

Notes

Introduction

1. Tim Newburn, “‘Tough on Crime’: Penal Policy in England and Wales,” *Crime and Justice* 36, 1 (2007) 457–458.

2. Steven Pinker, *The Better Angels of Our Nature: The Decline of Violence in History and Its Causes* (New York 2011) 47–56. The debates over Pinker’s numbers are discussed in the conclusion here. Arriving anecdotally at a similar conclusion is James Sharpe in *A Fierce and Furious People: A History of Violence in England* (London 2016).

3. Max Nordau, *Degeneration* (London 1898) 40; Cesare Lombroso, *Crime* (Boston 1911) 43; Émile Durkheim, *The Division of Labour in Society*, 2nd ed., trans. W. D. Halls (orig. ed. 1893; reprint, Houndmills 2013) 42, page citations referring to the Houndmills edition.

4. Sarah A. Seo, *Policing the Open Road: How Cars Transformed American Freedom* (Cambridge MA 2019) 12–13; Frank R. Baumgartner et al., *Suspect Citizens: What 20 Million Traffic Stops Tell Us about Policing and Race* (Cambridge 2018) 5.

5. US Department of Justice, *Crime and Justice Atlas 2000* (Washington DC 2000) 40. Adding driving under the influence, drunkenness, liquor laws, and drug abuse together for 2017 gives a total of 30.4 percent of total arrests, which is larger than even traffic violations, whose true size is submerged in the category “all other offenses,” at 31.2 percent. Percentages calculated from the figures in FBI, “Table 29: Estimated Number of Arrests,” Uniform Crime Reporting Program, Crime in the United States 2017, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-29>.

6. Cal Winslow, “Sussex Smugglers,” in Douglas Hay et al., eds., *Albion’s Fatal Tree: Crime and Society in Eighteenth Century England* (New York 1975) 147; Clive Emsley, *Crime and Society in England, 1750–1900*, 4th ed. (Harlow 2010) 29.

7. *The Week*, 13 December 2019.

8. Manuel Eisner, “Long-Term Historical Trends in Violent Crime,” *Crime and Justice* 30 (2003) 96–98.

9. Randolph Roth, “Homicide in Early Modern England 1549–1800,” *Crime, histoire et sociétés* 5, 2 (2001) 55; Randolph Roth, *American Homicide* (Cambridge MA 2009) 13–14; Robert R. Dykstra, “Body Counts and Murder Rates: The Contested Statistics of Western Violence,” *Reviews in American History* 31, 4 (2003) 556.

10. Eisner, "Long-Term Historical Trends in Violent Crime," 107.
11. Starting in the early 1990s, the US murder rate declined from around 6.5/100,000 to 4.4/100,000 in 2014 (FBI, "Table 1: Crime in the United States by Volume and Rate per 100,000 Residents, 1998–2017," Uniform Crime Reporting Program, Crime in the United States 2017, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-1>).
12. Norbert Elias, *The Civilizing Process* (London 2000).
13. Peter Baldwin, *Contagion and the State in Europe, 1830–1930* (Cambridge 1999) 410–413.
14. Hubert John Pragnell, *Early British Railway Tunnels: The Implications for Planners, Landowners, and Passengers between 1830 and 1870*, University of York Railway Studies (October 2016) 233–234, <http://etheses.whiterose.ac.uk/16826/1/Railway%20tunnels%20recovered%203.pdf>; Sonya Sawyer Fritz, "'A Room of Her Very Own': Privacy and Leisure in the Victorian Girl's Bedroom," *Girlhood Studies* 8, 2 (2015) 46–47.
15. Peter Baldwin, "The Return of the Coercive State: Behavioral Control in Multicultural Society," in T. V. Paul et al., eds., *The Nation-State in Question* (Princeton 2003) 114.

Chapter 1

1. Durkheim, *Division of Labour*, 60.
2. The theme of E. Adamson Hoebel, *The Law of Primitive Man* (Cambridge MA 1954).
3. Jan Assmann, *The Price of Monotheism* (Stanford 2010) 54.
4. Alan E. Bernstein, *The Formation of Hell: Death and Retribution in the Ancient and Early Christian Worlds* (Ithaca 1993) 3, 61, 160–161, 200–201.
5. Plato, *Phaedo*, trans. David Gallop (Oxford 1975) 107c.
6. Trevor J. Saunders, *Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology* (Oxford 1991) 53.
7. Rémi Brague, *The Law of God* (Chicago 2007) 14; Yonglin Jiang, *The Mandate of Heaven and the Great Ming Code* (Seattle 2011) 9; R. P. Peerenboom, *Law and Morality in Ancient China: The Silk Manuscripts of Huang-Lao* (Albany 1993) 5.
8. Derk Bodde, "Basic Concepts of Chinese Law," *Proceedings of the American Philosophical Society* 107, 5 (1963) 378.
9. Hoebel, *Law of Primitive Man*, 260; Henry Maine, *Ancient Law* (London 1861) 218.
10. Helen Silving, "The Oath," *Yale Law Journal* 68 (1959) 1335, 1383; Richard H. Underwood, "False Witness," *Arizona Journal of International and Comparative Law* 10 (1993) 229; Michael D. Gordon, "The Invention of a Common Law Crime: Perjury and the Elizabethan Courts," *American Journal of Legal History* 24, 2 (1980) 148.
11. Kent Flannery and Joyce Marcus, *The Creation of Inequality* (Cambridge MA 2012) 55.

12. Saunders, *Plato's Penal Code*, 34–38.
13. Raffaele Pettazzoni, *The All-Knowing God* (London 1956) 20–21.
14. Leviticus 26:14–18.
15. Genesis 4:9–10.
16. J. Walter Jones, *The Law and Legal Theory of the Greeks* (Oxford 1956) 97.
17. Christine Hayes, *What's Divine about Divine Law?* (Princeton 2015) 2.
18. Paula Fredriksen, *Sin: The Early History of an Idea* (Princeton 2012) 18.
19. Israel Drapkin, *Crime and Punishment in the Ancient World* (Lexington 1989) 276.
20. Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2nd ed. (Cambridge 1898), 1:130.
21. Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge 1987) 3.
22. Emsley, *Crime and Society in England*, 188, 196; Craig B. Little and Christopher P. Sheffield, "Frontiers and Criminal Justice: English Private Prosecution Societies and American Vigilantism in the Eighteenth and Nineteenth Centuries," *American Sociological Review* 48, 6 (1983) 797.
23. Daniel Klerman, "Settlement and the Decline of Private Prosecution in Thirteenth-Century England," *Law and History Review* 19 (2001) 8; Prosecution of Offenses Act 1985, c. 23, sec. 6(1); Alec Samuels, "Non-Crown Prosecutions: Prosecutions by Non-police Agencies and by Private Individuals," *Criminal Law Review* (1986) 34; David Friedman, "Making Sense of English Law Enforcement in the Eighteenth Century," *University of Chicago Law School Roundtable* 2 (1995) 476; Bruce P. Smith, "The Emergence of Public Prosecution in London, 1790–1850," *Yale Journal of Law and Humanities* 18 (2006) 29.
24. Michael Cavadino and James Dignan, *Penal Systems: A Comparative Approach* (London 2006) 165, 178–179.
25. Strafgesetzbuch, §123, §247, §183, §§293–294.
26. Gerhard O.W. Mueller, "Tort, Crime, and the Primitive," *Journal of Criminal Law, Criminology, and Police Science* 46 (1955) 312; Jones, *Law and Legal Theory of the Greeks*, 116–117.
27. Montesquieu, *Spirit of the Laws*, 6:9.
28. Immanuel Kant, *The Philosophy of Law*, trans. W. Hastie (Edinburgh 1887) 197; Peter J. Steinberger, "Hegel on Crime and Punishment," *American Political Science Review* 77, 4 (1983) 860.
29. Tom R. Tyler, *Why People Obey the Law* (Princeton 2006) passim.
30. Hence, Marxism, which insisted that behind the democratic facade lay only class oppression, also refused to accept the claim of law to be self-imposition, regarding even democratically decided law as akin to that forced on subject populations.
31. David Philips, "'A New Engine of Power and Authority': The Institutionalization of Law-Enforcement in England 1780–1830," in V. A. C. Gatrell et al., eds., *Crime and the Law* (London 1980) 158; Penry Williams, *The Tudor Regime* (Oxford 1979) 232; Michael R. Weisser, *Crime and Punishment in Early Modern Europe* (Atlantic Highlands 1979) 65; Victor Bailey, "The Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945–51," *Law and History Review* 18, 2 (2000) 306. In Mamers in eighteenth-century France, only 9 percent of criminal trials

eventually resulted in sanctions. Alfred Soman, "Deviance and Criminal Justice in Western Europe," *Criminal Justice History* 1 (1980) 7.

32. Thomas Andrew Green, *Verdict according to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800* (Chicago 1985) 310.

33. Both the punisher, whose energies are sapped by harshness, and the punished must be considered. Jiangnan Zhu, "Do Severe Penalties Deter Corruption? A Game-Theoretic Analysis of the Chinese Case," *China Review* 12, 2 (2012) 12.

34. Albrecht Funk, *Polizei und Rechtsstaat: Die Entwicklung des staatlichen Gewaltmonopols in Preussen 1848–1914* (Frankfurt 1986) 320.

35. Edward Jenks, *A Short History of English Law*, 6th ed. (London 1949) 347.

36. Anna Bindler and Randi Hjalmarsson, *The Fall of Capital Punishment and the Rise of Prisons: How Punishment Severity Affects Jury Verdicts*, University of Gothenburg, School of Business, Economics, and Law, Working Papers in Economics 674 (October 2016) 5, 21.

37. Michel Foucault, *Discipline and Punish* (New York 1977) 82.

38. Leon Radzinowicz, *History of English Criminal Law* (London 1948) 1:93.

39. Thomas A. Green, "Societal Concepts of Criminal Liability for Homicide in Mediaeval England," *Speculum* 47, 4 (1972) 671; Green, *Verdict according to Conscience*, 32.

40. Crown Prosecution Service, *Annual Report and Accounts* (2014–2015) 69, https://www.cps.gov.uk/publications/docs/annual_report_2014_15.pdf. The rate in US state courts in 2006 was 94 percent (US Bureau of Justice Statistics, "Felony Sentences in State Courts, 2006," <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2152>). Among federal cases, 91 percent ended in conviction in 2011–2012 US Department of Justice, *Federal Justice Statistics 2012: Statistical Tables* (January 2015) NCJ 248470, table. 4.2

41. The conviction rate was almost 92 percent in 2017: Table D-4. U.S. District Courts–Criminal Defendants Disposed of, by Type of Disposition and Offense, during the 12-Month Period Ending September 30, 2017, http://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2017.pdf; Gábor T. Rittersporn, "Terror and Soviet Legality: Police vs Judiciary, 1933–1940," in James Harris, ed., *The Anatomy of Terror: Political Violence under Stalin* (Oxford 2013) 187.

42. Brian Chapman, *Police State* (New York 1970) 82.

43. Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* (Philadelphia 1948) 392.

44. David A. Harris, "'Driving while Black' and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops," *Journal of Criminal Law and Criminology* 87 (1997) 558; Seo, *Policing the Open Road*, 27.

45. Barton L. Ingraham, *Political Crime in Europe* (Berkeley 1979) 6.

46. John Baker, "Revisiting the Explosive Growth of Federal Crimes," Heritage Foundation, 16 June 2008, <https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes>; *Revised Statutes of the United States* (Washington DC 1875), *US Statutes at Large*, vol. 18, pt. 2, chap. 36, <https://www.loc.gov/law/help/statutes-at-large/43rd-congress/c43-DC.pdf>; *US Code* (2018 ed.) 12:749–1230, 13:1–407, <https://www.govinfo.gov/content/pkg/USCODE-2018-title18/pdf/USCODE-2018-title18.pdf>.

47. Mila Sohoni, "The Idea of 'Too Much Law,'" *Fordham Law Review* 80 (2012) 1606; William J. Stuntz, "The Pathological Politics of Criminal Law," *Michigan Law Review* 100 (2001–2002) 513–518.

48. John C. Coffee Jr., “Does ‘Unlawful’ Mean ‘Criminal’? Reflections on the Disappearing Tort/Crime Distinction in American Law,” *Boston University Law Review* 71 (1991) 216.

49. Ezekiel 18:13.

50. Chad Baruch, “In the Name of the Father: A Critique of Reliance upon Jewish Law to Support Capital Punishment in the United States,” *University of Detroit Mercy Law Review* 78 (2000) 54; F. W. Maitland, “The Deacon and the Jewess: Or Apostasy at Common Law,” *Transactions of the Jewish Historical Society of England* 6 (1908–1910) 260; Aibek Ahmedov, “Religious Minorities and Apostasy in Early Islamic States,” *Journal of Islamic State Practices in International Law* 2 (2006) 1, 5.

51. Gary A. Anderson, *Sin: A History* (New Haven 2009) 3.

52. Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York 2005) 51–52.

53. Islamic law does not insist very firmly on creditors’ rights to repayment. As a result, in some places, such as Egypt and the Gaza Strip, there are no bankruptcy laws, and debtors are still jailed. See “Why Hamas Jails People Who Can’t Pay Their Debts,” *Economist*, 2 August 2018.

54. Tawny Paul, *The Poverty of Disaster: Debt and Insecurity in Eighteenth-Century Britain* (Cambridge 2019) 33; Caleb Foote, “The Coming Constitutional Crisis in Bail,” *University of Pennsylvania Law Review* 113, 7 (1965) 991; Jason J. Kilborn, “Foundations of Forgiveness in Islamic Bankruptcy Law,” *American Bankruptcy Law Journal* 85 (2011) 344.

55. Paul H. Haagen, “Eighteenth-Century English Society and the Debt Law,” in Stanley Cohen and Andrew Scull, eds., *Social Control and the State* (New York 1983) 225.

56. Gordon Wright, *Between the Guillotine and Liberty: Two Centuries of the Crime Problem in France* (New York 1983) 84.

57. Floyd Seyward Lear, *Treason in Roman and Germanic Law* (Austin 1965) 29; Inga Glendinnen, *Aztecs* (Cambridge 2014) 56; J. A. Sharpe, *Crime in Early Modern England 1550–1750*, 2nd ed. (Harlow 1999) 74.

58. Williams, *Tudor Regime*, 144.

59. William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (Chicago 1990) 224; F. L. Attenborough, ed., *The Laws of the Earliest English Kings* (Cambridge 1922) Ine cap 2; *Allgemeines Landrecht für die Preußischen Staaten* (1794) pt. 2, §738.

60. J. M. Beattie, *Policing and Punishment in London, 1660–1750* (Oxford 2001) 169–70; Steve Hindle, “The Keeping of the Public Peace,” in Paul Griffiths et al., eds., *The Experience of Authority in Early Modern England* (Basingstoke 1996) 219.

61. Saunders, *Plato’s Penal Code*, 245.

62. Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression* (Cambridge 1984) 137.

63. Strafgesetzbuch, Bavaria, 1813, art. 401.

64. Edward Delman, “When Adultery Is a Crime,” *Atlantic*, 2 March 2015.

65. David Nash, “Analyzing the History of Religious Crime: Models of ‘Passive’ and ‘Active’ Blasphemy since the Medieval Period,” *Journal of Social History* 41, 1 (2007) 14.

66. With organized religion having abandoned the everyday duties of witches, such as exorcism, a market has opened up for others to enter. See “Demand for Exorcists Is Soaring in France,” *Economist*, 20 July 2017.

67. Christina Lerner, "Crimen Exceptum: The Crime of Witchcraft in Europe," in Gattrell et al., *Crime and the Law*, 50.

68. "Witches Are Still Hunted in India—and Blinded and Beaten and Killed," *Economist*, 21 October 2017.

69. "Vatican Gives Official Backing to Exorcists," *Guardian*, 2 July 2014; Adrita Biswas, "The Vatican to Train Exorcists," *International Business Times*, 26 February 2018; Jason Horowitz, "'Shut Up, Satan': Rome Course Teaches Exorcism, Even by Cellphone," *New York Times*, 19 April 2018.

70. Art. 54; Corinne Treitel, *A Science for the Soul: Occultism and the Genesis of the German Modern* (Baltimore 2004) 201; Robin Levinson-King, "Canada's Last Witch Trials," *BBC News*, 30 October 2018.

71. Sharpe, *Crime in Early Modern England*, 121, 123. The last woman punished as a "scold" in the United States was ducked in Jersey City in 1889. Darius Rejali, *Torture and Democracy* (Princeton 2007) 282.

72. George L. Kelling and Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (New York 1996) 47.

73. Kelling and Coles, *Fixing Broken Windows*, chap. 2.

74. Defamation suits made up a large and eventually majority portion of all cases in certain courts in England starting in the late sixteenth century. See J. A. Sharpe, "Such Disagreement betwix Neighbors': Litigation and Human Relations in Early Modern England," in John Bossy, ed., *Disputes and Settlements* (Cambridge 1983) 170–171. Examples of defamatory language in this period are given in David Cressy, *Dangerous Talk: Scandalous, Seditious, and Treasonable Speech in Pre-modern England* (Oxford 2010) chap. 2.

75. Ann C. Motto, "'Equity Will Not Enjoin a Libel': Well, Actually, Yes, It Will," *Seventh Circuit Review* 11, 2 (2016) 272; Hannah Rogers Metcalfe, "Libel in the Blogosphere and Social Media," *Charleston Law Review* 5 (2011) 486; Ian Burrell, "Libel Cases Prompted by Social Media Posts Rise 300% in a Year," *Independent*, 19 October 2014; "Online Defamation Cases in England and Wales Double," *BBC News UK*, 26 August 2011, <http://www.bbc.com/news/uk-14684620>; Leslie Yalof Garfield, "The Death of Slander," *Columbia Journal of Law and the Arts* 35 (2011) 42; James Lasdun, *Give Me Everything You Have: On Being Stalked* (London 2013) 110.

76. Durkheim, *Division of Labour*, 113, 123–127.

77. Clive Emsley, "Repression, 'Terror,' and the Rule of Law in England during the Decade of the French Revolution," *English Historical Review* 100, 397 (1985) 807–808; John J. Merriam, "Natural Law and Self-Defense," *Military Law Review* 206 (2010) 80.

78. Weisser, *Crime and Punishment*, 21; Lawrence M. Friedman, *The Republic of Choice* (Cambridge MA 1990) 142.

79. Amanda Vickery, "An Englishman's Home Is His Castle? Thresholds, Boundaries, and Privacies in the Eighteenth-Century London House," *Past and Present* 199 (2008) 148; Weisser, *Crime and Punishment*, 45.

80. Radzinowicz, *History of English Criminal Law*, 1:709–710.

81. Beattie, *Policing and Punishment*, 125–126; Clive Emsley, *The English Police*, 2nd ed. (Harlow 1996) 76.

82. Stuntz, "Pathological Politics," 556; Steven N. Gofman, "Car Cruising: One Generation's Innocent Fun Becomes the Next Generation's Crime," *Brandeis Law Journal* 32 (2002) 6.
83. Markus Dirk Dubber, "Policing Possession: The War on Crime and the End of Criminal Law," *Journal of Criminal Law and Criminology* 91, 4 (2001) 874.
84. John Braithwaite, *Crime, Shame, and Reintegration* (Cambridge 1989) 40–41.
85. John C. Coffee Jr., "From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line between Law and Ethics," *American Criminal Law Review* 19 (1981) 127–128; Coffee, "Does 'Unlawful' Mean 'Criminal'?" 202; Samuel W. Buell, *Capital Offenses: Business Crime and Punishment in America's Corporate Age* (New York 2016) 41–45.
86. French penal code, revision of 13 May 1863, art. 406, §2; Carl Ludwig von Bar, *A History of Continental Criminal Law* (Boston 1916) 340.
87. Coffee, "Does 'Unlawful' Mean 'Criminal'?" 200.
88. Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (New York 1989).
89. Stephen F. Smith, "Overcoming Overcriminalization," *Journal of Criminal Law and Criminology* 102, 3 (2012) 546.
90. Vern L. Bullough, "Age of Consent: A Historical Overview," *Journal of Psychology & Human Sexuality* 16, 2–3 (2004) 37–38; Kate Sutherland, "From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities," *William and Mary Journal of Women and the Law* 9 (2003) 314.
91. John Pratt, "Scandinavian Exceptionalism in an Era of Penal Excess," *British Journal of Criminology* 48 (2008) 287; Julian V. Roberts et al., *Penal Populism and Public Opinion: Lessons from Five Countries* (New York 2003) 130.
92. Stuntz, "Pathological Politics," 513; "Violence against Women: Government Bill 1997/98:55," Swedish Government Offices, Fact Sheet, 1999.
93. California penal code, §288a.
94. Bernard E. Harcourt, "The Collapse of the Harm Principle," *Journal of Criminal Law and Criminology* 90, 1 (1999) passim.
95. Act of 26 July 1873; von Bar, *History of Continental Criminal Law*, 340.
96. Alex S. Vitale, *The End of Policing* (London 2017) chap. 5.
97. Julius R. Ruff, *Violence in Early Modern Europe* (Cambridge 2001) 35–39.
98. John Boswell, *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (New York 1988) 58–60; Benjamin F. Martin, *Crime and Criminal Justice under the Third Republic* (Baton Rouge 1990) 4.
99. Simon Szreter, "The Right of Registration: Development, Identity Registration, and Social Security," *World Development* 35, 1 (2007) 71.
100. Kim Brooks, *Small Animals: Parenthood in the Age of Fear* (New York 2018).
101. Paul G. Chevigny, "From Betrayal to Violence: Dante's *Inferno* and the Social Construction of Crime," *Law and Social Inquiry* 26, 4 (2001) 804.
102. Peter Baldwin, *The Copyright Wars* (Princeton 2014).
103. John Crook, *Law and Life of Rome* (Ithaca 1967) 253.
104. James Barr Ames, "Law and Morals," *Harvard Law Review* 22, 2 (1908) 103; S. F. C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London 1981)

384–385; Huw Beverley-Smith et al., *Privacy, Property, and Personality: Civil Law Perspectives on Commercial Appropriation* (Cambridge 2005).

105. Helen Pringle, “Are We Capable of Offending God?,” in Elizabeth Burns Coleman and Kevin White, eds., *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society* (Canberra 2006) 31; Lorenz Langer, *Religious Offence and Human Rights: The Implications of Defamation of Religions* (Cambridge 2014) 370–377.

106. Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (New York 2007) 4.

107. Morris M. Kleiner, “Occupational Licensing,” *Journal of Economic Perspectives* 14, 1 (2000) 190.

108. Prosecuting those who hurt animals has thrown up its own issues: Why pets but not farmed animals? Why do reformers who reject reliance on imprisonment for other crimes retain it for animal harm? See Justin Marceau, *Beyond Cages: Animal Law and Criminal Punishment* (Cambridge 2019).

109. The Dangerous Dogs Act of 1991 in Britain determines which kinds of dog are not pets, for example.

110. Christopher D. Stone, “Should Trees Have Standing? Towards Legal Rights to Natural Objects,” *Southern California Law Review* 45 (1972). The Whanganui River in New Zealand has been given legal standing. “Innovative Bill Protects Whanganui River with Legal Personhood,” New Zealand Parliament, 28 March 2017, <https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/>. As has the Amazon forest in Colombia: Anastasia Moloney, “Colombia’s Top Court Orders Government to Protect Amazon Forest in Landmark Case,” *Reuters*, 6 April 2018, <https://www.reuters.com/article/us-colombia-deforestation-amazon/colombias-top-court-orders-government-to-protect-amazon-forest-in-landmark-case-idUSKCN1HD21Y>.

111. Michael E. Tigar, “The Right of Property and the Law of Theft,” *Texas Law Review* 62, 8 (1984) 1454; George P. Fletcher, “The Metamorphosis of Larceny,” *Harvard Law Review* 89, 3 (1976) 471–474.

112. Michael D. Gordon, “The Perjury Statute of 1563,” *Proceedings of the American Philosophical Society* 124, 6 (1980) 444.

113. Yannis D. Kotsonis, “Taxes and the Two Faces of the State since the Eighteenth Century,” in John L. Brooke et al., eds., *State Formations* (Cambridge 2018) 239; Richard S. Willen, “Religion and the Law: The Secularization of Testimonial Procedures,” *Sociological Analysis* 44, 1 (1983) 57–62; Underwood, “False Witness,” 248.

114. Coffee, “Does ‘Unlawful’ Mean ‘Criminal’?,” 202–204; Fletcher, “Metamorphosis of Larceny,” passim; Smith, “Overcoming Overcriminalization,” 559–560.

115. R. J. V. Lenman, “Art, Society, and the Law in Wilhelmine Germany: The Lex Heinze,” *Oxford German Studies* 8 (1973) 98; *Protokoll über die Verhandlungen des Parteitages der Sozialdemokratischen Partei Deutschlands*, Hannover, 9–14 October 1899 (Berlin 1899) 86–87; Franz v. Liszt, *Lehrbuch des Deutschen Strafrechts*, 16th and 17th ed. (Berlin 1908) 619.

116. Kristen E. Eichensehr, “Treason in the Age of Terrorism: An Explanation and Evaluation of Treason’s Return in Democratic States,” *Vanderbilt Journal of Transnational Law* 42 (2009) 1496.

117. David S. Ardia, "Freedom of Speech, Defamation, and Injunctions," *William and Mary Law Review* 55, 1 (2013) 12; Yang-Ming Tham, "Honest to Blog: Balancing the Interests of Public Figures and Anonymous Bloggers in Defamation Lawsuits," *Villanova Sports and Entertainment Law Journal* 17 (2010) 231.

118. Tabatha Abu El-Haj, "Defining Peaceably: Policing the Line between Constitutionally Protected Protest and Unlawful Assembly," *Missouri Law Review* 80 (2015) 971.

119. Stuntz, "Pathological Politics," 515; Erik Luna, "The Overcriminalization Phenomenon," *American University Law Review* 54 (2005) 704; Stuart P. Green, "Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses," *Emory Law Journal* 46 (1997).

120. Markus D. Dubber, *The Dual Penal State* (New York 2018) chap. 4. A similar theme informs Gary Gerstle, *Liberty and Coercion: The Paradox of American Government from the Founding to the Present* (Princeton 2015).

121. R. A. Duff, "Criminalizing Endangerment," *Louisiana Law Review* 65 (2005) 961.

122. Clive Emsley, "'Mother, What Did Policemen Do When There Weren't Any Motors?' The Law, the Police, and the Regulation of Motor Traffic in England, 1900–1939," *Historical Journal* 36, 2 (1993) 366; Seo, *Policing the Open Road*, 50–51.

123. Sanford H. Kadish, "The Crisis of Overcriminalization," *Annals of the American Academy of Political and Social Science* 374 (1967) 158; James R. Copland and Rafael A. Mangual, *Overcriminalizing America*, Manhattan Institute (August 2018) 7, <https://media4.manhattan-institute.org/sites/default/files/R-JC-0818.pdf>.

124. Elizabeth E. Joh, "The Paradox of Private Policing," *Journal of Criminal Law and Criminology* 95, 1 (2004) 121–122.

125. Douglas Kim, "Asset Forfeiture: Giving Up Your Constitutional Rights," *Campbell Law Review* 19 (1997) 528–529, 541; Todd Barnet, "Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act," *Duquesne Law Review* 40 (2001) 94. The standard work on asset forfeiture is Leonard W. Levy, *A License to Steal: The Forfeiture of Property* (Chapel Hill 1996). Some reform has now been introduced with the Civil Asset Forfeiture Reform Act of 2000: see Michael Van den Berg, "Proposing a Transactional Approach to Civil Forfeiture Reform," *University of Pennsylvania Law Review* 163 (2015) 875–879. There are similarities in the UK Proceeds of Crime Act of 2002: see Simon Hallsworth and John Lea, "Reconstructing Leviathan: Emerging Contours of the Security State," *Theoretical Criminology* 15, 2 (2011) 148.

126. Didier Fassin, *The Will to Punish* (New York 2018) 40; Azam Ahmed, "Fighting as Masked Vigilantes, Brazil's Police Leave a Trail of Bodies and Fear," *New York Times*, 20 December 2019.

127. Edward Peters, *Torture*, exp. ed. (Philadelphia 1996) 117.

128. Swedish penal code, chap. 23, sect. 6, <https://www.government.se/content/assets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf>; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford 2014) 101.

129. Dubber, *Dual Penal State*, 41–42.

130. John H. Langbein, *Torture and the Law of Proof* (Chicago 1976) 47–48.

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Chapter 2

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Chapter 3

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8. Matthew 5:38–48.
9. Durkheim, *Division of Labour*, 72. Durkheim goes further to argue that punishment continues to be inspired by broadly theological concerns, protecting something higher, even as it becomes secular. *Division of Labour*, 77, 110.
10. Drapkin, *Crime and Punishment*, 55–56.
11. Genesis 9:5–6.
12. Plato, *Laws*, 768a; David Cohen, *Law, Sexuality, and Society: The Enforcement of Morals in Classical Athens* (Cambridge 1991) 227–228.
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32. Coffee, "Does 'Unlawful' Mean 'Criminal'?", 222; George Kateb, "Punishment and the Spirit of Democracy," *Social Research* 74, 2 (2007) 303.
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39. Nash, "Analyzing the History of Religious Crime," 8; Garnot, "La législation et la répression des crimes," 78; Philip S. Gorski, "The Protestant Ethic Revisited: Disciplinary Revolution and State Formation in Holland and Prussia," *American Journal of Sociology* 99, 2 (1993) 279.
40. Sharpe, *Crime in Early Modern England*, 215; Axtmann, "'Police' and the Formation of the Modern State," 42; Stuart Banner, *The Death Penalty* (Cambridge MA 2002) 14.

41. In June 2015, a group of Western tourists on Mount Kinabalu in Malaysia caused outrage by stripping, and a subsequent deadly earthquake was blamed on their disrespect. Andreas Illmer, "Playboy Model Angers Maori with Nude Shoot on Sacred Mountain," *BBC News*, 3 May 2017, <http://www.bbc.co.uk/news/world-asia-39789508>.

42. Drapkin, *Crime and Punishment*, 64, 69, 71; Baruch, "In the Name of the Father," 56; Leviticus 24:16.

43. Gagarin, *Drakon*, 164; Tacitus, *Germania*, chap. 12; von Bar, *History of Continental Criminal Law*, 72; Laster, "Criminal Restitution," 73.

44. Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850* (New York 1978) 17.

45. Leon R. Yankwich, "Law and Order under the Incas," *Southern California Law Review* 22 (1949) 149; Mueller, "Tort, Crime, and the Primitive," 321.

46. Drapkin, *Crime and Punishment*, 237.

47. Drapkin, *Crime and Punishment*, 69.

48. George M. Calhoun, *The Growth of Criminal Law in Ancient Greece* (Berkeley 1927) 16–17, 85; Treston, *Poine*, 23, 146, 93.

49. Theodor Mommsen, *Römisches Strafrecht* (Leipzig 1899) 614; von Bar, *History of Continental Criminal Law*, 16; Treston, *Poine*, 4.

50. Green, *Verdict according to Conscience*, 5; Given, *Society and Homicide*, 5; Diamond, *Primitive Law*, 74; Green, "Societal Concepts," 669–670.

51. MacDowell, *Law in Classical Athens*, 53; Jones, *Law and Legal Theory of the Greeks*, 253.

52. Danielle S. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* (Princeton 2000) 39; Calhoun, *Growth of Criminal Law*, 78.

53. Von Bar, *History of Continental Criminal Law*, 39.

54. King, *Law and Society in the Visigothic Kingdom*, 88, 92; "Capitulary of Charlemagne," 199.

55. Mommsen, *Römisches Strafrecht*, 1043; Jones, *Law and Legal Theory of the Greeks*, 183.

56. Richard M. Fraher, "The Theoretical Justification for the New Criminal Law of the High Middle Ages," *University of Illinois Law Review* 3 (1984) 578; McAuley, "Canon Law and the End of the Ordeal," 495.

57. Julius Goebel Jr., *Felony and Misdemeanor: A Study in the History of Criminal Law* (Philadelphia 1976) 36; Harding, *Medieval Law*, 75.

58. Friedland, *Seeing Justice Done*, 36.

59. W. Ullmann, "Some Medieval Principles of Criminal Procedure," *Juridical Review* 59, 1 (1947) 7–9.

60. McAuley, "Canon Law and the End of the Ordeal," 495; Fraher, "Theoretical Justification," 582.

61. John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge MA 1974) 144.

62. Jean Michel Antoine de Servan, quoted in Lascoumes et al., *Au nom de l'ordre*, 25.

63. Maine, *Ancient Law*, 217; Gagarin, *Early Greek Law*, 63; MacDowell, *Law in Classical Athens*, 57.

64. Martin Ostwald, *From Popular Sovereignty to the Sovereignty of Law: Law, Society, and Politics in Fifth-Century Athens* (Berkeley 1986) 15; MacDowell, *Law in Classical Athens*, 129–131.

65. Mueller, "Tort, Crime, and the Primitive," 309.

66. Goebel, *Felony and Misdemeanor*, 64–68, discussing Frankish law of the sixth century. Yet seventh-century Visigothic law is said not to distinguish clearly between crimes and torts. King, *Law and Society in the Visigothic Kingdom*, 87.

67. Esmein, *History of Continental Criminal Procedure*, 336.

68. Fletcher, "Metamorphosis of Larceny," 479–480; Goebel, *Felony and Misdemeanor*, 66.

69. Spierenburg, *Spectacle of Suffering*, 2–3; Langbein, *Prosecuting Crime*, 211–212; Harding, *Medieval Law*, 19.

70. Pollock and Maitland, *History of English Law*, 1:37; James B. Given, *Inquisition and Medieval Society: Power, Discipline, and Resistance in Languedoc* (Ithaca 1997) 21.

71. Bartlett, *Trial by Fire and Water*, 132; Harding, *Medieval Law*, 33.

72. Max Weber, *Economy and Society* (Berkeley 1978) 762.

73. Genesis 18:21; Luke 16:1–2.

74. Langbein, *Prosecuting Crime*, 130–131; Esmein, *History of Continental Criminal Procedure*, 114–115.

75. Fraher, "Theoretical Justification," 582.

76. Green, *Verdict according to Conscience*, 97.

77. Langbein, *Prosecuting Crime*, 216–217, 177, 198–199; Weisser, *Crime and Punishment*, 94–95.

78. Weisser, *Crime and Punishment*, 96–97; Herrup, *Common Peace*, 68; Kollmann, *Crime and Punishment*, 205.

79. Bruce Lenman and Geoffrey Parker, "The State, the Community, and the Criminal Law in Early Modern Europe," in Gatrell et al., *Crime and the Law*, 26–27; Diamond, *Primitive Law*, 92; Green, "Jury and the English Law," 416.

80. R. van Caenegem, "The Law of Evidence in the Twelfth Century," in Stephan Kuttner and J. Joseph Ryan, eds., *Proceedings of the Second International Congress of Medieval Canon Law* (Vatican City 1965) 297–298.

81. Goebel, *Felony and Misdemeanor*, 76–77; van Caenegem, "Law of Evidence," 300.

82. Klerman, "Settlement and Decline of Private Prosecution," 5–6; Given, *Society and Homicide*, 98–99.

83. Green, *Verdict according to Conscience*, 105–106.

84. Langbein, *Prosecuting Crime*, 22–24, 35.

85. Beattie, *Crime and the Courts*, 35.

86. Ullmann, "Some Medieval Principles," 23–24; Richard M. Fraher, "IV Lateran's Revolution in Criminal Procedure," in Rosalio Castillo Lara, ed., *Studia in honorem Eminentissimi Cardinalis Alphonsi M. Stickler* (Rome 1992) 103; W. Ullmann, "Reflections on Medieval Torture," *Juridical Review* 56, 3 (1944) 130; Goebel, *Felony and Misdemeanor*, 70–75.

87. Ullmann, "Some Medieval Principles," 4; Given, *Inquisition and Medieval Society*, 21–22; Esmein, *History of Continental Criminal Procedure*, 19–20.

88. Treston, *Poine*, 226; Gagarin, *Drakon*, 119; King, *Law and Society in the Visigothic Kingdom*, 113.

89. Leviticus 24:16.
90. Plato, *Laws*, bk. 9, chap. 12.
91. MacDowell, *Law in Classical Athens*, 254; Treston, *Poine*, 423.
92. Lewis, *Sanctioned Violence*, 92.

Chapter 4

1. Exodus 22:28.
2. Pandias M. Schisas, *Offences against the State in Roman Law* (London 1926) 3, 20.
3. Inghram, *Political Crime in Europe*, 30–31.
4. Derek Bodde and Clarence Morris, *Law in Imperial China* (Cambridge MA 1967) 41; Bodde, “Basic Concepts,” 392. However, in the Ming treason was punished only by beheading, not by slow slicing of the body. Jiang, *Mandate of Heaven*, 96.
5. Pollock and Maitland, *History of English Law*, 1:300.
6. David Lorton, “The Treatment of Criminals in Ancient Egypt: Through the New Kingdom,” *Journal of the Economic and Social History of the Orient* 20, 1 (1977) 14; Lewis, *Sanctioned Violence*, 28.
7. John Bellamy, *The Tudor Law of Treason* (London 1979) 202–205; “Historical Concept of Treason: English, American,” *Indiana Law Journal* 35, 1 (1959) 71.
8. Treason Act 1814, 54 George III, c. 146. But by 1820 decapitation and the other dismemberments were no longer inflicted. V. A. C. Gatrell, *The Hanging Tree: Execution and the English People 1770–1868* (Oxford 1994) 298–299.
9. In the United States, treason remains punishable by death. Eichensehr, “Treason in the Age of Terrorism,” 1500.
10. John Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge 1970) 13; Treston, *Poine*, 220; Lex Quisquis, 397, quoted in S. H. Cuttler, *The Law of Treason and Treason Trials in Later Medieval France* (Cambridge 1981) 8.
11. Bruce G. Trigger, *Understanding Early Civilizations* (Cambridge 2003) 237.
12. Allgemeines Landrecht für die Preußischen Staaten, Part 2, chap. 20, pt. 2, §95; Strafgesetzbuch für das Königreich Baiern (Munich 1813), art. 118.
13. Stephen C. Thaman, “Marxist and Soviet Law,” in Markus D. Dubber and Tatjana Hornle, eds., *Oxford Handbook of Criminal Law* (Oxford 2014) 317; Mark Edle and Michael Geyer, “States of Exception: The Nazi–Soviet War as a System of Violence, 1939–1945,” in Michael Geyer and Sheila Fitzpatrick, eds., *Beyond Totalitarianism: Stalinism and Nazism Compared* (Cambridge 2009) 385.
14. Manuel Eisner, “Killing Kings: Patterns of Regicide in Europe, AD 600–1800,” *British Journal of Criminology* 51 (2011) 563–564.
15. Goebel, *Felony and Misdemeanor*, 45; Jiang, *Mandate of Heaven*, 155.
16. Eisner, “Killing Kings,” 568–569.
17. G. R. Elton, *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge 1972) 387–391.
18. “Historical Concept of Treason,” 74; Walter G. Simon, “The Evolution of Treason,” *Tulane Law Review* 35, 4 (1961) 687.

19. 33 Henry VIII, c. 23; Bellamy, *Tudor Law of Treason*, 38.
20. Jonathan K. van Patten, "Magic, Prophecy, and the Law of Treason in Reformation England," *American Journal of Legal History* 27 (1983) 10–11.
21. George P. Fletcher, "Ambivalence about Treason," *North Carolina Law Review* 82 (2003–2004) 1614; J. Richard Broughton, "The Snowden Affair and the Limits of American Treason," *Lincoln Memorial University Law Review* 3 (2015) 15.
22. Thomas Jefferson wrote of treason codes that "they do not distinguish between acts against the government and acts against the oppressions of the government; the latter are virtues; yet they have furnished more victims to the executioner than the former." Quoted in *Cramer v. United States*, 325 US 1 (1945) n. 28.
23. Stuart E. Abrams, "Threats to the President and the Constitutionality of Constructive Treason," *Columbia Journal of Law and Social Problems* 12 (1975–1976) 379–380. In the various colonial laws, treason included only levying war and aiding and adhering to the enemy. Richard Z. Steinhaus, "Treason: A Brief History with Some Modern Applications," *Brooklyn Law Review* 22 (1955–1956) 256.
24. James Willard Hurst, *Law of Treason in the United States* (Westport 1971) chap. 4; Herbert L. Packer, "Offenses against the State," *Annals of the American Academy of Political and Social Science* 339 (1962) 78.
25. Hurst, *Law of Treason*, 5–6, 144.
26. US Constitution, art. 3, §3; Steinhaus, "Treason," 258.
27. "The History of Treason," *Law Coach* 2 (1921–1922) 147.
28. Broughton, "Snowden Affair," 17–18; J. H. Leek, "Treason and the Constitution," *Journal of Politics* 13, 4 (1951) 609; Hurst, *Law of Treason*, 195. The Sedition Act of 1798 (allowed to expire in the years immediately following Jefferson's election in 1800), which charged as misdemeanors the uttering, publishing, or printing of false and malicious writings against the government, was a spasm in the other direction, as was the Sedition Act of 1918 and the Wilson Act of 1940. Leek, "Treason and the Constitution," 618–619.
29. Hurst, *Law of Treason*, 7, 198–201; Carlton F. W. Larson, "The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem," *University of Pennsylvania Law Review* 154 (2005–2006) 901–902.
30. The numbers vary: see Mary Connery, "Hung, Drawn and Quartered? The Future of the Constitutional Reference to Treason," *Trinity College Law Review* 5 (2002) 73; Leek, "Treason and the Constitution," 616.
31. John N. Hazard and William B. Stern, "'Exterior Treason': A Study in Comparative Criminal Law," *University of Chicago Law Review* 6, 1 (1938) 78; Leek, "Treason and the Constitution," 617.
32. George Washington pardoned the insurrectionaries of the Whiskey Rebellion of 1794 to undercut hardcore dissent from the new republic. Erin Creegan, "National Security Crime," *Harvard National Security Journal* 3 (2011–2012) 380. But some Southern residents were prosecuted for treason consisting of adherence to the North. *Cramer v. United States*, 325 US 1 (1945), n. 14.
33. *Cramer v. United States*, 325 US 1 (1945) 26.
34. Bruno S. Frey, "Why Kill Politicians? A Rational Choice Analysis of Political Assassinations," *Working Paper Series*, Institute for Empirical Research in Economics, University of Zurich (2007) 3; Abdelilah Bouasria, "Elián Gonzalez: The Messiah of

Fidel Castro," *Journal of the International Relations and Affairs Group* 1, 1 (2011) 107. Attempts on Castro's life are documented in the film *638 Ways to Kill Castro* (2006).

35. Zaryab Iqbal and Christopher Zorn, "Sic semper tyrannis? Power, Repression, and Assassination since the Second World War," *Journal of Politics* 68, 3 (2006) passim.

36. Otto Kirchheimer, *Political Justice* (Princeton 1961) 34–35.

37. Connery, "Hung, Drawn, and Quartered?," 65.

38. A. H. J. Greenidge, "The Conception of Treason in Roman Law," *Juridical Review* 7 (1895) 230.

39. Van Patten, "Magic, Prophecy, and the Law of Treason," 4. To be precise, traitors forfeited their lands to the king, but felons' land escheated. Pollock and Maitland, *History of English Law*, 1:351. This was one of the motives that prompted the development of trusts in English common law—to prevent land of those declared enemies by the king from escheating to him. G. R. Elton, "The Law of Treason in the Early Reformation," *Historical Journal* 11, 2 (1968) 216; Bellamy, *Tudor Law of Treason*, 10.

40. Kathleen A. Parrow, "Neither Treason nor Heresy: Use of Defense Arguments to Avoid Forfeiture during the French Wars of Religion," *Sixteenth Century Journal* 22, 4 (1991) 706.

41. Montesquieu, *Spirit of the Laws*, 12:7.

42. Lear, *Treason*, 152; Samuel Rezneck, "The Early History of the Parliamentary Declaration of Treason," *English Historical Review* 42, 168 (1927) 504; Bellamy, *Tudor Law of Treason*, 42–43; Carla Hesse, "The Law of the Terror," *Modern Language Notes* 114, 4 (1999) 717; 27 Elizabeth I, c. 2.

43. Admittedly charged with defamation, not treason. Thomas Fuller, "Thai Man May Go to Prison for Insulting King's Dog," *New York Times*, 14 December 2015; Austin Ramzy and Wai Moe, "Myanmar Poet Who Wrote of Penis Tattoo Is Convicted of Defaming Ex-Leader," *New York Times*, 24 May 2016.

44. Simon, "Evolution of Treason," 699; Connery, "Hung, Drawn, and Quartered," 68–69; Paul T. Crane, "Did the Court Kill the Treason Charge? Reassessing *Cramer v. United States* and Its Significance," *Florida State University Law Review* 36 (2008–2009) 636–639; Eichensehr, "Treason in the Age of Terrorism," 1457.

45. G. A. Kelly, "From Lèse-Majesté to Lèse-Nation: Treason in Eighteenth-Century France," *Journal of the History of Ideas* 42, 2 (1981) 269–270.

46. MacDowell, *Law in Classical Athens*, 176; Lear, *Treason*, xix, 28; Barrington Moore Jr., "Cruel and Unusual Punishment in the Roman Empire and Dynastic China," *International Journal of Politics, Culture, and Society* 14, 4 (2001) 734.

47. Gretason, "Crime, Guilt, and Punishment," 142; Romans 13:1. Early colonial statutes in North America cited more elliptically relevant sources, from Samuel and Numbers. Hurst, *Law of Treason*, 69–70.

48. Innocent III, *Vergentis in senium*, decretal letter, 25 March 1199. See Helga Schnabel-Schüle, "Das Majestätsverbrechen als Herrschaftsschutz und Herrschaftskritik," *Aufklärung* 7, 2 (1994) 35; Peters, *Torture*, 53; Kenneth Pennington, "Pro peccatis patrum puniri: A Moral and Legal Problem of the Inquisition," *Church History* 47, 2 (1978) 137.

49. Levy, *Treason against God*, 169; Parrow, "Neither Treason nor Heresy," 707; Garnot, "La législation et la répression des crimes," 78.

50. W. H. Greenleaf, "James I and the Divine Right of Kings," *Political Studies* 5, 1 (1957) 47; Schnabel-Schüle, "Majestätsverbrechen," 36.

51. Hesse, "Law of the Terror," 708; von Bar, *History of Continental Criminal Law*, 279–281. *Lèse-majesté divine* was abolished in the new penal code of 1791. This term was used also by Calvin. Levy, *Treason against God*, 131.

52. Florike Egmond, "The Cock, the Dog, the Serpent, and the Monkey: Reception and Transmission of a Roman Punishment, or Historiography as History," *International Journal of the Classical Tradition* 2, 2 (1995) 167, passim; Mary Nagle Wessling, "Infanticide Trials and Forensic Medicine: Württemberg 1757–93," in Michael Clark and Catherine Crawford, eds., *Legal Medicine in History* (Cambridge 1994) 118.

53. Moore, "Cruel and Unusual Punishment," 747.

54. James Fitzjames Stephen, *A History of the Criminal Law of England* (London 1883) 3:95.

55. Art 13. Attempts on the emperor were punished as parricide. Art 86. Amputation was abolished in 1832 and parricide was no longer singled out in the penal code of 1994.

56. Shigenori Matsui, "Constitutional Precedents in Japan: A Comment on the Role of Precedent," *Washington University Law Review* 88, 6 (2011) 1674.

57. In the Roman Empire and in the English statute of 1351. Lear, *Treason*, xiv–xv, 30.

58. Cuttler, *Law of Treason*, 29.

59. 28 Henry VIII, c. 24; Bellamy, *Tudor Law of Treason*, 36.

60. "Editor Defends Diana over Mirror Letters," *BBC News*, 31 August 2000, <http://news.bbc.co.uk/1/hi/uk/905239.stm>.

61. Lear, *Treason*, xvi.

62. Greenidge, "Conception of Treason," 229.

63. Elmer Truesdell Merrill, "Some Remarks on Cases of Treason in the Roman Commonwealth," *Classical Philology* 13, 1 (1918) 35.

64. Schisas, *Offenses against the State*, 6.

65. Isaac J. Colunga, "Untangling a Historian's Misinterpretation of Ancient Rome's Treason Laws," *Journal Jurisprudence* 9 (2011) 11–15, 17; C. W. Chilton, "The Roman Law of Treason under the Early Principate," *Journal of Roman Studies* 45 (1955) 74–75; von Bar, *History of Continental Criminal Law*, 42.

66. As an aside, until 2003 the US Secret Service was the police arm of the Treasury and had as its main functions investigating counterfeiting and other violations of money as well as protecting the president.

67. Lear, *Treason*, 29.

68. Adalbert Erler and Ekkehard Kaufmann, eds., *Handwörterbuch zur Deutschen Rechtsgeschichte* (Berlin 1971) 1:649.

69. Lear, *Treason*, chaps. 5 and 6. The Nazis used the same terminology. Georg Dahm, "Verrat und Verbrechen," *Zeitschrift für die gesammte Staatswissenschaft* 95, 2 (1935) 291–292.

70. Brunner, *Land and Lordship*, 222–223.

71. The English Treason Act 1351 (25 Edward III, st. 5, c. 2) codified this. Petty treason involved a servant killing his master or a wife her husband. The penalties were slightly milder than for high treason—no quartering, but still drawing and hanging. Lear, *Treason*, 241–242.

72. As distinguished from *Landesverrat*, which includes acts of outright collaboration and aid to an enemy, as opposed to internal sedition.
73. Simon, "Evolution of Treason," 685; Foster, quoted in Hurst, *Law of Treason*, 43.
74. King, *Law and Society in the Visigothic Kingdom*, 40–41; Harding, *Medieval Law*, 38, 44.
75. Treason Act 1351, 25 Edward III, st. 5, c. 2.
76. Greenleaf, "James I," 45.
77. Quentin Skinner, "The State," in Terence Ball et al., eds., *Political Innovation and Conceptual Change* (Cambridge 1989) 124.
78. Lewis, *Sanctioned Violence*, 205.
79. Lear, *Treason*, 14.
80. Simon, "Evolution of Treason," 681; Elton, "Law of Treason," 211.
81. Ralph E. Giesey et al., "Cardin Le Bret and Lese Majesty," *Law and History Review* 4, 1 (1986) 28–29.
82. Lear, *Treason*, 40; Brian Z. Tamanaha, *On the Rule of Law* (Cambridge 2004) 24.
83. Ann Lyon, "From Dafydd ap Gruffydd to Lord Haw-Haw: The Concept of Allegiance in the Law of Treason," *Cambrian Law Review* 33 (2002) 37; Bellamy, *Law of Treason*, 10; Cuttler, *Law of Treason*, 5.
84. That rebellion against a tyrant is not treason was also identified in the Golden Bull of Hungary in 1222, the Peace of Fexhe of the Principality of Liege, and the Joyeuses entrées of Brabant in 1356. M. Denis Szabo, "Political Crimes," *Denver Journal of International Law and Policy* 2 (1972) 13.
85. Richard L. Greaves, "Concepts of Political Obedience in Late Tudor England," *Journal of British Studies* 22, 1 (1982) 25; Gordon, *Controlling the State*, 125–126.
86. D. Alan Orr, *Treason and the State: Law, Politics, and Ideology in the English Civil War* (Cambridge 2002) 4, 176.
87. Thomas Hobbes, *Leviathan*, chap. 21.
88. Szabo, "Political Crimes," 8–10.
89. Bellamy, *Law of Treason*, 64.
90. Michael Jones, "'Bons Bretons et bons Francoys': The Language and Meaning of Treason in Later Medieval France," *Transactions of the Royal Historical Society* 32 (1982) 96.
91. Orr, *Treason and the State*, 19.
92. Bellamy, *Law of Treason*, 206–207; Brackett, *Criminal Justice and Crime in Late Renaissance Florence*, 127–128.
93. Conrad Russell, "The Theory of Treason in the Trial of Strafford," *English Historical Review* 80, 314 (1965) 37, 46; Orr, *Treason and the State*, 183, 4.
94. *Every Man His Own Lawyer* (New York 1768) 266, quoted in Larson, "Forgotten Constitutional Law," 901.
95. Strafgesetzbuch für das Königreich Baiern, art. 300. Articles 309 and following include detailed accounts of libel and other trespasses against the sovereign, his wife, and heir.
96. French penal code, 1810, art. 86.
97. Fritz van Calcker et al., *Verbrechen und Vergehen gegen den Staat und die Staatsgewalt* (Berlin 1906) 26, 103–104, 111. However, insulting and defaming the monarch were crimes much less regulated and prosecuted in England than in most other European nations.

98. Treason Act of 1695, 7 & 8 William III, c. 3, s. 6.
99. Treason Act of 1795, 36 George III, c. 7.
100. Treason Act of 1800, 39 & 40 George III, c. 93. The Treason Act of 1817 also removed other protections from the statute of 1695 for those who assaulted the monarch. 57 George III, c. 6 s. 4, repealed by Crime and Disorder Act 1998, c. 37.
101. Giles St. Aubyn, *Queen Victoria* (London 1991) 161–163.
102. Treason Act of 1842, 5 & 6 Vict., c. 51. Until the Security from Violence Act 1863, which punished robbery with violence, the firearms violation was the only crime punished by whipping. Jennifer Davis, “The London Garotting Panic of 1862,” in Gatrell et al., *Crime and the Law*, 208.
103. Crime and Disorder Act 1998, c. 37.
104. Eichensehr, “Treason in the Age of Terrorism,” 1450–1451.
105. Kelly, “From Lèse-Majesté to Lèse-Nation,” 272–273, 283–284.
106. French penal code, art. 86.
107. Thomas R. Robinson, “Treason in Modern Foreign Law,” *Boston University Law Review* 2 (1922) 102.
108. Ernst J. Schuster, “‘Lèse-Majesté’ in Germany,” *Journal of the Society of Comparative Legislation*, n.s. 41 (1901) 43; Reichsstrafgesetzbuch (1871), §§94–104; Robinson, “Treason in Modern Foreign Law,” 108. Thirteen European nations still make insulting the head of state a crime. *Economist*, 4 June 2016.
109. Reichsstrafgesetzbuch (1871), §80.
110. Robinson, “Treason in Modern Foreign Law,” 99. The Prussian Code of 1794 made similar distinctions: *Hoch* and *Landesverrat* and then *Majestätsbeleidigung*, pt. 2, chap. 20, sect. 5, §196.
111. Robinson, “Treason in Modern Foreign Law,” 98; Calker et al., *Verbrechen und Vergehen*, 28–29; Thomas Vormbaum, *A Modern History of German Criminal Law* (Berlin 2014) 153.
112. Law of 21 July 1922; Richard J. Evans, *Rituals of Retribution: Capital Punishment in Germany, 1600–1987* (London 1996) 505–506.
113. Strafgesetzbuch, §81.
114. French penal code, 1994, art. 410–411. Other aspects of these fundamental interests are “the balance of its natural surroundings and environment, and the essential elements of its scientific and economic potential and cultural heritage.”
115. George P. Fletcher, “The Case for Treason,” *Maryland Law Review* 41, 2 (1982) 199.
116. 18 USC §871; Abrams, “Threats to the President,” 351.
117. The killing of John F. Kennedy’s assassin, Lee Harvey Oswald, by Jack Ruby was blamed on the federal authorities’ inability to take the case out of local hands. US Senate, *Judiciary Committee Report 89-498*, 21 July 1965, 2, 6.
118. 18 USC §1751; Abrams, “Threats to the President,” 379.
119. Simon, “Evolution of Treason,” 687; Bellamy, *Tudor Law of Treason*, 16–17; “History of Treason,” 147.
120. “Historical Concept of Treason,” 73.
121. Bellamy, *Law of Treason*, 207–208.
122. Penal ordinance of 1532, Emperor Charles V, art. 127; Peter Blickle, “The Criminalization of Peasant Resistance in the Holy Roman Empire,” *Journal of Modern History* 58 (1986) S88.

123. Blickle, "Criminalization of Peasant Resistance," S91–93.
124. Orr, *Treason and the State*, 173.
125. *Cramer v. United States*, 325 US 1 (1945) 21.
126. Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (orig. ed. 1941; reprint, Oxford 2017) 49.
127. Angela K. Bourne and Fernando Casal Bértoa, "Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945–2015)," *European Constitutional Law Review* 13 (2017) 230.
128. Thomas R. Robinson, "Treason in Roman Law," *Georgetown Law Journal* 8 (1919–1920) 20.
129. Hurst, *Law of Treason*, 70.
130. US Constitution, art. 4, §4.
131. Andrews, "Boundaries of Citizenship," 93.
132. Decree of 4 December 1792, <http://artflsrv02.uchicago.edu/cgi-bin/philologic/getobject.pl?c.32:43.baudouin0314>.
133. French penal code, 1810, art. 87. The Belgian penal code of 1867 gave much the same definition of treason.
134. Hurst, *Law of Treason*, 49; Calker et al., *Verbrechen und Vergehen*, 4.
135. These are the themes of Ingraham, *Political Crime in Europe*, chapters 13–15. But Ingraham makes of this trend a return to the old importance of treason rather than the historical anomaly it seems in retrospect to have been. Similar themes are found in Margaret Boveri, *Treason in the Twentieth Century* (New York 1963) 6–8 and *passim*.
136. Packer, "Offenses against the State," 83; Abrams, "Threats to the President," 358; Szabo, "Political Crimes," 16.
137. The English concept of high treason is confusingly closer to the German *Landesverrat* than to *Hochverrat*. *Landesverrat* is giving away state secrets to foreign powers. *Hochverrat* is violently undermining the constitutional order. Strafgesetzbuch, §§94, 81. In the US Constitution, treason is defined as levying war against the states or aiding and giving comfort to their enemies. Only in the penal code is sedition mentioned as internal attempts to overthrow the government. Sedition is rebellion against the authority of the United States or its laws. 18 USC §2383. And there is a crime of advocating the overthrow or destruction of the government. 18 USC §2385.
138. Williams, *Tudor Regime*, 376; Elton, "Law of Treason," 222, 231–232; Orr, *Treason and the State*, 18. Earlier examples are given in I. D. Thornley, "The Treason Legislation of Henry VIII," *Transactions of the Royal Historical Society* 11 (1917) 107–109. An overview is given in Cressy, *Dangerous Talk*, chap. 3. The Treason Act 1534 was repealed in 1547 under Edward VI.
139. Abrams, "Threats to the President," 374–376; Cuttler, *Law of Treason*, 47. By the seventeenth century, spoken words alone were no longer thought to constitute treason.
140. Andrews, "Boundaries of Citizenship," 92–93.
141. New York Act, 30 March 1781, cited in *Cramer v. United States*, 325 US 1 (1945) n. 13.
142. Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York 1987) 149; Tom W. Bell, "Treason, Technology, and Freedom of Expression," *Arizona State Law Journal* 37 (2005) 1028–1029.
143. Abrams, "Threats to the President," 352, 355–356.

144. Michael Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770–1820," *Oxford Journal of Legal Studies* 10 (1990) 307–309; El-Haj, "Defining Peaceably," 967.

145. 18 USC §§2383–2384. But anyone convicted of insurrection was punished with only up to ten years in prison and forbidden to hold office. These paragraphs were based on laws of 17 July 1862 and 31 July 1861, respectively. *Revised Statutes of the United States*, 2nd ed. (Washington DC 1878) §§5334, 1036; 5336, 1037.

146. Creegan, "National Security Crime," 381–382.

147. 18 USC §§2385–2386.

148. Crane, "Did the Court Kill the Treason Charge?" 684; Hazard and Stern, "Exterior Treason," 81; Broughton, "Snowden Affair," 10; Eichensehr, "Treason in the Age of Terrorism," 1472.

149. The Rosenbergs were convicted only of conspiring to spy because the statute of limitations on espionage had run out. Packer, "Offenses against the State," 87.

150. Treason Felony Act 1848, 11 & 12 Vict., c. 12; Radzinowicz, *History of English Criminal Law*, 5:461.

151. Treachery Act 1940, 3 & 4 George VI, c. 40.

152. French penal code, 1994, arts. 411-2 to 411-11, 412-1 to 450-5.

153. Hazard and Stern, "Exterior Treason" 85–86.

154. Harry Söderman and John J. O'Connell, *Modern Criminal Investigation*, 5th ed. (New York 1962) 499.

155. Martin van Creveld, *The Rise and Decline of the State* (Cambridge 1999) 401–402.

156. Richard Moran, "The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)," *Law and Society Review* 19, 3 (1984) 493, 495.

157. Eric H. Monkkonen, *Police in Urban America, 1860–1920* (Cambridge 1981) 63.

158. *United States v. Lawrence*, 26 F. Cas. 887 (C.C.D.C. 1835) (No. 15,557), cited in William F. Duker, "The Right to Bail," *Albany Law Review* 42 (1977) 90; Foote, "Coming Constitutional Crisis," 992.

159. Ingraham, *Political Crime in Europe*, 128.

160. Robert Aitken and Marilyn Aitken, "The M'Naghten Case: The Queen Was Not Amused," *Litigation* 36, 4 (2010) 55.

161. Though Napoleon III was perhaps suspected of this fabrication unfairly: see Howard C. Payne, *The Police State of Louis Napoleon Bonaparte 1851–1860* (Seattle 1966) 268–269.

Chapter 5

1. Mommsen, *Römisches Strafrecht*, 24; Maine, *Ancient Law*, 81.

2. Weisser, *Crime and Punishment*, 21.

3. Figures are surprisingly hard to come by. This paywalled site claims to have some: <https://www.statisticbrain.com/arranged-marriage-statistics/>.

4. Lintott, *Violence in Republican Rome*, 7.

5. Vigilantism is “unreasonable self-help action by citizens that tends to disrupt the administration of the criminal justice system.” *State v. Johnson*, 122 N.M. 696, 930 P.2d 1148 (1996), quoted in Jane Boyd Ohlin and Alvin Stauber, “The Applicability of Citizen’s Arrest Powers to the Hospitality Industry,” *Journal of Hospitality and Tourism Research* 27, 3 (2003) 345.

6. *R v. Brown* [1993] 2 All ER 75, 4, <http://www.bailii.org/uk/cases/UKHL/1993/19.html>; Barbara Falsetto, “Crossing the Line: Morality, Society, and the Criminal Law,” *Cambridge Student Law Review* 5 (2009) 186–187.

7. Thomas C. Grey, *The Legal Enforcement of Morality* (New York 1983) 145–146.

8. Patrick Devlin, *The Enforcement of Morals* (London 1965) 6.

9. Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill 1991) 13.

10. Muir, *Mad Blood Stirring*, chap. 8.

11. Markku Peltonen, *The Duel in Early Modern England* (Cambridge 2003) 67, 110.

12. Bartlett, *Trial by Fire and Water*, chap. 6.

13. John W. Baldwin, “The Intellectual Preparation for the Canon of 1215 against Ordeals,” *Speculum* 36, 4 (1961) 616.

14. *Grettir’s Saga*, trans. Denton Fox and Hermann Pálsson (Toronto 1974) 39.

15. Bartlett, *Trial by Fire and Water*, 104–105, 120–122.

16. Bartlett, *Trial by Fire and Water*, 114.

17. Austrian Aryans did not accept challenges from Jews, for example, unless they were especially persistent. George Weidenfeld, *Remembering My Good Friends* (London 1994) 60–61.

18. Boehm, *Blood Revenge*, 87.

19. Ute Frevert, “Honour and Middle-Class Culture: The History of the Duel in England and Germany,” in Jürgen Kocka and Allen Mitchell, eds., *Bourgeois Society in Nineteenth-Century Europe* (Oxford 1993). The Dutch, in contrast, were unimpressed. Pieter Spierenburg, *Violence and Punishment: Civilizing the Body through Time* (Cambridge 2013) 44–45.

20. Beattie, *Crime and the Courts*, 92.

21. Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven 2001) chap. 4.

22. Spierenburg, *History of Murder*, 73–78.

23. Appiah, *Honor Code*, 30; Spierenburg, *History of Murder*, 182.

24. Banner, *Death Penalty*, 78; Kollmann, *Crime and Punishment*, 406.

25. R. H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge MA 2015) 152; Ryan P. Brown, *Honor Bound: How a Cultural Ideal Has Shaped the American Psyche* (New York 2016) 16.

26. This is the spirit in which economists have approached vigilantism. Kelly D. Hine, “Vigilantism Revisited,” *American University Law Review* 47 (1998) 1241.

27. Stephen P. Frank, “Popular Justice, Community, and Culture among the Russian Peasantry, 1870–1900,” *Russian Review* 46, 3 (1987) 240–241; Spierenburg, *Spectacle of Suffering*, 11.

28. Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York 1980) 31–32; William C. Culbertson, *Vigilantism: Political History of Private Power in America* (New York 1990) 37.

29. France, Code de procédure pénale, art. 73; Germany, Strafprozeßordnung, §127; Malaysia, Criminal Procedure Code, sect. 27.

30. Culberson, *Vigilantism*, 11.

31. Alan Hunt, *Governing Morals: A Social History of Moral Regulation* (Cambridge 1999) 60; Roth, *American Homicide*, 193–194, 266–267; Frederick Allen, “Montana Vigilantes and the Origins of 3-7-77,” *Montana: The Magazine of Western History* 51, 1 (2001) 4–6; Friedman and Havemann, “Rise and Fall of Unwritten Law,” 1021; Culberson, *Vigilantism*, 47; Ira P. Robbins, “Vilifying the Vigilante: A Narrowed Scope of Citizen’s Arrest,” *Cornell Journal of Law and Public Policy* 25 (2016) 560, 580. In Montana, schools and businesses are still named “Vigilante” as a mark of approval.

32. Stephanie Juliano, “Superheroes, Bandits, and Cyber-nerds: Exploring the History and Contemporary Development of the Vigilante,” *Journal of International Commercial Law and Technology* 7, 1 (2012) 44–45.

33. Culberson, *Vigilantism*, 5; Elizabeth Dale, *Criminal Justice in the United States, 1789–1939* (Cambridge 2011) 47.

34. Sylvia D. Hoffert, “Gender and Vigilantism on the Minnesota Frontier: Jane Grey Swisshelm and the U.S.–Dakota Conflict of 1862,” *Western Historical Quarterly* 29, 3 (1998) 357–359; Walter T. Howard, “Vigilante Justice and National Reaction: The 1937 Tallahassee Double Lynching,” *Florida Historical Quarterly* 67, 1 (1988) 42.

35. One such orgy of lynch violence was the case of George Hughes in Texas in 1930. Beth Crabb, “White Man’s Justice for a Black Man’s Crime,” *Journal of Negro History* 75 (1990).

36. Tsuyoshi Hasegawa, *Crime and Punishment in the Russian Revolution: Mob Justice and the Police in Petrograd* (Cambridge MA 2017) chap. 5.

37. Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Durham NC 2009) 217–218; Juliano, “Superheroes,” 58.

38. Franklin E. Zimring, *The Contradictions of American Capital Punishment* (New York 2003) 90.

39. David Garland, *Peculiar Institution: America’s Death Penalty in an Age of Abolition* (Cambridge MA 2010) 31.

40. Michael J. Pfeifer, *Rough Justice: Lynching and American Society, 1874–1947* (Urbana 2004) 29, chap. 4.

41. There were 1,540 lynchings versus 1,215 executions. Terance D. Miethe and Hong Lu, *Punishment: A Comparative Historical Perspective* (Cambridge 2005) 98.

42. Calculated from figures at Tuskegee University. Tuskegee University Archives Repository, 022 Lynching Information, Monroe Work’s Compilation, “Lynching, Whites & Negroes, 1882–1968.”

43. Zimring, *Contradictions of American Capital Punishment*, 89–90.

44. Børge Bakken, “China, a Punitive Society?” *Asian Criminology* 6 (2011) 40–41.

Chapter 6

1. Ugo Mattei, *Basic Principles of Property Law* (Westport 2000) 65–67; Barry Nicholas, *An Introduction to Roman Law* (Oxford 1962) 129–130.

2. Although for many offenses the talionic logic was not in fact eye for eye but an infliction that preventively rendered the offender harmless—thus, castration for rape, not counterrape—except in Assyria. Diamond, *Primitive Law*, 98, 102.

3. This description comes from the second-century Christian text *Apocalypse of Peter*. Meeks, *Origins of Christian Morality*, 176; Bernstein, *Formation of Hell*, 285.

4. Beccaria, *On Crimes and Punishments*, chap. 7.

5. Gerald Dworkin and David Blumenfeld, “Punishment for Intentions,” *Mind* 75, 299 (1966) 396–399.

6. David Boonin, *The Problem of Punishment* (Cambridge 2008) 57; Paul H. Robinson, “Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice,” *Harvard Law Review* 114, 5 (2001) 1438.

7. Jeremy Bentham, *Principles of Penal Law*, in John Bowring, ed., *Works of Jeremy Bentham* (Edinburgh 1838) 1:396.

8. Bentham, *Principles of Penal Law*, 398.

9. Drapkin, *Crime and Punishment*, 211; von Bar, *History of Continental Criminal Law*, 337, 381.

10. Although Kant was not interested in deterrence, his concern with the bloodguilt that would adhere to that community’s members even as they dispersed if they failed to carry out the sentence arguably suggested a worry with supernatural anger that introduced a preventive note—prevention against divine retribution. Kant, *Philosophy of Law*, 198.

11. Robinson, “Punishing Dangerousness,” 1439–1440.

12. Punishing attempted murder less than actual murder made no sense unless the hope was to encourage accomplice behavior as a preferable alternative to primary perpetrator behavior. Dressler, “Reassessing the Theoretical Underpinnings,” 114.

13. Such branding was therefore ended after seven years. Beattie, *Crime and the Courts*, 491.

14. Esmein, *History of Continental Criminal Procedure*, 235; Radzinowicz, *History of English Criminal Law*, 1:730; Meghan A. Novisky and Robert L. Peralta, “When Women Tell: Intimate Partner Violence and the Factors Related to Police Notification,” *Violence against Women* 21, 1 (2015) 67.

15. Montesquieu, *Spirit of the Laws*, 6:16. The marginal deterrence, as modern economists would put it, was askew. George J. Stigler, “The Optimum Enforcement of Laws,” *Journal of Political Economy* 78 (1970) 527.

16. Francis Fukuyama, *The Origins of Political Order* (New York 2011) 130.

17. Amy Adler, “The Perverse Law of Child Pornography,” *Columbia Law Review* 101, 2 (2001) 254–256, 262–265.

18. *The Digest of Justinian*, trans. Alan Watson (Philadelphia 1985) 1.1.10.

19. Kant, *Metaphysics of Morals*, 6:332.

20. J. M. Kelly, *A Short History of Western Legal Theory* (Oxford 1992) 448–449; Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability* (Cambridge 2009) 192–196.

21. Hobbes, *Leviathan*, chap. 28.

22. John Locke, *Second Treatise*, chap. 2, sec. 8.

23. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford 1907) 170.

24. Von Bar, *History of Continental Criminal Law*, 4–5; Nicola Lacey, *State Punishment* (London 1988) chap. 2.

25. The logic spelled out by Socrates in Plato, *Gorgias*, 525A–B.

26. Plato, *Protagoras*, 324.

27. Walker, *Popular Justice*, 247.

28. William Blackstone, *Commentaries on the Laws of England* (Oxford 1765–1769) 4:249.

29. Hugo Adam Bedau, “Capital Punishment,” in Tom Regan, ed., *Matters of Life and Death* (New York 1993) 182; Arne Jansson, *From Swords to Sorrow: Homicide and Suicide in Early Modern Stockholm* (Stockholm 1998) 19, chap. 3; Karin Andriolo, “Murder by Suicide: Episodes from Muslim History,” *American Anthropologist* 104, 3 (2002) 739; Vitale, *End of Policing*, 79.

30. Dubber, *Dual Penal State*, 149.

31. That was Alex’s objection to hearing Beethoven while being reprogrammed in Stanley Kubrick’s film *A Clockwork Orange*.

32. Friedland, *Seeing Justice Done*, 62; Drapkin, *Crime and Punishment*, 27–28; Spierenburg, *Spectacle of Suffering*, 76. The deterrent effect of banishment was undercut, however, as Bentham pointed out, by the punishment being inflicted far away from those to be deterred. Also it incapacitated only as far as the source community was concerned, not necessarily the destination society. John Hirst, “The Australian Experience,” in Norval Morris and David J. Rothman, eds., *Oxford History of the Prison* (New York 1995) 274.

33. Hence, the Soviet Union never imposed life sentences, thinking that all prisoners could be rehabilitated. Thaman, “Marxist and Soviet Law,” 314.

34. John C. Coffee Jr, “Paradigms Lost: The Blurring of the Criminal and Civil Law Models. And What Can Be Done about It,” *Yale Law Journal* 101, 8 (1992) 1882.

35. Friedland, *Seeing Justice Done*, 207.

36. Parker, *Miasma*, 118; Treston, *Poine*, 140; Hirst, “Australian Experience,” 274–275.

37. Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford 1968) 44–45; Paul H. Robinson and John M. Darley, “The Utility of Desert,” *Northwestern University Law Review* 91 (1996–1997) 454.

38. Williams, *Tudor Regime*, 235.

39. David J. Rothman, “Perfecting the Prison,” in Morris and Rothman, *Oxford History of the Prison*, 125; Norval Morris, “The Contemporary Prison,” in Morris and Rothman, *Oxford History of the Prison*, 247; Edgardo Rotman, “The Failure of Reform,” in Morris and Rothman, *Oxford History of the Prison*, 172, 189–190; Robinson and Darley, “Utility of Desert,” 464; Bernard E. Harcourt, “The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century,” *University of Chicago Law Review* 70, 1 (2003) 105–109.

40. Anthony Bottoms, “The Philosophy and Politics of Punishment and Sentencing,” in Chris Clarkson and Rod Morgan, eds., *The Politics of Sentencing Reform* (Oxford 1995) 19–21; Harcourt, “Shaping of Chance,” 105.

41. Miethe and Lu, *Punishment*, 211.

42. Andrew Ashworth, “Social Control and ‘Anti-social Behaviour’: The Subversion of Human Rights,” *Law Quarterly Review* 120 (2004) 270–271; Roberts et al., *Penal Populism*, 127; Barnett, “Restitution,” 288–298; Lacey, *State Punishment*, 11.

Chapter 7

1. Vega, *Royal Commentaries of the Incas*, 96.
2. Plato, *Laws*, bk.10, 908a; Jones, *Law and Legal Theory of the Greeks*, 119.
3. Danielle S. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* (Princeton 2000) 202; Crook, *Law and Life of Rome*, 272.
4. Parker, *Miasma*, 118; Salima Ikram, *Ancient Egypt* (Cambridge 2010) 230; Lorton, "Treatment of Criminals," 7, 30. Similar attempts were made in Rome to eradicate the names of traitors altogether. Chilton, "Roman Law of Treason," 80.
5. Plato, *Laws*, bk. 9, chap. 12, 873a–c.
6. Michael R. Dutton, *Policing and Punishment in China* (Cambridge 1992) 78–79; Pollock and Maitland, *History of English Law*, 1:478.
7. Jakub J. Grygiel, *Return of the Barbarians: Confronting Non-state Actors from Ancient Rome to the Present* (Cambridge 2018) 35–41.
8. Anthony Giddens, *The Nation-State and Violence* (Berkeley 1987) 51, 79.
9. Leviticus 18:28–29, 20:3–5.
10. Gagarin, *Drakon*, 123.
11. MacDowell, *Law in Classical Athens*, 73; Seipp, "Distinction between Crime and Tort," 64.
12. Treston, *Poine*, 257; MacDowell, *Law in Classical Athens*, 117; Jones, *Law and Legal Theory of the Greeks*, 256.
13. Drapkin, *Crime and Punishment*, 77–79.
14. Genesis 4:12–21.
15. Bodde and Morris, *Law in Imperial China*, 78; Byock, *Viking Age Iceland*, 315.
16. Ames, *Righteous Persecution*, 150.
17. James Casey, "Household Dispute and the Law in Early Modern Andalusia," in Bossy, *Disputes and Settlements*, 210; Alan Williams, *The Police of Paris 1718–1789* (Baton Rouge 1979) 235.
18. Pieter Spierenburg, "The Body and the State," in Morris and Norval, *Oxford History of the Prison*, 62; von Bar, *History of Continental Criminal Law*, 32–33; Chilton, "Roman Law of Treason," 74–76.
19. Law of 28 March 1793; Lascoumes et al., *Au nom de l'ordre*, 160; Julian Swann, *Exile, Imprisonment, or Death: The Politics of Disgrace in Bourbon France, 1610–1789* (Oxford 2017) 62, 185–188; Patricia O'Brien, *The Promise of Punishment: Prisons in Nineteenth-Century France* (Princeton 1982) 260.
20. Hirst, "Australian Experience," 264.
21. Given, *Society and Homicide*, 93; Pollock and Maitland, *History of English Law*, 1:478; Spierenburg, "Body and the State," 62–63; Williams, *Police of Paris*, 235.
22. Alice Bullard, *Exile to Paradise: Savagery and Civilization in Paris and the South Pacific, 1790–1900* (Stanford 2000) chap. 5; Patricia O'Brien, "The Prison on the Continent," in Morris and Norval, *Oxford History of the Prison*, 212; Andrews, "Boundaries of Citizenship," 94; Wright, *Between the Guillotine and Liberty*, 93, 130, 138, 184.
23. Spierenburg, "Body and the State," 76; Miethe and Lu, *Punishment*, 31.
24. Hirst, "Australian Experience," 293.

25. Hans Mommsen, "The Realization of the Unthinkable: The Final Solution of the Jewish Question in the Third Reich," in Gerhard Hirschfeld, ed., *The Policies of Genocide* (London 1986).

26. David L. Hoffmann, "The Conceptual and Practical Origins of Soviet State Violence," in Harris, *Anatomy of Terror*, 89; Philip Ther, *The Dark Side of Nation-States: Ethnic Cleansing in Modern Europe* (New York 2014) 180–196.

27. Brackett, *Criminal Justice and Crime in Late Renaissance Florence*, 69; John A. Davis, *Conflict and Control: Law and Order in Nineteenth-Century Italy* (Atlantic Highlands 1988) 131, 223–226.

28. Kollmann, *Crime and Punishment*, 243–245; Thaman, "Marxist and Soviet Law," 314–315.

29. Bodde and Morris, *Law in Imperial China*, 82–84; Frank Dikötter, *Crime, Punishment, and the Prison in Modern China* (New York 2002) 53.

30. Dutton, *Policing and Punishment in China*, 82.

31. Though do not forget how many are still assassinated abroad by operatives from the regimes they have fled, such as Russians in London and Rwandan opposition members abroad.

32. Plato, *Apology*, 37c.

33. "Australia Plans to Deny Passports to Convicted Paedophiles," *BBC News*, 30 May 2017, <http://www.bbc.co.uk/news/world-australia-40089351>.

34. The United States has the most elaborate such rules. Britain and France also have sex-offender registries, but they are not made public. Keith Soothill, "Sex Offender Recidivism," *Crime and Justice* 39, 1 (2010) 151, 189, 191; Roberts et al., *Penal Populism*, 140; Corey Rayburn Yung, "The Emerging Criminal War on Sex Offenders," *Harvard Civil Rights–Civil Liberties Law Review* 45 (2010) 448–450; *New York Times*, 2 October 2005, A20.

35. Joseph Goldstein, "Housing Restrictions Keep Sex Offenders in Prison beyond Release Dates," *New York Times*, 21 August 2014.

36. Automatic alarms go off if sex offenders approach: *Spiegel* 32 (2005) 56.

37. Mandatory life sentences are now also possible in Britain. Ashworth and Zedner, *Preventive Justice*, 156–157; Howard, *Unusually Cruel*, 44.

38. Dubber, "Policing Possession," 855.

39. Diane Taylor, "Former UBS Trader Kweku Adoboli Vows to Fight Deportation," *Guardian*, 18 August 2018; Vanessa Barker, *Nordic Nationalism and Penal Order: Walling the Welfare State* (Milton Park 2017) 92.

40. Peter John Young, "Punishment, Money, and Legal Order: An Analysis of the Emergence of Monetary Sanctions with Special Reference to Scotland," PhD diss., Edinburgh University, 1987, passim, especially chap. 3.

41. Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (Abingdon 2009) 58–60, 77–79.

42. And the majority of sentences for antitrust, food and drug, and environmental offenses. Newburn, "Tough on Crime," 446–447; US Sentencing Commission, *Overview of Federal Criminal Cases: Fiscal Year 2018* (June 2019) 1, 9, 10, https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf.

43. Drapkin, *Crime and Punishment*, 22–26.

44. Charles H. Miller, "The Place of the Fine in Modern Penology," *Proceedings of the American Prison Association* (1951) 209–210.
45. Derek A. Westen, "Fines, Imprisonment, and the Poor," *California Law Review* 57 (1969) 783–785.
46. Green, *Verdict according to Conscience*, 15, 100–101.
47. Calvin R. Massey, "The Excessive Fines Clause and Punitive Damages," *Vanderbilt Law Review* 40, 6 (1987) 1253.
48. Tacitus, *Germania*, chap. 12; Phillpotts, *Kindred and Clan*, 70.
49. Beth A. Colgan, "Reviving the Excessive Fines Clause," *California Law Review* 102, 2 (2014) 307.
50. Hence, civil fines are often much larger than criminal fines since civil fines price the behavior that requires restitution. Ashworth, "Social Control," 273.
51. Michael K. Glenn, "The Crime of 'Pollution': The Role of Federal Water Pollution Criminal Sanctions," *American Criminal Law Review* 11 (1973) 845–847.
52. Julia Moses, *The First Modern Risk: Workplace Accidents and the Origins of European Social States* (Cambridge 2018) 30.
53. Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (New York 1939) 174–175.
54. Beattie, *Policing and Punishment*, 215; Douglas Greenberg, *Crime and Law Enforcement in the Colony of New York 1691–1776* (Ithaca 1974) 162–163; Young, "Punishment, Money, and Legal Order," 40.
55. Coffee, "Paradigms Lost," 1882.
56. John P. Dawson, "Specific Performance in France and Germany," *Michigan Law Review* 57, 4 (1959) 498.
57. Williams, *Tudor Regime*, 394; Simon, "Evolution of Treason," 694; Levy, *Treason against God*, 314; Beattie, *Crime and the Courts*, 459.
58. Alex Harris et al., "Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States," *American Journal of Sociology* 115, 6 (2010) 1758.
59. "Fighting for Identity," *Economist*, 17 May 2014.
60. Glenn, "Crime of 'Pollution,'" 836–838; O'Malley, *Currency of Justice*, 69.
61. Panos D. Bardis, "Main Features of the Ancient Roman Family," *Social Science* 38, 4 (1963) 237.
62. Lenman and Parker, "State, Community, and Criminal Law," 20; Pollock and Maitland, *History of English Law*, 1:56.
63. Wilson, *Varieties of Police Behavior*, 95; *Times* (London), 5 July 2019, 8.
64. Michael Dutton, *Policing Chinese Politics* (Durham NC 2005) 280–281; Jonathan R. Zatzlin, *The Currency of Socialism: Money and Political Culture in East Germany* (Cambridge 2007) 121.
65. Mommsen, *Römisches Strafrecht*, 50; von Bar, *History of Continental Criminal Law*, 271.
66. Blackstone, *Commentaries on the Laws of England*, 4:373.
67. Beattie, *Crime and the Courts*, 456–457; Massey, "Excessive Fines Clause," 1249–1250.
68. Diamond, *Primitive Law*, 67; Edward M. Peters, "Prison before the Prison," in Morris and Rothman, *Oxford History of the Prison*, 6; King, *Law and Society in the Visigothic Kingdom*, 191.

69. Seipp, "Distinction between Crime and Tort," 83–84; Colgan, "Reviving Excessive Fines Clause," 334.

70. Robert J. Steinfield, *Coercion, Contract, and Free Labor in the Nineteenth Century* (Cambridge 2001) 212, *passim*.

71. Kant, *Philosophy of Law*, 197.

72. Allen, *World of Prometheus*, 226.

73. Miller, *Eye for an Eye*, 22; Johnson and Krüger, "Good of Wrath," 167. This was Beccaria's argument, too. *On Crimes and Punishment*, chap. 20.

74. Brackett, *Criminal Justice and Crime in Late Renaissance Florence*, 5; von Bar, *History of Continental Criminal Law*, 274–275.

75. Rothman, "Perfecting the Prison," 112; O'Brien, "Prison on the Continent," 212–214; Emsley, *English Police*, 219.

76. Rusche and Kirchheimer, *Punishment and Social Structure*, 172–173.

77. Baldwin, *Contagion and the State in Europe*, 266–273. Similar dilemmas, fines or jail, were weighed for transmitting venereal diseases. *Zeitschrift für die Bekämpfung der Geschlechtskrankheiten* 11 (1910) 219; 15, 3 (1914) 94.

78. Crook, *Law and Life of Rome*, 250.

79. Mommsen, *Römisches Strafrecht*, 23.

80. O'Malley, *Currency of Justice*, 33, 40–41; Pollock and Maitland, *History of English Law*, 1:36, 56.

81. Miethe and Lu, *Punishment*, 135–136.

82. Emsley, "'Mother, What Did Policemen Do,'" 363; Seo, *Policing the Open Road*, 54.

83. The reengineering of fines was unfair in one way but fair in another—that the fine be proportional to the harm caused for everyone, however rich or poor they were. Restitution ran into the same problems, that some could afford it better than others, in which case did one stagger the payments according to wealth? Barnett, "Restitution," 288–298.

84. Saunders, *Plato's Penal Code*, 347.

85. Miller, "Place of the Fine," 213; Westen, "Fines, Imprisonment, and the Poor," 813; Miethe and Lu, *Punishment*, 26; Schafer, "Restitution to Victims," 253.

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138. Spierenburg, "Body and the State," 64.

139. McGowen, "Well-Ordered Prison," 83; Beattie, *Crime and the Courts*, 571; Michael Meranze, *Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760–1835* (Chapel Hill 1996) 168–169.

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Chapter 8

1. Durkheim, *Division of Labour*, 44.

2. Mühlhahn, *Criminal Justice in China*, 30.

3. Radzinowicz, *History of English Criminal Law*, 1:3–4.

4. In China during the Spring and Autumn periods, 770–476 BCE, public punishments were, if anything, even worse than in Europe in the 1700s. Dutton, *Policing and Punishment in China*, 109.

5. Dean, "Criminal Justice in Mid Fifteenth-Century Bologna," 27.

6. Gattrell, *Hanging Tree*, 15. Masterfully surveyed in Garland, *Peculiar Institution*, chap. 3.

7. Langbein, *Torture*, 11–12.

8. Similar exemptions for the literate were found widely in ancient law codes. Diamond, *Primitive Law*, 96–97.

9. Williams, *Tudor Regime*, 226; Beattie, *Crime and the Courts*, 141–145, 452.

10. Sharpe, *Crime in Early Modern England*, 90–91, 97, 99; Weisser, *Crime and Punishment*, 140.

11. Herrup, *Common Peace*, 165.

12. Spierenburg, "Body and the State," 60; F. W. Maitland, *Constitutional History of England* (Cambridge 1926) 478.

13. Garland, *Peculiar Institution*, 115, 105; Philips, "New Engine of Power," 156.

14. Gattrell, *Hanging Tree*, 8. Russia did something similar in 1767, as did Austria in 1787.

15. Rothman, "Perfecting the Prison," 114. In 2008, the US Supreme Court reserved death for crimes involving a loss of life, with treason as a possible exception. Eichensehr, "Treason in the Age of Terrorism," 1450, 1500; Creegan, "National Security Crime," 429.

16. Evans, *Rituals of Retribution*, 142.

17. Miethe and Lu, *Punishment*, 127; Bin Liang et al., "Sources of Variation in Pro-Death Penalty Attitudes in China," *British Journal of Criminology* 46 (2006) 130; Dikötter, *Crime, Punishment, and the Prison in Modern China*, 46–47.

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20. Eichensehr, "Treason in the Age of Terrorism," 1450.

21. Garland, *Peculiar Institution*, chap. 4.

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26. S. E. Finer, *The History of Government from the Earliest Times* (Oxford 1997) 650; Langbein, *Prosecuting Crime in the Renaissance*, 144; Feng Li, *Early China* (Cambridge 2013) 289.

27. Friedland, *Seeing Justice Done*, 100; Bodde and Morris, *Law in Imperial China*, 97; Mühlhahn, *Criminal Justice in China*, 29; Spierenburg, "Body and the State," 59.

28. Peters, *Torture*, 83; Sharpe, *Crime in Early Modern England*, 95; Dale, *Criminal Justice in the United States*, 38; Beattie, *Crime and the Courts*, 471.

29. Beattie, *Crime and the Courts*, 541; Wright, *Between the Guillotine and Liberty*, 140.

30. Rotman, "Failure of Reform," 184; Whitman, *Harsh Justice*, 152.

31. Gatrell, *Hanging Tree*, 15–16; Radzinowicz, *History of English Criminal Law*, 1:268.

32. This story is told well in Friedland, *Seeing Justice Done*, chaps. 5–7, and Spierenburg, *Spectacle of Suffering*, chap. 6.

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40. Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890–1990* (Chicago 1993) 33–34.

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47. Dressler, “Reassessing the Theoretical Underpinnings,” 95–96.
48. William Rann Kennedy, “The State Punishment of Crime,” *The Brief* 2 (1899–1900) 25.
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Chapter 9

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94. Ames, "Does Inquisition Belong to Religious History?," 21; Peters, *Torture*, 46; Bartlett, *Trial by Fire and Water*, 79.
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99. Theodore A. McConnell, "Confession in Cross-Disciplinary Perspective," *Journal of Religion and Health* 8, 1 (1969) 77–78.
100. Bossy, "Social History of Confession," 30–33, 36.
101. Murray, "Confession before 1215," 62.
102. R. F. Clarke, "The Practice of Confession in the Catholic Church," *North American Review* 169, 517 (1899) 829; Murray, "Confession before 1215," 52.
103. Bossy, "Social History of Confession," 26; Ronald K. Rittgers, "Private Confession and the Lutherization of Sixteenth-Century Nördlingen," *Sixteenth Century Journal* 36, 4 (2005) 1066–1068.
104. Rittersporn, "Terror and Soviet Legality," 186.
105. Owen Gingerich, "The Galileo Affair," *Scientific American* 247, 2 (1982) 143.
106. Iain Lauchlan, "Chekist *Mentalité* and the Origins of the Great Terror," in Harris, *Anatomy of Terror*, 20.

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108. Robert Conquest, *The Great Terror* (London 1968) 146–147, 550; Robert Sharlet and Piers Beirne, “In Search of Vyshinsky: The Paradox of Law and Terror,” *International Journal of the Sociology of Law* 12 (1984) 166; Harald J. Berman, ed., *Soviet Criminal Law and Procedure: The RSFSR Codes*, 2nd ed. (Cambridge MA 1972) 66.

109. The modern version of using certain acts as indicators of forbidden attitudes came with the Chinese crackdown on Uighurs and the Karakax list of suspicious activities that prompted detainment, including using Virtual Private Networks and clicking on foreign internet links. *Financial Times*, 18 February 2020.

110. Peters, *Inquisition*, 50; Wickersham, *Rituals of Prosecution*, 85.

111. Wickersham, *Rituals of Prosecution*, 13–14; R. Po-Chia Hsia, *Social Discipline in the Reformation* (London 1989) 68.

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113. Ning, “Public Opinion and the Death Penalty,” 87–88. More than a quarter of all death sentences in China were for such crimes.

Chapter 10

1. Leon Shaskolsky Sheleff, “Morality, Criminal Law, and Politics,” *Tel Aviv University Studies in Law* 2 (1976) 217.

2. Ames, *Righteous Persecution*, 45, 183.

3. Grey, *Legal Enforcement of Morality*, 29.

4. Lobban, “From Seditious Libel to Unlawful Assembly,” 307–309.

5. Pringle, “Are We Capable of Offending God?,” 35.

6. Norenzayan, *Big Gods*, 131.

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14. Trigger, *Understanding Early Civilizations*, 437; Strathern, *Unearthly Powers*, 38–39.

15. Svend Ranulf, *The Jealousy of the Gods and Criminal Law at Athens* (London 1933) 1:66.

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20. Clasen, "Medieval Heresies," 393, 404.
21. Levy, *Treason against God*, 245.
22. Gershom Scholem, *Sabbatai Ševi: The Mystical Messiah: 1626–1676*, 2nd ed. (Princeton 1975) 628; Carlebach, *Pursuit of Heresy*, 9, 184.
23. Alan Watson, *The State, Law, and Religion: Pagan Rome* (Athens GA 1992) 4–5; Mary Beard, "The Sexual Status of Vestal Virgins," *Journal of Roman Studies* 70 (1980) 13.
24. Porter, "Christian Ethics," 3–4.
25. Hobbes, *Leviathan*, chap. 27; R. J. Spjut, "Hobbes' Definition of Crime," *Anglo-American Law Review* 13 (1984) 6.
26. Von Bar, *History of Continental Criminal Law*, 399; Beattie, *Policing and Punishment*, 82.
27. Locke, *Letter concerning Toleration*, 43.
28. Beccaria, *On Crimes and Punishment*, chap. 2.
29. Kelly, *Short History of Western Legal Theory*, 295.
30. *Anmerkungen zum Strafgesetzbuche für das Königreich Baiern* (Munich 1813) 2:59–60.
31. *Strafgesetzbuch, Bavaria*, 1813, art. 400–401.
32. Montesquieu, *Spirit of the Laws*, 12:4.
33. Charles Donahue Jr., "The Ecclesiastical Courts," in Wilfried Hartmann and Kenneth Pennington, eds., *The History of Courts and Procedure in Medieval Canon Law* (Washington DC 2016) 249.
34. McKenna, "Treason against God," 33.
35. Ames, *Righteous Persecution*, 183.
36. Blasphemy Act 1697, 9 William III, c. 35.
37. Levy, *Treason against God*, 245, 252, 302–306, 313.
38. Quoted in Devlin, *Enforcement of Morals*, 10.
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44. McKenna, "Treason against God," 35–37.

45. H. L. A. Hart, *Law, Liberty, and Morality* (Stanford 1963) 44; Nash, "Analyzing the History of Religious Crime," 13; Pringle, "Are We Capable of Offending God?," 37.

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47. Nash, "Analyzing the History of Religious Crime," 14; Gauri Viswanathan, "Blasphemy and Heresy: The Modernist Challenge," *Comparative Studies in Society and History* 37, 2 (1995) 406–407, 410.

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53. Peter Jimack, "The French Enlightenment II: Deism, Morality, and Politics," in Stuart Brown, ed., *Routledge History of Philosophy* (London 1996) 5:255–256; Adriano Sofri and Lydia Cochrane, "On Optimism," *Critical Inquiry* 30, 4 (2004) 754.

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65. John Warwick Montgomery, “Law and Morality,” *Law and Justice* 122–123 (1994) 90–91.
66. Hans Kelsen, *The Pure Theory of Law* (Berkeley 1967) 63–64.
67. A. R. Louch, “Sins and Crimes,” *Philosophy* 43, 163 (1968) 43–45.
68. Kent Greenawalt, “Legal Enforcement of Morality,” *Journal of Criminal Law and Criminology* 85, 3 (1995) 710; Basil Mitchell, *Law, Morality, and Religion in a Secular Society* (Oxford 1967) chap. 2.
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70. Hart, *Law, Liberty, and Morality*, 26–27; Gabrielle Viator, “The Validity of Criminal Adultery Prohibitions after *Lawrence v. Texas*,” *Suffolk University Law Review* 39 (2005–2006) 837; Ethan Bronner, “Adultery, an Ancient Crime That Remains on Many Books,” *New York Times*, 14 November 2012.
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76. Steinfeld, *Coercion, Contract, and Free Labor*, 45–47.
77. A. L. Goodhart, *English Law and the Moral Law* (London 1953) 118.
78. Pound, *Law and Morals*, 27, 56; Brague, *Law of God*, 142.
79. French civil code, art. 1131–1133; German civil code, sect. 138, 242.
80. Woodard, “Thoughts on the Interplay between Morality and Law,” 788; Miethe and Lu, *Punishment*, 195.
81. W. Bertelsmann, “The Essence of *Mens Rea*,” *Acta Juridica* 34 (1974) 44; Nancy Travis Wolfe, “Mala in Se: A Disappearing Doctrine?” *Criminology* 19, 1 (1981) 138.
82. Pieper, *Concept of Sin*, 66–67; Aristotle, *Nicomachean Ethics*, bk. 5, chap. 7.
83. Rollin M. Perkins, “The Civil Offense,” *University of Pennsylvania Law Review* 100, 6 (1952) 832; Richard L. Gray, “Eliminating the (Absurd) Distinction between Malum in Se and Malum Prohibitum Crimes,” *Washington University Law Quarterly* 73 (1995) 1375.
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85. Seipp, “Distinction between Crime and Tort,” 59–60.
86. Coffee, “Does ‘Unlawful’ Mean ‘Criminal’?,” 195, 239; Coffee, “Paradigms Lost,” 1876, 1884–1885.
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Compilation regarding Incest Statutes," March 2013, <https://ndaa.org/wp-content/uploads/Incest-Statutes-2013.pdf>.

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90. Rajeev Ranjan et al., "(De-)Criminalization of Attempted Suicide in India," *Industrial Psychiatry Journal* 23, 1 (2014).

91. Attenborough, *Laws of the English Kings*, Wihtred cap 9–11.

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95. Durkheim, *Division of Labour*, 64.

96. Goodhart, *English Law and the Moral Law*, 147.

97. British and American law are among the few that allow testamentary freedom with few restrictions.

98. Sheleff, "Morality, Criminal Law, and Politics," 202–203; Baldwin, *Copyright Wars*, chap. 8.

99. Julian V. Roberts, "Public Opinion, Crime, and Criminal Justice," *Crime and Justice* 16 (1992) 135.

100. Coffee, "Does 'Unlawful' Mean 'Criminal'?", 235–237.

101. Nasser Arshadi and Thomas Eyssell, *Law and Finance of Corporate Insider Trading* (New York 1993) 43–45; Harry V. Ball and Lawrence M. Friedman, "The Use of Criminal Sanctions in the Enforcement of Economic Legislation," *Stanford Law Review* 17, 2 (1965) 197–198.

102. Buell, *Capital Offenses*, chap. 7.

103. Bertelsmann, "Essence of *Mens Rea*," 48.

104. Green, "Why It's a Crime to Tear the Tag off a Mattress," 1565.

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106. "Perjury: The Forgotten Offense," *Journal of Criminal Law and Criminology* 65, 3 (1974) 363.

107. Statute of Winchester, 1285, 13 Edw. I, c. 4.

108. Greenawalt, "Legal Enforcement of Morality," 713–715. Four US states have weak Good Samaritan statutes.

109. T. B. Macaulay et al., *The Indian Penal Code as Originally Framed in 1837* (Madras 1888) 140–141.

110. The contrast is narrowed insofar as Anglo-American common law punishes commission by omission more than civil law does. Thus, a parent or guardian who stands by while someone over whom they have a duty of care drowns would be liable for murder or manslaughter. French law recognizes no such commission by omission. Edward A. Tomlinson, "The French Experience with Duty to Rescue," *New York Law School Journal of International and Comparative Law* 20 (2000) 463.

111. Strafgesetzbuch, §323c; French penal code, art. 223–226; Swiss penal code, art. 128.
112. Sheleff, “Morality, Criminal Law, and Politics,” 214.
113. Grey, *Legal Enforcement of Morality*, 168–169, 174.
114. Tomlinson, “French Experience,” 462, 470–472; Peter M. Agulnick and Heidi V. Rivkin, “Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law,” *Touro International Law Review* 8 (1998) 107–109.
115. Ronald P. Sokol, “The Kindness of Strangers,” *International Herald Tribune*, 3–4 June 2006.
116. Tomlinson, “French Experience,” 497.
117. The UN Convention of the Law of the Sea (art. 98) requires all signatories to have legislation making it a duty to render assistance to ships and persons in distress.
118. Roberts, “Public Opinion,” 128; Robinson and Darley, “Utility of Desert,” 457.
119. Sharpe, *Crime in Early Modern England*, 182–183; Spierenburg, “Body and the State,” 58; Winslow, “Sussex Smugglers,” 149.
120. Spierenburg, *Spectacle of Suffering*, 126; Ruff, *Violence in Early Modern Europe*, 239.
121. Sanford H. Kadish, “Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations,” *University of Chicago Law Review* 30, 3 (1963) 439–440.
122. Coffee, “Does ‘Unlawful’ Mean ‘Criminal’?,” 237.
123. Roberts et al., *Penal Populism*, 100; Friedman and Havemann, “Rise and Fall of the Unwritten Law,” 1054.

Chapter 11

1. Wallace-Hadrill, “Bloodfeuds of the Franks,” 141; Treston, *Poine*, 227.
2. Specific deterrence of the individual offender could be done privately, of course, but not general deterrence of other potential offenders.
3. “Capitulary of Charlemagne,” 199.
4. Fraher, “Preventing Crime,” 231.
5. Moran, “Origin of Insanity,” 512; Kennedy, “State Punishment of Crime,” 20.
6. Meranze, *Laboratories of Virtue*, 27; Philips, “New Engine of Power,” 158–159; Douglas Hay, “Property, Authority, and the Criminal Law,” in Hay et al., eds., *Albion’s Fatal Tree*, 50.
7. Bodde and Morris, *Law in Imperial China*, 24.
8. “Capitulary of Charlemagne,” 198–199.
9. Fraher, “Preventing Crime,” 220, 231–232; McAuley, “Canon Law and the End of the Ordeal,” 494–495.
10. Schneider, “Imprisonment in Pre-classical and Classical Islamic Law,” 166; Given, *Inquisition and Medieval Society*, 84–85; Ames, *Righteous Persecution*, 171.
11. Stephen J. Davies, “The Courts and the Scottish Legal System 1600–1747,” in Gatrell et al., *Crime and the Law*, 128; Banner, *Death Penalty*, 65; Claire Duchon,

"Crime and Punishment in Liberated France: The Case of the *les femmes tondues*," in Claire Duchén and Irene Bandhauer-Schöffmann, eds., *When the War Was Over: Women, War, and Peace in Europe 1945–1956* (London 2000).

12. Most dramatically in the registries put online as of 2018 in Poland: Nina Apin, "Populismus statt Opferschutz," *taz.de*, 3 January 2018.

13. Trevaskes, *Policing Serious Crime in China*, 71.

14. Workhouse Test Act 1723; Paul Slack, *The English Poor Law 1531–1782* (Houndmills 1990) 40.

15. *Poor Law Commissioners' Report of 1834*, Cd. 2728 (1834) 44.

16. Émile Durkheim, *Moral Education* (New York 1961) 198–199.

17. Bailey, "Shadow of the Gallows," 312.

18. Beccaria, *On Crimes and Punishment*, chap. 28; Wright, *Between the Guillotine and Liberty*, 167, 172; Clive Emsley, *Crime, Police, and Penal Policy* (Oxford 2007) 33.

19. Davis, *Conflict and Control*, 128.

20. Liang, "Sources of Variation," 123.

21. Drapkin, *Crime and Punishment*, 75; Peters, "Prison before the Prison," 17; E. N. Gladden, *A History of Public Administration* (London 1972) 1:134.

22. Finer, *History of Government*, 1117; Moore, "Cruel and Unusual Punishment," 731, 752; Miethé and Lu, *Punishment*, 124–125. In China, the coup de grace was usually given early in the process, and the aim was less physical cruelty than to prevent the offender's spirit from regaining its wholeness in a future life. Bodde and Morris, *Law in Imperial China*, 93.

23. "Historical Concept of Treason," 74; Harrington, *Faithful Executioner*, 48; Spierenburg, "Body and the State," 52–54; Evans, *Rituals of Retribution*, 122.

24. Gatrell, *Hanging Tree*, 70.

25. Friedland, *Seeing Justice Done*, 56–65.

26. Foucault, *Discipline and Punish*, 3–5. The Chinese, however, seem not to have turned their executions into spectacles. Mühlhahn, *Criminal Justice in China*, 40–41.

27. Kollmann, *Crime and Punishment*, 406; Beattie, *Crime and the Courts*, 489, 524–525.

28. Plato, *Laws*, bk. 9, chap. 12.

29. Peter Linebaugh, "The Tyburn Riot against the Surgeons," in Hay et al., eds., *Albion's Fatal Tree*, 76. As late as 1904, a Massachusetts statute reaffirmed dissection of murderers. Banner, *Death Penalty*, 78. And in China, dissections of the corpses of poor prisoners continued into the twentieth century. Dikötter, *Crime, Punishment, and the Prison in Modern China*, 90.

30. Criminal Justice (Scotland) Act 1949, s. 14.

31. Gatrell, "Decline of Theft and Violence," 266–267; Banner, *Death Penalty*, 12.

32. Langbein, *Torture*, 40; Weisser, *Crime and Punishment*, 138; Radzinowicz, *History of English Criminal Law*, 1:76; Gatrell, *Hanging Tree*, 8–9; Patrick Joyce, *The State of Freedom: A Social History of the British State since 1800* (Cambridge 2013) 126.

33. Clive Emsley, *Policing and Its Context, 1750–1870* (London 1983) 59; Evans, *Rituals of Retribution*, 228; Radzinowicz, *History of English Criminal Law*, 1:288.

34. Gatrell, *Hanging Tree*, 91–92; Wiener, *Reconstructing the Criminal*, 93; Evans, *Rituals of Retribution*, 257–258; Meranze, *Laboratories of Virtue*, chap. 3.

35. Friedland, *Seeing Justice Done*, chaps. 5–7; Banner, *Death Penalty*, chap. 6.

36. Beccaria, *On Crimes and Punishment*, chap. 27.
37. Beccaria, *On Crimes and Punishment*, chap. 12; Binder, "Punishment Theory," 335; Bentham, *Introduction to the Principles of Morals*, 170.
38. Fraher, "Preventing Crime," 231; Adam Smith, *Lectures on Jurisprudence*, Glasgow ed., ed. R. L. Meek et al. (Oxford 1978) 331.
39. Packer, *Limits of Criminal Sanction*, 44–45; Robinson and Darley, "Utility of Desert," 454.
40. Beattie, *Crime and the Courts*, 523; Friedland, *Seeing Justice Done*, 212; Beccaria, *On Crimes and Punishment*, chap. 28.
41. Spierenburg, "Body and the State," 58; Wiener, *Reconstructing the Criminal*, 97.
42. Friedland, *Seeing Justice Done*, chaps. 8–10; French penal code of 6 October 1791, art. 2–5.
43. Evans, *Rituals of Retribution*, 305, 315; Gattrell, *Hanging Tree*, 10; Banner, *Death Penalty*, 156; Friedland, *Seeing Justice Done*, 270, 275.
44. Beattie, *Crime and the Courts*, 614; Wright, *Between the Guillotine and Liberty*, 70.
45. Bakken, "Moral Panics," 80; Susan Trevaskes, "Severe and Swift Justice in China," *British Journal of Criminology* 47 (2007) 39.
46. Pfeifer, *Rough Justice*, 136.
47. Foucault, *Discipline and Punish*, 9.
48. Vaale, *Dommen til Døden*, 66.
49. Trevaskes, *Policing Serious Crime in China*, 5.
50. Lucia Zedner, "Policing before and after the Police: The Historical Antecedents of Contemporary Crime Control," *British Journal of Criminology* 46, 1 (2006) 84.
51. Von Bar, *History of Continental Criminal Law*, 245.
52. Ethan Shagan, *The Rule of Moderation: Violence, Religion, and the Politics of Restraint in Early Modern England* (Cambridge 2011) 76.
53. Quoted in Nicholas Davidson, "Theology, Nature, and the Law: Sexual Sin and Sexual Crime in Italy from the Fourteenth to the Seventeenth Century," in Dean and Lowe, *Crime, Society, and the Law in Renaissance Italy*, 78.
54. Pollock and Maitland, *History of English Law*, 2:475.
55. Sayre, "Criminal Responsibility," 720.
56. Kelly, *Short History of Western Legal Theory*, 296; Dubber, *Police Power*, 31.
57. Mommsen, *Römisches Strafrecht*, 77.
58. Francis Bowes Sayre, "Mens Rea," *Harvard Law Review* 45 (1931–1932) 985, 1005; Moran, "Origin of Insanity," 487–488; Beattie, *Crime and the Courts*, 85.
59. Criminal Lunatics Act 1800, 39 & 40 George III, c. 94, detailed in Moran, "Origin of Insanity."
60. Aitken and Aitken, "M'Naghten Case," 54–56.
61. Aristotle, *Politics*, 1274b; Mommsen, *Römisches Strafrecht*, 1043.
62. David McCord, "The English and American History of Voluntary Intoxication to Negate Mens Rea," *Journal of Legal History* 11 (1990) 373–776, 381.
63. Oliver Wendell Holmes Jr., *The Common Law* (Boston 1881) 3.
64. Perkins, "Civil Offense," 833.
65. Michel Foucault, "About the Concept of the 'Dangerous Individual' in 19th Century Legal Psychiatry," *International Journal of Law and Psychiatry* 1 (1978) 1–2, 9.

66. David Bashevkin, *Sin*agogue: Sin and Failure in Jewish Thought* (Boston 2019) chap. 5; Ruth Kara-Ivanov Kaniel, "'Gedolah Aveirah Lishmah': Mothers of the Davidic Dynasty, Feminine Seduction, and the Development of Messianic Thought, from Rabbinic Literature to R. Moshe Haim Luzzatto," *Nashim: A Journal of Jewish Women's Studies & Gender Issues* 24 (2013) 28.
67. Sanford H. Kadish, "The Decline of Innocence," *Cambridge Law Journal* 26, 2 (1968) 274; Broughton, "Snowden Affair," 11.
68. Larson, "Forgotten Constitutional Law," 901–902.
69. *Regina v. Thurborn*, 169 Eng. Rep. 293 (1848); Fletcher, "Metamorphosis of Larceny," 514.
70. Sayre, "Mens Rea," 999–1000.
71. Benjamin A. Mains, "Virtual Child Pornography, Pandering, and the First Amendment," *Hastings Constitutional Law Quarterly* 37, 4 (2010) 833.
72. Fletcher, "Case for Treason," 206; Meli, "Hate Crime," 926.
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83. Exodus 21:12–14; Deuteronomy 19:4–13.
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85. Bodde and Morris, *Law in Imperial China*, 30; Li, *Early China*, 291.
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89. Twelve Tables, Table VIII, §12; Fletcher, "Metamorphosis of Larceny," 477; Drapkin, *Crime and Punishment*, 233.
90. King, *Law and Society in the Visigothic Kingdom*, 86, 259–260; Attenborough, *Laws of the English Kings*, Alfred cap 36; Levitt, "Origin of Mens Rea," 121; Drapkin,

Crime and Punishment, 283; Treston, *Poine*, 53; Mueller, "Tort, Crime, and the Primitive," 324.

91. Ullmann, *Medieval Idea of Law*, 144, 147. De Penna went so far as to argue that if the delinquent was not motivated by evil intent, there was no reason to punish.

92. Sayre, "Mens Rea," 980–981, 985.

93. Von Bar, *History of Continental Criminal Law*, 126.

94. Green, "Societal Concepts of Criminal Liability for Homicide," 669; Green, "Jury and the English Law of Homicide," 419–420.

95. Kaye, "Early History of Murder," 366; Gray, "Eliminating the (Absurd) Distinction," 1374.

96. Sayre, "Mens Rea," 993; Green, *Verdict according to Conscience*, 30; Kaye, "Early History of Murder," 365–366; Beattie, *Crime and the Courts*, 91.

97. Karlen, "Mens Rea," 238; Robbins, "Double Inchoate Crimes," 16.

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105. Larry Alexander and Kimberly D. Kessler, "Mens Rea and Inchoate Crimes," *Journal of Criminal Law and Criminology* 87, 4 (1997) 1138–1139.

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108. Alexander and Kessler, "Mens Rea," 1169–1170.

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114. Ferzan, "Inchoate Crimes," 1280; Fletcher, "Metamorphosis of Larceny," 523.

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118. Matthew 5:28.

119. Ullmann, *Medieval Idea of Law*, 144.

120. Pound, *Law and Morals*, 67.

121. Aquinas, *Summa Theologica*, first part of the second part, question 91, art. 4.

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133. Lorton, "Treatment of Criminals," 13–14.

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Chapter 12

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2. Robert Estienne, *Dictionnaire François–Latin*, 1539, quoted in Williams, *Police of Paris*, 8.

3. Markus Dubber, however, argues in *Dual Penal State* that police law continues a powerful and underacknowledged force in American penalty.

4. That the English did not give broad regulatory powers to their police leads historians of Britain to odd conclusions, such as interpreting the Victorian spread of behavioral legislation (regarding vagrancy, public drunkenness, prostitution) as a new eruption of policing into conduct formerly controlled only by informal prohibitions, but from a continental perspective this approach was nothing particularly new. See Wiener, *Reconstructing the Criminal*, 260, for an example.

5. Chapman, *Police State*, 51; Gerstle, *Liberty and Coercion*, chap. 2; William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill 1996) chap. 5.

6. David H. Bayley, *Patterns of Policing* (New Brunswick 1985) 39; J. J. Tobias, "Police and Public in the United Kingdom," *Journal of Contemporary History* 7 (1972) 202; Beattie, *Policing and Punishment*, 77; Chapman, *Police State*, 38–39. Patrick Colquhoun's *Treatise on the Police of the Metropolis* stood in the *Polizei* tradition, but, published in 1797, was late and derivative.

7. Chapman, *Police State*, 13; Franz-Ludwig Knemeyer, "Polizei," *Economy and Society* 9 (1980) 174–175; Liang, *Rise of Modern Police*, 1.

8. Beattie, *Policing and Punishment*, 124; Joel F. Harrington, *Reordering Marriage and Society in Reformation Germany* (Cambridge 1995) 123, 210–212.

9. Friedland, *Seeing Justice Done*, 76–77; Williams, *Police of Paris*, 26, 30–35, 41, 101; Knemeyer, "Polizei," 177; Axtmann, "'Police' and Formation of the Modern State," 42, 57; Charles Tilly, "Food Supply and Public Order in Modern Europe," in Charles Tilly, ed., *The Formation of National States in Western Europe* (Princeton 1975) 441–442.

10. John Merriman, *Police Stories: Building the French State, 1815–1851* (New York 2006) 24; Clive Emsley, *Gendarmes and the State in Nineteenth-Century Europe* (Oxford 1999) 82.
11. Monkkonen, *Police in Urban America*, 34, chap. 3; Neil Weissman, “Regular Police in Tsarist Russia, 1900–1914,” *Russian Review* 44, 1 (1985) 56–57.
12. James F. Richardson, *The New York Police: Colonial Times to 1901* (New York 1970) 150, 226–228.
13. Robert Reiner, *The Politics of the Police*, 2nd ed. (Toronto 1992) 69.
14. Raymond B. Fosdick, *European Police Systems* (New York 1915) 20–21, 113, 128.
15. David H. Bayley, “The Police and Political Development in Europe,” in Tilly, *Formation of National States*, 336; Mawby, *Comparative Policing Issues*, 46.
16. John Brewer et al., *The Police, Public Order, and the State*, 2nd ed. (New York 1996) 209.
17. Fosdick, *European Police Systems*, 147; Reiner, *Politics of the Police*, 69; Wilbur R. Miller, *Cops and Bobbies: Police Authority in New York and London, 1830–1870* (Chicago 1977) 128.
18. Reiner, *Politics of the Police*, 142, 212.
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20. Mark Harrison Moore, “Problem-Solving and Community Policing,” in Tonry and Morris, *Modern Policing*, 114; Reiner, *Politics of the Police*, 139, 97, 141.
21. Bayley, *Patterns of Policing*, 149; Bayley, *Police for the Future*, 20.
22. Wilson, *Varieties of Police Behavior*, 6.
23. Knemeyer, “Polizei,” 185–86; Axtmann, “‘Police’ and the Formation of the Modern State,” 46–47.
24. Allgemeines Landrecht, part 2, title 17, §10.
25. Bayley, *Patterns of Policing*, 110–111.
26. Gatrell, “Decline of Theft and Violence,” 271–272.
27. Liang, *Rise of Modern Police*, 19.
28. David H. Bayley, “Comparative Organization of the Police in English-Speaking Countries,” in Tonry and Morris, *Modern Policing*, 535.
29. Emsley, *Gendarmes*, 134.
30. Bayley, *Patterns of Policing*, 204; Roger Lane, “Urban Police and Crime in Nineteenth-Century America,” in Tonry and Morris, *Modern Policing*, 18.
31. Bayley, “Police and Political Development,” 373; Reiner, *Politics of the Police*, 63–68.
32. Richardson, *New York Police*, 70–71.
33. Liang, *Rise of Modern Police*, 4.
34. Dorothy H. Bracey, “Policing the People’s Republic,” in Ronald J. Troyer et al., eds., *Social Control in the People’s Republic of China* (New York 1989) 130.
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36. Julie Ayling et al., *Lengthening the Arm of the Law: Enhancing Police Resources in the Twenty-First Century* (Cambridge 2009) 190–206; Treitel, *Science for the Soul*, 146.
37. Daniel Jütte, *The Strait Gate: Thresholds and Power in Western History* (New Haven 2015) 92; Williams, *Police of Paris*, 73, 232; Funk, *Polizei und Rechtsstaat*, 279; Emsley, *English Police*, 225.

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39. Bellamy, *Tudor Law of Treason*, 83; Wickersham, *Rituals of Prosecution*, 97.
40. Karina M. Tehusijarana, "Fears Grow over App to Police Minorities," *Jakarta Post*, 26 November 2018.
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49. Miller, *Cops and Bobbies*, 107–108; Gatrell, "Decline of Theft and Violence," 276.
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155. Bartlett, *Trial by Fire and Water*, 16–20, 29.

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177. Williams, *Tudor Regime*, 150; Beattie, *Policing and Punishment*, 147, 231, 379.
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181. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. 100-704, 19 November 1988, 102 Stat. 4679; Ayling et al., *Lengthening the Arm of the Law*, 112.

182. Jütte, *Strait Gate*, 64.

183. Dwyer et al., *Actual Innocence*, chap. 3.

184. Noah Clements, "Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony," *Indiana Law Review* 40 (2007) 271; Henry F. Fradella, "Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony," *Federal Courts Law Review* 2 (2007) 3.

185. Smyth, *Cause of Death*, 19–20; Sung Tz'u, *The Washing Away of Wrongs*, trans. Brian E. McKnight (Ann Arbor 1981) 4, 62–63, 71, 132.

186. Mark Jackson, "Suspicious Infant Deaths: The Statute of 1624 and Medical Evidence at Coroners' Inquests," in Clark and Crawford, *Legal Medicine in History*, 75–81.

187. Frank, "Popular Justice," 259. Further evidence also dispelled the idea of floating lungs. Roth, "Homicide in Early Modern England," 39.

188. Spierenburg, *History of Murder*, 170. The first such case was in Paris in 1902. Martin, *Crime and Criminal Justice under the Third Republic*, 81.

189. Söderman and O'Connell, *Modern Criminal Investigation*, 122–123.

190. Smyth, *Cause of Death*, 18.

191. Cole, *Suspect Identities*, 88–90.

192. Footprints were used as evidence as early as the seventeenth century. Herrup, *Common Peace*, 74.

193. Söderman and O'Connell, *Modern Criminal Investigation*, 256; Dwyer et al., *Actual Innocence*, 45.

194. Emsley, *Crime, Police, and Penal Policy*, 182; Smyth, *Cause of Death*, 75.

195. Dwyer et al., *Actual Innocence*, 208–214.

196. D. H. Kaye, "Revisiting Dreyfus: A More Complete Account of a Trial by Mathematics," *Minnesota Law Review* 91 (2007) 829–830; Henry T. F. Rhodes, *Alphonse Bertillon* (London 1956) 174–175.

197. Dana Dryzal, "Blood Stain Pattern Analysis: Applications and Challenges," *D.U.Quark* 2, 2 (2018); Giovanni Acampora et al., "Bloodstain Pattern Analysis: A New Challenge for Computational Intelligence Community," in *Proceedings of the International Conference on Fuzzy Computation Theory and Applications* (2014); Vincent Denault et al., "The Analysis of Non-verbal Communication: The Dangers of Pseudoscience in Security and Justice Contexts," *Anuario de psicología jurídica* (2019); Vincent Denault and Louise Marie Jupe, "Justice at Risk! An Evaluation of a Pseudoscientific Analysis of a Witness' Nonverbal Behavior in the Courtroom," *Journal of Forensic Psychiatry & Psychology* 29, 2 (2017); Sophie J. Nightingale and Hany Farid, "Assessing the Reliability of Clothing-Based Forensic Identification," *Proceedings of the National Academy of Sciences* 117, 10 (2020) 5176.

198. Quoted in Dwyer et al., *Actual Innocence*, xviii.

199. William C. Thompson, "The Myth of Infallibility," in Sheldon Krinsky and Jeremy Gruber, eds., *Genetic Explanations: Sense and Nonsense* (Cambridge MA 2013) 230; Kimberly Cogdell Boies, "Misuse of DNA Evidence Is Not Always a Harmless Error: DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction," *Wesleyan Law Review* 17 (2011); Heather Murphy, "When a DNA Test Says

You're a Younger Man, Who Lives 5000 Miles Away," *New York Times*, 7 December 2019. Planting false evidence was a problem also with fingerprints. Cole, *Suspect Identities*, 278.

200. Tal Golan, *Laws of Men and Laws of Nature: The History of Scientific Expert Testimony in England and America* (Cambridge MA 2007) chap. 3.

201. Branding ended in France in 1832 or possibly, by some accounts, not until the 1930s; in Holland in 1854; and in China in 1905. Martin, *Crime and Criminal Justice under the Third Republic*, 80; Söderman and O'Connell, *Modern Criminal Investigation*, 68; Smyth, *Cause of Death*, 111.

202. Cole, *Suspect Identities*, 27–29.

203. Smyth, *Cause of Death*, 112–117; Emsley, *Crime, Police, and Penal Policy*, 187; Cole, *Suspect Identities*, chap. 2.

204. Page Hinners et al., "Determining Fingerprint Age with Mass Spectrometry Imaging via Ozonolysis of Triacylglycerols," *Analytical Chemistry*, 3 January 2020.

205. Finnane, *Police and Government*, 80–82.

206. Michael Kirkpatrick, assistant director in charge, Criminal Justice Information Services Division, FBI, testimony before the US House of Representatives, Judiciary Committee, 30 March 2004, <https://archives.fbi.gov/archives/news/testimony/fbi-fingerprint-program>; Cole, *Suspect Identities*, 198. The claim that the FBI had 160 million fingerprints by the early 1970s seems fanciful. It is made in Walker, *Popular Justice*, 187, which takes it from Samuel Walker, *A Critical History of Police Reform: The Emergence of Professionalism* (Lexington 1977) 157–159, which gives no verifiable source. Smyth mentions 140 million in 1956 in *Cause of Death*, 143.

207. Miller, *Cops and Bobbies*, 119.

208. Laurent Lopez, "Policiers, gendarmes et signalement descriptif," *Crime, histoire et sociétés* 10, 1 (2006) 53–54, 65; Merriman, *Police Stories*, 120. The ancient Egyptians had developed something similar. Söderman and O'Connell, *Modern Criminal Investigation*, 68.

209. Wacquant, *Punishing the Poor*, 272; Anderson, *In Thrall to Political Change*, 401.

210. Edwin Chadwick, "Preventive Police," *London Review* 1 (1829) 252, 304–308.

211. Kelling and Coles, *Fixing Broken Windows*, 50–51.

212. Registration at hotels, strictly enforced in Europe, is more laxly regulated and often only at the local level in the United States, though the use of a credit card to ensure payment has largely erased the difference. Söderman and O'Connell, *Modern Criminal Investigation*, 13.

213. Davis, *Conflict and Control*, 107; John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State*, 2nd ed. (Cambridge 2018).

214. Kevin D. Haggerty and Richard V. Ericson, "The Militarization of Policing in the Information Age," *Journal of Political and Military Sociology* 27 (1999) 240, 242.

215. Emsley, "Mother, What Did Policemen Do," 369–371; Reiss, "Police Organization," 84; Finnane, *Police and Government*, 101.

216. Thompson, "Myth of Infallibility," 248; Gates, *Our Biometric Future*, passim.

217. Patrick Radden Keefe, "Total Recall," *New Yorker*, 22 August 2016, 56; Paul Mozur, "Inside China's Dystopian Dreams," *New York Times*, 8 July 2018; <https://www.bbc.com/news/world-asia-china-43751276?ref=gazelle.popsugar.com>.

218. Durkheim, *Division of Labour*, 234; Gates, *Our Biometric Future*, 83–85.

219. Zedner, "Fixing the Future," 54.
220. "Advances in AI Are Used to Spot Signs of Sexuality," *Economist*, 9 September 2017; "Are Programs Better Than People at Predicting Reoffending?" *Economist*, 17 January 2018.
221. Alec Wilkinson, "Annals of Crime: The Serial-Killer Detector," *New Yorker*, 27 November 2017.
222. Jessica Saunders et al., "Predictions Put into Practice: A Quasi-experimental Evaluation of Chicago's Predictive Policing Pilot," *Journal of Experimental Criminology* 12 (2016) 350–352; Darwin Bond-Graham and Ali Winston, "All Tomorrow's Crimes," *SF Weekly*, 30 October 2013; Ali Winston, "Palantir Has Secretly Been Using New Orleans to Test Its Predictive Policing Technology," *Verge*, 27 February 2018.
223. Miller, *Bloodtaking*, 183.
224. Ruff, *Violence in Early Modern Europe*, 221.
225. Chadwick, "Preventive Police," 273.
226. *The Odyssey*, 21.5–7, 46–50; Matthew 16:19; Angela Cervi, "Keys and Locks," in *Encyclopedia of Ancient History*.
227. Liang, *Rise of Modern Police*, 119, 251.
228. Summerson, "Enforcement of the Statute of Winchester," 233.
229. Beattie, *Policing and Punishment*, 84, 215; Chadwick, "Preventive Police," 274, 285.
230. Quoted in Adler, "Perverse Law of Child Pornography," 271. Texas governor Rick Perry more recently got into hot water by suggesting that electric lights powered by fossil fuels helped cut sexual assault in Africa. "Rick Perry under Fire for Suggestion Fossil Fuels Can Reduce Sexual Assault," *Guardian*, 2 November 2017.
231. French penal code, 1810, art. 385; Eloise Moss, *Night Raiders: Burglary and the Making of Modern Urban Life in London, 1860–1968* (Oxford 2019) 5.
232. Moore, "Problem-Solving and Community Policing," 122, but see also Sherman "Attacking Crime," 190.
233. Ericson and Haggerty, *Policing the Risk Society*, 144–145; Nicolai Ouroussoff, "Uncle Sam, Visionary Builder?" *New York Times*, 19 September 2004. More generally, see Neal Kumar Kaytal, "Architecture as Crime Control," *Yale Law Journal* 111 (2002); Samia Henni, *Architecture of Counterrevolution: The French Army in Northern Algeria* (Zurich 2017).
234. Edwin Chadwick calls for the latter in "Preventive Police," 272.
235. Josh Barro, "Here's Why Stealing Cars Went Out of Fashion," *New York Times*, 12 August 2014.
236. Clifford D. Shearing and Phillip C. Stenning, "From the Panopticon to Disney World: The Development of Discipline," in Anthony N. Doob and Edward L. Greenspan, eds., *Perspectives in Criminal Law: Essays in Honour of John Ll. J. Edwards* (Aurora 1997).
237. Bodde and Morris, *Law in Imperial China*, 24; Dutton, *Policing and Punishment in China*, 24, 73, 123; Lewis, *Sanctioned Violence*, 61; Dutton, *Policing Chinese Politics*, 165–168.
238. Jonathan Drimmer, "When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System," *Houston Law Review* 33 (1996) 744; Duker, "Right to Bail," 37; Wendy Davies, "People and Places in Dispute

in Ninth-Century Brittany," in Davies and Fouracre, *Settlement of Disputes in Early Medieval Europe*, 77.

239. Statute of Winchester, 1285, 13 Edw. I, c. 2; Weisser, *Crime and Punishment*, 92; Given, *Society and Homicide*, 9–10.

240. Donald V. Kurtz, "The Legitimation of the Aztec State," in Henri J. M. Claessen and Peter Skalnik, eds., *The Early State* (The Hague 1978) 184; Kollmann, *Crime and Punishment*, 71, 124.

241. Décret sur la police intérieure des communes de la République, 10 Vendémiaire an IV (2 October 1795), https://www.1789-1815.com/loi_10_vend_an4.htm; Frank Biess, *Homecomings: Returning POWs and the Legacies of Defeat in Postwar Germany* (Princeton 2006) 35; Hazard and Stern, "'Exterior Treason,'" 90.

242. Ingraham, *Political Crime in Europe*, 304; Dershowitz, "Law of Dangerousness," 28.

243. Criminal Code of Canada, sect. 810; Jian Ghomeshi, "Reflections from a Hashtag," *New York Review of Books*, 11 October 2018.

244. Allan Y. Jiao, "Crime Control through Saturated Community Policing," *International Journal of Comparative and Applied Criminal Justice* 21, 1 (1997) 80.

245. Chamberlin, "Bounty Hunters," 1181; Emily Michael Stout, "Bounty Hunters as Evidence Gatherers," *University of Cincinnati Law Review* 65 (1997) 670.

246. Lorton, "Treatment of Criminals," 40–45; Bartlett, *Trial by Fire and Water*, 50; Hindle, "Keeping of the Public Peace," 218.

247. Blackstone, *Commentaries on the Laws of England*, 4:250–253.

248. French penal code, 1810, art. 44; O'Brien, *Promise of Punishment*, 229.

249. Code des délits et des peines, 25 October 1795, art. 19.

250. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Edinburgh 1814) bk. 3, 213; Durkheim, *Division of Labour*, 233.

251. Manning, "Information Technologies," 355; Bayley, *Police for the Future*, 26; Cohen, *Visions of Social Control*, 67–68.

252. Beattie, *Policing and Punishment*, 120–121.

253. This is the very limited concept meant when it is said that establishing the London Police in 1829 was the triumph of the preventive idea in policing. Emsley, *Policing*, 119; Miller, *Cops and Bobbies*, 2.

254. Quoted in Philips, "New Engine of Power," 188.

255. Ashworth and Zedner, *Preventive Justice*, 34; Emsley, *Policing*, 94.

256. Monkkonen, *Police in Urban America*, 40; Lane, "Urban Police and Crime," 12; Sheryl Gay Stolberg, "Does a Uniform Keep Officers in Line? The Baltimore Chief Thinks So," *New York Times*, 14 April 2017.

257. Reiner, *Politics of the Police*, 70; Monkkonen, *Police in Urban America*, 39; Miller, *Cops and Bobbies*, 33.

258. Williams, *Police of Paris*, 221; Emsley, *Policing*, 58; Fosdick, *European Police Systems*, 239.

259. Richardson, *New York Police*, 64–66.

260. Carol S. Steiker, "The Limits of the Preventive State," *Journal of Criminal Law and Criminology* 88, 3 (1998) 774.

261. Kelling and Coles, *Fixing Broken Windows*, chap. 3, 5, 162–163; Bayley, *Patterns of Policing*, 108–109.

262. Mawby, *Comparative Policing Issues*, 115; David H. Bayley, *Forces of Order: Policing Modern Japan* (Berkeley 1991) chap. 2.
263. Bracey, "Policing the People's Republic," 132; Dutton, *Policing Chinese Politics*, 259; "China Wants Eyes and Ears on Every Street," *Economist*, 28 June 2018.
264. Steiker, "Limits of the Preventive State," 803.
265. This future without personal biological secrets is anticipated in the film *Gattica* (1997). See also "People Leave Molecular Wakes That May Give Away Their Secrets," *Economist*, 13 February 2020.
266. Moore, "Problem-Solving and Community Policing," 112.
267. Sherman, "Attacking Crime," 184, 172.
268. Langbein, *Prosecuting Crime*, 145; Hall, "Criminal Attempt," 793; Ashworth and Zedner, *Preventive Justice*, 30; Blackstone, *Commentaries on the Laws of England*, 4: chap. 13; Graeme Newman, *The Punishment Response*, 2nd ed. (New Brunswick 2008) 98.
269. Williams, *Tudor Regime*, 278, 398; Braddick, *State Formation*, 150, 164; Wiener, *Reconstructing the Criminal*, 150; Philips, "New Engine of Power," 168; French penal code, 1810, art. 269–271; Davis, *Conflict and Control*, 219.
270. Vagrancy Act 1824, 5 George IV, c. 83; Metropolitan Police Act 1829, 10 George IV, c. 44, s. 7.
271. Gatrell, "Crime, Authority and the Policeman-State," 277–278; Liang, *Rise of Modern Police*, 251.
272. Dubber, "Policing Possession," 894; Luna, "Principled Enforcement," 328–329; Poulos, "Chicago's Ban on Gang Loitering," 398.
273. Street Terrorism Enforcement and Prevention Act, 1988, California; Strossner, "Anti-gang Ordinances," 109.
274. *Illinois v. Wardlow*, 528 US 119 (2000); Dubber, "Policing Possession," 882; Ashworth and Zedner, *Preventive Justice*, 52–54.
275. Harcourt, *Against Prediction*, 9; Creegan, "National Security Crime," 403; McSherry, "Expanding the Boundaries of Inchoate Crimes," 158; Ashworth and Zedner, *Preventive Justice*, 100.
276. Harcourt, *Against Prediction*, 2, 103; Baumgartner et al., *Suspect Citizens*, 8.
277. Stephen A. Toth, *Beyond Papillon: The French Overseas Penal Colonies, 1854–1952* (Lincoln 2006) 23–24; Harcourt, "Shaping of Chance," 117; Demleitner, "Abusing State Power," 1651.
278. Weiner, *Reconstructing the Criminal*, 342; O'Brien, *Promise of Punishment*, 289.
279. Habitual Criminals Act, 1869, 32 & 33 Vict., c. 99.
280. O'Brien, *Promise of Punishment*, 265; Davis, *Conflict and Control*, 223.
281. Walker, *Popular Justice*, 99; McConville, "Victorian Prison," 156; Ashworth and Zedner, *Preventive Justice*, 45; Cole, *Suspect Identities*, 217.
282. Robinson, "Punishing Dangerousness," 1435–1436; Harcourt, *Against Prediction*, 92. Similar legislation passed in Australia. Roberts et al., *Penal Populism*, 55–56.
283. Gottfredson and Hirschi, "True Value of Lambda," 217.
284. *Robinson v. California*, 370 US 660, 667.
285. Benno Weisberg, "When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the 'Robinson' Doctrine to Homelessness and Other Contextual 'Crimes,'" *Journal of Criminal Law and Criminology* 96, 1 (1973) 332–344. Yet

most courts have not held that homelessness is a status—that is, an involuntary state—but rather that it is a condition and therefore not protected. Kelling and Coles, *Fixing Broken Windows*, 54–55.

286. Andrew Guthrie Ferguson, *The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement* (New York 2017) chap 3; John Eligon and Timothy Williams, “Police Program Aims to Pinpoint Those Most Likely to Commit Crimes,” *New York Times*, 24 September 2015.

287. Garen J. Wintemute et al., “Extreme Risk Protection Orders Intended to Prevent Mass Shootings,” *Annals of Internal Medicine* 171, 9 (2019) 655; Hannah S. Szyk et al., “Firearm Suicide as a Human Rights Priority for Prevention,” *Washington University Journal of Law and Policy* 60 (2019) 143; Kraska and Kappeler, “Militarizing American Police,” 7.

288. Ashworth and Zedner, *Preventive Justice*, 15–16; Dubber, “Policing Possession,” *passim*.

289. Every other thing involved in the production or sale of illegal drugs is also confiscated. 21 U.S. Code §881(a).

290. Susan R. Klein, “Redrawing the Criminal–Civil Boundary,” *Buffalo Criminal Law Review* 2 (1999) 699, 701; Kim, “Asset Forfeiture,” 529; Ross, “Civil Forfeiture,” 260–262.

291. Edward P. Richards, “The Jurisprudence of Prevention: The Right of Societal Self-Defense against Dangerous Individuals,” *Hastings Constitutional Law Quarterly* 16 (1989) 330–331, 339.

292. Leviticus 15:1–14.

293. Baldwin, *Contagion and the State*, chap. 5; Peter Baldwin, *Disease and Democracy: The Industrialized World Faces AIDS* (Berkeley 2005) 53–58.

294. Wendy E. Parmet, “Legal Power and Legal Rights: Isolation and Quarantine in the Case of Drug-Resistant Tuberculosis,” *New England Journal of Medicine* 357 (2007) 434; Lawrence O. Gostin, “Tuberculosis and the Power of the State,” *University of Chicago Law School Roundtable* 219 (1995) 270; Nigel Walker, “Dangerous People,” *International Journal of Law and Psychiatry* 1 (1978) 39.

295. Marie Nissen, “Her er de otte hovedpunkter i den hastelov, regeringen vil have vedtaget i dag,” *Politiken*, 12 March 2020; Sofie Bak Thorup, “Ny hastelov giver mulighed for at tvangsbehandle: Lægeforeningen bakker op,” *Politiken*, 12 March 2020.

296. Malcolm M. Feeley, “Actuarial Justice and the Modern State,” in Gerben Bruinsma et al., eds., *Punishment, Places, and Perpetrators* (Uffculme 2004) 62.

297. Janus, *Failure to Protect*, 97–103; Harcourt, “Shaping of Chance,” 106; Vitale, *End of Policing*, 92–93.

298. John N. Mitchell, “Bail Reform and the Constitutionality of Pretrial Detention,” *Virginia Law Review* 55, 7 (1969) 1231; George W. Pugh, “Administration of Criminal Justice in France,” *Louisiana Law Review* 23, 1 (1962) 21; Cavadino and Dignan, *Penal Systems*, 178; Foote, “Coming Constitutional Crisis,” 963.

299. Cavadino and Dignan, *Penal Systems*, 145; Bayley, *Forces of Order*, 144.

300. Ashworth and Zedner, *Preventive Justice*, 65–66; Shadd Maruna et al., “Putting a Price on Prisoner Release: The History of Bail and a Possible Future of Parole,” *Punishment and Society* 14, 3 (2012) 330; Hans Zeisel, “Bail Revisited,” *American Bar Foundation Research Journal* 4 (1979) 774; Thomas H. Cohen and Brian A. Reaves, *Pretrial Release*

of *Felony Defendants in State Courts*, Bureau of Justice Statistics, Special Report, NCJ 214994 (November 2007), <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

301. Dershowitz, "Law of Dangerousness," 30; Barbara Gottlieb, "The Pretrial Processing of 'Dangerous' Defendants," National Institute of Justice, January 1984, reprinted in *Report on Bail Reform Act of 1984*, H.R. Rep. No. 98-1121 (1984); Anthea Hucklesby, "Police Bail and the Use of Conditions," *Criminal Justice* 1, 4 (2001) 442.

302. Floud and Young, *Dangerousness*, 103–105, 107–109; Demleitner, "Abusing State Power," passim; Ashworth and Zedner, *Preventive Justice*, 16; Andrew von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," *Buffalo Law Review* 21 (1971–1972) 718. India, too, has preventive detention: Indian Constitution, art. 22.

303. Ashworth, "Social Control," 264.

304. Richards, "Jurisprudence of Prevention," 352–356; Jeslyn A. Miller, "Sex Offender Civil Commitment: The Treatment Paradox," *California Law Review* 98, 6 (2010) 2101. Civil commitment of the potentially dangerous without due-process protection was then reined back in the 1990s, however, requiring mental illness for detention. Tamara Rice Lave, "Controlling Sexually Violent Predators: Continued Incarceration at What Cost?," *New Criminal Law Review* 14, 2 (2011) 255–256.

305. Ashworth and Zedner, *Preventive Justice*, 3, 75, 79–81; Ashworth and Zedner, "Just Prevention," 299. There are even more of such preventive orders: Nonmolestation Orders, Exclusion from Licensed Premises Orders, Football Spectator Banning Orders, Travel Restriction Orders, Sexual Offences Prevention Orders, Foreign Travel Restriction Orders, Risk of Sexual Harm Orders, Drinking Banning Orders, Serious Crime Prevention Orders, Violent Offender Orders, Terrorism Prevention and Investigation Measures.

306. Ashworth, "Social Control," 266.

307. Stuart Macdonald, "A Suicidal Woman, Roaming Pigs, and a Noisy Trampolinist: Refining the ASBO's Definition of 'Anti-social Behaviour,'" *Modern Law Review* 69 (2006) 185–189, 197–198; Elizabeth Burney, "The ASBO and the Shift to Punishment," in Peter Squires, ed., *ASBO Nation* (Bristol 2008) 137; Kenan Malik, "Since When Was It a Police Job to Impose Sanctions on Drill Musicians?" *Guardian*, 9 February 2019.

308. Vrij et al., "Pitfalls and Opportunities," 110.

309. Janus, *Failure to Protect*, 5–6.

310. Hirsch, "Prediction of Criminal Conduct," 733–738; Saunders et al., "Prediction Put into Practice," 351.

311. Floud and Young, *Dangerousness*, 40–42.

312. Given, *Inquisition*, 84.

313. Finnane, *Police and Government*, 75; Allgemeines Landrecht für die Preußischen Staaten, pt. 2, title 20, §5; French penal code, 1810, art. 44–50.

314. Walker, *Popular Justice*, 95–96. On recent developments in parole, see Howard, *Unusually Cruel*, chap. 6.

315. Kohler-Hausmann, *Misdemeanorland*, 80; Ashworth and Zedner, *Preventive Justice*, 156–157.

316. Deuteronomy 22:23–26.

317. Brackett, *Criminal Justice and Crime in Late Renaissance Florence*, 67–68.

318. Gottschalk, *Caught*, 198–200; Yung, "Emerging Criminal War," 449.

319. Gottschalk, *Caught*, 201; Corey Rayburn Yung, "Sex Offender Exceptionalism and Preventive Detention," *Journal of Criminal Law and Criminology* 101, 3 (2011) passim; Miller, "Sex Offender Civil Commitment," 2101; Demleitner, "Abusing State Power," 1640.

320. *Kansas v. Hendricks*, 521 US 346 (1997); Harcourt, *Against Prediction*, 14.

321. Title III, §302, of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 587, codified at 18 USC §4248; Yung, "Sex Offender Exceptionalism," 978–979; Klein, "Redrawing the Criminal–Civil Boundary," 685, 702–703.

322. Michaela Pobořilová, "Virtual Child Pornography," *Masaryk University Journal of Law and Technology* 5, 2 (2011) 252.

323. *Our Sexual Future with Robots* (2017) 27–28, <https://responsible-robotics-myxf6pn3xr.netdna-ssl.com/wp-content/uploads/2017/11/FRR-Consultation-Report-Our-Sexual-Future-with-robots-1-1.pdf>. The literature on automaton sex is growing: see, for example, Kate Devlin, *Turned On: Science, Sex, and Robots* (London 2018); David Levy, *Love and Sex with Robots: The Evolution of Human–Robot Relationships* (New York 2008); John Danaher and Neil McArthur, eds., *Robot Sex: Social and Ethical Implications* (Cambridge MA 2018); Kathleen Richardson, *Sex Robots: The End of Love* (Cambridge 2019).

324. Gabrielle Russell, "Pedophiles in Wonderland: Censoring the Sinful in Cyberspace," *Journal of Criminal Law and Criminology* 98, 4 (2008) 1468–1469, 1488.

325. PROTECT Act of 2003, Pub. L. 108-21 (30 April 2003), 117 Stat. 678, §501 Findings, 9–15; Mains, "Virtual Child Pornography," 811–812; Paula Bird, "Virtual Child Pornography Laws and the Constraints Imposed by the First Amendment," *Barry Law Review* 16 (2011) 165–166; Sofya Peysakhovich, "Virtual Child Pornography: Why American and British Laws Are at Odds with Each Other," *Albany Law Journal of Science and Technology* 14 (2004) 815.

326. Adler, "Perverse Law of Child Pornography," 216.

327. On whether possessing child pornography is preventive of or precipitating toward greater harm, the literature is ambivalent. See Drew A. Kingston et al., "The Importance of Individual Differences in Pornography Use," *Journal of Sex Research* 46 (2009).

328. Peysakhovich, "Virtual Child Pornography," 805–806, 819; Mains, "Virtual Child Pornography," 814.

329. Adler, "Perverse Law of Child Pornography," 254–256, 259–260, 262–263.

330. Criminal Justice and Public Order Act 1994, c. 33, sect. 84; Richard Stone, "Extending the Labyrinth: Part VII of the Criminal Justice and Public Order Act 1994," *Modern Law Review* 58, 3 (1995) 391–392.

331. Peysakhovich, "Virtual Child Pornography," 821. Dutch law prosecutes virtual child porn. Pobořilová, "Virtual Child Pornography," 251. Even in Japan, where laws on child pornography are lax, Tokyo sought to pass a municipal law that covers "nonexistent minors" as well. *Economist*, 20 March 2010.

332. Child Pornography Prevention Act, 1996; Mains, "Virtual Child Pornography," 821.

333. PROTECT Act, 2003, 18 USC §1466A.

334. 18 USC §1466A(c).

335. 18 USC §2256(8)(B).
336. 18 USC §2256(11).
337. 18 USC §2252(c)(1)(2).
338. *US v. Kutzner*, Case No. CR-10-0252-S-EJL, Sentencing Memorandum, 2010; Sean Michael Robinson, “Criminal Contexts: *The Simpsons* ‘Child’ Pornography Case and Its Implications,” *Comics Journal*, 28 January 2011, <http://classic.tcj.com/news/sean-michael-robinson-criminal-contexts-the-simpsons-child-pornography-case-and-its-implications/>; Keisha April, “Cartoons Aren’t Real People Too: Does the Regulation of Virtual Child Pornography Violate the First Amendment and Criminalize Subversive Thought?,” *Cardozo Journal of Law and Gender* 19 (2012) 259–262.
339. *United States v. Whorley*, 550 F.3d 326, 331 (4th Cir. 2008), discussed in April, “Cartoons Aren’t Real People,” 253–256.

Conclusion

1. These are the themes masterfully identified and analyzed by Garland, Wacquant, and Gottschalk, among others.

2. Patrick Sharkey, *Uneasy Peace: The Great Crime Decline, the Renewal of City Life, and the Next War on Crime* (New York 2018); John J. Donohue, “Understanding the Time Path of Crime,” *Journal of Criminal Law and Criminology* 88, 4 (1998) 1427; Brian Levin and Sara-Ellen Amster, “Making Hate History: Hate Crime and Policing in America’s Most Diverse City,” *American Behavioral Scientist* 51, 2 (2007) 320.

3. Dubber, “Theories of Crime,” 699–700; Michael Tonry, “Why Aren’t German Penal Policies Harsher and Imprisonment Rates Higher?” *German Law Journal* 5, 10 (2004) 1187–1188. Dubber, however, also sees neoretributionism as common to all liberal democracies. *Dual Penal State*, 3–4.

4. Cavadino and Dignan, *Penal Systems*, 33–34; Joachim T. Savelsberg, “Knowledge, Domination, and Criminal Punishment,” *American Journal of Sociology* 99, 4 (1994) 916. Total years of imprisonment sentenced increased fourfold for some crimes in Sweden in the late twentieth century, however. Von Hofer and Tham, “Punishment in Sweden,” 35–36.

5. This is a leitmotif of Didier Fassin, *Prison Worlds: An Ethnography of the Carceral Condition* (Cambridge 2017) 21 and *passim*.

6. Miethe and Lu, *Punishment*, 204.

7. Simon, *Poor Discipline*, 57; William Alfred Morris, *The Frankpledge System* (London 1910) 2.

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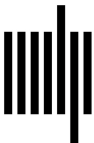
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