# Crime and Punishment in a Free Society

Would a free society be a crime-free society? We have good reason to anticipate it.

Don't accuse me of utopianism. I don't foresee a future of new human beings who consistently respect the rights of others. Rather, I'm drawing attention to the distinction between *crime* and *tort* — between offenses against the state (or society) and offenses against individual persons or their justly held property. We're so used to this distinction, and the priority of the criminal law over tort law, that most of us don't realize that things used to be different. At one time, an "offense" that was *not* an act of force against an individual was not an offense at all.

What happened? In England, the early kings recognized that the administration of justice could be a cash cow. So they grabbed on and never let go. As a result, the emphasis shifted to punishment (fines and imprisonment) and away from restitution (making victims or their heirs as whole as possible).

Liberty-minded people should regret this change. Yet again, the ruling elite exploited the people. It needed wealth to buy war materiel and allegiance, so it took it by force from the laboring masses, and corrupted the justice system in the process.

In *The Enterprise of Law*, Bruce Benson explains that before the royal preemption, customary law prevailed in England. One feature of this spontaneous order was that

> *offenses are treated as torts (private wrongs and injuries) rather than crimes (offenses against the state or the "society"). A potential action by one person has to affect someone else before any question of legality can arise; any action that does not, such as what a person does alone or in voluntary cooperation with someone else but in a manner that clearly harms no one, is not likely to become the subject of a rule of conduct under customary law.*

Benson also notes that

> *prosecutorial duties fall to the victim and his reciprocal protection association. Thus, the law provides for restitution to victims arrived at through clearly designed participatory adjudication procedures, in*

> *order to both provide incentives to pursue prosecution and to quell victims' desires for revenge.*

In such a system of law, one was not likely to see "offenses" without true victims. Since cooperation through reciprocity is key to the success of customary law, the system is likely to be kept within narrow libertarian-ish limits. (Also relevant is John Hasnas's paper "Toward a Theory of Empirical Natural Rights" [PDF].)

This arrangement worked out fairly well — until would-be rulers, who needed money to finance wars of conquest and buy loyalty by dispensing tax-funded jobs, discovered that there was gold to be had in the administration of justice.

> *Anglo-Saxon kings saw the justice process as a source of revenue, and violations of certain laws began to be referred to as violations of the "king's peace." Well before the Norman conquest [1066], outlawry began to involve not only liability to be killed with impunity but [quoting historians Frederick Pollack and Frederick Maitland] "forfeiture of goods to the king."*

The idea of the "king's peace" started small but eventually expanded to all of society. The incentive was obvious. "Violations of the king's peace required payment to the king," Benson writes. As customary law was co-opted by the crown, the concept *felony*, arbitrariness in punishment, and imprisonment came to the administration of "justice." The people were not pleased with the shifting focus from victims to king and his cronies, so they had to be compelled to cooperate.

> *For example, royal law imposed coercive rules declaring that the victim was a criminal if he obtained restitution before he brought the offender before a king's justice where the king could get his profits. This was not a strong enough inducement, so royal law created the crimes of "theftbote," making it a misdemeanor for a victim to accept the return of stolen property or to make other arrangements with a felon in exchange for an agreement not to prosecute.*

Benson sums up

> *By the end of the reign of Edward I [1307], the basic institutions of government law had been established, and in many instances older custom had been altered or replaced by authoritarian rules to facilitate the transfer of wealth to relatively powerful groups. "Public interest" justifications for a government-dominated legal system and institutions must be viewed as ex post rationalizations rather than as ex ante explanations of their development.*

Thus the criminal justice system as we know it is a product of state arrogation and a repudiation of individualism. This perverse approach to law was inherited by the representative democracies that succeeded the absolute monarchies in England and then America.

For reasons too obvious to need elaboration, a system of justice aimed at restitution makes eminently good sense. Someone is wronged, so the perpetrator should, to the extent possible, make things right. (In the case of murder, the victim's heirs would have a monetary claim against the killer; in the case of an heirless victim, the claim could be homesteaded by anyone who puts the effort into identifying and prosecuting the killer.)

At the same time, the principle of restitution undercuts the case for punishment, correction, and deterrence as objectives of the justice system. The point isn't to make perpetrators suffer or to reform them or to make potential perpetrators think twice. What good are these for the present victim? Correction and deterrence may be natural byproducts of a system of restitution, but they are not proper objectives, for where could a right to do more than require restitution come from?

Violence is so destructive of the conditions required by a community that facilitates human flourishing that its use is justifiable only when necessary to protect innocent life or to make victims whole. Thus it cannot be legitimate to use force to punish, reform, or deter. (Private nonviolent acts — for example, shunning — can have a proper role here. Also, a perpetrator who demonstrates that he is a continuing threat might legitimately be confined for reasons of self-defense.)

Punishment is wrong, Roderick Long writes, because "after all, we do not think that those who violate others' rights accidentally should be made to suffer; but the only difference between a willing aggressor and an accidental aggressor lies in the contents of their thoughts — a matter over which the law has no legitimate jurisdiction." (For more see Long's "The Irrelevance of Responsibility" [PDF]. To my knowledge, Randy Barnett is the first libertarian of our era to lay out the case for a restitution-only system of justice.)

As Gary Chartier concludes in *Anarchy and Legal Order*, “Because there is no warrant for executions or punitive fines, and no warrant for restraint (which need not involve imprisonment) except as a matter of self-defense and the defense of others, there is no need for the distinctive institutions and practices of the criminal justice system.” (David Friedman argues for replacing the criminal law in this video.)

In a free society, crimes against person and property would be treated like torts. This would be a welcome change in a society that imprisons more people than any other, often for nonviolent and victimless “crimes.”