US as on public. Even in statist China, a third of all policing is private, although these forces are owned by the Ministry of Public Security. In Shanghai, private forces are half as big as the official police; in Beijing, the numbers are largely equal.⁷⁰ Not part of the state's monopoly of violence, private police are restricted in their powers—unless they are deputized or are regular police moonlighting. But nor are they hampered by the due-process limits imposed by criminal procedure or regulation. Private-security forces in the US are not subject to the same curbs on conduct as official police. As agents of property owners, they can exclude or eject the unwanted from private premises in a way regular police cannot from public spaces.⁷¹

Recognizably modern police forces were established in the late eighteenth century on the continent, followed half a century later in Britain and then in the United States. The earliest was perhaps in France in the mid-1600s.⁷² By the early eighteenth century, the *maréchaussée*, mounted officers, had arguably become the first national police force—some three thousand men, doubled in size after the revolution. Paris in the late seventeenth and early eighteenth centuries was well policed by the standards of the day. In 1667, the traditional night watch was replaced with a professionalized uniformed force reporting to the central government. Centralized police became the norm already under Louis XIV. It was continued by the revolutionaries and the two Napoleons.⁷³ By the late eighteenth century, some three thousand officers patrolled a city of six hundred thousand, the largest and best-organized force in Western Europe. Only about half were police in the modern sense. The rest were garbage collectors, firefighters, censors, architects, and the like.⁷⁴ London became as well patrolled only half a century later.⁷⁵

Early on, police and army were scarcely distinguishable. Both served the ruler, putting down unrest and maintaining order—sometimes against external enemies, other times against domestic troublemakers. In autocracies, both forces were often made up of foreigners to avoid sympathy and fraternization when used domestically. Vikings protected the emperor in tenth-century Byzantium. The Swiss Guards quelled unrest for the pope and the French king, among others. After the revolutions of 1848, the police in Vienna often were Czech or Moravian. In southern Italy, the carabinieri usually hailed from the North, sporting an inbred feeling of superiority.⁷⁶

With nationalism and democracy, however, such disjuncture no longer worked. Citizens were now rallied for the patriotic cause against foreign enemies and recruited en masse to the military. The police, too, began reflecting the population they kept in line.⁷⁷

Barracked officers were separated from civilians, but police generally lived like and among civilians when off work. True, Russian police were recruited heavily from the army and rarely natives of the region they supervised. London bobbies were deliberately enlisted from the provinces. But New York City cops were chosen from those they would police, leading to an informal rapport but also, predictably, more corruption.⁷⁸ The gendarmes in France under Napoleon were supposed to know their local area so well that they implausibly could go to any point in their districts with their eyes closed.⁷⁹ More recently, radios and cars have centralized police, who swoop in only when summoned. The backlash against such distancing has prompted a return to community policing. Foot and bike patrols in local neighborhoods now allow citizens and officers to cooperate in maintaining order.⁸⁰

Military and police have become separated. The peacetime British army in the eighteenth century fulfilled discrete functions: suppressing smuggling, putting down riots, and crushing insurrections.⁸¹ Only in extremis was the military—eventually an emanation of the nation, even when a professional force—marshaled against civilians. In the Peterloo massacre of 1819, constables, unable to control a crowd of sixty thousand demonstrators in Manchester, called in the hussars. When a dozen civilians were killed, the authorities realized that the old system of repression no longer worked. Victorian Britain used the military against civilians only twice: during riots against the ban on Sunday trading in 1855 and during the parliamentary reform agitation of 1866–1867.⁸² In the early twentieth century, troops were deployed mainly in industrial disputes.⁸³ The Emergency Powers Act of 1920 allowed the British army to protect food and fuel supplies. In the United States, the Posse Comitatus Act of 1878 restricted the use of the army for domestic policing duties, something that had become widespread in the South after the civil war.⁸⁴

The separation between military and police took longer elsewhere. In the late nineteenth century, Russian authorities transferred cases to military tribunals if necessary for public order.⁸⁵ In the early twentieth century, Budapest's uniformed police were still a military troop, armed and barracked like soldiers, ready for service at a bugle call. The Italian carabinieri, originally a sixteenth-century branch of the Piedmontese army, remained part of the military after Italy's unification. It reported to the Ministry of War and, for its more purely policing functions, to the Ministry of the Interior. Much the same held for the French gendarmerie and the Spanish *guardia civil*.⁸⁶ In Germany, the Social Democrats proved disastrously willing to use the Freikorps (demilitarized troops employed domestically) to suppress the revolution of November 1918. The Freikorps' murder of Communist leaders soured relations between the two major parties of the Left, later undermining hopes of a unified opposition to the Nazis. The Third Reich continued blurring the lines, turning the police into the "internal army."⁸⁷ In the developing world, militarized police are still used as, in effect, an occupying army, as when Brazil's federalized police invade favelas and battle drug gangs. Recent terrorism has also meant that semi-militarized gendarmeries have expanded, especially in border security.⁸⁸

National guards bridged the gap between police and the military, deployed in emergencies without seeming to pit army against citizens. In 1842, after riots were quelled by the army, Cincinnati created a reserve militia police guard.⁸⁹ More recently, the police, locked in an arms race with offenders, have adopted military equipment and tactics, blurring the line again. Even as the state monopolized violence, pacifying society, armaments technology forced it to weaponize at home as military battlefield kit leaked to criminals. Nineteenth-century police were armed with sticks and swords. London inspectors were allowed to carry pocket pistols as of 1829, and constables could draw revolvers from 1883 on.⁹⁰ The British

police still generally do not carry arms when on patrol, but they use body armor and updated weapons such as batons, rigid handcuffs, and incapacitating spray. Trained officers (5 percent of the force) are armed.⁹¹ German, French, and US police are armed as a matter of routine.⁹² Legitimized by the “war” against drugs and then terrorism, SWAT teams and other paramilitary units have been used against civilians.⁹³ In the United States, deployment of such quasi-military teams increased fourteenfold in the late twentieth century, often for nonemergencies such as drug searches. Their tactics, weapons, and attitudes have been adopted by regular police forces, too.⁹⁴

Crowd control upped the ante. Authorities fear mass unrest far more than individual crime. To deal with unruly crowds, violent crimes, hostage situations, and terrorism, police forces everywhere have ratcheted up their technological prowess, maintaining special units for emergencies. Water cannons and tear gas are used to disperse crowds. French forces especially have been armed to the teeth. Gendarmes use the army’s standard assault rifles, submachine guns, and pump-action shotguns. In extreme situations, they marshal heavy weaponry, helicopters, armored vehicles with machine guns, and chemical, biological, radiological, and nuclear protection equipment.⁹⁵ Since the late 1990s, the equivalent forces in the US have used surplus military hardware against civilian protests—armored vehicles, ballistic helmets, tactical vests, night-vision goggles. In the 1960s, Britain, too, developed paramilitary forces to control crowds, strikes, and riots. Deployed against striking coal miners in the mid-1980s, they sported shields and helmets, later water cannon, tear gas, and plastic bullets, and eventually robocop armor.⁹⁶ But there has also been technological de-escalation. Less-lethal weapons have been developed: stun guns and tasers, water and sound cannons, tear- and other gas. Hydraulic equipment and kinetic devices, stun grenades, and barricade-breaching technologies have joined the armamentarium. New technologies of crisis defusion have also been developed: mediation training and hostage negotiation.⁹⁷

Professionalizing the Police

Seen in a long historical sweep, the likelihood of an offender being punished has moved from possible through plausible to at times even probable. The dark figure of undetected crime remains obscure—more so the further into the past we go. To claim that the proportion of crimes committed that are also convicted is increasing would be a supposition. But we do know that the percentage of those indicted who are also punished is growing. The early modern state, as we have seen, punished the few criminals in its hands in spectacular ways to trumpet its deterrent message. But as the justice system and the police were able to accomplish their mission more effectively, punishment shifted from sending a message to would-be criminals to dealing with those offenders in its grasp. The state was in a position to affect their behavior—whether merely by incapacitating them or perhaps also by reforming them. The more prisoners in the state's hands, the better it could influence overall criminality.

How the justice system upped its game can be gauged by its growing ability to deliver known offenders to their just deserts. Just 10 to 20 percent of accused killers were convicted in fourteenth-century England.⁹⁸ More than 40 percent of those tried in seventeenth-century Sussex were acquitted, 30 of them in late seventeenth-century and early eighteenth-century Norfolk and Suffolk. Figures for all of England from the sixteenth to the eighteenth centuries were similar.⁹⁹ Conviction rates in Bavaria in the early nineteenth century hovered between 40 and 50 percent.¹⁰⁰ By the nineteenth century in France, they had climbed to 70 percent.¹⁰¹ And modern judiciaries convict even more efficiently. In Japan today, 90 percent of those tried plead guilty, and acquittal rates are miniscule.¹⁰² In Europe and the United States, the percentage of prosecutions leading to convictions are uniformly higher than 80 percent, sometimes significantly so.¹⁰³

The judiciary became more efficient in prosecuting criminals for reasons explored later in this chapter. More fundamentally, crime

and sanction increasingly aligned from the eighteenth century on. Punishments were moderated, and death sentences grew rare. Juries no longer felt morally compelled to acquit petty criminals who otherwise faced the scaffold. In a virtuous circle, the more offenders the state found and prosecuted, the less it had to rely on deterrence in the form of grotesque barbarities. The scissors gradually closed between what the authorities did to the wretches they caught to discourage other would-be criminals and what popular opinion regarded as proportionate sanction.

Even without juries to buffer an insistent prosecution, continental Europe's inquisitorial systems had built-in circuit breakers in the form of pardons and amnesties. They were tripped when crime and sanction seemed out of synch or when the numbers of the indicted simply grew insurmountable. The Theodosian Code mentions thirteen amnesties granted between 332 and 413 CE. The Spanish Crown's pardons extended even into the American colonies. When Louis XVI left Paris for exile in June 1791, he deplored how the National Assembly had stripped away his prerogative to pardon and commute sentences. His subjects, he lamented, would no longer regard him as their common father.¹⁰⁴ Even in republican times, that tradition continues. The French prison population has largely been stable since 1988 thanks in part to a series of mass pardons marking national holidays or presidential inaugurations. Although the timing of their use differed from the Western experience, China had an even more luxuriant tradition of "great acts of mercy" by which entire cohorts of offenders were pardoned on a regular basis—every three years, for example, during the last four decades of Emperor Wu's reign, from 128 BCE on.¹⁰⁵ Overall, pardons today are rare, but they remain as a curiously patriarchal remnant of once-feudal relationships. As punishments aligned with offenses, the need waned for royal pardons (followed in republics by their presidential and gubernatorial versions) to take the edge off earlier barbarities. Perfect legislation, as Beccaria pointed out, eliminated

the need for pardons. Clemency should be the task of the legislator, not the sovereign.¹⁰⁶ The state could finally enforce just, measured, and—above all—if not likely then at least not implausibly improbable punishments.

Starting in the nineteenth century, police numbers and budgets marched steadily upward. Figures began being kept in the 1930s, showing that police ranks per capita have multiplied almost everywhere.¹⁰⁷ Some nations centralized their forces; others left oversight to local entities. Regardless, the police slowly professionalized and bureaucratized. Having begun as volunteers, officers were first salaried and then subjected to modern bureaucracy's usual processes of examination, training, discipline, and meritocratic advancement. In the early nineteenth century, the Russian tsar's political police force was staffed by personnel so ill educated that they quite literally could not understand the regime opponents they interrogated.¹⁰⁸ That had to change.

Maintaining order, providing evidence to prosecute offenses, and preventing crime were, in that order, largely what police did. The medieval hue and cry did rouse citizens in immediate pursuit of an offender, but grappling with criminals in flagrante diminished as part of police work. Today, only about a tenth of radio calls to patrol cars raise even the possibility of law enforcement in the narrow sense—stopping a burglary, catching a prowler, making an arrest, or investigating something suspicious.¹⁰⁹ In New York, even in poor neighborhoods in the high-crime 1980s, 40 percent of patrol officers made not a single felony arrest per year, and 69 percent made no more than three. In London, an officer might encounter a burglary in progress once every eight years. Direct crime work took up as little as 3 percent of patrol officers' working hours.¹¹⁰

In the twentieth century, the French police boasted an ability to find their culprit anywhere in the nation within twenty-four hours. Such powers developed only slowly. Continental police could inspect and arrest. In 1666, the officers of the Châtelet, the

most important police headquarters in Paris, were given the right to enter homes and other buildings. Bearing arms was also concentrated largely in their hands, though not wholly—thanks to resistant nobles.¹¹¹ In the Anglo-Saxon nations, police had few powers beyond those of civilians. In seventeenth-century Sussex, the old hue and cry, obliging all citizens to help corral offenders, gave way to the need for written warrants, sworn before a justice of the peace and issued to a constable. This requirement made rounding up more of a duty for officials. In the eighteenth century, constables began making arrests and bringing offenders to court and jail. They also searched for the accused and at times for stolen property. Nonetheless, bringing offenders to justice still remained the task of victims.¹¹²

Robert Peel founded the London police in 1829. He wanted his bobbies regarded as but members of the public who were paid to give full-time attention to duties that were in fact incumbent on all citizens.¹¹³ In colonial America, attacks on constables and sheriffs were frequent, and they lacked any effective power to arrest suspects who resisted. In mid-nineteenth-century New York, officers who misused firearms (killing a fleeing suspect, for example) were arrested by their colleagues like any civilian. Citizens had much the same powers of arrest as any official.¹¹⁴ Both New York and London officers could be sued in ordinary courts for false arrest. In the United States, officers and citizens alike could arrest for misdemeanors committed in their presence. Both could arrest for felonies they had witnessed and for those they had probable cause to believe had occurred. But if the felony turned out not to have taken place, the civilian, but not the officer, was considered to have committed an offense. Some US states also permitted shopkeepers, hoteliers, restaurateurs, and the like to arrest and detain suspects until the police arrived.¹¹⁵

In many US states today, ordinary citizens may still arrest for misdemeanors committed in their presence and for felonies they have probable cause to believe have occurred.¹¹⁶ Indeed, in certain

respects, citizens retain greater powers over each other than do the police. Authorities are bound by due-process restrictions on searching and seizing evidence without warrants; citizens performing arrests are not.¹¹⁷ Even today in Britain, policing is theoretically a private matter, with the officer in principle but a uniformed citizen. In the mid-1980s, almost a quarter of criminal court cases were prosecutions by nonpolice agencies, such as local authorities or the Royal Society for the Protection of Cruelty to Animals, as well as by individuals.¹¹⁸ Citizens also retain powers to use proportional force, though not to detain, by relying on the doctrines of self-defense, defense of others, and defense of property. The right of self-defense remains since even modern police cannot always be everywhere. Even today, citizens must take responsibility for their own safety.¹¹⁹ Ultimately, the modern state relies on a vestige of vigilantism.

And yet police were granted significant powers from the start. Constables in the late seventeenth century could arrest and imprison, break into houses, and disperse unruly crowds. Eighteenth-century London watchmen freely stopped odd people at night: a man selling cheese in the street at 3:00 a.m., for example, or carrying a sack of coal in the wee hours. Night watchmen looked out for suspicious people and arrested prostitutes and vagrants. Police in eighteenth-century Paris checked pedestrians at night and interrogated irregular characters, especially if they carried packages of potentially stolen goods.¹²⁰ German cities were well policed within their walls, and it was the suburbs where delinquency flourished as authority petered out.¹²¹

Over time, such powers were enhanced. The Anglo-Saxon common law gave police but few powers of arrest beyond those of every citizen. True, only police could execute arrest warrants, but most arrests were made without one. Yet only police could execute search warrants and sometimes search without one. And they could command bystanders. English civilians could arrest without a warrant for serious crimes such as murder. Constables, however, could arrest

on suspicion alone. For minor offenses (being drunk and disorderly, for example), they needed no warrant.¹²² Such powers expanded in the nineteenth century. The Metropolitan Police Act of 1829 empowered London bobbies to apprehend loose, idle, and disorderly persons whom they merely suspected of evil designs. Their New York colleagues could arrest those seemingly intent on a felony and their powers to search citizens for stolen goods were modeled on the London statutes. The portmanteau concept of disorderly conduct gave police on both sides of the Atlantic broad discretion. Being tasked to regulate traffic also gave London police expansive powers to disperse crowds and to keep thoroughfares open.¹²³

Secret Police

“When a man marries his mistress, he creates a job vacancy” is a bon mot often attributed to the financier Jimmy Goldsmith but coined in fact by the multiwedded French actor Sacha Guitry.¹²⁴ So, too, with the police. As they became rule bound, regulated by law, and tasked with enforcing order in increasingly democratic societies, the need arose for special forces to sidestep the established procedures that now hobbled official inquiry. Once a uniformed police presence became commonplace, its deterrent effect lessened. Undercover police now became the joker in the deck. Pinkerton’s plainclothesmen deterred because no one could be certain whether one was lurking nearby.¹²⁵

Secret police were used against occult crimes in particular, especially theological and political unorthodoxy. The ancient Greek sky and thunder god Zeus, who was not omniscient, ran a spy service of thirty thousand immortals who roamed the earth, noting unjust deeds. Aristotle recommended a system of spies to keep tabs on dissidents.¹²⁶ Starting in the thirteenth century, Franciscans and especially Dominicans (God’s dogs) were also early covert enforcers—trained

to ferret out heresy, operating Europe-wide, and answering directly to the pope.¹²⁷ Many of the techniques later perfected by the modern secret police were first tested by the Inquisition: evaluating evidence of forbidden thoughts such as ritual practices or refusal to participate, ownership of prohibited writings, association with other suspects, statements to others. Nonheretics were obliged to report and testify; confession was extracted by threatening punishments or implying that others had already revealed all; grace periods were promised those who confessed now.¹²⁸ Under Henry VIII, Thomas Cromwell used his network of spies to report on subjects' theological shortcomings and doubts about the king's marital extravagances. Sometimes informants pretended to be fellow prisoners to gain the trust of papists and other enemies of the throne.¹²⁹ In Renaissance Florence, tracking aristocratic families' plots against the Medicis was the secret police's main function, as under Nicholas I in Russia.¹³⁰ Joseph II, Holy Roman emperor in the late eighteenth century, used his undercover police to keep tabs equally on his own officials and on revolutionaries.¹³¹ The Bourbon secret police in the early nineteenth century kidnapped and sometimes murdered political opponents in exile—as does the Russian government to this day.¹³²

As democratic winds began to blow across Europe, the autocracies feared revolution. In quiet times, the secret police mostly tracked the opposition press, followed and sometimes censored books and theater, and kept an eye on political meetings. The Prussians banned all German-language papers imported from America, fearing democratic tendencies.¹³³ But as protest quickened, things turned nastier. The French *police speciale* and the tsar's Third Department, dating to the sixteenth century, were among the most notorious of Europe's political police forces, ruthlessly suppressing opposition.¹³⁴ The English Special Branch was established in 1884 in response to bombings by Irish republicans. Despite much posturing about French-style plainclothesmen being an arm of autocracy, even the British found them useful. In 1842, a small detective force

was established surreptitiously and not publicly acknowledged until the 1870s. From the late nineteenth century on, the British police, much like their continental counterparts, made clear their interests in political enemies.¹³⁵ Before unification in the 1870s, the German states collaborated across their multiple borders to track liberals, socialists, and Communists.¹³⁶ World War I marked a watershed, with the state now massively keeping tabs on its soldiers and citizens, including by intercepting and reading mail to measure the pulse of public opinion. If the Russian monarchy had forty-nine police officers reading the public's letters in 1913, the Soviets had ten thousand doing this work seven years later.¹³⁷

Agents provocateurs were especially resented, embroiling the state in similar questions of complicity as its use of informers and entrapment for regular crime. Joseph Fouché, in service seriatim to the revolution, the Directory, and Napoleon, spearheaded the deployment of political undercover agents.¹³⁸ So active were the secret police under Napoleon III's Second Empire that all seditious affairs were said ultimately to have been their doing, much as Louis XV had been assured that wherever three people met, a police spy was at hand. Indeed, during the 1880s the police prefect financed the first Parisian anarchist newspaper, writing articles in it that prompted bombing attempts.¹³⁹ The Lyon police maintained a certain secret society so as to have conspirators to arrest or release as government policy demanded.¹⁴⁰ When Captain Renault ordered the "usual suspects" rounded up in *Casablanca*, this was the tradition he drew on.

Detective squads were also established to collect evidence and track down offenders. Detectives thus did what is commonly considered police work, but precisely because most actual patrol work was not like that, separate detective outfits were needed. One of the first was the criminal investigation division set up in London in 1842. Detectives' work habits and tasks differed sharply from the regular police: no uniforms, regular beats, or schedules. Detectives were reactive, delving deeply to solve crimes post facto. They were

in close contact with the underworld, so corruption and graft were common among them. Like vice control, detective work was a tangle of mixed motives and quasi-legal temptations.¹⁴¹

The detective quickly became star of the most popular literary genre ever, barring perhaps the romance. The public was gripped by the narrative thrust, intellectual puzzles, and dramatic punch of the common law world's courtrooms. Dueling attorneys presented competing narratives and their evidentiary backup to a jury of everymen. Starting with Edgar Allan Poe's *Murders in the Rue Morgue* in 1841 and Wilkie Collins's *Woman in White* in 1859, detective fiction became the reading public's staple.¹⁴² Charles Dickens is said to have invented the word *detective*, identifying Inspector Bucket in *Bleak House* (1852) as a "detective officer."¹⁴³ Introduction of the jury trial to Russia in 1864 made possible the use of fictional court cases with their inherent drama, presented as theater, to educate citizens in the early Soviet Union.¹⁴⁴ By the mid-twentieth century, a quarter of all English-speaking fiction and television programs were crime stories.¹⁴⁵ Poe's narrator may have emphasized his detective's almost preternatural reasoning, but Dupin himself pursued evidence with unbridled empiricism.¹⁴⁶ Sherlock Holmes spoke often of deduction, but his method was as inductive as scientific method insisted.¹⁴⁷ In *A Study in Scarlet* (1887), Watson noted Holmes's excellent knowledge of chemistry, anatomy, biology, and geology but also his profound ignorance of literature and philosophy. "Data! Data! Data!," Holmes exclaimed in "The Adventure of the Copper Breeches" (1892). "I can't make bricks without clay."¹⁴⁸

What Police Knew

Most important of the commodities traded by the police was information—the content, of course, but equally the flow. Tsar Nicholas's secret police were his best—and surprisingly accurate

and useful—source of information on the state of his realm in all respects.¹⁴⁹ Their hierarchical organization, military-style command and communications, and strategically located outposts made the police efficient conveyors. Someone reporting a crime could expect that something might actually happen in response.¹⁵⁰ The early Russian police in cities were spaced at stations within eyesight or earshot of each other. Electronics merely amplified this technique. Already in the 1840s, the New York police connected the chief's office with precincts via telegraph.¹⁵¹ With telephone and then two-way radio, help could be summoned at greater distances. Motorizing officers separated policing even more from the crime scene. Today, three-digit emergency phone numbers have annoyingly similar but unidentical three-digit codes: 911 (United States), 112 (European Union, but with local variants for landlines: 110 in Germany, 999 in Britain), 100 (India), 110 (China and Japan), 190 (Brazil), 102 (Russia). Once mastered, they make official emergency responders the first and best source of help. Americans know officers swooping in via car or helicopter as “911 policing.” Having once been a duty for all citizens, rescue became yet another state service, much like the government disaster relief that has mushroomed to cover most uninsured losses.¹⁵² The paparazzi who tailed Princess Diana's car in Paris and then did nothing to save her after the crash were not prosecuted since, as the court noted, one had phoned in the accident. With that, their legal duties had been fulfilled.¹⁵³

The content of what the police knew or could discover was even more important. So long as most crimes pursued were tangible ones committed by offenders tied into networks of kin and community—known people deliverable for revenge or restitution—police were largely superfluous. But a private prosecutory system could scarcely deal with occult crimes that were not evidently known to others or with crimes that had been committed by people who were not members of groups that were willing to prosecute or defend.¹⁵⁴ For the anomic criminal, for offenses requiring investigation, or for

crimes knowable only by probing, kin or other informal arrangements did not suffice.

The state had tackled occult crime from the start. Ordeals—God’s testimony—were intended to solve crimes that might not have witnesses (individual heresy, infanticide) or where witnesses were party to the offense (simony, adultery, incest, sodomy, concubinage, bribery) or could not testify (bestiality).¹⁵⁵ Torture, too, was meant to uncover hidden evidence. But over time, the judiciary’s verdicts came to depend not on supernatural and forced testimony but on circumstantial evidence and other simply empirical and scientific data. As oaths, ordeals, and torture were replaced by observational, scrutinized evidence, policing as an epistemological tool came into its own.

The judiciary found and punished ever more offenders as it grew better able to marshal evidence, constructing convincing cases. And as more merciful sanctions set in, ending popular resistance to how offenders were penalized, only faulty evidence impeded the state in prosecuting criminals. The civil law’s inquisitorial system was more targeted than the common law, with its adversarial confrontation before a jury. Prosecutors’ discretion whether to pursue cases varied, from largely none in nations such as Finland, Italy, and Germany to a great deal in the Netherlands and Norway.¹⁵⁶ But after preliminary investigation, all civil law prosecutors brought forth those cases they considered winnable, thus increasing their hit rate. The common law states attorneys, in contrast, had to decide whether to proceed while armed with less information. And they were at the jury’s mercy, however watertight their arguments.¹⁵⁷

The jury in turn evolved into a mechanism for evaluating evidence. Having been a group of self-informing peers, picked largely because they already knew the circumstances, the jury turned into a forum for weighing evidence of thirdhand events. In the Middle Ages, they had been selected for their personal knowledge of the case. But such contact eventually disqualified jurors as nonimpartial.¹⁵⁸

Once the oath, with its appeal to supernatural intervention, no longer promised certainty and a verdict, jurors had to evaluate the evidence.¹⁵⁹ Sealed in the black box of the jury room, they judged witnesses' credibility, their testimony's verifiability. "Beyond a reasonable doubt" evolved as the evidentiary legal standard at about the same time as the seventeenth century's scientific revolution made testimony of the senses and empiricism more generally the most trusted form of knowledge.¹⁶⁰

The state won cases largely on the evidence supplied from citizens and rounded up by police legwork. Before technology helped them much, the police turned to an unsavory ecosystem of spies, snitches, snoops, stooges, and informers who passed on gossip, denunciations, and hints, all prompted by an array of mixed motives: pay, reward, exemption from punishment, and sometimes even public-spiritedness. Napoleon's *concierges* or the *dvorniks* of St. Petersburg were only the most regularized of the bunch.¹⁶¹ Plato required citizens to report impieties they came across.¹⁶² In early modern England, those who turned in criminals had their own crimes pardoned. Informers ratted on tariff and customs violators and religious dissenters in the seventeenth century and then on violators of Sabbatarian laws and public cursers in the eighteenth. Lutheran pastors in sixteenth-century Württemberg were required to inform on each other.¹⁶³ Informants often made serious money from rewards paid for leads. In the Victorian era, this use of rewards led to scandal and parliamentary inquiries.¹⁶⁴

Old-regime France required brothel madams to file reports on their clients. Prostitutes were handy sources of information in the nineteenth century. French detectives believed that *mouchards* (informants) were as useful to tracking down crime as smoke was to locating fire. Chinese Communists took a similar approach in the late 1940s.¹⁶⁵ The tsarist police enlisted house porters and night watchmen.¹⁶⁶ The Soviet and Nazi secret police relied heavily on denunciations, and no system has ever roped in proportionately as

many snitches as the East German Stasi. Former criminals in China today provide the bulk of informants and information.¹⁶⁷ In modern liberal democracies, too, informers pull their weight, encouraging religious extremists to become terrorists, for example, and thus leading to their arrest.¹⁶⁸ The recent lavish development of conspiracy law has incentivized criminals to rat on their fellow offenders.¹⁶⁹ But, like entrapment, relying on informers means that the police must encourage crime in order then to solve it.

Bounties made lay citizens collaborators with the police. In ideologized states, whether religious or political, denunciation enforced orthodoxy.¹⁷⁰ But denouncers have been found everywhere. In ancient Greece, sycophants were those who turned in offenders for a share of the spoils. In the Middle Ages, denunciation allowed prosecution even of those whom no one wished to officially accuse.¹⁷¹ In seventeenth-century England, neighbors denounced each other at extraordinary rates for sexual deviance.¹⁷² In fourteenth-century Venice, carved lions' mouths on the sides of buildings hid letter slots for denunciations. In Florence a century later, residents' *tamburazione*, anonymous denunciations to the police, initiated many prosecutions. Tsar Paul I placed his infamous yellow box to receive denunciations in front of the Winter Palace in St. Petersburg.¹⁷³ The French revolutionaries—like later totalitarian regimes—elevated denunciation to a civic virtue. Done publicly, it protected the general good against enemies and was therefore allegedly morally superior to the private gain pursued by the old regime's snitches.¹⁷⁴

Informers played crucial roles in early modern Europe. Eight percent of Florence's police budget went to paying them, and another 12 percent to reward those who reported violations of peace and treaty agreements. Minor public officials, the *sindaci*, were selected for each neighborhood, tasked with reporting crime and rewarded by the case.¹⁷⁵ In seventeenth-century England, rewards for evidence leading to conviction became a lucrative element of the justice system—apprehending a highway robber paid £40 and the offender's horse,

arms, and money. Informants on illegal London gin shops collected half the fine, as did their colleagues in the American colonies who reported shoddy merchandise or retail fraud.¹⁷⁶ More than 90 percent of prosecutions under the Statute of Apprentices (1563) were brought by private informers. Many made a profession of informing. In 1699, the “Tyburn Ticket” was granted to those who helped convict burglars, shoplifters, and horse thieves, exempting them from duties in local offices—such as policing their neighborhood as constables. In 1720, the total reward for the conviction of a robber in London was £140, thrice a journeyman’s annual income.¹⁷⁷

Such incentives continue today. Besides the rewards posted on the most-wanted list, information leading to conviction pays off as immunity from prosecution for those who testify as state’s evidence. Bounty hunters are rewarded, as are whistle-blowers—in tax fraud, proportionately to the recouped sums.¹⁷⁸ US state attorney generals’ offices keep the fines they impose on banks for malfeasance.¹⁷⁹ Law enforcement agencies retain some of the proceeds of confiscated crime-related property.¹⁸⁰ Prosecution of some crimes relies heavily on covert information, for example, insider trading, where bounties can reach 10 percent of penalties (which can be thrice the illicit profits). Up to a third of cleared-up crime may be thanks to informers.¹⁸¹

Other surreptitious means of information gathering have evolved with the technology at hand. For centuries, private letters have been opened by state officials, leading to an arms race of competing techniques of sealing, opening, and resealing them. Eavesdropping in the literal sense has occurred ever since there were eaves to stand under, the edge of the eaves marking the legal limit of the private, domestic space.¹⁸² Electronic devices now make for more convenient listening, wiretapping phones, secretly recording conversations, and audio-surveilling homes and offices. Today, we debate government access to email and social media.

Much more of a revolution and not just amplifying the circuits of witnessing was the growing acceptance of empirical and scientific

evidence independent of human testimony. The judicial system's evidentiary base gradually shifted from confession and witnessing to evidence that existed autonomously of anyone involved in the offense. Insisting on eyewitness testimony and confession, Roman law had discounted circumstantial evidence. Interrogation, with torture as its most extreme form, never got beyond witnesses, including possible perpetrators, and their limited and self-interested vantage. Today we forbid torture, not only for humanitarian motives but also for epistemological reasons as likely to produce self-serving and unreliable information. And we understand eyewitness testimony to be inherently unreliable, colored by all manner of influence and but a dim reflection of what happened.¹⁸³ The testimony of facts and the traces of our biological and physical trails instead supply the most illuminating evidence. We are spared the forceful extraction of confession from our souls by the betrayal of our bodies. *Indicia*, once spurned as merely epiphenomenal, have returned as the queen of evidence.

The new evidentiary gold standard relied on induction from knowledge of the world to conclude guilt or innocence, entirely independent of whether the acts in question had been witnessed or even perceived. Knowledge could be uncovered regardless of humans encountering it, having it, or testifying to it. One of Roman law's two queen proofs, eyewitness, came to be understood as unreliable and often outright misleading. Indeed, false or mistaken eyewitness accounts have proven to be the preeminent cause of wrongful convictions.¹⁸⁴ The apparently stolid facts presented by the world instead took their place. Forensic investigations have been performed at least since the physician Antistius claimed that only one of Julius Caesar's twenty-three stab wounds had been fatal and even two centuries earlier in China. Sung Tz'u's thirteenth-century Chinese text on forensic investigation, *The Washing Away of Wrongs*, explained how to distinguish between corpses killed before or after being burned or inundated, how to discern the difference

between hanging and strangulation or between drowning and being drowned, and how to distinguish murders from suicides committed so as falsely to implicate others. With a deft noirish touch, he recommended checking the anuses of unexpectedly deceased elderly husbands married to young wives—to look for hidden penetration wounds.¹⁸⁵ In early modern Europe, mothers who gave birth while alone and whose child died were often suspected of infanticide. Had the infant been stillborn or killed postpartum? In the absence of an unimplicated eyewitness, the lungs of the infant were submerged in water. If they floated, that was considered proof that the child, born alive, had taken its first gasps to inflate them.¹⁸⁶

Early modern Russian peasants killed by beating on planks placed on their victims' swaddled stomachs. This technique destroyed the victims' innards without leaving external traces but was rendered obsolete once coroners began their forensic investigations in the late nineteenth century.¹⁸⁷ In 1905, two murderers were hanged on the basis of a thumbprint on a cash box.¹⁸⁸ In the late nineteenth century, crime photography began to reveal evidence obscure to the naked eye. The disturbed dew drops on a park bench next to the body of an apparent suicide, for example, betrayed the presence of someone else at the scene.¹⁸⁹ In such cases—whatever the merits of the science of the day—nature spoke directly, though not unaided, to the court. We now take cross-examining nature on the stand—the *dramatis personae* of countless courtroom dramas—so much for granted that we are blind to the significance of the change.

Fingerprinting emblemized the justice system's embrace of the new scientific evidence. "Every contact leaves a trace" was the mantra of the investigatory work that underlay forensic science.¹⁹⁰ Fingerprinting was used sporadically in the ancient world and likely developed first in China. It caught on systematically in British India and then in Europe and the Americas in the 1890s. The first trial where fingerprinting provided the main evidence was held in India in 1898. The court accepted that the partial print left behind proved

the suspect had touched a box with stolen money and so convicted him of burglary. But it was still unwilling to accept by the implied logic that he had also killed the box's owner.¹⁹¹

Subsequent technologies have sharpened our observational lens, often demonstrating that earlier techniques were faulty or unreliable. Crime scenes were photographed to scale, footprints measured and cast in plaster, soles typologized, as were automobile and bicycle tires later.¹⁹² Particulate residue in earwax as well as nail and hair clippings gave evidence of activities undertaken even months earlier. Starting in the 1930s, blood typing began to crudely associate suspects with offenses. DNA testing has since become an exact and reliable science.¹⁹³ Together with genetic databases, it now allows criminals to be identified even decades after their offense. Dental records began identifying murder victims. Tooth isotope analysis revealed where victims had grown up and sometimes events of their lives—whether they had been weaned and if they had ever starved. Toxicology pinpointed more wrongful poison deaths. Microscopic examination allowed crime's implements to be identified. Ballistics, the forensic analysis of bullets and firearms, became its own discipline in the late eighteenth century.¹⁹⁴ Chemistry was turned to detecting forgeries—of checks, wills, or artworks.

Over time, some technologies were displaced or discredited. Now supplanted by DNA analysis, the once popular microscopic inspection of hair proved largely worthless.¹⁹⁵ Graphology held the nineteenth-century world in thrall. It still retains adherents but has been largely discredited—indeed, handwriting itself is a technology in steep decline. Alphonse Bertillon—inventor of the mugshot—helped convict Alfred Dreyfus, the Jewish officer accused of treason against France in 1894, with convoluted claims that Dreyfus himself had written incriminating documents using a tracing method as though someone were forging his actual hand, thus giving him deniability.¹⁹⁶ Not that we have freed ourselves of charlatantry. Doubtful technologies of alleged expertise still sway juries, such as

blood-spatter analysis, forensic investigation of clothing, and body-language scrutiny.¹⁹⁷ DNA analysis has instead become the gold standard, revisiting and upending past wrongful convictions based on more primitive technologies. “DNA testing is to justice what the telescope is for the stars,” one of its early practitioners put it, “a way to see things as they really are. It is a revelation machine.”¹⁹⁸ But its precision can and has been overstated, and its seeming accuracy has created problems. A German swab-manufacturing technician (dubbed the “Phantom of Heilbronn”) inadvertently spread his own DNA to evidentiary samples and so appeared to be a prolific serial offender. Transplant recipients receive and incorporate the DNA of their donors and can leave it behind as traces. And people may plant misleading DNA at crime scenes.¹⁹⁹ More generally, such evidence supplies evermore ammunition for the common law’s adversarial system. Experts duel for both sides, leaving juries to sort out whose testimony deserves credence.²⁰⁰

Keeping track of previous offenders has been vital. Mutilation and branding were once both an element of punishment and a convenient indicator of recidivism. Now we use the everyday singularities of the human body.²⁰¹ The British compiled a Register of Distinct Marks in the 1870s on the assumption that criminals’ bodies were individual enough to allow identification.²⁰² Bertillon systematized this approach in the 1880s by measuring bodily dimensions for individual identification. This cumbersome anthropometrical method, Bertillonage, was overtaken by the (re)discovery late in the century that fingerprints were unique.²⁰³ Fingerprinting also had the enormous advantage of combining a system of identification—like Bertillonage—with the evaluation of traces left behind at the crime scene. And today fingerprints can even be dated.²⁰⁴ The more fingerprints, the more useful the database, and so the race was on to expand the files. By 1906, Australian police were routinely collecting fingerprints of known “bad characters under arrest.” By the 1950s, the volume had become so large that some jurisdictions discontinued

printing minors.²⁰⁵ In the United States, the FBI amassed some eighty million fingerprints, only some of which belonged to criminals. Reformers pushed for universal or at least broad fingerprinting of all citizens.²⁰⁶

From the 1840s, photography, too, was used to identify offenders. The Prevention of Crimes Act of 1871 in England established a national photographic record.²⁰⁷ In the 1880s, the mugshot was standardized by Bertillon. Unable to send photographs other than by mail, he also developed a system of written portraits to telegraph descriptions of suspects. This foreshadowed the algorithms that contemporary face-recognition technology uses to express images in machine-searchable formats. But, given the technology of the day, in fact most of these late nineteenth-century written portraits were largely identical, and few suspects without identifying marks were arrested on this basis.²⁰⁸ Like fingerprints, DNA records even of nonconvicts are kept today. In France as of 2003, DNA profiles were collected from suspected offenders, with fines and jail for refusals, and of all inmates serving longer sentences.²⁰⁹

Quotidien Policing

As policing joined the state's machinery, many of its functions blended into everyday life. Data gathering hummed along in the background. Secret police and informers did their work covertly, but information was also amassed openly, often with subjects' active help. This was the "long, laborious, repulsive investigation" foreseen by Edwin Chadwick, the great Victorian social reformer, as necessary for preventive policing.²¹⁰

In the Middle Ages, self-governing towns and cities decided who could live there, just as guilds and other corporations chose who exercised the professions. We take freedom of movement and residence, *Freizügigkeit*, for granted, at least within each nation, but

it was one of the first civil rights won—in France with the revolution as intermediary organizations were abolished. But the state still wanted to know who lived where and worked as what. Deep into the twentieth century, localities could deny paupers residence.²¹¹ The duty to register home addresses, broadly imposed across the European continent, helped police track suspects. Required to record visitors, hotels, too, were dragooned into the effort.²¹² With *livrets* and other work papers, police could monitor apprentices' and journeymen's movements as of the mid-eighteenth century. Passports did the same for border crossings.²¹³ Their analogues also allowed control domestically in nations such as the Soviet Union and China today that restrict freedom of residence. When in the midst of the Seven Years' War Mr. Yorick in Laurence Sterne's novel *Sentimental Journey* (1768) traveled without any papers from London to Paris, the modern reader is amazed by the sheer haphazardness of it all.

Security cameras and traffic monitoring gather petabytes of data, tamed into intelligibility by face-recognition and other ordering technologies. A city dweller in Britain can expect to be filmed every five minutes. Police have become eager consumers of military and other databases. The satellite photos used by the Los Angeles police to place O. J. Simpson's white Bronco at the site of his wife's murder were supplied by a commercial company.²¹⁴ Police speed traps were set up in Britain already with the first speed limits in 1903. Radar and other remote monitoring of driving and random breathalyzer tests have turned all drivers into potential suspects. Even without being considered offenders, we are surveilled.²¹⁵ DNA databases allow authorities to identify offenders using family resemblances from samples of relatives, not just to confirm suspicions of guilt based on other evidence. Automated face recognition coupled with blanket closed-circuit television coverage has undermined the anonymity once expected in public.²¹⁶ Every year the London police crack some two thousand cases using fingerprints and another two thousand with DNA. But in 2016 they solved twenty-five hundred

cases using imagery and face recognition—and more cheaply, too. In 2018, the Chinese police used face recognition to spot a suspect in a concert audience of sixty thousand. The culprit had hoped he would blend in.²¹⁷ Durkheim's proverb "One is nowhere so well hidden as in a crowd" no longer held. Virtual policing at a distance had arrived.²¹⁸

Computer-analyzed big data have begun to routinize the constant background surveillance of all citizens, suspects and innocents alike, begun by traffic monitoring. By uncovering patterns indiscernible to the naked eye, digital analysis lays bare what once was secret—criminal or not.²¹⁹ Indoor marijuana farms in bland suburbia have been betrayed in the days of incandescent lighting by exorbitant electricity bills. Insider trading has been revealed by analyzing stock sales patterns in the run-up to important corporate announcements. Radiologists are being displaced by computerized detection of clinical anomalies in medical scans, and doctors use pattern-recognition technology to diagnose rare diseases that mark our faces. Algorithms have been able to discern the sexuality of photographed persons better than human observers, and they predict recidivism as well as professionals do.²²⁰ The body continues to betray the soul. Without torture, observers can still penetrate our interiors. More mundanely, big data feed the actuarial calculations that foresee who will reoffend. Algorithms analyze homicide data, identifying subtle similarities among cases and thus indicating serial killers at work.²²¹ Police forces in Chicago and New Orleans have data trawled through police records, social media, and auto records to identify likely future offenders and crime hot spots. Though the results have been mixed, the trend is undeniable.²²²

Today's data-drenched surveillance technologies arguably reach on a global scale the transparency and lack of privacy once characteristic of the village community. Urban anonymity and the policing functions it required may turn out to have been a two-century blip in a longer continuity of panoptic self-policing. As more accurate information is gleaned from freely available observation,

strengthened privacy may not suffice to shield citizens. Laws protecting privacy assume that legally enforceable ignorance of what you want to keep to yourself is a goal in itself, worth defending. In fact, privacy is but a crude and indirect means of achieving the real aim: ensuring that we do not suffer from others knowing what were once our secrets. When we no longer can hide information, privacy promises little. Assuming instead that greater transparency is inevitable, whether privacy protections are beefed up or not, it is arguably better to protect against being persecuted by others who now know what once was kept under wraps. We achieve autonomy more effectively by strengthening other rights than by hiding behind an ever less opaque veil of privacy.

Policing has also been baked into everyday life by gradually hardening the environment against crime. Theft, for example, was once a different sort of offense. There were fewer things to steal, and they were more easily identifiable because hand-made and unique. Even coins were once—in medieval Iceland—individually identifiable.²²³ With the largely interchangeable artifacts of mass industrialization, however, theft is often not worth the bother of investigating. Women's jewelry, its sentimental value often greater than its market value, is among the last kind of item we seek to retrieve, not just to replace. We have instead socialized theft's cost through compensation or insurance, simply substituting largely fungible goods. Items whose return is worth pursuing we make even more unique by tagging them with serial numbers or other identifiers (and sometimes even by swabbing them with human DNA). Yet even with mass consumption, society seeks to make fungible goods less available. Early modern burglars often tortured their victims to reveal where valuables were hidden.²²⁴ Today safes and bank deposit boxes have the musty air of a declining technology. Muggers might force victims to reveal their ATM pin codes, but the amount and number of withdrawals that can be made are limited, anyway. Credit instruments have reduced the valuables in circulation. In the early nineteenth

century, cattle salesmen who once carried cash began using checks, postdating them so that if they were stolen, the funds could be frozen.²²⁵ Stripping cash out of retail transactions has diminished the incentives for theft. In return, crime has gone cashless, too, targeting digital repositories of value—identity theft, internet fraud, and the like.

Theft is now an increasingly socialized risk, yet it has also become more difficult. The early modern thief faced few obstacles. Today, there is more to pilfer, but it is harder to do so. Locks have become evermore intricate, resistant, and cheap—allowing everyone the security of the rich person's strongbox. Lockpicking is a skill in terminal decline. As simple bolts, locks merely impeded intrusion into an occupied space. The development of the key allowed owners privacy and security even when they went out. Homer described an early version of such a contraption, and Christ promised Peter the keys to heaven.²²⁶ Locks were two-faced. They protected people from each other and from the state. As in our own debates over encryption software (a digital lock), the state also demanded access to physical locks for its own authorized purposes. In Plato's republic, the Guardians—with nothing to hide—were forbidden locks on their doors. When that prohibition was no longer possible, the state still demanded entry. Following a bombing of the tsar's train in November 1879, the authorities ordered St. Petersburg students to leave their keys in the door, allowing the police to enter at will. The Nazis required known criminals to leave duplicate house keys with the police.²²⁷ The US Transportation Security Administration-approved luggage lock is the modern version of this *pas de deux* of citizen and authority. It protects us against each other but not against the state and its authorized intrusion.

Making the environment crime resistant goes back almost as far as the lock itself. The Statute of Winchester in 1285 prescribed what current terminology calls "target hardening" of highways between market towns. They were to be broadened, with woods and hedges

pruned back on either side to eliminate hiding places for robbers.²²⁸ In the late seventeenth century, London required house owners to light public spaces by hanging lanterns in front of their homes between nightfall and curfew's onset. Only in the following century did that become a municipal task, centrally organized and paid by taxes. Robberies on highways were down, Edwin Chadwick celebrated in the early nineteenth century, in part because street lighting discouraged thieves.²²⁹ Just as sunlight is the best disinfectant, Supreme Court justice Louis Brandeis agreed, so electric light is the most efficient policeman.²³⁰ Lest we forget how terrifyingly criminogenic darkness was in pre-electric days, recall that committing an offense at night was long considered an aggravating element—as late as in the Napoleonic penal code. Burglary even today, defined as a nocturnal crime in Britain, can be punished more harshly than its daylight pendant, housebreaking.²³¹

In our own day, ordinances in Florida hamper robbery by requiring late-night convenience stores to remove window ads, making their interiors visible from the street.²³² Shopping centers broadcast high-pitched sounds audible only to young ears to discourage teenagers from congregating. In the United States, post-9/11 federal buildings were built to resist bombs, while not resembling bunkers.²³³ Over the years, coins were made harder to shave, paper currency less easy to counterfeit, checks more difficult to forge.²³⁴ Credit cards once required signatures, then pin codes; phones needed pin codes, then finger prints or face recognition. Safes became harder to crack, cars more theft resistant. Ignition keys stopped thieves from starting cars, and steering-column immobilizers prevented them from being driven even if hotwired. Improved registries of ownership impeded selling stolen vehicles for parts. GPS technology can locate stolen automobiles almost instantly, and kill switches immobilize them. Thefts of cars have plummeted (by 96 percent in New York City since the 1990s), with only older models still targeted.²³⁵ A fully crime-resistant environment will eventually leave little to chance,

constantly supervise its residents, instantly monitor outsiders, and never allow offensive situations to arise. In other words, we will one day live in something akin to today's theme parks.²³⁶

Preventive Policing

Policing has been a preventive enterprise from the start. Making punishment collective gave many a stake in encouraging would-be offenders not to act in the first place. While society was organized in small communities, the state had little choice but to hope for enforcement from families, towns, corporations, and churches. Though the state might make the initial move, last-mile policing fell to civil society. Sureties and bonds required such intermediary groups to vouch for their members' behavior, often punishing everyone if individuals strayed. In China, groups of five to ten households were held responsible for each member's conduct. The *silin* were the immediately proximate households that were duty bound to keep an eye out for illegal or immoral behavior and reform or report it. Failure to report criminal activity could result in bisection at the waist, while those who turned in offenders were rewarded like those returning from battle with an enemy's head. Family members could also sometimes substitute for each other in serving prison sentences. In the 1950s, the Communists saddled work units with similar collective policing duties.²³⁷

Sureties in pre-Norman England held those who had posted them—sometimes the entire community—liable for the actions of others and subject to the punishment the offenders dodged by failing to appear for trial. Most extremely, those who acted as sureties were required to kill their charges if they continued to offend.²³⁸ The Statute of Winchester continued this system, imposing collective responsibility on the hundreds. Under the frankpledge, every adult male was enrolled in a group of ten (a tithing), and it in turn

in a group of one hundred, which guaranteed the appearance of its members in court and paid fines in their absence.²³⁹ Aztecs punished kin for both treason and drunkenness by their family members. In fifteenth- and sixteenth-century Russia, communities were collectively fined or flogged for members' transgressions.²⁴⁰ Revolutionary France, which otherwise mandated individual liability, held communities collectively responsible for violent crimes and damages, except when offenders were demonstrably from elsewhere. The Soviets and Nazis punished and sometimes executed families of deserters.²⁴¹ In the era of community policing, everyone was in effect a vigilante.

As with most other early means of enforcement, even when policing finally fell mainly to the state, sureties and bonds remained—used against labor leaders in the United States in the 1930s and against antiwar demonstrators in the 1960s.²⁴² Canadians can still demand sureties, obliging each other to keep the peace. Anyone who fears harm to person or property or to spouse or child—for example, sex with a minor or publication of intimate photographs—can ask a court to require the defendant to sign a recognizance, promising to behave, with prison a threat otherwise. In 2014, a Canadian radio broadcaster, fired after allegations of sexual harassment, avoided one charge by agreeing to a peace bond guaranteeing his good behavior for a year.²⁴³ Chinese corporations are expected to police their employees even outside the workplace and are held accountable for their offenses.²⁴⁴ Bail grew out of the English variant of this approach in the thirteenth century. Prisoners were released into the custody of sureties who vouched for them. No distinction was drawn, legally speaking, between being in jail and being under the guardianship of the surety. This system broadly continues today in the United States, where commercial bondsmen have full custodial rights over bailees, whom they guarantee to bring to trial.²⁴⁵

Even more obviously preventive were individual pledges of good behavior. Ulysses famously tied himself to the mast to avoid succumbing to temptation. The Egyptians formalized the precautions

individuals imposed on themselves. A man whose family tomb abutted another's was made to swear in court that should he steal from the neighboring grave, he would be impaled, and his nose and ears cut off. Another Egyptian promised in court that if he divorced his wife, he would suffer a hundred blows and forfeit his share of their common property. Medieval Europe's peaces obliged men to abjure violence, punishing them if they violated their word. In fourteenth-century England, the binding-over system gave the authorities—often prompted by private parties—power to require certain behaviors of someone on payment of a bond, which would be forfeited in default.²⁴⁶ Justices of the peace in Britain could demand sureties of those who threatened to beat or kill others, who brandished unusual weapons, who spoke intemperately, or who were quarrelsome. Indeed, anyone could demand sureties if willing to swear to the truth of the threat. Those of demonstrably bad character were also liable: people who consorted with prostitutes, badmouthed the authorities, slept during the day or were out at night, sired illegitimate children, or were thieves, eavesdroppers, drunkards, cheats, or vagabonds.²⁴⁷ Released prisoners in France had to post a cash security and could be ordered to live where the authorities designated, which as of 1851 meant outside of Paris or its suburbs.²⁴⁸ More generally, the institution of the oath was a form of preventive self-policing, the act of committing oneself to a certain standard of conduct.

Policing in the form of *Polizei* was inherently preventive. It was woven into society's fabric, ordering and regulating almost every aspect of the community. As social engineering, it sought to prevent not only crime but also poverty, disease, hunger, pollution, unemployment, addiction, bad housing, illiteracy, and, indeed, most other social ills. The French revolutionaries designated part of policing as administrative, tasked with maintaining public order and thus with preventing offenses.²⁴⁹ What the English considered preventive policing—the scarecrow function of men in uniform—was by comparison much narrower: deterring by making police presence

obvious. *Polizei*, in contrast, dealt with the causes of crime by regulating society as a whole. Yet even the continental nations eventually narrowed the police role to solving crimes and maintaining order in the superficial sense of public placidity. Modern policing let society run its course, reacting only in a specific and localized manner to punish transgressions after the fact.

Nonetheless, modern policing also had its preventive aspects. If crime were worth punishing after the fact, all the more reason to sidestep it in the first place. Spies and informers gave the police a head start on offenses. As we have seen, the law began to intervene evermore anticipatorily. Policing followed suit, expanding from a post facto reactive rounding up of miscreants to a preventive throttling of crime in the cradle. Preventive policing had been baked into traditional society's small *gemeinschaftlich* communities where privacy was scant and everyone's business public knowledge. Strangers could not settle there, and no one was unknown. Reputation was part of society's informal information control. But in the anonymity of big cities, the authorities had to grow their own ears and eyes. Surveying the world from the compact urbanity of late eighteenth-century Edinburgh, Adam Smith noted that people in small communities were known, their actions observed. By misbehaving, they forfeited their good character and reputation. But in large cities residents could do as they pleased.²⁵⁰

Bereft of help from offenders' kin or community, metropolitan police had less chance to solve old crimes and therefore an incentive to prevent new ones. By surveillance, spying, warnings, and anticipatory arrests, police identified and supervised potential offenders, seeking to forecast what was coming. When the London bobbies were first organized in the 1830s, they were reactive, maintaining a public presence to deter crime and responding when that failed. But police gradually began investigating on their own initiative, gathering data to foresee and solve crimes, and deciding whom to keep tabs on. They even organized or facilitated transgressions to elicit

offenses (i.e., soliciting sex, offering bribes or to buy drugs, receiving stolen property, and even paying for murder), thus entrapping the too easily tempted with sting operations.²⁵¹

Like the law, the police were preventive in different ways. Most rudimentarily, they deterred. A constant, uniformed, visible police presence reminded citizens they were under scrutiny. London watchmen occupied their stations throughout the night, while town criers walked the streets.²⁵² Nighttime curfews kept potential miscreants in bed. Police actively patrolled neighborhoods, seeking out crime and not just waiting for burghers to report offenses. The London and New York forces made such proactive intervention part of metropolitan life.²⁵³ In the words of the instructions issued to its superintendent in 1829, the London police should make “it evident to all such that they are known and strictly watched, and that certain detection will follow any attempt they may make to commit the crime.”²⁵⁴ By their continual presence, Patrick Colquhoun’s London river police deterred theft of cargo from boats. The French rural police of the nineteenth century, the *gardes champêtres*, were also said to prevent merely by being there.²⁵⁵

Uniformed officers were visible deterrents—at least until they became taken for granted. As in the military, uniforms held their wearers to account. Much as mercenary soldiers in military regalia were dissuaded from melting away in battle, so uniforms hampered the police from repairing to the nearest bar rather than walk their beat in the cold. And it held them responsible. By contrast, plainclothes police occasionally shirked duties or acted unaccountably—as they sometimes do today.²⁵⁶ Uniforms also kept police from secrecy, stealth, or subterfuge. The English made much of how their bobbies in blue (not red, the military color of the day) were the antithesis of the continent’s civilian and therefore secret police. Though not conventionally uniformed, the London police were recognizable in their blue-tailed coats and top hats (which were reinforced so that in a pinch they served as stools to peer over walls). To avoid being

confused with autocratic secret police, bobbies wore their uniform even off duty.²⁵⁷ The Parisian police of the eighteenth century also patrolled in uniform. The *sergents de ville* sported blue uniforms, bicorne hats, and a white cane during the day but a saber by night. By the late nineteenth century, European police were uniformly uniformed, with the most splendid regalia found in Hamburg, the shabbiest in Glasgow.²⁵⁸

The issue was more complicated in the United States. Uniforms were initially resisted to avoid suggestions that police were a military-style force but also because they were considered socially degrading. In the 1830s, even servants refused livery, as did railroad conductors and police. They gave in only later in the century as labor-market competition heated up. In 1844, officers in New York trialing new blue uniforms were hissed and stoned. Yet uniforms eventually won out. They enhanced the police's moral authority and also helped civilians avoid picking inadvertent fights with authorities in civvies. In 1853, New York police began wearing them on a regular basis.²⁵⁹

To this day, the police deter crime through an ongoing public presence. Zero-tolerance policing, introduced in the 1980s as a constant neighborhood patrolling, deliberately turned away from the hyperreactive 911 style of policing at a distance. Even with the most rapid 911 response times, police nabbed only a tiny fraction of criminals in the act (3 percent in some studies). Tactics were therefore rejiggered. Officers continuously patrolled on foot, exercising a low-level discretionary authority to maintain order. That returned them to the scarecrow function implemented by the London bobbies more than a century earlier.²⁶⁰ Community policing likewise provided a constant uniformed presence and a willingness to handle disorder and minor offenses, not just intermittently pursue serious crime. This made policing a more persistent, intrusive, and ongoing intervention into communities than the 911 style. Day after day, the police warned and advised, sending drunks home in taxis, shooing juveniles off the street, warning lovers to shun dangerous

parks, cautioning the disorderly.²⁶¹ Everyday policing approximated the Japanese model, where officers behaved more like postal workers, patiently following quotidian routines, than firefighters, roused only in emergencies. Most Japanese police work not in patrol cars, but from local mini stations, the Koban, keeping an eye on neighborhoods.²⁶² Similarly, the Chinese use “grid managers” as a form of community control to keep an informal check on residents.²⁶³

As we have seen, target hardening, or building crime resistance into everyday infrastructure, also rudimentarily prevented offending by tamping down opportunities and temptations. A variant was the increasing passive knowledge that police collected on citizens. Routine sobriety checkpoints and other forms of suspicionless testing, such as workplace drug probes, identified offenders and encouraged compliance by heightening the risk of being caught.²⁶⁴ Broad, possibly universal DNA collection will likely soon dampen offending—at least by rational would-be perpetrators. As the traces we leave behind in public reveal evermore information about us (about our diets from a dried drop of sweat via metabolite analysis, for example), our hope of keeping secrets will diminish.²⁶⁵

Deterrence and everyday keeping order were just the start of the preventive effort. Deterrence did not demand any deep investigation, though omnipresent authority—its trump card—required resources. Moving beyond deterrence, the authorities also sought to get out ahead of crime. As new crimes were formulated, the police’s remit expanded. Thoughts—the motor of potential offenses—had long been under the glass. As the concept of inchoate offenses developed, the authorities had to investigate before or in the absence of the fact. Crimes without victims or witnesses could not await first being reported, nor could offenses where victims might not even know they had been harmed—fraud, say, or toxic-waste dumping.²⁶⁶

Some preventive policing was direct and uncomplicated. In the 1930s, US police goon squads targeted violent criminals who enforced business deals or extorted payments. These offenders were known

to the authorities, who cruised in patrol cars until they recognized one, beating and disarming him. Decoy units were used to catch robbers, sting operations to nab burglars. Illicit-drug marketplaces were patrolled, and special units kept tabs on repeat offenders.²⁶⁷ The police sought those most likely to offend. They extrapolated from past behavior and the characteristics of specific groups to anticipate future acts. Certain categories of people were statistically likely to have offended. Belonging to one was therefore often treated as tantamount to having committed a crime. Predictions based on past conduct or on characteristics statistically associated with offending justified laws that targeted certain statuses or behaviors as proxies for others. Being statistically associated with offending often became a crime in itself.

Such guilt by proxy was not new. Those classified as *landschädlich* (harmful to the land) in the twelfth century (mainly robber knights and peasant vagabonds) were not allowed to defend themselves by oath and thus were legally disadvantaged. Nightwalkers were considered inherently suspicious and punished. Scolds were chastised in the early modern era for being just that and so made to wear bridles.²⁶⁸ In sixteenth-century England, Jesuits were declared ipso facto traitors. In early modern and Victorian Britain and in the Napoleonic penal code, being a vagrant was punished regardless of any specific acts.²⁶⁹ Loiterers could be arrested for that reason alone in England as of 1824. So in 1829 could loose, idle, and disorderly Londoners as well as anyone lying down or loitering in public between sunset and morning.²⁷⁰ Loitering with intent to commit a felony was punishable, and after 1869 even the intent was not required for former convicts. The interwar fascist regimes also singled out political opponents and so-called asocial elements, aside from their supposedly racial enemies.²⁷¹ Japanese Americans were interred during World War II as enemy sympathizers because of their ethnicity. In 1934, New Jersey outlawed being a gangster, defined—among other ways—as possessing a machine gun while not in the military. A

Chicago ordinance in the 1970s forbade habitual drunkards, addicts, prostitutes, or felons from meeting in public.²⁷²

Gang membership has often been criminalized.²⁷³ If done in high-crime areas, otherwise legal behaviors have allowed police to stop suspects. British police gained broad powers to temporarily contain suspects, excluding certain categories of people from specific areas, stopping and searching, detaining for questioning, and remanding them to custody.²⁷⁴ Tax authorities have used algorithms to identify filers worth auditing. Terrorists have been targeted as such, before any act.²⁷⁵ Airport-security profiles justify pulling aside likely hijackers or drug couriers. Police have employed an array of shorthand descriptions of potential offenders: the car-thief profile, the poacher profile, the serial-killer profile—and, of course, not forgetting the alimentary-canal-smuggler profile. With a touching faith in reverse psychology, one Florida state trooper developed a drug-courier profile that targeted those who hoped to avoid drawing attention by driving through his remote beat precisely at the speed limit.²⁷⁶

Though modern policing sought more sophisticated criteria, it relied most heavily on past offenses to calculate the probability of future transgression.²⁷⁷ However crude, bygone behavior proved to be the most reliable indicator of that to come. Crime came to be seen not just as a one-off, spontaneous fluke but as the outcome of character, habit, or proclivity. Sentencing recidivists more harshly followed logically as a preventive tactic, even though it targeted the person more than the act. Recidivism was a self-fulfilling prophecy. As record keeping improved in the late nineteenth century, the British and French authorities recognized that crimes were disproportionately committed by a small group of hardened *roués*.²⁷⁸ In Britain, the Habitual Criminals Act of 1869 imposed seven years of police supervision for second-time felony offenders, with swift summary punishment for subsequent crimes.²⁷⁹ As of the 1880s, France relegated repeat offenders to penal colonies for life, while Italy used *domicilio coatto*, a form of internal exile.²⁸⁰

Louisiana passed a habitual offenders statute in 1870, allowing doubled and tripled prison terms for second and third offenses and a life term for a fourth. Britain's Prevention of Crime Act of 1908 targeted repeat offenders with indefinite preventive detention added to the sentences already imposed. US laws in the 1930s imposed life sentences for fourth felony convictions.²⁸¹ American three-strikes (habitual-offender) laws in the 1990s followed a similar logic. Ever-harsher subsequent punishments were not tailored to the crime but assumed that past offenses predicted future ones. They were in effect a form of preventive detention. Unfortunate results followed, such as lifelong prison for petty thefts, which had been haphazardly classified as felonies.²⁸²

Predicting future behavior on the foregone meant believing that past acts betrayed a quality likely to repeat itself. Based on psychology, as a reading of character or proclivity, this type of prediction might have been plausible. Based on actuarial calculations associating certain citizens with particular behaviors, however, it had at most probability going for it. Two big problems bedeviled such reasoning. First, requiring a history of transgression meant that offenders were identified as recidivists only late in their criminal careers. Yet offending is largely inversely proportional to age, the old obeying the law more than the young. When someone could finally be identified as a dangerous recidivist, chances were that he no longer was.²⁸³

Second, if recidivism were a proxy for an underlying causal variable, then the problem had only been pushed back one level. To suspect someone on the basis of demographic, economic, social, or other indicators came close to criminalizing a certain status. But if a status were outlawed, how could being in breach of that status ever end? Status based on volitional behaviors was one thing: scolds could perhaps bite their tongues, vagrants find housing and a job. But being born in a poor neighborhood to immigrant ethnic

minority parents was a potentially lifelong condition, impossible to overcome. Even so, targeting status rather than act proved a durable policing tactic. In 1962, the logic was challenged in the United States when a law making it illegal to be an alcoholic was struck down.²⁸⁴ Yet to distinguish legally between status and act proved difficult. Sometimes status made certain acts unavoidable. The homeless had no choice but to sleep and drink in the open. So laws forbidding public drinking, though technically targeting acts, effectively also punished status.²⁸⁵ Rarely has jurisprudence come so close to Anatole France's trenchant *bon mot* about the law in its majestic impartiality forbidding both rich and poor from sleeping under bridges.

Despite flaws, actuarial predictions have increasingly been used to target recidivists and thus to prolong their sentences by denying them probation or parole and supervising them after release. The authorities have also moved to prevent future acts by the potentially dangerous. Restraining orders, antistalking orders, antiloitering laws, limits on residence and employment, and restrictions on weapons have been tactics. In Chicago, thousands of young men on a "heat list" of those statistically predicted most likely to die in violent crime are warned by teams of detectives and social workers of their risk in hopes of turning their lives around. In Kansas City, police routinely gather young—often Black and Hispanic—lawbreakers to caution them that if caught again even for minor infractions, they will suffer the severest penalties possible.²⁸⁶ Extreme risk protection, or "red flag," orders allowed authorities to deny access to weapons for those thought to pose threats. The US "war on drugs" permitted police to serve search-and-arrest warrants on sellers and users preemptively through no-knock raids.²⁸⁷ The implements of crime were also targeted. As we have seen, possessing the requisite tools has been used as evidence of inchoate crimes such as conspiracy and attempt. Targeting mere possession made it easier to prosecute. Confiscating tools mixed prevention and

punishment.²⁸⁸ Impounding a john's auto might deter prostitution, but it also punished his wife as its co-owner. The same held for the house where drugs were stashed. Confiscating the cash intended for a drug buy became in effect a fine on intent.²⁸⁹ Together with punitive fines, such civil asset forfeitures built on the logic of deodands—punishing the things that had offended—and added a retributive element to civil cases.²⁹⁰

Preventive sentencing, too, has become a large-caliber weapon in the arsenal of anticipatory enforcement. Why, after all, identify likely offenders if not to render them harmless? Subordinating individual rights to the public good, sentencing in anticipation of offending has understandably sparked controversy. Law enforcement here adopted a technique long common in public health, restricting the freedom of those whose travels, contacts, habits, or proclivities made them epidemiological threats. A community danger justified civil rights restrictions.²⁹¹ The Old Testament imposed isolation and cleansing on those with unclean bodily discharges.²⁹² In fourteenth-century Venice, arrivals on ships from infected ports were detained for the forty days that the medicine of the day took to be the plague's incubation period. Suspected prostitutes were compulsorily tested for venereal disease in the nineteenth century. If infected, they were detained and treated. In the 1980s, Swedish and US authorities jailed HIV seropositives who continued to have unsafe sex.²⁹³ Sufferers of drug-resistant tuberculosis have been compulsorily medicated and sometimes detained, epileptics and narcoleptics forbidden to drive.²⁹⁴ Modern citizens suffer legally imposed bodily violations such as vaccination for the community's good. The motives of such interventions mix concern for the afflicted with the desire to protect society at large, but the results impinge on the rights of individuals. All nations permit drastic interventions in emergencies. Faced with the coronavirus pandemic in early 2020, China imposed mass quarantines on several

cities. Even otherwise liberal Denmark enabled its authorities temporarily to compel inspection, isolation, vaccination, and treatment of victims, end public assemblies, blockade neighborhoods, shut down transportation, forbid visits to hospitals and care homes, and close institutions.²⁹⁵ Thanks to the gravity of the potential consequences for not acquiescing to such public-health legislation, it has been broadly uncontroversial despite its draconian effects.

Preventive sentencing—selective incapacitation—expanded this logic to more people.²⁹⁶ Those judged to be risks could be detained or restrained even before trial. Already imposed sentences could be extended. To avoid the penal code's due-process restrictions, civil law was mustered to give the authorities more leeway.²⁹⁷ These impositions—not for offenses committed but for ones that might occur—moved punishment far from its retributive foundations. Not only were predictions unavoidably vague and often inaccurate, but even had they been true, holding potential offenders accountable for crimes not yet committed also amplified the utilitarian logic of subordinating individual rights to community needs.

In principle, an accused is presumptively innocent before being convicted and should therefore not be incarcerated, but detaining arrestees even before trial and conviction has become more common. Many nations make little or no use of bail or other means of pretrial release: most of the European continent and Japan, for example.²⁹⁸ Half of all prisoners in Italy and France remain jailed on remand, awaiting trial. Suspects in Japan can be jailed for twenty-three days before charges are brought.²⁹⁹ Even in the Anglo-American systems, the role of bail, which has been used since the early Middle ages, has shrunk. In England, a third of defendants are held in custody before trial, on average for nine weeks, though a quarter of those for up to half a year. In the United States, the bail bond industry allows release for those able to pay (usually 10 percent of bail). Even so, about a third of US arrestees remain jailed until trial.³⁰⁰

Not only those accused of crime were jailed before trial. Pretrial detention was the obverse of bail. Rather than assuming innocence before guilt was determined, even those whose offense was merely being potentially dangerous were jailed. Starting in the 1960s, the US and Britain passed laws allowing pretrial preventive detention. These laws made explicit judges' informal ability to detain suspects preventively by setting excessive bail. Judges could then deny bail to or impose other restrictions on defendants considered likely to commit crimes in the interim.³⁰¹ After trial, the sentences of those deemed to be risks have also been extended. Most countries allow prolonging the sentences of defendants considered special threats. The Netherlands have "detention at the Government's pleasure," for two years at a time, indefinitely extendable by court decision; the Germans have *Sicherungsverwahrung*. Canada, too, allows preventive detention for indefinite terms of those considered habitual criminals.³⁰² This tactic is also applied to sex offenders, as discussed in the next section.

To defang objections to this side-stepping of due-process restrictions, the civil law was also roped in. Civil preventive orders were marshaled against offenses that although perhaps not quite criminal were sufficiently noisome to be worth targeting.³⁰³ They imposed punishments similar to the penal code, including jail, while having to meet only the civil law's lower standard of proof. In the United States, such orders began being levied in the 1970s against gangs and juvenile offenders as well as against nuisance and public-order behaviors and drug- and alcohol-related conduct. The Supreme Court allowed civil commitment of the potentially dangerous without the full due-process protection of criminal cases.³⁰⁴ Britain, too, enthusiastically adopted the technique early in the new millennium. A dozen variants emerged, from Anti-Social Behavior Orders (ASBOs) to Serious Crime Prevention Orders, Risk of Sexual Harm Orders, and Terrorism Prevention and Investigation Measures.³⁰⁵ Authorities could close noisy or drug-infested premises, pursue

parents of chronically truant or misbehaved children, restrict where sex offenders could live or work, restrain people from harassing others, and disperse groups in public. ASBOs could last indeterminately and apply to offenders as young as ten. Breaching them was a criminal offense punishable by prison for up to five years or fines or both.³⁰⁶ Allowing the authorities broad discretion against low-level behaviors that individually might not have triggered sanctions but that collectively and over time were a nuisance, ASBOs were often eccentrically applied: the pirate DJ who had broadcast from a top floor forbidden ever to set foot in a building taller than four stories; the car thief prohibited from entering any parking lot anywhere for any purpose; the suicidal woman who had to promise not to approach rivers, lakes, or railway bridges; the hip-hop musicians forbidden to mention death, injury, or competing musicians in their songs.³⁰⁷

As the definition of crime expanded, the authorities were evermore concerned with risks, not committed offenses. Getting out ahead of crime meant investigating plans drawn up, intents formulated, conspiracies hatched, and dangers posed. Interrogative techniques were developed to ascertain what was being planned. Police noted, for example, that although dissembling about past events was often less detailed than truthful recounting of what had happened, for future plans the level of detail—with no actual experience to narrate—between false and true accounts was largely similar.³⁰⁸ Once the authorities began trying to prevent risk, few behaviors were indifferent, and almost all citizens potentially posed a threat.³⁰⁹ Preventive detention inevitably affected many false positives, people who were locked up even though they would have committed no crime. But falsely jailed innocents were less conspicuous in the media and political debate than the guilty set free to offend. Once established, a preventive system thus invariably generated data in favor of its expansion.³¹⁰ The logical extreme was universal preventive detention, the ability to detain anyone considered a possible threat. In effect, all citizens began to be treated as parolees.³¹¹

Catholic inquisitors rooting out Cathar heretics in thirteenth-century Languedoc had taken this approach. All sentences were for life, in principle. Even after the sinner had been released, the issue could be revisited at any moment, adding new penalties for relapses or extending existing ones.³¹² Indeterminate sentencing and conditional release, practiced increasingly in most Western nations as of the late nineteenth century, applied a similar logic. Whether in or out of prison, offenders remained within the carceral loop. Laws on habitual criminality in the English colonies, modeled on the homeland, permitted police to keep discharged prisoners under surveillance and to search the dwellings of those suspected of receiving stolen goods. The Prussian penal code allowed indefinite detention of thieves and other dangerous offenders until they showed they could provide for themselves honestly on release. Napoleon imposed postrelease surveillance on former prisoners that lasted from two years to life, depending on the offense, with the authorities allowed to decide where they could live.³¹³

In 1877, the prison administrator Zebulon Brockway proposed a law in New York to make all sentences indeterminate, releasing only the compliant. This law was adopted only partly, and parole and probation have fallen out of favor in the United States since the 1970s. But something like indefinite sentencing is now imposed, as we will see, on sex offenders.³¹⁴ In New York City, a common outcome of misdemeanor arrests is to adjourn the case for some specified time, then dismiss it if the defendant has not been rearrested in the meantime. The British Criminal Justice Act of 2003 allowed mandatory life sentences. Prisoners could be released at the discretion of the parole board but remained on license for life, reincarcerated if judged a risk.³¹⁵

Universal preventive detention, where all citizens are treated as parolees, differs from our own state by degree, not kind. We are all on notice. At the end of Franz Kafka's novel *The Trial*, the court

artist tells Joseph K. that final acquittals are elusive, the court forgets nothing, and he can be hauled before it again on renewed charges. Any citizen who offends is naturally subject to official attention. Yet as the definition of crime has expanded to new acts and to ever-earlier preparatory stages of potential offenses, the chances of being investigated have expanded, too. In no case is that truer than with sex offenders.

Sex Crimes

Though homicide is the oldest crime, rape must have been a close second.³¹⁶ As long as there has been law, it has been punished—though motivated at first more by the damage done the property interests of father, lord, or husband than by consideration for the woman. Male-on-male rape has long been punished, too—primarily as a violation of strictures on sodomy.³¹⁷ Statutory rape expanded the offense as the age of consent was raised. That change required adjusting for the relative ages of the parties involved, distinguishing between older predators and young lovers. What counted as consent has been debated, too, as reformers sought to ensure that rape was treated as a real crime, not merely an indiscretion. Allowing adultery to be punished within the family was long tolerated. Today, sexual betrayal is no longer considered a crime and excuses neither battery nor murder.

Sex crimes became the object of particular attention at the turn of the millennium, especially pedophilia. Even while the incidence of rape and sexual assault was falling, convictions for sex offenses quadrupled in the 1990s. Between 10 percent and 20 percent of state prisoners in the US are now locked up for such reasons. Incarceration for child porn and other sexually explicit material increased more than sixtyfold between 1996 and 2010.

Because pedophilia—along with incest and cannibalism—is universally regarded as viscerally repugnant, few objected as punishments grew more severe. Sentences for pedophilia and child pornography lengthened. The PROTECT (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today) Act of 2003 in the United States imposed mandatory life on those convicted of child sexual abuse for a second time. Arizona required ten-year sentences for each illegal porn image possessed, thus life in most instances. The average federal child porn sentence became longer than for all other crimes except murder and kidnapping.³¹⁸ Long criminal sentences for pedophilia are now often supplemented by extensions under civil law, allowing offenders believed likely to recommit to be held beyond their initial verdicts—sometimes indefinitely.³¹⁹ In 1997, the Supreme Court upheld an instance of someone civilly committed for life in anticipation of crimes he might commit.³²⁰ The Adam Walsh Act in 2006 allowed sex offenders to be detained indefinitely after their sentences were complete if they were considered dangerous. Nor did such civil detentions count as a double-jeopardy bar to criminal prosecution for the same action.³²¹

Sexual harm against children, including real-life pornography, is indisputably evil. Virtual pornography—comics, anime, drawings, and the like—poses the question of what precisely is being prohibited. If no actual child has been harmed in making it, how and why are viewers of it culpable? For their thoughts? For the corruption of social morality that follows when some are depraved in private (much as Devlin had insisted that private immorality is as impossible as private subversive activity)? What is the underlying crime? Is it enhanced when technologies go beyond two-dimensional porn, allowing viewers to participate actively in on-screen or soon-to-be fully immersive virtual-reality experiences of seducing, raping, or worse? Should it be a crime to sexually violate in cyberspace? Or to do things to pretend minors (virtual ageplay) that would be illegal in the wetware world? *Second World*, a virtual ecosystem, for

example, allows sex with minor avatars.³²² No doubt it is but a pale simulacrum of what fully developed virtual reality will soon deliver. The burgeoning sex-robot industry also stands ready to tailor product to any taste—including devices resembling specific identifiable children.³²³ Should virtual rape of a facsimile of an actual human be treated as similar to inflicting emotional distress?³²⁴ Would we then be outlawing ideas or fantasies outside of actual harm?

Those who advocate forbidding even virtual pornography have marshaled a Devlian logic on the collateral social damage that follows in immorality's wake. First, much virtual porn still manipulates images of existing children, thus harming actual victims. Arguing that their materials were virtual, pornographers have in fact sometimes been exonerated.³²⁵ But even born-digital images, with no real-world referent, might have noxious knock-on effects. Pedophiles could harness virtual porn to convince actual children that joining in was normal and fun. Perhaps they thus whetted their own sexual appetites, raising the chances of an actual sexual encounter.³²⁶ But perhaps by having such material—as is also argued for pornography in general—they thus satiated their desires harmlessly, lessening the chances of real-world offenses.³²⁷ Did virtual porn encourage the idea of children as sexual objects and therefore put them at risk?³²⁸ Arguments at this level of generality cut both ways. Attempts to prosecute child porn also kept the topic in the limelight, helping sexualize children. A case in 1993 determined that even images of clothed children (videos of young girls striking poses in bathing suits) could be pornographic. Cases involving mainstream advertising (Calvin Klein) parsed seemingly innocent photos of children and adolescents in terms of whether their genitals were discernable beneath the underwear, whether they thrust forth their pelvic regions, and the like. Some pedophiles find innocent images the most alluring, thus impeding hopes of policing, forbidding, or even defining child porn except in the most expansive of terms.³²⁹ Since even innocuous images can prompt outlawed thoughts, what is not illegal?

Undaunted by these conundrums, the law plowed ahead. Britain outlawed “pseudophotographs” in 1994, apparently aiming at computer-generated composite photographs of real people.³³⁰ In 2001, article 9 of the European Convention on Cybercrime defined child porn to include both the virtual and the real.³³¹ In 1996, the United States banned virtual child pornography, including any image that “is, or appears to be, of a minor engaging in sexually explicit conduct,” whether a computer-generated minor or an adult who looks underage. It was forbidden to possess, produce, sell, transport, ship, receive, mail, and distribute such images in interstate or foreign commerce and by any means, including electronic. Also forbidden were all pornographic images of children, whether of actual or computer-generated or morphed children or of youthful-looking adults.³³² Aspects of this law were struck down by the Supreme Court in 2002 as overbroad violations of free speech. A compromise in 2003 protected realistic virtual images and nonrealistic ones (drawings, cartoons and the like) unless they were deemed obscene (lacking serious literary, artistic, political, or scientific value). Pornographic images of actual children remained illegal.³³³ The code now specifically stated that it was not a requirement that the child portrayed actually existed.³³⁴ And it defined child pornography to include computer images “indistinguishable from” images of real minors having sex.³³⁵ But it explicitly excluded drawings, cartoons, sculptures, and paintings.³³⁶ And it allowed as an affirmative defense that the child pornography in question had been produced with adult actors or that it had been created entirely virtually.³³⁷

One case under the rewritten law was of a teacher whose computer stored images of the *Simpsons* cartoon children having sex with adults and animals. In theory, that should not have been actionable. But the defendant pled guilty and the case never went to trial. His computer also held other images depicting actual children in suggestive and clothed poses.³³⁸ Another case convicted someone of having anime-style child pornography. No actual minors had been

involved, but the material was deemed obscene and thus without free-speech protections. He was also punished for emails describing sexual fantasies with minors—pure speech with no representational qualities.³³⁹ Though the legal subtleties of these and similar laws are difficult to parse, the law here came close to prosecuting desires, thoughts, and other mental states. Aiming at the offense of child molestation, an overt and tangible crime, the law in fact ended up targeting pedophilia, a state of mind that is not always acted on.

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