

Conclusion: Still Present after All These Years

Dominated by Anglophone scholars interested in their own nations and engaged by an important political issue, criminology is focused largely on the present. Much of the recent historiography reflects the American situation—its crime wave of the 1960s and 1970s and the attendant incarceration boom. It is preoccupied by the turn to retributive justice in the late twentieth century, with its adoption of long and harsh jail sentences and abandonment of earlier rehabilitative ideals.¹ Only recently has the literature begun to address the decline of urban crime since the 1980s as many big cities have become safer.²

We gain perspective by stepping back from the ripples of immediate events to consider long-term currents. The retributive turn of the late twentieth century had most impact on the Anglo-Saxon nations, and even there it may be in the process of stabilizing. Letting this tail do the wagging obscures our view of the dog. In Europe, a tempered rehabilitationism lived on.³ Though rising in the Anglophone nations, most extremely in the US, rates of imprisonment remained flat in Scandinavia, Germany, and Japan and only moderately increased elsewhere.⁴ Britain and France are the European nations that most closely followed the neoretributionist path.⁵ In Saudi Arabia, Singapore, and China, harsh punishments have continued to go hand in hand—whatever the causality—with low crime rates and even lower recidivism.⁶

If we instead examine how the state has grappled with crime over the *longue durée* of three millennia, recent events appear in a broad historical context, revealing some unexpected aspects. Two general observations on the deep history of crime merit mention. History deals with both ruptures and continuities. Taken over three thousand years, as here, both will inevitably figure. Almost every era has debated whether punishment's justification is retributive (delivering what offenders deserve) or utilitarian (aiming to diminish crime). The emphasis has tipped one way, then another. But elements of both have invariably left traces—as indeed today when retributivists pander to public sentiment to be tough on crime at the same time as utilitarians seek to reduce offending by ignoring desert to focus on result.

Equally notable from a long perspective is how development proceeds by accretion, not just by substitution. Layers of the old remain, a palimpsest of policies. The old is present though partly shunted aside, never fully obscured or covered by the new. Much of the old privatized approach to crime remains even now when the state pretends to have assumed this task wholly. Pardons remind us of our feudal past, when the king kindly dispensed justice regardless of what the law actually said. Churches remain refuges, an exception by courtesy to the state's allegedly all-encompassing territorial domination. Parole is a modernized form of surety as the community to which the inmate is released fulfills a similar role to compurgators. Bail is the obverse of the frankpledge, a guarantee given before rather than after the crime.⁷ Civil asset forfeitures continue the medieval idea of deodands, the state confiscating the tools of crime. The persistent acceptance of the concept of justifiable homicide suggests that the state cannot be bothered to—or perhaps just cannot—impose its will on all our actions, even extreme ones. So do the remnants of vigilante justice the state still tolerates, as does the private assistance it accepts (and indeed relies on) from civil society, whether in the form of vast nonofficial police forces or the

cooperation of citizens in investigating crime. Also to be included here is the barely polite fiction that the state has imposed a thoroughgoing monopoly on violence and its means. In the United States, Second Amendment discussions continually raise the primal heresy—sedition, really—of civil society's possible armed revolt against its own state, not just against outside enemies. But nations defended by citizen armies, such as Switzerland and Israel, face the same prospect should major political disagreement erupt. So do countries with heavily armed citizenries and living memories of partisan strife and civil war, such as Finland and Greece.

That brings us to more specific conclusions about the state's role in dealing with crime over the past several millennia. The first is how late the idea of crime as an offense against society emerged as distinct from the more immediate sense of wrongs committed between private parties and resolved among them independently. That broader idea of crime, in turn, was a function of how late the state came to what now seems one of its core competencies—enforcing law and punishing its violation. As treason's immediate victim, the state did, of course, punish it from the outset. But for centuries other offenses were left to be sorted by the implicated parties themselves. The ancient Greeks and Romans established rudimentary judicial and policing systems, taking some matters out of private hands. But not until the early modern era did the state once again penalize crime. That holds even for the world's oldest continuous statutory authority, in China. Across the world, most judicial and police work was outsourced to civil society, with kin groups and other intermediary organizations accountable for their members' transgressions. Today we think of law enforcement as one of the state's primary functions. But policing in the modern sense is in fact a very recent activity—arising long after defense, taxation, economic regulation, social services, and often even public education.⁸

Starting in the seventeenth century, as the European state became directly involved in enforcing law and penalizing crime, it

moved to consolidate its power. Monopolizing violence, confiscating and regulating weaponry, subordinating private military troops to its own armies, running one universally recognized judicial system, the state took in hand the business of formulating, promulgating, and enforcing law. To assert its preeminence despite its limited capacities, it acted harshly and publicly. Bloody town-square executions under emperors in China and monarchs in Europe testified both to the state's claims to obedience and to the patchiness of its enforcement. The state's imperfect knowledge led to only occasional capture of offenders and even rarer conviction. Public torturing was needed to deter. The miserable bird in the hand suffered for all its compatriots in the bush.

From a long historical perspective, the state's need to demonstrate its power diminished as its actual strength grew. As the state multiplied its capabilities, it could better detect, deter, and punish transgression. It no longer had to strong-arm and terrorize its subjects. The more powerful and self-confident a community, the more moderate its penal law, Friedrich Nietzsche pointed out.⁹ The Enlightenment philosophes were right: predictability deterred more than ferocity. Torture was the weak state's route to evidence. Better surveillance and detective work made torture redundant. Recalibrating the correspondence between offense and punishment also changed the nature of the evidence required. In the early Middle Ages, confession or two eyewitnesses were needed for capital crimes. Later, when lesser but factual evidence was admitted, in return punishments were moderated.¹⁰

With the admittedly gaping exception of Europe's twentieth-century totalitarian regimes and arguably today in China, the state's power and its harshness have been inversely correlated. A stronger and more pervasive state could police more effectively and therefore benignly. With data flowing evermore freely, the reciprocal transparency between authority and citizenry reduced the need for drastic interventions and in any case limited the extent to which

they were tolerated. That historical trend continues today. DNA analysis has retrospectively spared innocents convicted on faulty testimony, electronic automobile tracking has dramatically reduced thefts, and closed-circuit TV evidence has raised detection and conviction rates. Riots in Los Angeles followed the acquittal in 1992 of the police who had beaten Rodney King while being filmed with one of the then-new digital cameras. Today, nearly thirty years later, we all inhabit a digital panopticon. Our insistence that police now film their encounters with the public demonstrates how transparency holds both authorities and citizens accountable. The killing in broad daylight of George Floyd by Minneapolis police in May 2020 demonstrated how little some things had changed in three decades. That the encounter was filmed from half a dozen vantages and the officers quickly arrested and charged suggested that others had.

This inverse correlation between the state's power and its harshness leaves a conceptual conundrum. Is the state becoming nicer, less intrusive, less draconian? Or is it becoming more pervasive, possibly less visible, but simultaneously more widespread and embedded in its subjects' lives? In the early nineteenth century, prison reformers heralded solitary confinement as a sea change in punitive techniques. Hoping to resocialize offenders' souls, its proponents knew they were inflicting a different but no less drastic form of pain: "no longer mere animal pain, but a pain that affects the whole spirit" or a "slow and daily tampering with the mysteries of the brain" that was "immeasurably worse than any torture of the body."¹¹ Was a lesser force being exerted? Or did solitary confinement herald something different but equally imposing? The new, apparently more moderate state might simply be more subtle, not less strong.

Legions of social control theorists have sought to rip the mask from the face of modern state power, revealing how the authorities—though more surreptitious—dominate citizens' lives more than ever. Herbert Marcuse's seeming paradox of "repressive tolerance"

emblemized this approach. Even the exercise of democratic rights, he argued, merely legitimated suppression.¹² That explanation solved the dilemma by definition, not by empirical analysis. Did the contemporary state's subtle power mean that it remained as absolute as in the era when it pulled no punches and had merely changed tactics? Or did modern moderation indicate that the state had actually retreated from centralized authority and its ability to compel? That was the crux of the matter.

Michel Foucault famously argued that as the modern state evolved from absolutism, it aimed to punish better, not less. That was a fence straddle. On the one hand, he spurned the whiggish view that growing enlightenment made the democratic state friendlier, exerting less immediate sway over its subjects. On the other, prison certainly seems preferable to drawing and quartering. His solution was to reframe the concept of power, moving from the absolutist authorities' centralized somatic brutality to modernity's "discipline," a form of coercion that was exerted from multiple sources, that was often self-imposed, and that held sway over both elites and subordinates. In this reframing, he was following the torch brandished by Norbert Elias in his concept of the civilizing process. Foucault and Elias share more in common than often realized. Elias focused on individuals learning to control themselves, the demand side. This they were spurred to accomplish by a mutual dependence arising from society's growing complexity and interreflection as well as by states that encouraged such reciprocal self-limitation, as among the French nobles corralled at Versailles before the revolution.

Foucault focused more on the supply side, looking at the all-pervasive disciplining imposed on subjects in countless ways through networks of power.¹³ Yet Foucault's only incipiently formulated concept of governmentality followed Elias in looking at civil society's self-disciplining and the mutually reinforcing effects of internal and external constraints. Late in his life, he turned away from his earlier

preoccupation with state power to examine how individuals took care of and cultivated themselves, a task more akin to Elias's concerns.¹⁴ His interest became "to show how the government of self is integrated with the government of others."¹⁵ The concept of governmentality was also a move beyond his early concern with social discipline. Though dispersed, power was still at the heart of discipline, exerted over citizens to mold their behavior to align with prevailing norms. Elias focused on individual self-discipline, and Foucault on the disciplining exerted through institutions, but both were concerned with the shaping of the individual psyche and its habits.

Governmentality was the strategy of managing risk by using nondisciplinary techniques. And that, in turn, was but one aspect of a broader governance approach to the state that saw it less as imposing top-down power and more as coordinating multiple ways of regulating independent social actors.¹⁶ The averaging of risk through insurance, for example, has long been put to use by individuals, but in the past two centuries it has come to pervade society as one of the main technologies imposed by the modern welfare state. Businesspeople have shared risk almost as long as humans have traded.¹⁷ The broader state strategy of averaging the risk of social problems threw up issues of free riding and underinsurance. Those, in turn, were dealt with once the state marshaled its powers of enforcement, requiring evermore citizens to be insured against risks that could be quantified, averaged, predicted, and priced. In the late nineteenth century, the German social reformer Lujo Brentano advised workers to maintain at least six different insurance policies: life insurance for their children, pension insurance for old age, burial insurance to pay for their funerals, and coverage for disability, illness, and unemployment.¹⁸ Not all of these risks were privately insurable, however, and over time the welfare state socialized the cost of such eventualities.

The modern state has also effectively mandated public health, thus socializing individually beneficial behaviors. It prophylactically

vaccinates infants, screens schoolchildren and army recruits, forbids noxious habits, quarantines the infected, and determines what happens to our bodies after death. In its benign form, such risk management became the liberal welfare state, but similar impulses prompted other states to assess, categorize, manage, improve, mold, and ultimately to deport or kill unwanted subjects. These impulses, some scholars have argued, lay at the heart of Stalin's supposedly improving ambitions and even—formulated in racial terms—of Nazism.¹⁹ Those terror regimes take us beyond our concern with crime and its punishment. In nontotalitarian countries, the shift from social disciplining to governmentality was not just from meddling with the individual psyche to mustering citizens. Managing risks meant combining individual self-discipline and social engineering. Citizens were increasingly expected to anticipate what needed to be done—adopting healthy habits, curbing excesses, training for the work to be done, insuring themselves. Only in the absence of or in addition to such individual prudentialist approaches did the state then step in.²⁰

Both Elias and Foucault realized that a binary approach to power led astray. Both rejected the nineteenth century's philosophical dead end of viewing the state as unilaterally all-powerful. Hegel defined the state as a transcendent force above civil society. Marx thought he was exposing the state's faux neutrality by unmasking its role as the tool of the dominant classes. But both agreed in regarding the state as being the dominant force in the relationship between the two. A century later Elias and Foucault parted with this tradition, insisting instead on the interaction between state and civil society and on how the state's role was shaped by the tasks presented to it by civil society. The modern democratic state could not impose itself unbidden on its citizens. Without at least some cooperation of the masses, for whom all modern states claimed to rule, it would fail. Even Hitler was in no position to force his subjects to obey when they refused outright.²¹ Stalin, governing a much less

industrialized and urbanized—thus less self-controlled—population than the Germans, used more overt violence against so-called anti-social elements (the unemployed, petty criminals, drifters, and the like) than did the Nazis.²²

Democracy required the state to work in tandem with its subjects. They in turn were expected to meet authority halfway, disciplining themselves and thus requiring less attention from on high. The state's authority was no longer unilateral. It interacted with civil society. That citizens imposed limitations on themselves did not necessarily mean that these were self-willed or self-chosen—any more than are the details of our childhood socialization.²³ Yet, by accomplishing much of what it would otherwise have had to do, self-discipline did reduce the state's remit. The psychic, emotional, and instinctual limitations citizens imposed on themselves were rewarded with physical freedom from statutory attention.

Both Foucauldian governmentality and Elias's civilizing process thus displaced attention from the unilateral imposition of state power to the interaction of authority and civil society.²⁴ Humans are hypersocial creatures, our communal existence wholly dependent on the culture that we learn from each other, passed down from our ancestors.²⁵ But we are not massified by instinct, like ants or bees, blindly slotting into our appointed social roles. Culture, not biology, socializes us. How then to ensure human behavior that is compatible with organized society?

Social contract theorists have imagined humans discussing the terms they would unite under, trading nature's autonomy—whether the bliss of noble savages or a war of all against all—for protection in organized society. But that reversed cart and horse. These allegedly presocial negotiators, adeptly parsing the fine points of contract law, had somehow already achieved what they were supposed to be accomplishing. Historically, no such ur-constitutional convention of Robinson Crusoes ever assembled. Humans first organized themselves in small bands. Some of these bands eventually joined

together in larger associations with incipient social stratification and some semblance of durable authority. Finally, some five millennia ago they formed the first recognizable states.

Before states emerged, and in the societies that remain without them, small and homogenous groups have governed themselves without much formal rule making or vesting of authority beyond their clan head.²⁶ Kin alliances forged largely through marriage helped create broader unity among disparate members as a matter of (sometimes made-up) descent. Polite fictions allowed new family members to be incorporated—adoption among the Romans, for example—alongside other means of artificially extending consanguinity.²⁷ Existing and historically documented tribes typically used such devices.²⁸ Chieftoms, in turn, represented a halfway step between tribes and formalized state structures. They were still based on descent from a common ancestor but now had some social stratification. Hereditary leaders ruled, but there was still no formal legislation or enforcement.²⁹

How tribal societies kept the peace by punishing aggressive or asocial members with the cold shoulder or worse is a leitmotiv of the anthropological literature.³⁰ With the hyperdense sociability of the igloo as their norm, Inuits regarded the Western anthropologists who visited them as emotionally incontinent in their petty outbursts and everyday irritable flare-ups. Having violated precept, offenders were ostracized into the cold. Shunning and exclusion were the most widespread sanctions, formalized in larger-scale societies as excommunication. Habitual bullies or other intolerables who violated the egalitarian premises of hunter-gatherer societies were killed by delegated executioners, the victim's immediate kin standing aside.³¹ Extrapolating backward from such anthropological findings, historians agree that prehistoric societies of hunter-gatherers and early agricultural settlements were likely similar.³²

Yet such theories of purely informal regulation have also been questioned. Anthropologists have disputed the relative roles of custom

and law to guide behavior in what used to be called primitive society. Bronislaw Malinowski rebelled against the anthropology of his day, which argued that group custom, obeyed unthinkingly, governed tribes and clans, with the individual but a cog in a kinship machine. He claimed to discern both criminal and civil law in such societies, with autonomous individuals tied into to a web of mutual obligation, responding to strictures prescribed for neglecting their duties. Much hinged on definition.³³ Formal mechanisms of adjudication, “codes, courts, and constables,” indicating the presence of law, were admittedly absent, but that scarcely meant no regulation. Quite the contrary. Early humans were likely governed by a dense network of stricture, with law being, as Malinowski put it, but one form of custom.³⁴

States, in turn, first arose some five millennia ago because they were better able to deal with challenges that stumped smaller, less-organized societies. Their organizational prowess delivered a competitive advantage, allowing them to prosper, grow, and dominate. Early states were adept at marshaling resources. Armies were assembled, economies organized, towering infrastructural projects stamped out of the ground—all by institutions with only basic technology. *Homo sapiens* lived for three hundred thousand years in rudimentary circumstances. Having invented the state, our ancestors took but a few thousand years to build pyramids, aqueducts, palaces, and roads, start to write, and worship universalist gods. The state is arguably the most important invention in human history. It is the ultimate organizing tool of our ultrasociable species, whose main competitive advantage has been its ability to muster itself collectively and to transmit accumulated knowledge over generations.

Historians of Europe are perhaps at a disadvantage in appreciating how ancient states are. After the fall of the western Roman Empire, nearly a millennium passed before European institutions again approximated what had been achieved under the Egyptians and Greeks, not to mention the Romans. Europe’s early modern

history is largely the story of rebuilding the state. We tend therefore to think of the state as a recent development. Add Hegel's insistence that the state of his era was its culmination and Max Weber's precise, exclusive definitions that made the difference between the modern state and all earlier states one of kind, not just degree. The result has been a historically myopic view of the state as a recent and unprecedented invention.

But states have long been with us. Unlike small, informally governed societies, they imposed the controls required to coordinate their many subjects from the top and from outside. Thanks to painstaking historical work, we now know, for example, how insufficient Weber's idea is that real bureaucracy developed only in the nineteenth century. It may be that the bureaucracy of the Third Dynasty of Ur, two millennia before Christ, answered to individual families and was thus not rational and impersonal in a Weberian sense.³⁵ But already the Zhou dynasty of China, in power for some eight hundred years starting a millennium before Christ, had developed a bureaucratic apparatus independent of the ruler's person, with meritocratic recruitment and advancement as well as specialized functions.³⁶

Such efforts were both cumbersome and costly. States with sufficient resources could police and tame their civil societies. Independent sources of revenue helped, such as state-owned mines, farms, or eventually factories. So did slaves or other forced labor. Early states were mechanisms to tame subject populations and extract resources. Karl Wittfogel's theory of hydraulic despotism argued that ancient Egypt and other early states organized agricultural water by harnessing subjects for public irrigation works. He has been criticized for extending this theory too broadly, but it has the virtue of highlighting how states mustered resources and subjugated populations to solve collective problems. James Scott has also recently argued that early states were predatory, centralizing power to accumulate wealth stored as grain.³⁷

We can thus imagine at one extreme autocratic external control over everything and at the other voluntary conformity produced by autonomous self-regulation. At times, states have been overbearing—not just among the Egyptians, Aztecs, or Incas but also in early modern Europe's *Polizei* regulations, addressing every conceivable behavior, and in the twentieth century's totalitarian autocracies, where the state permeated civil society, though perhaps less thoroughly than historians first imagined.³⁸ Of the organizational forms that governed through pervasive informal behavioral control, we find only faint echoes from distant and semidocumented societies and from short-lived experiments of the like-minded, withdrawing from established society to unite in voluntarily adopted uniformity: utopian associations, communes, *kibbutzim*, and religious communities. That is what Christian society was supposed to be like. Christ had only a staff, Luther explained, because Christians were sheep and he their shepherd. The wolves and lions of the mundane world, in contrast, required force. In historical fact, a few such communities have been successful, such as the Amish, Mennonites, and the Hasidic town of Kiryas Joel in New York State. Others went spectacularly bad: the Anabaptists in Münster in 1534, the People's Temple in Jonestown in 1978, and the Branch Davidians in Waco in 1993.³⁹

Complex societies have traded off between these two techniques of behavioral control—outside imposition and internal informal self-regulation. At times, civil society has functioned efficiently as the engine of socialization, with family and church acculturating community members. If someone who had violated a deeply felt point of honor was shunned and ostracized or left to commit suicide—thus sparing the law the unpleasant necessity of an execution—that indicated that custom and code still reinforced each other.⁴⁰ In ancient Egypt, defendants condemned to death were sometimes allowed to kill themselves, as was Socrates in Athens. Convicted Japanese Samurai, too, were permitted to commit *seppuku*, or *harakiri*.⁴¹ Early

twentieth-century Melanesia considered it a sign of cultural decline that those who had seriously violated norms were now jailed rather than, as earlier, committing suicide.⁴²

Yet at some point more was needed. Most states began formalizing rules that had earlier been implicit. Whom one married, how one dressed, what one believed about the supernatural—all became matters of law. The state moved into new arenas of behavioral regulation, taking as its remit education, large swaths of childrearing, and more generally the socialization of citizens. Laws replaced or supplemented informal behavioral molding. Raising the next generation became evermore a task for institutions beyond the family. As the church lost influence, religion ceded pride of place to secular morality and etiquette, the last-mile guide to appropriate behavior. And as the informal socialization into correct conduct that had been religion and morality's task dissolved in modernity's anomic acid bath, it was displaced in turn by the law as an immediate guide to behavior. Village communities once prodded, scolded, exhorted, and shamed their members to toe the line. In urban society, matters became formalized. In the eighteenth century, laws were passed against vagrancy, prostitution, public drunkenness, sloth, and other behaviors that had earlier been only informally discouraged. Expanding its policing function, the state minutely regulated every conceivable behavior: from how children should address their parents to locking doors in the evenings. The state replaced kin as the enforcer.

The Civilizing Process

State and civil society thus engaged in a *pas de deux*. Over the past four millennia, the state's role has expanded enormously—as we have seen here in the single sphere of crime control. Yet, despite

absolutism's or even totalitarianism's pretensions, the state never acted alone. First of all, starting some five thousand years ago, the state could rely on humans' own evolutionary history. Compared to our surviving primate cousins, humans are generally less violent within our own communities. We slaughter others in planned and organized raids, skirmishes, and wars, but to those we live with we are roughly a hundred times less violent than chimpanzees. Even more so than the fairly pacific bonobos, humans are self-domesticated. Like dogs and other domesticated animals, but unlike other human or near-human species such as Neanderthals, we have developed smaller brains and teeth, more gracile limbs, and shorter faces, males becoming more like women and adults like children. Such attributes of the domestication syndrome go hand in hand with the most basic change, the taming of our propensity for violence, allowing us to associate peacefully and cooperatively to solve problems collectively. Humans' evolutionary advantage lay in our ability to learn from each other, including elders and ancestors, profiting from accumulated wisdom and experience. From deep time to the present, the most successful groups have arguably been those that self-selected for cooperation, cultural accretion, and collective problem solving.⁴³

Though they are strikingly clever, no other primates could cooperate sufficiently to form a state. Humans are not happy cheek by jowl on long-haul flights, but three hundred chimps crowded together in similar circumstances would tear each other apart.⁴⁴ Elias's civilizing process is arguably but the tip of a massive evolutionary iceberg of behavioral adjustment that has brought forth today's ultrasociable humans. Elias described behavioral changes that were culturally driven as pacification was rewarded in increasingly complex and interdependent human societies. But those changes built on a broader evolutionary logic of how humanity has housetrained itself into sociability. The state relies both on this evolutionary self-domestication and on society's informal self-regulation.

This has not been a simple trade-off across the board. From the state's perspective, some forms of antisocial behavior were best tackled through voluntary means. Others required a bit of steel. One could in theory mandate healthy living to achieve public-health goals, and to some extent we still do. Public smoking is banned today in the most liberal societies, as it once was in autocratic eighteenth-century Prussia. But on the whole states seek to convince citizens to adopt healthy habits. They do not mandate daily push-ups or muesli for breakfast.

Yet not every public good can be achieved by jolly along worthy habits. Vaccination has to be required and enforced, lest free riders undermine herd immunity. Even the most law-abiding societies, with few citizens in jail, have kept their police departments. The better its policing, the less the state has to rely on prison. Yet on the whole the relationship between authority and citizen has become less enforced and more voluntarily compliant. Today, taxes are deducted at source or via bank transfer and not wrested in kind from barns and lofts by collectors' thugs. Military recruits muster up; they are no longer dragged off at bayonet point.⁴⁵ The triumph of informal behavioral molding is confirmed more than one hundred thousand times daily in each airplane safety briefing. Passengers politely ignore the stewards' demonstrations, idly wondering, "Where be this mythical creature who in this day boards a plane actually ignorant of how to buckle a safety belt?"

Today we are nearly all socialized into the conduct that makes dense metropolitan life tolerable and safe. Behaviors we now regard as innate have in fact often been only recently learned. The basic politeness and civility analyzed by Elias dated mostly from the sixteenth century.⁴⁶ Yet, like human evolution, the civilizing process continues to socialize us into behaviors that we quickly come to regard as necessary or even natural, not recognizing how recent is their pedigree. Behaviors as functionally imperative as toilet training developed only gradually and recently and still vary widely. In

many earlier societies, sphincters did not require strict control. Nor was privacy in the act prized. The Spaniards conquering Mexico in 1519 were amazed that the locals had set up shelters of reed or straw along roads to allow discreet excretion and to save the results, which they used to tan hides.⁴⁷ In most agrarian societies as late as the 1950s, scheduling and timing toilet use was not pressing. In cities, such controls are now being extended from humans also to their pets. Already in the 1890s, a quarter of all fines imposed by French auxiliary police were for public excretion—human and canine.⁴⁸ It even rose to become a labor issue: How frequent and lengthy bathroom breaks did workers need?⁴⁹ The Indian government has recently unrolled a massive campaign to discourage outdoor excretion, which spreads disease and allows rapists to prey on women. Even among industrialized nations, toilet training has varied dramatically—early, communal, and draconian in East Germany, for example, but more prolonged and forgiving elsewhere.⁵⁰ Mainland Chinese still often permit toddlers to relieve themselves in the street, while Hong Kong frowns on such crudity.⁵¹

Spitting, too, was once regarded as an irrepressible natural instinct, like breathing or urinating. In the 1890s, Chicago streets could be walked only gingerly, picking one's way among the expectorations. The trams were even worse.⁵² Nineteenth-century public-health officials, rightly fearing that public spitting spread tuberculosis, campaigned against it. Spittoons became a fixture of urban life. During the Spanish flu epidemic of 1918, New York City punished open coughing or sneezing in public by a \$500 fine, close to an average annual wage.⁵³ Largely involuntary, coughing and sneezing remain beyond the law's reach, but public spitting has generally been socialized out of everyday behavior. Spittoons are but curiosities. Today we judge it much as our grandchildren will regard smoking: a nasty habit worthy at best of country bumpkins—or the occasional baseball pitcher.

In other aspects of personal hygiene, we have come far from even our recent forbears. Asians have long adopted modern habits, but

among Europeans washing and cleanliness were until recently considered enervating and debilitating.⁵⁴ Oral hygiene today is a \$40 billion industry. But cleansing teeth—except perhaps using urine, as the Dutch thought was practiced among the Spanish in the 1500s—was uncommon before the twentieth century.⁵⁵ Today, anyone as dirty as many Europeans were even in the 1950s would be ostracized. In those days, an English landlady could eject an American tenant who bathed daily—not so much for wasting water but for the contagious dermatological disease self-evidently betrayed by such peculiar behavior. Even English toffs, who self-identify by scorning bourgeois propriety, are reasonably clean these days. Princess Margaret once humiliated one of her ladies in waiting by giving her a loo brush for Christmas, having noticed the absence of one while visiting her home.⁵⁶ In fact, the mortified lady—as posh of course as the princess herself—had merely hidden it while Margaret was staying, too embarrassed to leave it out in the open because of the implied suggestion that a royal might be expected—Gandhi-like—to scrub her own toilet.

To *épater les bourgeois*, hippies of the 1960s made a virtue of being smelly. More recently, habits have become so squeakily clean that our children's asthmas and allergies are likely aggravated because their immune systems simply lack practice on now banished microorganisms. In the Korean movie *Parasite* (2019), a chauffeur murders his employer for humiliating him by complaining about his odor—an olfactory class divide now largely unthinkable in the West. Westerners, in turn, still suffer a certain chronic humiliation, knowing that the Japanese consider them smelly.⁵⁷ Once extravagances of the rich, mani- and pedicures have become everyday grooming. The depilation craze has made pubic hair exotic, akin to mut-tonchop sideburns. The Brooklyn hipster beard is admittedly a bit anomalous, yet the sheer variety of product and the specialized implements required for it reveal it to be not a return of untamed nature but stylized hirsute adornment.

Belching, farting, and urinating in public, once commonplace, are now frowned upon or illegal. Kibbutzniks in postwar Israel deliberately upended the dining rituals of the shtetl. To signal rejection of their proper upbringing, they ate communally, unceremoniously, and each at their own pace.⁵⁸ While eating habits are informalizing everywhere, the purely bodily aspects have tightened up. We may eat dinner off paper plates, supine on the couch before the television, but we have also coined a word, *misophonia*, for the agony of disgust that others' open-mouthed chewing now inflicts. Something as biologically unremarkable as mouth breathing is today lambasted as uncouth and evolutionarily harmful.⁵⁹ Drinking to oblivion on Saturday nights used to be commonplace in the northern and eastern European countryside, accompanied by swaggering and fisticuffs. In those nations that drink, alcohol consumption remains high, but some binge-drinking cultures are shifting to more Mediterranean habits, favoring beer or wine over spirits and consuming more moderately with meals.⁶⁰ Seatbelts were installed in cars beginning in the late 1960s, and their use was required globally as of the mid-1980s. Thirty years later, compliance (front-seat use) has become largely universal. A few nations (Cambodia, Italy, Argentina) lag, but most of the developed world arrays itself in serried ranks, from 90 percent compliance up through the most obedient, the French at 99 percent.⁶¹

Gay sexuality has been normalized over the past several decades. In the 1970s, in the first flush of gay liberation but before the AIDS epidemic of the early 1980s, male homosexuals celebrated their new-found erotic freedoms with festive abandon—their polymorphous hookups and unabashed promiscuity. The gay bathhouse culture of San Francisco and New York, with its pansexual anonymous delights, explicitly challenged the bodily restrictions of monogamous heteronormative society. As a visiting professor at Berkeley, Foucault may have consciously risked a *va banque* wager between prudently avoiding HIV infection and the Dionysian delights of

San Francisco's bathhouses.⁶² This was the world of John Rechy and his vision of gays as erotic outlaws, defiantly upending conventionality. Promiscuity was then seen as the core of gay male sexual practice, the "righteous form of revolution."⁶³

This revolution was, alas, an ambition cruelly dashed by AIDS and the gradual realization that unprotected promiscuity was epidemiologically risky.⁶⁴ Forty years on, the hot topics of debate are no longer glory holes, doors on bathhouse cubicles, or condom use but gay marriage. Safe sex has gone from being regarded as the public-health authorities' attempt to squelch gay self-expression to the price of admission for intercourse. Once resisted as a plot hatched by sexual Quislings to bring homosexuals to heel, gay marriage is now considered a major rights victory for formerly shunned outsiders. By abandoning the riskiest sexual practices, male gays were able to stave off coercive public-health interventions during the AIDS epidemic. They won broad social acceptance as a group distinguished by the object of their sexual desire but no longer meaningfully by their erotic practices. Heteronormatized, gaydom became accepted precisely because it had domesticated itself.

Besides producing ever cleaner and more circumspect citizens, the interaction of law and socialization in the civilizing process also led to behavioral shifts more closely related to our theme here and ultimately more important. We have followed the process by which law's adjudication and enforcement became the state's mandate, removing such functions from the hands of kin and community. For most of history, civil society was crime's primary punisher. Once the state began playing a role, too, civil society did not of course vanish, but the division of labor between the two parties changed. Formal detection, adjudication, and enforcement fell to the authorities. Civil society was relegated to socializing humans into citizenship—in effect ensuring that they would intersect with formal sanctions only rarely. Meeting the state halfway, civil

society's ability to regulate itself meant the modern state grew less repressive and interventionist. Political freedom was arguably the reward for self-discipline.

Taming War

Making crime the state's problem also became an element of a larger pacification in human history. Most significant among its effects was the overall decline of pain, cruelty, and violence. Pain is something that we have done our best to banish. Anesthesiologists are among the unsung heroes of civilization, allowing us to endure and not just survive childbirth and surgery. Pain medication has become so sophisticated that, as with food, its provisioning has met needs while creating problems of overconsumption. One fundamental remaining global injustice is the divide setting us apart from those who still face sickness, age, and accident largely bereft of any analgesia.⁶⁵ Meanwhile, the developed world chokes on its own excesses as death rates from addiction to pain relief soar.

The taming of violence is probably the state's single most significant accomplishment. But at the same time, the state, like a protection racket, may well also have been the main cause of the violence it then suppressed. As it subdued its subjects at home, it united them in warfare abroad. Domestic peace and outward aggression were flip sides of the state's coin. Yet this was not a hydraulic effect, with pressures reduced in one spot erupting elsewhere. Total violence decreased. Living as we do in the shadow of half a century of world war, it may seem counterintuitive, but violent deaths per capita—including the state's own military acts—have steadily declined over the past five millennia. On that there is scholarly consensus. In dispute remains what the situation looked like ten thousand years ago, in the prestate age of hunter-gatherers. From the behavior of

certain primates, from existing human tribes, and from skeletal evidence at prehistoric burial sites, some archaeologists and evolutionary psychologists have concluded that warfare was then sufficiently endemic (killing perhaps a quarter of all males) to have powered the engines of evolution—warlike traits being selected for.⁶⁶ Others have questioned this conclusion, pointing out that the evidence for wide-scale warfare in prehistoric times is still scant.

That warfare eventually grew common is undisputed; the question is when. Much also hangs on how warfare is defined. Besides eradicating most of the planet's terrestrial megafauna, *Homo sapiens* may also have had a hand in the extinction of Neanderthals, Denisovans, *Homo floresiensis*, and other archaic near-human peoples. Whether that happened through outright aggression or a subtler outcompetition for resources is unclear. By perhaps thirty thousand years ago, *Homo sapiens* were the lone humanoids on the planet.⁶⁷ Given this possible ur-xenocide, the scholarly debate over warfare among hunter-gatherers thus deals largely with our aggression against ourselves, not our near kin.

The *Homo sapien* hunter-gatherers of sparsely populated prehistoric times likely came into contact with each other only sporadically, perhaps meeting up at hunting grounds or for ceremonial purposes. They probably rarely fought over common resources, though this is a guess only. From ten thousand years ago, as with most other aspects of human life then, little evidence of warfare has survived.⁶⁸ But as populations densified and settled, social stratification multiplied. With the emergence of complex foraging communities, hereditary leaders arose, and the potential for antagonism between now more proximate groups increased. The beginnings of agriculture and domesticated livestock intensified the territoriality of settlement. At some point, moving in search of new resources put groups in conflict with others who were already occupying what only seemed to be empty and yielding territory.⁶⁹ That complex hunter-gatherers were violent seems widely agreed upon. Evidence

for warfare increased in the Neolithic (starting ca. 5500 BCE). By the beginning of the Copper Age (ca. 4500 BCE), it was undeniable.⁷⁰

Beyond the hunter-gatherer stage, proto-states began, ordering the affairs of evermore complex, sedentary, agricultural civilizations. Sedentism preceded both widespread grain agriculture and state formation by several millennia. There was no lockstep in which these various aspects of human development marched.⁷¹ Though sedentism did not automatically lead to statehood, states did require sedentary subjects. As Neolithic people densified on fertile lands, chiefdoms likely emerged, besting smaller, disorganized villages.⁷²

States produced violence, then, but mostly in the sense that the circumstances they were called on to tame would have led to warfare even in their absence. Proximity, density, and the ability to produce and store valuables that were vulnerable to plunder, such as nuts, grains, textiles, and slaves—all this encouraged raids and wars as a shortcut to wealth without work, though of course not without the cost of armaments, training, and casualties. States, too, fell for this temptation. True, they suppressed violence internally by adjudicating and policing, but they encouraged violence externally by plundering and conquering neighbors. As tribes and villages became chiefdoms, chiefdoms became states, and states eventually empires, the internal pacifying effect spread, reducing the number of entities in competition and expanding what counted as domestic and thus demilitarized territory. States thus both produced and suppressed violence. Had humanity remained foragers, with Malthusian pressures checking their numbers, warfare could perhaps have been sidestepped. But after the shift to agriculture, states and warfare were unavoidable. Having perhaps invented or at least accompanied war, states then also became part of subduing violence.

Those scholars who have most forcefully noted the pacifying effect of states compare today's violent-death rates to the rates supposedly characteristic of hunter-gatherer societies. Among prehistoric societies, an average of 15 percent of skeletons examined give

evidence of violent death, some of which may have happened in hunts. Violent deaths in the twentieth century, including even those caused only indirectly, range between 1 and 3 percent.⁷³ Compared to stateless societies, states thus successfully suppressed violence. The point remains, less forceful but dramatic nonetheless, even if we agree that the portion of violent deaths among hunter-gatherers has been exaggerated. The life of an ancient forager may not have been as violent as supposed, and the state may have helped create the problem it then solved. Yet, overall and in the long run, given that humanity turned to agriculture and violence intensified, states tamed violence.

Living as we do under the state's thumb, it takes an act of historical imagination or perhaps a comparison with the turmoil of contemporary failed states to appreciate the effect on our lives of this peaceful ordering. The level of social chaos considered acceptable even as recently as the eighteenth century would be inconceivable today, absent utter social breakdown. Intent on plunder, thousand-strong crowds savagely attacked the crews and the police trying to protect them of ships wrecked on the English coast in the eighteenth century. During the Gordon riots of 1780, the mob ran unchecked in central London. After the elections in 1819, prominent MPs were pelted with mud in public, and the windows of the rich were broken if they refused the crowd's insistence on candles in them.⁷⁴ Rioting was in effect a tolerated form of public expression, and the authorities were largely unable to do anything about it in any case. Today we accept only much lower levels of public disorder. Outdoor marches and assemblies require official approval and all manner of permits and insurances.⁷⁵ Universal suffrage has made everyone complicit in governing, dramatically raising the bar for legitimate rioting by providing other means of being heard. Enhanced police power, too, has raised the stakes of unrest.⁷⁶ When riots occur, they are often own goals, the poor damaging their own neighborhoods.

Social Control

How do we understand civil society's self-regulation? Is it something undertaken voluntarily in a neo-Kantian spirit of self-willed autonomy and freedom? Or is it a subtle but still outside imposition on unwilling subjects by the state, possibly acting on behalf of powerful interests? Where an initial socialization had failed and citizens were then brought back into the fold, power relations were obvious. Alex's resocialization in Stanley Kubrick's dystopian film *A Clockwork Orange* trained him in conventional behavior, spoiling his pleasure in Beethoven as collateral damage. Unsurprisingly, state-led socialization often legitimized and favored elite habits, activities, and entertainments. Alfred Doolittle, Eliza's dustman father in *My Fair Lady*, resentfully chides "middle-class morality" for spoiling his enjoyment of being one of the undeserving poor. Nineteenth-century social workers scrutinized proletarian families and their habits, vigilantly encouraging them to adopt middle-class mores. Public-health officials forced themselves on often unwilling subjects, requiring them to vaccinate their children, send them to school, not crowd too densely in their dwellings, give up sharing them with animals, and the like. Urban workers resisted antidrink campaigns for undermining accustomed rituals of sociability. Sports and other leisure activities varied by class. Joys of the elite were protected, whereas working-class pleasures were denied. Fox hunting and falconry flourished; ratting, bearbaiting, and cockfighting were banned. Dog racing ceded pride of place to horse racing. Some gambling and often prizefighting were suppressed.⁷⁷

Yet self-control could be liberating, too. Self-discipline was not just a crude class-determined imposition. Social control has often been interpreted as a subtle way to ensure what the state or dominant groups sought. But the civilizing process cannot be boiled down just to class terms. Did elites force controls on their inferiors in order to maintain their dominance? If so, then, as Elias has

shown, they did it only after imposing this self-discipline on themselves. Historically, certain elites were the first to control themselves. That was the implicit assumption in codes, such as the Islamic, which punished more harshly the further down in the social scale they went. Inspired by his Calvinist faith, the seventeenth-century Great Elector of Prussia, Friedrich Wilhelm, imposed austerity, self-discipline, and rigor on his administration, helping by willpower and effort his small, poor, distant nation punch far above its geopolitical weight.⁷⁸ The first cohort of aristocrats could by definition not have been chosen by lineage. Even as the caste solidified, it recognized and folded in outsiders with enviable personal qualities. Having achieved social recognition under feudalism, certain families managed to remain prominent for centuries thereafter, across revolutions, depressions, crashes, and other misfortunes likely to have undermined their unearned social advantage. Was that longevity due to qualities of mind and character they managed to pass on to descendants?⁷⁹

The civilizing process aimed for a self-controlled citizen of moderate, restrained tastes and habits. That selected against the rowdier of lower-class pursuits as well as against paupers, with their alleged tendency to be insubordinate, footloose, improvident, and unwilling to work.⁸⁰ But the civilizing process was equally a rejection of the sexual libertinage, purposeless blood sports, and lavish consumption of the wealthy. In countless ways, markets, societies, and states have socialized modern people into prudent, regular habits, bringing forth the disciplined, punctual, reliable, and predictable citizens required by complex economies. The meritocracy debate of our own era indicates the extent to which the allegedly bourgeois virtues of thrift, hard work, tamed instincts, and the cultivation of talent and intellect have come to define us all.⁸¹ Hedge-fund managers, quants, and technonerd are the new exemplars; landowners have lost their allure.

The discipline that drove the civilizing process could be democratic and liberating in a neo-Kantian way. Much as Kant and Hegel

thought that freedom was achieved by following just law, so citizens came to see self-discipline and self-control as means to avoid authority's outside impositions by submitting voluntarily to the dictates of civilized cohabitation. The point of socialization was to sidestep the need for external interventions. The more self-control and self-policing, the fewer the state's impositions. Nikolas Rose has expanded Elias's theory to argue that self-government is true government and self-discipline not the state's psychic imposition but the means of achieving freedom.⁸²

Social control has been a conceptual black box, concealing various approaches to the question "Who wields power?" Social control has been innocently interpreted as the means of assuring the behavioral calibration required by life in interdependent industrialized society. The nineteenth-century sociologists who first formulated the concept meant the way in which necessary behavioral modifications were achieved through a consensual mutual adjustment by everyone.⁸³ Socialization, informal social pressure, and then, only if these had failed, the state's formal apparatus—those were the tools to keep citizens in line. The American jurist Roscoe Pound defined social control as "the pressure upon each man brought to bear by his fellow men in order to constrain him to do his part in upholding civilized society."⁸⁴ Seen thus, social control was necessary and benign.

Social control is also more cynically seen as how elites ensure their predominance, merely disguising the exertion of power and coercion. Precisely by whom and why were the issues. Prisons were unmasked as means of turning recalcitrant proletarians into a docile reserve army of workers. Mental hospitals made differently thinking patients conform. Even welfare or charitable policies or organized leisure pursuits—sports and the like—might be means of keeping a possibly unruly lower class placid by supplying bread and circuses. Exerted as indoctrination, such power left even people who felt free toeing a line drawn by someone else—led astray by

the ever-malleable false consciousness.⁸⁵ With some imagination, everything short of outright revolution could be interpreted as socially stabilizing and functionally coercive.

Self-abnegation, thrift, industriousness, and temperance could be taken at face value as habits that helped their practitioners make something of themselves. Or they could be interpreted cynically as what capitalism required of its workers. Without a clear steer as to whose interests governed society, social control arguments easily tied themselves in knots. If docility were the goal, why inculcate habits of self-discipline that might lead workers to expect a better future for themselves?⁸⁶ Religion, the opium of the masses, might be a better ideological control, as it in fact remained in those states that recognized the inherent danger of allowing subordinates, whether the poor, ethnic minorities, or women, to learn to read or otherwise better themselves.

And all this assumed that the institutions of social control actually performed as planned. But did they? Victorian prisons, for example, were rarely the engines of social discipline imagined by Foucauldians. More often, they treated their inmates better than they were accustomed to in the outside world, imposing little discipline and scarcely any control. In any case, the prisons were too understaffed and kept their charges too briefly to have much influence one way or the other.⁸⁷ Ironically, the theorists of disciplinary institutions—Erving Goffman, Michel Foucault, and David Rothman—wrote at just that twentieth-century moment when they witnessed these institutions' trajectory reverse.⁸⁸ Convincing anyone that universities and hospitals were institutions of covert coercion had always been a long shot. Workhouses and poorhouses were long gone. Asylums and orphanages, in turn, emptied out precisely at the moment their affinity to prisons was being trumpeted. Starting in the 1960s, the mentally ill were radically deinstitutionalized.⁸⁹ Like the blind, orphans and their institutions have largely vanished thanks to a combination of demographic, medical, and

social changes. Only the prison—the most obviously disciplinary of the institutions—remained and has expanded. The insight into these institutions' supposed carceral commonality that then seemed so trenchant has been considerably blunted since.

Conversely, if social control actually did what was claimed on its behalf, why so ineffectually? If modern prisons were supposed to keep a reserve labor force off the streets when unemployment was high, why should incarceration cost more than the dole? If state schools were intended to train the rising generation of worker bees, why not do so more effectively? Who were these Machiavellians covertly running things? If they were so clever, why did they usually fail? Like all conspiracy theories, the view of social control as an effective force stumbled over the fatal contradiction between an allegedly omniscient and omnipotent group of manipulators and the hash they were in fact making of things. Nor, in this view, was there any room for discipline that individuals underwent for their own betterment—abstinence, self-improvement, or even any form of training or education.

Whatever their precise formulation, social control arguments still approached power as a bilateral encounter: the powerful exerted force over the dispossessed, either directly or indirectly, covertly or overtly, and the dispossessed in turn resisted as best they could. But this view was rife with ambiguities. Who controlled whom, and for what purpose? If the powerful were the first to self-discipline, if self-control were broadly speaking good for those undertaking it and not just something forced on them, then who was to say that power was being exerted in only one direction? Hospitals sought to cure, schools to educate, factories to produce, and even prisons sometimes to rehabilitate. Could all these activities be unmasked as somehow serving the dominance of the powerful? Unless one were willing to argue that they were ultimately motivated less by what they did for their immediate clients than by how they maintained the system for elites, then power described only as an act

of domination was insufficient. Yes, prisons, factories, hospitals, and schools resembled each other in being disciplinary institutions. Inmates, pupils, and workers may have resented the control imposed. Patients did not, so long as physicians cured them. Nor did the civil servants, managers, scholars, and other professionals who spent long years in training to achieve their coveted positions.

Elias willingly accepted the socially ameliorative aspects of self-discipline. Rose expanded on that notion, harnessing it to a broader Kantian project of freedom achieved through law. Foucault shunned the crude Marxism of locating power reductively in the hands of dominant classes, with the state but their handmaiden. His escape from the dilemma that remained was to obfuscate the very idea of power. No longer something exerted by one actor over another, power became decentered, a multitude of forces cascading hither and yon, controlling elites and subordinates equally. Discipline, not power, became the overarching concept, able to reconcile the apparent moderation of the modern state with an insistence that the velvet glove still harbored iron. Power, quoth Foucault, is “a machine in which everyone is caught, those who exercise power just as much as those over whom it is exercised.”⁹⁰

L'état continue

Whether the state really has become more moderate therefore depends on the extent civil society regulates itself. If civil society's (self-)disciplinary efforts in fact have left the state with less enforcing to do, then perhaps it really has been rolled back. The overall social control effort may have remained constant but is now apportioned differently—more for civil society, less for the state. Yet there lies the rub. “Law varies inversely with other social control,” scholars have assured us.⁹¹ If Elias, Foucault, and Rose were right, if the disciplinary and normalizing effort was working and controls were

increasingly internalized and informalized, we would expect ever fewer new laws and less enforcement of existing ones. Indeed, law would have been superseded. But has it been?

Cultures have made use of formal and informal controls to different extents. To sting, shame punishments require buy-in to shared standards. A communitarian society can enforce norms by threatening to ostracize offenders. An individualistic one relies more heavily on the state and its coercive apparatus.⁹² Nor has every society been able to impose the same degree of informal social control. Immigrant societies, with few shared values or traditions, have struggled to institute broad risk- and cost-sharing social policies, compared to the more easily achieved solidarities of nations that—at the moment of forming their welfare states—were more ethnically and religiously homogenous.⁹³ The citizens of multicultural, immigrant nations, especially if their welfare policies do not shore up the traditional institutions of socialization, are less likely to agree on common social norms than the inhabitants of countries governed by what the Germans call a *Leitkultur*, a dominant cultural ethos.⁹⁴ Multiculturalism's fissures have come to strain countries whose policies once could assume a certain behavioral uniformity. Even something as mundane as ticketing on mass transit spans a range, from relying on citizen honesty to up-front uniformed control.⁹⁵

Within any given culture, the balance between formal and informal control has also shifted back and forth historically. Inculcated behavioral norms sometimes weaken or reverse. Increasing urbanization has drained small, tight-knit communities with their everyday mechanisms of socialization. The recent rise of antivaccination movements has undermined once widely adopted, socially beneficial conduct, prompting authorities to reinforce formal obligations—subjecting children to the needle before enrolling them in school.⁹⁶ For a brief moment in the 1960s, the West seemed to relax informal control, lessening behavioral regulation.⁹⁷ Individual civil rights were enhanced, conventional proprieties disregarded. Hedonistic

behavior—sexual, emotional, drug-related—spread into even the middle classes. Were an older work ethic and norms of social control more generally unwinding?

Perhaps behavioral control did briefly relax during the 1960s and 1970s. Nonetheless, looking back half a century later, the continuities impress more than the ruptures. Despite some loosening in matters sexual and possibly also on inebriation, social self-regulation seems as strict today as ever. The shift from blue- to white-collar jobs, from production to service, demands ever firmer self-discipline. Ill-educated working-class men, smarting at their inability to master new jobs, supply the shock troops of today's populist movements. Educational requirements and demands have ratcheted steadily skyward. The universities where the sixty-eighters lazily turned on, tuned in, and dropped out now expect Stakhanovite hyperaccomplishment. Even adolescents have lengthy CVs. Far from relaxing, informal controls have arguably strengthened in the past half century. Jerry Rubin, for example, went from Yippie to yuppie. He led Berkeley protests in the 1960s, taunted brokers by throwing dollar bills onto the New York Stock Exchange floor, and was tried as part of the Chicago Seven after riots at the Democratic National Convention in 1968. In the 1970s, however, he became a businessman and multimillionaire before being killed while jaywalking across Wilshire Avenue in Los Angeles. Jane Fonda trod a similar path toward self-discipline, from the sex-kitten Barbarella to antiwar protester to the queen of the autoregulating rigor of fitness and diet.

Informal social control and formal law have counterintuitively increased in tandem. As society has become more complicated and less homogeneous, increasingly rift by social, religious, ethnic, and other multicultural divides, control has shifted. Formal imposition has arguably made a comeback, supplementing informal socialization. A neoretributionist wave of penal policy has hit some nations, with more people imprisoned. And police numbers have grown across the world, with vast private forces now enhancing the official.

But, more important and less expected, new laws and novel kinds of regulations have expanded the state's reach into our lives, indeed our minds. Even as we exert more self-control, and even as the engines of informal socialization turn more swiftly, we also have more overt law—not just regulatory but penal too. More and different behaviors have been criminalized. Thoughts and intentions have increasingly become actionable. Even when multiple laws merely duplicate prohibitions, the state has arrogated to itself unprecedented powers through charge stacking—that is, targeting the same behavior via multiple avenues of prosecution.⁹⁸ Prosecutors have gained greater leverage to insist on plea bargains—effectively coercing defendants into pleading guilty, increasing the court system's throughput, and sparing themselves work. The charge that overcriminalization is now a problem has come from both Left and Right.⁹⁹

Following Tocqueville, Foucault argued that modern regimes sought to change citizens' souls and did not just require correct outward behavior. These two thinkers focused on prisoners and mental patients, those pitiful, deviant marginals who bore the brunt of society's disapproval and discipline. Yet, as we have seen, the state's ambitions went even further. It aimed not only to criminalize more behaviors but also to apply formal statute ever deeper into citizens' psyches, holding them accountable for a wider palette of offenses at ever earlier stages of planning or even just consciousness. As the state sought to prevent—and not just punish—crimes, simple retributivist verities dissipated. It was no longer clear precisely what was forbidden, nor was the punishment for each offense set. Even the fundamental principle of no punishment without law seemed up for grabs. Expanding into inchoate offenses and crimes of omission, the law pushed past our actions to peer into our thoughts, holding us responsible for what went on in our minds, too.

Setting itself ever more tasks and motivated by the best of intentions, the modern state willy-nilly became a bigger part of the everyday. Modern life, it seemed, required more law. New technologies of

course demanded new regulation, but the state was also asked to do more. We have more immigration law than ever before, not because we have more immigration than in, say, the late nineteenth century but because citizens expect the state to regulate it. Preserving the environment, ensuring workplace health and safety, protecting women from abuse, minorities from discrimination, children from predation, and consumers from fraud: all have become state tasks. Environmental legislation alone now makes up 15 percent of US federal regulations.¹⁰⁰ That would have surprised the early modern state. And the development of inchoate law in effect quadrupled the range of possible offenses, as planning, conspiring, and intending crimes were added to the acts themselves.

As the law expanded to an ever broader array of both overt and covert behaviors, more citizens became potential offenders—defendants who had just not yet been caught, the sword of Damocles ever pendant over them. As more actions became crimes, more citizens became criminals. Wanting to preserve First Nation artifacts, the state prosecuted campers on federal land who dug for arrowheads. Hoping to corral toxic poisons, it jailed entrepreneurs who shipped chemicals in nonregulated containers. Intending to preserve marine life, authorities went after food wholesalers who imported undersize lobsters. Worried at growing drug use, the state punished as complicit not just narcotics dealers but also the realtors who sold them houses and the interior decorators who chose their carpets.¹⁰¹ Indeed, as one wag has pointed out, legal codes “are full of ingenious suggestions for committing crimes.”¹⁰²

Seeking to make life safer, healthier, and happier, US lawmakers have at one time or another prohibited hat pins of certain lengths, the public eating of reptiles, masked balls, hats at theatrical performances, and hotel sheets less than nine feet in length. In the 1880s, James Bryce, British ambassador to the United States, followed in the footsteps of Tocqueville’s earlier travels throughout the country and reported wryly on the state-level regulations governing every

conceivable topic. His irony extended not just to how it was forbidden to send annoying letters or employ the color-blind on trains but also to what we might consider sensible, indeed prescient, measures: requiring doctors and dentists to be licensed, obliging buildings taller than a certain height to have fireproof staircases, and prohibiting hotels and insurance companies from discriminating against Blacks and Jews. All such measures, he seemed to think, were wildly beyond anything at home in Britain.¹⁰³ Already in 1900, long before our own era's tsunami of new legislation, an observer imagined Dracon and Solon, the Greek legislators whose names live on in their codes, shaking their heads in bemusement at the panoply of laws governing the lives of modern Americans: punished for jumping off trains in motion, sleeping in bakeries, killing partridges out of season, failing to report infants' infected eyes, serving margarine in prisons, riding horses on the sidewalks of unincorporated villages, and so forth in all their eccentric glory.¹⁰⁴

In sum, across the past several centuries, civil society has grown evermore orderly and regulated, but the state has also continued to expand in parallel. The retributive turn of the 1980s, with harsher punishments and more incarceration, was an Anglo-Saxon blip on larger secular developments. The state's interventions here were naked and undeniable. But more subtle states expanded their role, too, even as civil society's self-regulation continued apace. Insofar as sexual relations were governed at all, for example, they used to be regulated by morality, propriety, deference, and some local police powers. Only in extremis did law and employment regulation enter the picture, which left a wide field for sexual predators, ranging from workplace pests to flashers, molesters, and rapists. Today, protection from predation in homes, schools, workplaces, and public spaces has been legalised. Much mocked at the time, the Antioch College rules from the early 1990s were a harbinger, setting out procedures to ensure explicit verbal consent at each stage of the courtship ritual.¹⁰⁵ Similar formalization has spread from

universities to the workplace. Men patting or pinching waitresses' or secretaries' bottoms, framed as harmless fun half a century ago, is now an offense. Domestic violence has been dealt with evermore formally. Injury to wives and children was specifically forbidden, as in England in 1853, and marital rape was finally explicitly outlawed there in 2003. In the past, police came only when domestic disputes spilled into public view, prompting someone to summon help. The authorities often sought to calm matters, resolving them without arrest. Today, this approach is seen as tolerating abuse. Police are now often required to arrest, turning what was once husbands' legal right to attack and batter their wives into a public offense. Abusive partners can be banished from the common home, imposing a de facto divorce.¹⁰⁶

Once-tolerated behaviors have evermore become law's object. Although we might smile at the painstakingly officious and meticulous *Polizei* regulations of the eighteenth century, much of their intent remains in effect. Modern microregulation is often administered through regulatory law rather than through the penal code, but it is enforced more effectively. Use of inebriants is subject to law, even as some are exempted from statute's attention—as most recently with marijuana. Of course, states have regulated consumption for centuries, but rarely on today's scale. America's war on drugs—heir to similar battles against alcohol—has formalized behavioral control as it massively applies semi-militarized state force against deeply engrained and widespread behaviors. Drug-using Americans, especially ethnic minorities, were sent to prison ten times as often in the late 1990s as a decade earlier.¹⁰⁷

Even sartorial regulations—seemingly pointless in the era of spandex worn in public—remain with us. East Germany outlawed long hair on men and short skirts on women. The Chinese use their digital panopticon surveillance to harass old folks who wear pajamas in public. But liberal democracies, too, intervene. Until 1937, a Yonkers ordinance prohibited appearing in public in “other than

customary street attire.” More recently, municipalities have forbidden baggy pants, the wearing of baseball caps backward, certain colors associated with gang membership, as well as ceremonial daggers borne by Sikhs. Japanese schools have required brown-haired pupils to dye their hair black to fit in. France and Denmark have banned burqas and other face coverings.¹⁰⁸ And the quickest way to end up in detention almost anywhere is to strip in public—or even in private if one is publicly visible.¹⁰⁹

At the same time, as noted, citizens are more self-controlled than in the past. Cultural conservatives often lament that we are losing our sense of humor, by which they mean that we are no longer permitted to mock or sneer at the downtrodden and vulnerable. This change testifies to the success of shifting informal standards: “Mean jokes go out of style because civilization moves on.”¹¹⁰ Old coots may lament being reprimanded for telling Polish or mother-in-law jokes. But few would desire a return to the early twentieth century, when victims of discrimination often turned to libel or defamation law to protect themselves against “accusations” that we no longer regard as calumnious. In those days, it was considered a libel or slander *per se* (one that was actionable even without causing harm) to be called Black and, later, Communist or homosexual.¹¹¹ Similarly those called Jewish who did not consider themselves such could and did sue for having been vilified.¹¹²

Society exerts all manner of restraint on us. Foucauldians are right to have emphasized that. But the expected corollary—that overt, formal, statutory control ceded pride of place to the new disciplinary regime—rings false. As we have seen, along with the growth of informal social discipline, the state has also vastly expanded its formal regulatory powers. It passes new laws on a massive scale, sharpens existing ones, and intervenes ever deeper into civil society. As has often been pointed out, new laws proliferate, while old ones remain. Accretion of old and disused statutes explains only in part the mushrooming quantity of law. The US Congress has

created fifty new crimes annually for the past several decades, the US states some forty.¹¹³ Of the federal criminal provisions put on the books since the American Civil War, a calculation in 1998 put the figure enacted since 1970 at an astonishing 40 percent.¹¹⁴ Britain instituted seventy immigration offenses over the entire twentieth century. A further eighty-four arrived in the first decade of the following millennium. The twelve years after 1979 saw half of all Chinese laws on public security enacted.¹¹⁵ Add to this the way courts have expansively interpreted these burgeoning laws, further extending the state's reach.¹¹⁶

Policing has also expanded accordingly. The state once took as its primary function the protection against external enemies. Today, internal adversaries are considered equally important. The manpower allotted to policing once paled in comparison to the armed forces. Today it has largely pulled even, and that counts just official police. Add in private policing, and the point is hammered home. The first national police force, the French *maréchaussée* from the 1760s, had 3,000 men, the French army 400,000.¹¹⁷ Today the US military has more than a million active personnel. Official policing institutions have somewhat less than a million, and there are about a million and a half police if the private forces are added in.¹¹⁸ In Britain, the military has 192,000 personnel, and the official police force has 150,000 or 381,000 if private security forces are counted, too, bringing it to twice the size of the military.¹¹⁹

As the number of laws and potential crimes increased, the theoretical chances of the average citizen crossing the line has also multiplied. "The vehicle code gives me fifteen hundred reasons to pull you over," as one California highway patrolman put it.¹²⁰ No one disputes that the poor are punished disproportionately or that white-collar offenses are often treated lightly.¹²¹ But the law has also taken aim at behaviors that were once not criminal at all. Today's good burghers, whose forebears might rarely have encountered the police, now often will—at least in theory. Citizens did not become

more evil, but as the arena of illegality extended, they were likelier than ever to offend. We thus face an apparent paradox. Did expanding and deepening the law's reach mean that more citizens became potential criminals? The expansion of drug laws has fueled America's jail boom. Many current white-collar crimes were once legal or at least ignored. Bankers are now perp-walked to prison. Could it be that the civilizing process actually increased criminality?

Writing in 1902, Arthur Cleveland Hall welcomed the growth of convictions and imprisonment as signs of civilization and progress. As society became more complex and sophisticated, he thought, it required more laws. Since that, in turn, forbade more actions, society necessarily pushed more people beyond the pale. But the nature of crime changed. The number of archaic, primitive crimes committed—assault, mayhem, homicide—declined. The number of new, more genteel offenses—fraud, forgery—increased.¹²²

How true that may be is hard to measure. Conviction rates have increased, though not in all nations.¹²³ Today, proportionately twice as many Americans have spent time in jail than half a century ago.¹²⁴ Almost twice the percentage of Britons were in jail in 2008 compared to in 1900.¹²⁵ Since more citizens have likely violated the law than we can ever pursue, the decision of who is a criminal now rests less with legislators than with the police and prosecutors.¹²⁶ Contacts between authorities and citizens that lead neither to arrest nor conviction yet serve a broader sense of enforcement have increased. Being stopped by police has become the most common form of citizen contact with criminal justice. Zero-tolerance policing has consigned a whole new class of petty misdemeanants to a system of official chicanery and invasive social control that stops short of conviction and incarceration.¹²⁷

But to know whether the average citizen is more likely to be arrested and convicted, we need to know about recidivism, too. Are some people being convicted multiple times even as more people avoid entanglement altogether? In the United States, three-quarters

of federal state prisoners released in 2005 were arrested again within five years.¹²⁸ What we do know is that even though the possibilities of offending have mushroomed, the overwhelming majority of citizens pass their lives without seriously confronting the law. Prison populations have skyrocketed, but over a lifetime “only” 5 percent of Americans will spend time in jail.¹²⁹ Given the exceptionally high incarceration rates in the United States, far fewer people go to prison almost anywhere else in the world. Though Hall’s extrapolation was logical, more laws would have led to more criminals only if average citizens did not adjust their behavior in tune with the ever-wider web of potential ensnarments. Exercising even greater self-control, they may have fallen no more afoul of the law than they did earlier—even as the law expanded to dig more potential pitfalls. If so, then the law spurred further efforts at self-control by defining the parameters of the acceptable ever more precisely.

By contrast, those least adept at self-control were likely to have had difficulty navigating the ever-narrower roads of legality. In theory, more citizens could offend since there was more to offend against. But they may not have. A small minority, however, has been caught in the unforgiving forcefield between expanding formal prohibitions and ever-higher demands on personal restraint. Society seems increasingly to have bisected: the majority self-regulated, only rarely encountering the business end of authority. Meanwhile, a smallish group of outsiders, downtrodden, and unfortunates bore the law’s full brunt. For them, law became the last remaining engine of socialization. Law enforcement targeted racial and class outsiders, foreigners, the mentally ill, drug addicts, and others who violated society’s increasingly numerous and elaborate norms, insufficiently reined in by informal guidance. Even when these outsiders were not convicted or locked up, a persistent barrage of petty violations (subway free-loading, marijuana use, and knife possession) sought to identify and control them.¹³⁰

The world over, prisons are filled with ethnic and national outsiders. The story of America's jails is well known. The prison boom of the late twentieth century has not made inmates more representative of society as a whole. Quite the opposite, most prisoners are Black and Latino men. In Europe, racial minorities are even more overrepresented behind bars. In the United States, Blacks are represented six times disproportionately in the prison population. In Britain, it is seven times. It is twelve times for Aborigines in Australia, and sixteen times for Afro-Caribbeans in Canada.¹³¹ In the US foreign nationals are underrepresented in prison—only 6 percent. Across Western Europe, however, foreigners often make up a large fraction and sometimes the majority of prisoners.¹³² In North Rhine Westphalia, Romanians are arrested at forty-four times the rate of Germans and jailed twenty-one times as often.¹³³ Seventy percent of the Swiss prison population is foreign born, 45 percent in Austria, and 30 percent in Germany.¹³⁴ Banishment is added to lockup, and foreign prisoners in Europe are often expelled once their sentences are over—frequently to “homes” they have never actually lived in.¹³⁵

Even as the state has grown relentlessly—with only few setbacks—over the past five thousand years, humans still dream of life without it. That law would eventually become unnecessary has been a fond illusion. The ancient Chinese expected law to vanish—Confucians because right living would become second nature, Legalists because punishments would be so cruel that no one would dare transgress.¹³⁶ In the fourth century, Augustine regarded the state as a necessarily coercive relationship between authority and humans, whose evil nature required subjugation, so it would be unnecessary in paradise.¹³⁷ Utopians have long hoped for communities held together by common sympathy and purpose, with no need for law.¹³⁸ Anarchists definitionally shunned the law when outlining their ideal futures. Like today's neoliberals, Proudhon imagined that contract

would substitute for it. Indeed, neoliberals aim to limit the state's task to fighting crime, thus leaving markets free to arrange most other social relations.¹³⁹

Marx and especially Friedrich Engels argued that after a proletarian dictatorship, when new rulers made use of old-regime power, the state would wither away. Absent private property, social contradictions would dissipate, and so, too, would the state. We all recognize the naïveté of this messianic expectation that law and policing would vanish as capitalism's social tensions evaporated under socialism's warm sun. Stalin certainly made short shrift of such yearnings. The illusion of doing without law was condemned, and socialist legality was declared statute's highest form, rigorously enforced.¹⁴⁰ Nonetheless, in the West today a related assumption remains widespread—the Foucauldian conviction that modernity shifts social control from state to society. These theorists insist that despite the illusion of liberalization, power remains, but it has moved from the state's heavy, centralized authority to subtle, diffuse, dispersed forms of discipline within society's institutions. The law has been expelled.¹⁴¹

Has no one recognized the continuing importance of the law? History has not been kind to Durkheim's understanding of why offending is sanctioned. He argued that society punishes crime not to revenge itself or to deter future offenses but ritually to express its communal ties, to reaffirm the unity of law-abiders against transgressors. The point of punishment was to influence not the offender but honest citizens, thus rallying the troops. In his early writings, Durkheim defined crime as acts that most people agree are transgressions, ones that offend the "collective consciousness" (society's "psychological type"), which he imagined present everywhere and across generations.¹⁴² This definition presupposed a communal mind, an essentialist cultural unity of a sort now largely rejected by social scientists.¹⁴³ At best, it would describe only a small fraction of all statute. Unsurprisingly, however, lawyers have been gratified by the importance Durkheim attributed to the law. Some have

arrogated to themselves the role once served by high priests. They argue that in the absence of shared national religions, law expresses our common beliefs of what must be condemned and helps create norms.¹⁴⁴

Durkheim's later writings, elaborating the development of individualism, more plausibly argued for a collective sense of justice and has influenced thinking on human rights.¹⁴⁵ Restorative justice, returning punishment to its traditional prestate role of making good the damage done, has Durkheimian roots. Though Durkheim had a curiously mystical view of the law as expressing the collective nous, he also made other points of interest here. Early gods were enforcers. Religious transgressions were the first public crimes, affecting the whole community. The state eventually assumed the divine's role in enforcing. The law socializes us, though he understood it as the expression of shared communal values and not—as seems more plausible today—a tool wielded by powerful social groups. Durkheim also thought that punishments moderated as society developed, though not, as argued here, because the state strengthened but because human sympathy extended from victims to criminals.¹⁴⁶

The argument made here is simple. Seen in the *longue durée* of global history, the state came late to making and enforcing law. But once started, it never looked back. Today, we are governed by more law than ever before. And yet even outside the law we are also increasingly socialized into correct behavior by an array of other means. So powerful is this socializing process that it raises the question: Why do we need the law any longer, especially more of it? Belt and suspenders? Clearly, the law persists. Despite our ever better-mannered and docile citizenry, law remains the workhorse of social control, defining and deepening the parameters of our socialization. Time therefore to bring the law back in, to move beyond Foucault. Today's penal codes are an absolutist ruler's wet dream, bestowing real power such monarchs would have envied. Yet most

of us—the codes' subjects—scarcely notice them in our daily lives. In *The Devil's Dictionary*, Ambrose Bierce defined *opiate* as “an unlocked door in the prison of identity. It leads into the jail yard.” We might say something similar of the Foucauldian vision of social discipline—the yard where inmates catch a glimpse of sky, run a few laps, and imagine the world beyond the prison walls. It remains in fact wholly under the state's umbrella.¹⁴⁷ To deter and otherwise shape our behavior, the law must exist, and it must be enforced. The rule of law requires laws, indeed ever more of them as matters become complex. A more advanced society may not have more criminals, as Hall thought, but it certainly has more laws, and those statutes require and encourage most citizens to toe the line. Ever new behaviors are forbidden, even as formerly offending conduct is gradually socialized away. To gain more self-control, it seems, we need more law.

Although the state may lay low, in dealing with crime it does not wither away.

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