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Lessons from soterial-legal history

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# Questioning Culpability: Lessons from Soterial-Legal History<sup>1</sup>

Chloë Kennedy<sup>2</sup>

**Abstract:** Through specific, historical, interchanges and the more diffuse molding of our ‘Western’ social imaginary, the Judaic-Christian tradition has helped shape several of the criminal law’s culpability concepts, including guilt, blame and reconciliation. In doing so, it has contributed towards the inherent moral grammar of our criminal justice thinking. By considering perennial questions, such as the importance of consciousness and intentionality in determining culpability, and the importance of culpability within the architecture of criminal liability more broadly, this article argues that re-engaging with the religious underpinnings of these debates is important and worthwhile, particularly in an age marked by the desire to secularize the criminal law and to become ‘emancipated’ from religious thinking. It concludes by suggesting that this re-engagement yields important insights regarding the tensions that permeate our criminal justice practices and points towards ways in which these might potentially be reconciled.

**Key words:** culpability, guilt, blame, punishment, law and religion, secularization

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<sup>1</sup> I have borrowed this term from Chris Tomlins’ ‘Debt, Death, and Redemption: Toward a Soterial-Legal History of the Turner Rebellion’ in D Cowan and D Wincott (eds) *Exploring the ‘Legal’ in Socio-Legal Studies* (Palgrave 2016).

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## 1. Introduction

Many of the terms we associate with criminal culpability – guilt, wrongdoing, blame, and punishment – are ‘metalegal concepts’. That is, they carry legal implications but, as products of the human condition more generally, draw their essence and meaning from beyond the legal sphere.<sup>3</sup> Perhaps the most obvious extra-legal source of ‘Western’<sup>4</sup> culpability concepts is the Judaic-Christian tradition. Various studies have shown how religious beliefs, actors, institutions and practices have shaped the criminal law,<sup>5</sup> especially the ideas and practices relating to punishment.<sup>6</sup> The influence of Christianity, particularly medieval Canon Law, is well documented<sup>7</sup> and although there are fewer established links with Judaism,<sup>8</sup> Christianity arose out of Judaism and worked, in different ways, with a shared set of sources.<sup>9</sup> Furthermore, at a more diffuse level, both traditions have contributed to the intellectual climate, or social imaginary, in which our legal thinking has developed.<sup>10</sup>

Despite this well-established religious heritage, criminal law theorists have generally shown limited interest in contemplating the theological roots of culpability and considering their ongoing salience. This disinclination reflects a more general reluctance to engage with morally charged terms, such as justice and guilt, that extends beyond criminal law theory and into criminology.<sup>11</sup> Part of the explanation for such reticence is the perception that evaluative and homiletic matters of this sort exceed the proper intellectual remit of legal scholars. As one writer puts it, ‘[t]he subject is, frankly, too deep for a theorist of criminal law’.<sup>12</sup> A further, related, explanation is the

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<sup>3</sup> Rafael Domingo *God and the Secular Legal System* (CUP 2016).

<sup>4</sup> I.e. typical of Anglo-American and European legal systems.

<sup>5</sup> E.g. Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press 1983) and *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Belknap Press of Harvard University Press 2003); Harold Maihold, ‘God’s Wrath and Charity: Criminal Law in (Counter-)Reforming Discourse of Redemption and Retribution’ in Wim Decock et al, *Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations* (Vandenhoeck & Ruprecht GmbH & Co 2014); ‘Guilt (Schuld)’ in Stanley N Katz, *Oxford International Encyclopedia of Legal History* (OUP 2009); James Q Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press 2008).

<sup>6</sup> E.g. Jeffrey C Tuomala, ‘Christ’s Atonement as a Model for Civil Justice’ (1993) *American Journal of Jurisprudence* 38 221; Jerome Hall, ‘Biblical Atonement and Modern Criminal Law’ (1983) *Journal of Law and Religion* 1(2) 279; Michael Ignatieff, ‘State, Civil Society, and Total Institutions: A Critique of Recent Social Histories of Punishment’ (1981) *Crime and Justice* 3 153; Michel Foucault, *Discipline and Punish* (Allen Lane, 1977); David A Green ‘Penal Optimism and Second Chances: The Legacies of American Protestantism and the Prospects for Penal Reform’ (2013) 15 *Punishment & Society* 123.

<sup>7</sup> Heikki Pihlajamäka & Mia Korpiola, ‘Medieval Canon Law: The Origins of Modern Criminal Law’ in Markus D Dubber & Tatjana Hörnle, *The Oxford Handbook of Criminal Law* (OUP 2014).

<sup>8</sup> E.g. Michael J Broyde, ‘The Hidden Influence of Jewish Law on the Common Law: One Lost Example’ (2007) 57 *Emory Law Journal* 1403; Jonathan Fisher, ‘Self-Incrimination at Common Law – Its Origin In Jewish Law’ in Nahum Rakover (ed), *Jerusalem City of Law and Justice*, ed. (The Library of Jewish Law) 461-474.

<sup>9</sup> Rémi Brague (Lydia G Cochrane trans.), *The Law of God: The Philosophical History of an Idea* (University of Chicago Press 2007) 86; David Novak, ‘Law and Religion in Judaism’ in John Witte Jr and Frank S Alexander (eds), *Christianity and Law: An Introduction* (CUP 2008) 35.

<sup>10</sup> Berman, *The Formation of the Western Legal Tradition* (n 5) 588.

<sup>11</sup> Stanley Cohen, ‘Guilt, Justice and Tolerance: Some Old Concepts for a New Criminology’ in Stanley Cohen, *Against Criminology* (Transaction Books 1988) 114; Simon Cottee, ‘Judging Offenders: The Moral Implications of Criminological Theories’ in Malcolm Cowburn et al (eds), *Values in Criminology and Criminal Justice* (Policy Press 2013) 5.

<sup>12</sup> George P Fletcher, *The Grammar of Criminal Law, Volume One: Foundations* (OUP 2007) 301.

tendency within contemporary legal scholarship to demoralize and secularize,<sup>13</sup> even where there is a desire to borrow from the theological conceptual toolkit.<sup>14</sup> This is frequently perceived as a process of emancipation,<sup>15</sup> which downgrades the place of religious thought, and other ‘contentious metaphysical assumptions’, within modern criminal law.<sup>16</sup>

Whatever its causes, this disengagement comes at a cost. Each of the key tensions that arise within the criminal law’s blaming practices has a counterpart within Judaic-Christian models of soteriology. How to assess the culpability of advertent vis-à-vis inadvertent misconduct and how to satisfy the drive to both condemn and forgive transgressors are pressing questions in both spheres of knowledge, themselves underpinned by the challenge of accommodating the agential-yet-determined nature of human conduct. As I argue in the following sections, as the genealogical if not strictly causal predecessors of contemporary culpability commitments, these soteriological models constitute a valuable resource for thinking through and better appreciating the nature of these tensions where they arise in law. Importantly, however, they also point towards how these tensions might be reconciled within an overarching framework of redemption within which guilt plays a central part.

Taking as a starting point the work of George Fletcher, who is one of the few contemporary theorists to advocate substantive consideration of the criminal law’s theological underpinnings, in the following section I outline two meanings of guilt that arise within both religious and criminal justice thinking. Although Fletcher’s work is distinctive in its engagement with Biblical sources, his analysis and conclusions highlight prevailing assumptions within criminal law scholarship, and some of their shortcomings. This makes his work particularly suitable as a counterpoint to the remaining sections of the article, where I seek to show that, *pace* Fletcher, the two forms of guilt he identify are intimately connected, operating as lynchpins that connect transgression and reconciliation in complex ways.

This analysis suggests, by way of analogy, some ways of moving beyond many of the divides that animate liberal criminal law theory and practice, recasting what are often considered to be opposing commitments as complementary constituents of an integrated whole. As I argue more fully in section 5, the apparent need to choose between subjective and objective liability, accepting freewill as absolute or denying its relevance, and between pursuing retributivist, rehabilitative or deterrent aims is revealed to be spurious and the product of a disintegrated view of culpability and punishment. By providing a fuller appreciation of the nature of this disintegration and a template for how it might be ameliorated, this analysis therefore offers both a critical understanding of several perennial debates in criminal liability and suggestions as to how we might approach them differently.

## 2. The Paradox and Mystery of Guilt

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<sup>13</sup> E.g. Matt Matravers ‘De-moralising Retributivism: Agency, Blame and Humanity in Criminal Law Theory and Practice’ in Jonathan Jacobs & Jonathan Jackson, *Routledge Handbook of Criminal Justice Ethics* (Routledge 2016) 144; Bruce N Waller, *The Powerful Belief in Moral Responsibility* (MIT Press Scholarship 2015).

<sup>14</sup> E.g. R A Duff, *Punishment, Communication and Community* (OUP 2001); ‘Penance, Punishment and the Limits of Community’ (2003) 5 *Punishment and Society* 295.

<sup>15</sup> Tatjana Hörnle, ‘Guilt and Choice in Criminal Law Theory – A Critical Assessment’ (2016) 4(1) *Bergen Journal of Criminal Law and Criminal Justice* 1 at 14.

<sup>16</sup> W Cole Durham Jr, ‘Religion and the Criminal Law: Types and Contexts of Interaction’ in J Witte et al, *The Weightier Matters of Law: Essays on Law and Religion* (Scholars Press 1988) 198; Chad Flanders, ‘Punishment, Liberalism, and Public Reason’ (2017) *Criminal Justice Ethics* 61.

For Fletcher, guilt is the paradox and mystery of criminal law: this charged moral term is used to refer to an essential component of liability to punishment, but the defendant's feelings, including her "actual guilt" for having committed the crime' are irrelevant to conviction, and they remain irrelevant until sentencing, when her 'remorse or regret' but 'not guilt' become relevant.<sup>17</sup> Furthermore, no criminal justice actor need actually blame the defendant; she must be considered blameworthy to be found guilty but those condemning her 'need not tender a feeling of blame'.<sup>18</sup>

As these remarks indicate, Fletcher uses 'guilt' to refer to two distinct entities: a transgression and a response. This tallies with contemporary psychological literature, which distinguishes guilt – delinquency, offence, crime or sin and feeling guilty – an affective-cognitive hybrid that stems from the state of guilt.<sup>19</sup> According to Fletcher's analysis, these two forms of guilt have been recognised since at least the book of Genesis, in which 'guilt' appears as an external form of 'pollution' that possesses a fixed quantity (objective guilt) and as a subjective feeling that admits of degrees (positive guilt).<sup>20</sup> Fletcher describes these as 'radically opposed', dichotomous senses of guilt, the former of which, in earlier times, elicited expiating sacrifices and the latter of which is met with punishment. Like others before him, Fletcher believes our modern conception of 'guilt' is skewed towards the subjective response and we have forgotten how to make sense of the older, alternative idea of guilt as a manifest stain on the land.<sup>21</sup>

Fletcher juxtaposes these two forms of guilt elsewhere, contrasting a purely formal idea of accountability, which, on breach of a norm, is presumed in the absence of contradicting reasons (i.e. objective guilt) and a subjective experience, which amounts to affirmative content that must be established in every case of punishable criminal wrongdoing (i.e. positive guilt). Once again, he casts this distinction as an ambiguity in the meaning of guilt,<sup>22</sup> which he connects to a further 'mystery' identified from his Biblical study: that 'guilt' refers both to events for which a confession could, and should, be given, i.e. instances of conscious wrongdoing, but also to sins committed in error or without knowledge, for which the need for a confession might go unrecognized. Through his analysis, Fletcher concludes that sin sacrifices would be offered for unconscious wrongdoing, when punishment was inappropriate. This interpretation sets up a distinction between sacrifice and punishment (though an (admittedly) somewhat confused relationship between the two is suggested) that maps on to the distinction between objective and subjective guilt.<sup>23</sup>

This precis of Fletcher's work discloses some of the ways it relates to contemporary debates in criminal law, particularly around the significance of inner states in attributing liability and dispensing punishment and whether there is a

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<sup>17</sup> George P Fletcher, 'Punishment, Guilt, and Shame in Biblical Thought' (2004) 18(2) *Notre Dame Journal of Law, Ethics and Public Policy* 343 at 343.

<sup>18</sup> *Ibid* at 344; Fletcher (n 12) 299.

<sup>19</sup> Jeff Elison, 'Shame and Guilt: A Hundred Years of Apples and Oranges' (2005) 23 *New Ideas in Psychology* 5 at 5-7.

<sup>20</sup> A similar point is made within the psychological literature: a person is either guilty or not but the affective-cognitive hybrid that attaches to this state of guilt may vary (*ibid* 12); Fletcher (n 3) 308.

<sup>21</sup> Fletcher (n 17) at 344; Fletcher (n 12) 304-305. Nietzsche of course wrote on the (damaging) interiorization of guilt in *The Genealogy of Morals* and we can see the assumption that 'guilt' equates to this internal response in contemporary legal literature e.g. Chris Thornhill, 'Guilt and the Origins of Modern Law' (2014) *Economy and Society* 103-135 at 104.

<sup>22</sup> Fletcher (n 12) 299-300.

<sup>23</sup> *Ibid* 122-123.

connection between these two matters. Since Fletcher perceives a split between these issues, portraying the two forms of guilt as opposing and accountability and punishment as wholly separable,<sup>24</sup> he concludes that criminal sanctions can be perceived as centering on either on acts, guilt (meaning the positive conception) or actors.<sup>25</sup> In his view, punishment is imposed for wrongdoing (acts) and not for guilt (meaning the positive conception; the objective conception remains relevant insofar as the actor must be accountable).<sup>26</sup>

There is much to commend this analysis. It draws out the partiality towards advertence-based liability within contemporary legal literature and practice<sup>27</sup> and the associated tendency to regard mental states as free-floating, things-in-the-world that must be interrogated as such, despite our limited capacity to do so.<sup>28</sup> But to describe these different meanings of guilt as conflicting and to cleave accountability and punishment apart so thoroughly is, ironically, to miss the central lesson provided by considering the religious legacy of culpability. My own examination of guilt within its Judaic-Christian soteriological contexts, explored fully in the following sections, instead reveals an integrity to transgression and response (both the response of the transgressor and the one to whom she is accountable) that is based on the possibility of redemption.

This longstanding complementarity explains why it is problematic to underplay the role of positive guilt, i.e. the feelings arising in connection with a transgressive act or omission that might prompt reflection and reform. As I argue more fully in section 4, even if these feelings do not precede or accompany the wrongdoing, and even if they are absent at the point of attributing liability, they should be what punishment – understood in its widest sense as communicating censure, upholding the integrity of law, and making amends<sup>29</sup> – at least aims to elicit. To be sure, unlike the sinner who brings herself before God the criminal offender seldom subjects herself to state punishment voluntarily.<sup>30</sup> As an analogue, however, the prospect of divine salvation and the importance in this process of being moved to repentance, via recognizing and reacting to one's objective guilt, suggests that it is unobjectionable to impose criminal liability for inadvertent conduct so long as there is some possibility that the offender might be brought to see her fault – conceived, as I explain in the following sections, as failing to adhere to established normative expectations – and some likelihood that she might meet these expectations in future. It also explains why concern with an individual's inner state should be central to imposing criminal liability. This does not require treating mental states, when they constitute a component of criminal liability, as freestanding. It merely requires that attributing liability and imposing punishment be aimed partly at stimulating an internal response (positive guilt) and that transgressive acts (objective guilt) reflect the actor's interiority. By this view, it makes little sense to

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<sup>24</sup> Cf Gabriele Taylor, *Pride, Shame, and Guilt* (Clarendon Press 1985) 89.

<sup>25</sup> Fletcher (n 12) 27-37.

<sup>26</sup> *Ibid* 307.

<sup>27</sup> *Ibid* 309, 312, 315; Jeremy Horder, *Ashworth's Principles of Criminal Law* (8<sup>th</sup> ed) (OUP 2016) p 196, 204, 207. For influential work in this vein, see Kimberly Kessler Ferzan and Larry Alexander, *Crime and Culpability: A Theory of Criminal Law* (CUP 2009).

<sup>28</sup> Fletcher (n 12) 55, 283, 307. On the separate and independent proof of *actus reus* and *mens rea*, see Stephen J Morse, 'The "Guilty Mind": Mens Rea' in Dorothy K Kagehiro & William S Laufer, *The Handbook of Psychology and Law* (Springer 1992).

<sup>29</sup> Though not necessarily always brought together in the same way with the same emphases.

<sup>30</sup> Although voluntary subjection to state punishment might be considered an ideal (e.g. Jacob Adler, *The Urgings of Conscience* (Temple University Press 1992)).

segregate act, actor and ‘guilt’-based conceptions of criminal law and there is no room for considering acts and inner states as severable.

All of this goes to show how Fletcher is to some extent reinventing the wheel when he proposes his alternative ‘normative’ theory of guilt, according to which all offences – intentional, reckless, and negligent – involve evaluative judgments of blameworthiness,<sup>31</sup> and his holistic theory of action, which defies mind/body dualism and challenges the ‘objective’ and ‘subjective’ split in criminal liability.<sup>32</sup> This normative theory is not, as he portrays it, a development that transcends both the ancient and psychological theories of guilt. Rather, it reprises (and depletes) the ancient view of guilt which, as closer examination reveals, did not operate exclusively as an ‘objective’ conception. An integrated understanding of guilt also reveals the facility of Fletcher’s suggestions that we blame failure to perceive risk *rather than* choice to run risk and that we blame in the absence of excusing conditions *rather than* on the basis of conscious factors, such as intentionally violating the law.<sup>33</sup> These are not mutually exclusive commitments and accommodating them is not a zero-sum game. An integrated understanding of guilt also undermines Fletcher’s view that punishment is not imposed for ‘guilt’ (positive guilt), or bad character, but *solely* for wrongdoing.<sup>34</sup> On a more integrated view, punishment may not be for guilt in the sense that it seeks to censure guilty feeling but it is *for* guilt in the sense that it seeks to elicit an affective-cognitive response. At times Fletcher comes close to recognizing the deeper logic to which his theological ruminations might have led. For example, he writes:

It is almost as though the purpose of punishment in practice is not to sanction guilt but somehow to bring the defendant to the point of *feeling guilty*. If he or she already has the feeling, there is no point to the exercise. And yet without the potential of the defendant’s feeling guilty, the criminal trial makes no sense.<sup>35</sup>

Fletcher’s inability to see that we might sanction objective guilt while at the same time seeking to stimulate subjective, ‘positive’ guilt could, I suggest, be rectified by a fuller acquaintance with the religious origins he so astutely ascribes to modern conceptions of criminal culpability. As I seek to show in section 5, acquaintance with these origins has implications for other theorists, indeed for anyone concerned with the nature and structure of culpability, too. A working, though by no means comprehensive, knowledge of the main dimensions of Judaic-Christian soteriology that reflect their contemporary criminal law correlates is therefore of widespread benefit.

### **3. Intention, Consciousness and the Scope of Culpability**

Each of the religious traditions considered in this article employs a different conception of sin and is characterized by a different underlying anthropology, and these diverse views feed in to correspondingly varied conceptions of atonement and salvation. As becomes clear through comparison, however, there are certain similarities that

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<sup>31</sup> Fletcher (n 12) 327. This is similar to Lacey’s claim that there is no evaluatively neutral way of setting culpability thresholds (Nicola Lacey, ‘Responsibility Without Consciousness’ (2015) 36(2) OJLS 219).

<sup>32</sup> Fletcher (n 12) 55-66. On the prevalence of this divide, see Alan Norrie, *Crime, Reason, History* (3<sup>rd</sup> ed) (CUP 2014) chs 1, 2 & 3.

<sup>33</sup> *Ibid* 320.

<sup>34</sup> Fletcher, ‘Remembrance of Articles Past’ 269 at 271; Fletcher (n 12) 223, 228, 255.

<sup>35</sup> Fletcher (n 12) 300.

transcend these distinctions, which centre on the importance of ensuring that a route to redemption remains open in the face of our ubiquitous tendency to fall short of the expectations placed upon us. As I discuss in the following section, acknowledging that people will inevitably breach the norms that apply to them has implications for what might be deemed an appropriate response. It also has implications for how these breaches are conceived, what role is played by consciousness and intentionality, and the ways these two inner states are reflected in transgressive acts.

In respect of the Jewish tradition, although it is far from monolithic,<sup>36</sup> the prevailing assumption is that humans possess free will<sup>37</sup> and the archetypal conception of law is that of divine, posited commands.<sup>38</sup> In keeping with this, the severest penalty under Jewish criminal law – death – requires, at least theoretically, satisfaction of strict evidentiary rules demonstrating the offender’s wilful violation of the relevant command(s).<sup>39</sup> This willfulness is more than a condition of accountability – it is the deliberate, brazen violation of God’s law in rebellion against God’s will, as demonstrated by the offender, having been forewarned that she is about to violate God’s law, affirming that she has understood and will commit the offence regardless.<sup>40</sup>

The realm of crime is wider than this, however.<sup>41</sup> Although they are weighted and atoned for differently, inadvertent transgressions – described as those committed without intention, knowledge or consciousness, including in error<sup>42</sup> – are certainly regarded as sinful.<sup>43</sup> The need for contrition in these cases, discussed in the next section, suggests there is a sense of culpability at play.<sup>44</sup> Importantly there does not seem to be any categorical divide between conscious and unconscious offending within Judaic thinking. *Pace* Fletcher, guilt and sin sacrifices – the two types of sacrifices that were offered by way of atonement prior to the destruction of the Temple in 70CE<sup>45</sup> – do not appear to have been distinguished on the basis of advertence. The difference between these kinds of sacrifice is notoriously complex, but scholarly interpretation suggests that the distinction hinged on the infliction of damage: sin sacrifices were for unwitting offences but guilt sacrifices were for *both* deliberate and unwitting offences when they caused damage.<sup>46</sup> Both conscious and unconscious offences were therefore deemed culpable and merited contrition.

Despite its different economy of salvation and conception of law, mainstream Christian teaching divides up the realm of culpability in a similar way.<sup>47</sup> Unlike

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<sup>36</sup> For reasons for space no consideration will be given to the differences between, for example, Orthodox and Reformed Jews.

<sup>37</sup> Friedrich Avemarie, ‘Sin, Guilt and Forgiveness: Judaism’ *Religion Past and Present* (Brill 2009).

<sup>38</sup> On the long, complex history of Jewish law, see N S Hecht et al (eds), *An Introduction to the History and Sources of Jewish Law* (Clarendon Press 1996).

<sup>39</sup> There are some difficulties with applying the term ‘crime’ to these offences but the term is often used. Stephen M Passamanek, ‘The Concept of Crime in the Jewish Tradition’ in Walter Jacob and Moshe Zemer, *Crime and Punishment in Jewish Law* (Berghahn Books 1999) 12; Rabbi Richard A Block, ‘Capital Punishment’ in Jacob and Zemer *Crime and Punishment in Jewish Law* 67.

<sup>40</sup> Arnold Enker, ‘Jewish Law’ in Dubber and Hörnle (eds) (n 7) 269.

<sup>41</sup> Understood as a violation of God’s law (Passamanek (n 39) 10).

<sup>42</sup> NH Snaith ‘The Sin-Offering and the Guilt-Offering’ (1965) *Vetus Testamentum* 73 at 77; Brent A Strawn ‘What Is It Like to Be a Psalmist? Unintentional Sin and Moral Agency in the Psalter’ (2015) 40(1) *Journal for the Study of the Old Testament* 61 at 67-68.

<sup>43</sup> Avemarie (n 37).

<sup>44</sup> John Stanton-Ife, ‘Strict Liability: Stigma and Regret’ (2007) 27(1) *OJLS* 151.

<sup>45</sup> Alexander Guttman, ‘The End of the Sacrificial Cult’ (1967) 38 *Hebrew Union College Annual* 137.

<sup>46</sup> Snaith (n 42) 73.

<sup>47</sup> Brague suggests that the “law” of the Old Testament and the “grace” of the New’ can both be understood as conditions of access to salvation the term *lex* can apply to both so that it is possible to speak of a “law of grace” (Brague (n 9) 108).



Judaism, Western (Latin) Christianity holds that every person born into the world is tainted by original sin. Although the focus of this paper is ‘actual sins’ (i.e. discrete sinful acts or omissions),<sup>48</sup> this difference is important because the effect of original sin and the corresponding role of God’s grace in facilitating salvation are important in understanding the distinctions in what can loosely be described as the Protestant and Catholic traditions.<sup>49</sup> The Catholic tradition teaches that baptism provides release from original sin and the concupiscentia that remains is merely an inducement to sin.<sup>50</sup> According to this view, human nature is not wholly corrupt,<sup>51</sup> and people remain capable of choosing right from wrong. Coupled to the belief that God has made truth and goodness available in the form of Scripture, Christ, the Church and natural reason, which provides knowledge of the natural law,<sup>52</sup> this positive view of human nature is key to understanding the Catholic notions that only that which offends the conscience is sin and that guilt arises from consenting to commit a transgressive act.<sup>53</sup>

Traces of these two requirements are evident in contemporary criminal law theory, most notably in the concern with consciousness and choice,<sup>54</sup> but it is important to recognize that within their theological context these two stipulations do not suggest that inadvertent wrongdoing is marginalized or excluded from the realm of culpability or that consent or offence against conscience must be proved separately from the transgressive act. With such a positive conception of human nature and confidence in the availability of natural law, it makes sense to assume many sinful acts are chosen against one’s conscience, in the absence of excuse. In classical Catholic theology, ignorance might provide such an excuse but, crucially, this excuse will only be available where the ignorance is invincible (non-culpable). In the case of natural law, ignorance cannot be considered invincible, so, where it exists, it can lessen but not alleviate culpability.<sup>55</sup> Outside the realm of natural law, ignorance is invincible only if it could not have been removed by applying reasonable diligence.<sup>56</sup> This suggests that the connection between culpability and consent resembles the notion of ‘choice’ that animates some contemporary criminal law theory, according to which culpability turns

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<sup>48</sup> To parallel the conception of secular crimes. For the same reason, the article is therefore not concerned with sins that are mere thoughts.

<sup>49</sup> Christopher Ocker, ‘Explaining Evil and Grace’ in Ulinka Rublack (ed) *The Oxford Handbook of the Protestant Reformations* (OUP 2016) 23. Anglicanism, though of worldwide import, is not considered separately here, partly because of its ‘radically provisional’ nature (Paul Avis, *The Identity of Anglicanism: Essentials of Anglican Ecclesiology* (Bloomsbury 2001) ch 1) and partly because its soteriology appears similar to the Protestant view outlined here (William G Witt, ‘Anglican Reflections on Justification by Faith’ (2013) 95(1) *Anglican Theological Review* 57-80).

<sup>50</sup> Wolf Krötke, ‘Sin, Guilt and Forgiveness: Dogmatics’ *Religion Past and Present* (Brill 2009).

<sup>51</sup> Heinrich Holze, ‘Sin, Guilt and Forgiveness: Church History’ *Religion Past and Present* (Brill 2009).

<sup>52</sup> David A Hoekama, ‘Punishment, the Criminal Law and Christian Social Ethics’ (1986) *Criminal Justice Ethics* 5:2 40; Jean Porter, *Natural & Divine Law: Reclaiming the Tradition for Christian Ethics* (Novalis 1999).

<sup>53</sup> Holze (n 51).

<sup>54</sup> Durham (n 16) 204; Berman, *Formation of the Western Legal Tradition* (n 5) 181-198. Contemporary criminal law theory does not often require offence of conscience (cf Douglas Husak, *Ignorance of Law: A Philosophical Inquiry* (OUP 2016)).

<sup>55</sup> Stephen P Garvey ‘Two Kinds of Criminal Wrongs’ (2003) 5(3) *Punishment & Society* 279 at 284.

<sup>56</sup> James Akin, ‘Ignorance – Invincible and Vincible’, (1999) *Catholic Answers Inc* 39 available at: <https://www.catholicculture.org/culture/library/view.cfm?recnum=1203>; Joseph A Shelling, *Reframing Catholic Theological Ethics* (OUP 2016) 64-65. On the complex distinctions between types of ignorance in Catholic moral theology see Romanus Cessario OP, *Introduction to Moral Theology* (Catholic University Press of America 2001) 113-115.

on whether the offender had fair opportunity to conform to the law.<sup>57</sup> Rather than a bare assessment of capacity, this is at heart a normative question that reflects some ideal of character or virtue, which the offender has failed to meet.<sup>58</sup>

Within this broad realm of culpability, transgressive acts are ranked by severity in accordance with a complex of object and subjective tests that determine whether the violation is a mortal or merely venial sin.<sup>59</sup> Significantly, a contemptuous motivation transforms an otherwise venial sin into a mortal one. In such cases, the offender's disdain, rather than her deliberation and knowledge, is crucial; just as a breach of divine law shows disdain for God, a contemptuous breach of human law shows disdain for justice and, indirectly, disdain for God. It seems that this contempt is assumed if not rebutted, for showing a just cause for breaking the law can negate inferences of contempt.<sup>60</sup>

This schema of fault, which encompasses both neglectful and contemptuous behaviour, is reflected, with different emphasis, within Protestant thinking. In relation of key soteriological matters, including the nature of sin and the appropriation of salvation, the Protestant Reformation marked a decisive break from the Catholic beliefs that had preceded it. Beginning with Luther, the Reformers introduced a radical understanding of sin, according to which humans are innately and inevitably evil and corrupt, and their reason, will and emotion are disabled from doing any good that might contribute towards salvation.<sup>61</sup> As discussed in the following section, this has implications for the power of offenders to attain forgiveness and turn away from sin unassisted. It also has ramifications for the sphere of culpability.

Protestant theology rejects the idea that the sins of justified Christians are confined to 'consciously committed actual sins'.<sup>62</sup> This makes sense according to a Protestant view of the person, according to which every human is afflicted with existential sinfulness<sup>63</sup> and has only unreliable innate knowledge of good and evil.<sup>64</sup> If sins were restricted to consciously committed wrongs then these beliefs in perverted reason and compromised ability to discern right from wrong would mean very few acts would constitute sins. In keeping with this attitude towards sin, Protestantism holds all sins to be mortal and deserving of damnation, save for the mercy of God.<sup>65</sup> Nevertheless, the Reformers distinguished sins on the basis of gravity, with resisting grace and fighting against mercy being amongst the most heinous.<sup>66</sup> They also taught that the gravity of sins could vary with the circumstances. Sins proceeding from 'strong affections of the heart' were less grievous, whereas those emerging from a set purpose, those injuring important individuals or occurring in public places, and those repeated enough to harden into habit, were aggravated.<sup>67</sup>

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<sup>57</sup> E.g. Lacey (n 31), where she describes conscious choice as just one way of meeting the fair opportunity condition (at 235).

<sup>58</sup> Garvey (n 55) 287.

<sup>59</sup> Richard R Ross, 'Binding in Conscience: Early Modern English Protestants and Spanish Thomists on Law and the Fate of the Soul' (2015) 33(4) *Law and History Review* 803 at 806-808.

<sup>60</sup> Ibid 809- 813.

<sup>61</sup> Ocker (n 49) 29; Holze (n 51).

<sup>62</sup> Risto Saarinen, 'Repentance: Dogmatics, Protestant' *Religion Past and Present* (Brill 2009).

<sup>63</sup> Protestantism teaches that even those who are justified remain sinners. Christians are therefore *simul iustus et peccator*, both just and sinner at once (Krötke (n 50); Ocker, (n 49) 30).

<sup>64</sup> Richard Bourne 'Communication, Punishment and Virtue: The Theological Limitation of (Post)Secular Penance' (2014) *Journal of Religious Ethics* 78 at 102.

<sup>65</sup> Ross (n 59) 806; Emma Disley, 'Degrees of Glory: Protestant Doctrine and the Concept of Rewards Hereafter' (1991) 42(1) *The Journal of Theological Studies* 77 at 81.

<sup>66</sup> Disley *ibid* at 83-84.

<sup>67</sup> Ross (n 59) at 815.

Drawing these summaries together, it is clear that within each tradition examined there is an arena of culpability whose parameters are determined normatively with reference to the capacities humans are considered to possess. Within Judaic and Catholic theologies, which largely assume a robust moral agency, there is an emphasis on consciousness and choice but these are not necessarily conceived as separable from the sinful conduct and neither implies that inadvertence precludes culpability. In contrast, Protestantism emphasizes the compromised ability of humans to perceive, and act on, what is right and thus consciousness is not a requirement of sin. Though transgressive acts express the inner nature of the sinner,<sup>68</sup> this connection does not hinge on choice and consent. Across all three models there is a subset of particularly heinous offences that is connected up with purposive action and rebellion.

This dual focus on scorn and dereliction captures the generally received essence of sin well. Although it can be expressed in hubristic pride or indolent self-neglect, it is always both: ‘rebellion and resignation, protest and sloth’, ‘[i]t oscillates between these two poles.’<sup>69</sup> The fact that both are of equal concern, though not equal severity, reflects the nature of law as both command and counsel that arises across and within Judaism and Christianity. Although typically described as a religion of command, the Judaic tradition also conceives of law as a normative model that offers guidance on how to live righteously.<sup>70</sup> Conversely, Christianity, within which law generally refers to the possibility of salvation through Christ’s sacrifice rather than a set of commandments, has nevertheless at times been described as excessively legalistic.<sup>71</sup> This heritage of law as both command and counsel helps explain why within the religious traditions discussed sin encompasses both the failure to observe rules and the failure to meet normative, even aspirational, standards. That law should fulfill both these roles articulates and supports the view of humanity as essentially conflicted – as incapable of avoiding sin but not beyond recovery – that underlies the Judaic-Christian tradition.<sup>72</sup> To appreciate how these factors work together to elucidate the justness of treating both types of shortcoming as blameworthy it is essential to turn to the purposes of punishment across the different traditions.

#### **4. Punishment, Engaging Conscience and the Path to Reconciliation**

As with the contours of culpability, the form and aims of punishment – what an offender is expected to do in the wake of sinning and to what ends – are bound up with the anthropology and conception of salvation that underpins each tradition. Unimpeded by original sin, transgressors within the Judaic tradition are considered capable of atoning for their offences via unmediated sacrifices and punishments. In contrast, within the Christian tradition atonement depends on the faithful participation in Christ’s sacrifice and the more enduring the effects of original sin the less able sinners are able to cooperate in their own salvation. Hence, within Protestantism the most atonement a sinner

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<sup>68</sup> Debora Shuger, ‘The Reformation of Penance’ (2008) 71(4) *Huntingdon Library Quarterly* 557 at 564.

<sup>69</sup> Krötke (n 50).

<sup>70</sup> As reflected in the term *Halakha*, which refers to the whole corpus of Jewish law as well as specific laws and is thought to be founded on metaphoric use of ‘a path to walk on’ (Peretz Segal, ‘Jewish Law During the Tannaitic Period’ in N S Hecht et al (eds), *An Introduction to the History and Sources of Jewish Law* 102) and the wider interpretation of ‘torah’ as ‘teaching’ rather than merely ‘law’ (Brague (n 9) 250-252).

<sup>71</sup> As discussed in Brague (n 9) 211, 242.

<sup>72</sup> John Cottingham, ‘Conscience, Guilt and Shame’ in Roger Crisp (ed), *The Oxford Handbook of the History of Ethics* (2013) 732.

can offer is a repentant attitude.<sup>73</sup> Irrespective of these differences, the expiatory conduct must always be accompanied by remorse and the resolution to abstain from future sin if reconciliation is to be achieved. This internal dimension is consequently of crucial importance and its stimulation constitutes one of the aims of punishment, understood as the imposition of hard treatment, across the Judaic-Christian tradition. Indeed, unless this internal shift is thought possible imposing blame makes little sense, especially in the case of unconscious offending.<sup>74</sup> Atonement for culpable wrongs (objective guilt), even when it is conceived as deserved suffering, is therefore intimately connected with future-oriented concerns and these two are bound together by the emergence, or invocation, of a particular affective response (subjective guilt).

The connection between these two forms of guilt is evident within the Judaic tradition through its early system of cultic sacrifices.<sup>75</sup> These sacrifices were not mechanistic vehicles of atonement, made with no regard for the affective response (positive guilt) of the transgressor. To be sure, an unconscious sinner, unaware of her sin, could not confess as could a conscious sinner,<sup>76</sup> but she could be moved to repent by sickness or suffering, afflictions that were considered to be divine punishment.<sup>77</sup> Either path – confession of sin or acknowledgement of unconscious transgressions following divine punishment – could move the sinner to repentance. With this in mind, it seems mistaken to portray these sacrifices as capable of substantiating a direct link between objective guilt and punishment that bypasses subjective (positive) guilt positive.<sup>78</sup> Punishment, in the form of suffering inflicted by God, served to sensitize unconscious offenders to their sinful state, following which they might be motivated to seek forgiveness, by way of an expiating sacrifice, and to request assistance in gaining a wise heart.<sup>79</sup> It seems in these instances that punishment *was* connected up to objective guilt, therefore, but in a way that incorporated what we might now describe as an affective-cognitive response.

This suggestion is supported by interpretations of these sacrifices that consider them to have been insufficient, in isolation, to elicit forgiveness. According to this view, without remorse and the resolution to abide by God's commandments, forgiveness and salvation would not be forthcoming. Within Rabbinic writings on crime and punishment, even *kārēt* – the excision that has been interpreted variously to mean premature death, death of the soul or permanent excommunication from the community – is considered avoidable through *malqut* (whipping) and repentance.<sup>80</sup> Furthermore, when the twelfth century (CE) philosopher Maimonides set out the requirements of *teshuva*,<sup>81</sup> they included remorse, the resolution not to repeat wrongdoing, confession

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<sup>73</sup> Saarinen (n 62).

<sup>74</sup> Within Biblical law, murder constitutes an exception to this. Even unintentional killing must be punished with death because this breach of natural law is an 'essential reality distinct from the legal responsibility of the perpetrator'. As this explanation makes clear, here punishment is imposed for reasons other than blame (Devora Steinmetz, *Punishment and Freedom: The Rabbinic Construction of Criminal Law* (University of Pennsylvania Press 2008) ch 4).

<sup>75</sup> Although these offerings were sometimes imposed as punishments, they were stipulated but seldom legally enforced (Walter Jacob, 'Punishment: Its Method and Purpose' in Jacob and Zemer (eds) (n 39) 57).

<sup>76</sup> Strawn (n 42) 69.

<sup>77</sup> Ernst-Joachim Waschke, 'Repentance: Old Testament' *Religion Past and Present* (Brill 2009); Jacob (n 75) 47.

<sup>78</sup> Cf Fletcher (n 17) at 347.

<sup>79</sup> Strawn (n 42) at 70-72.

<sup>80</sup> Steinmetz (n 74) ch 5, especially 73, 97.

<sup>81</sup> Which translates to 'return' and is usually taken to mean 'repentance'.

and the changing of one's ways. According to one contemporary interpreter, the order in which remorse and resolution occur is interchangeable but both are essential.<sup>82</sup>

This resolution to change makes sense according to the robust view of moral agency that is generally found within Judaism across the ages. The inadvertent sinner may have committed a lesser offence than her advertent counterpart but she could have done better.<sup>83</sup> This model of agency is most clearly expressed in the book of Deuteronomy, where humans are portrayed as capable of distinguishing obedience from disobedience and choosing and acting accordingly.<sup>84</sup> Elsewhere in the Hebrew Bible, however, weaker conceptions of human agency appear. At their most drastic, these call into question the capacity of sinners to repent or become reformed in the absence of divine assistance, with some portions of the book of Ezekial characterizing moral agency as a wholly external, divinely acquired gift.<sup>85</sup> A similarly negative view of moral agency is found in some Qumran texts, dating from the period of Second Temple Judaism. In these, various internal and external impairments to moral agency are described as surmountable through knowledge of the salvic commands of God and, in the case of external impairments, their removal by God.<sup>86</sup> In the *Hodayot*,<sup>87</sup> which describes *all* people as possessing a moral faculty so defective as to give rise only to guilty actions, the speaker is described as being instilled with the Divine Spirit. This spirit does not replace the speaker's own defective one; it remains tangible and the speaker can perceive it working through him, comprising his capacity for moral agency.<sup>88</sup>

These two models of full and compromised moral agency are also reflected in Catholic and Protestant views of atonement and repentance. In accordance with Catholic beliefs in free will, sinners are considered capable, through the sacrament of penance, of restoring their relationship with God and thereby obtaining forgiveness and salvation. Again, as in the Judaic context, it appears that punishment plays a role in prompting an affective response in the case of unconsciously committed sins. During the increasing juridification of the Catholic Church across the twelfth and thirteenth centuries, it became possible for an individual to commit a sin without realizing it. Confession was thereby transformed from an act by which a sinner, troubled by a guilty conscience, came to seek a means of making reparation into a form of 'ethical instruction and spiritual stocktaking'.<sup>89</sup> In respect of this wider sphere of offending, confession seems to be a way of *bringing* the offender to remorse. In other words, rather than being spontaneously triggered at the time of transgression, in these cases the engagement of conscience occurs later, at the time of dispensing the demands for reparation.

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<sup>82</sup> Samuel J Levine 'Teshuva: A look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought' (1999) 27 (5) *Fordham Urban Law Journal* 1677 at 1682-1685. According to Levine, *teshuva* is present in the Bible, Talmud, and the legal and philosophical writings of medieval and modern scholars (at 1680).

<sup>83</sup> Enker (n 40) 282.

<sup>84</sup> Carol A Newsom, 'Models of the Moral Self: Hebrew Bible and Second Temple Judaism' (2012) 131(1) *Journal of Biblical Literature* 5 at 15; Anne W Stewart, 'Moral Agency in the Hebrew Bible' in Oxford Research Encyclopedia of Religion DOI: 10.1093/acrefore/9780199340378.013.9 at 7.

<sup>85</sup> Newsom *ibid* 8-10, 14.

<sup>86</sup> *Ibid* 15-21.

<sup>87</sup> Thanksgiving hymn.

<sup>88</sup> Newsom (n 84) 24.

<sup>89</sup> Martin Ohst, 'Repentance: Church History' *Religion Past and Present* (Brill 2009).

In keeping with the need for internal change, this reparation must be accompanied by contrition on the part of the penitent in order to secure forgiveness.<sup>90</sup> The balance between the role of these contributions and God's grace in securing this justification<sup>91</sup> shifted in response to criticisms by Protestant Reformers that the Catholic penitential system, and its focus on good works, implied that God's freedom to save was limited.<sup>92</sup> It is now largely accepted that while contrition and satisfaction are not the *basis* for justification, they assist in preparing the offender for justification and help her to overcome offending habits.<sup>93</sup> Rejection of one's sinful self and the ongoing formation of virtue are thus both important parts of the Catholic understanding of penance.<sup>94</sup>

Unsurprisingly, the negative conception of human nature that pervades Protestant theology lends the conscience-raising function of the law a prominent place. This so-called theological use of the law serves to reveal to sinners their shortcomings. Coupled to the civil use of the law, which aims to deter offenders – 'a bridle to stay the wicked from their mischiefs' – this theological use operates as a 'spur to prick forward such as be slow and negligent'.<sup>95</sup> Unable to fully perceive their depravity unaided, humans are dependent on the law, which acts like as a mirror in which one's transgressions and ignorance become apparent. In bringing these sins to light, the law serves both to condemn the sinner, ensuring the integrity of the law, and to prompt her to seek God's grace.<sup>96</sup> These two effects are intimately connected, for it is only when confronted with, and condemned for, her sins that the sinner is moved via a crisis of conscience to repent and seek God's help. As Luther so powerfully put it, 'when the law is being used correctly, it does nothing but reveal sin, work wrath, accuse, terrify, and reduce consciences to the point of despair'.<sup>97</sup> To be effective, this despair should not become so deep as to extinguish hope of forgiveness and belief in the possibility of change, though. As with the shame, or guilt, that facilitates *teshuva*, its purpose is to trigger repentance and this aim will be compromised if the offender becomes too despondent.<sup>98</sup>

Reflecting the inherently communal nature of Protestantism, others might initiate this process of invoking the conscience, too.<sup>99</sup> Although Protestant teaching rejects the sacrament of penance, repentance is considered essential and any Christian can help another to gain knowledge of her heart's innermost anguish, thereby moving her to repent. Hamlet's treatment of his widowed mother, Gertrude, following her marriage to her brother in law provides a powerful literary illustration of this process. Faced with this incest, Hamlet berates his mother for her conduct, proclaiming '...let me wring your heart; for so I shall, / If it be made of penetrable stuff'.<sup>100</sup> It is essential to recognize that this hard treatment was done in the spirit of love. Despite its apparent

<sup>90</sup> Ibid.

<sup>91</sup> God's act of removing the guilt and penalty of sin and declaring the sinner righteous.

<sup>92</sup> Colin Gunton, 'Redemption / Soteriology: Dogmatics' *Religion Past and Present* (Brill 2009).

<sup>93</sup> Jürgen Werbick, 'Repentance: Dogmatics, Catholic' *Religion Past and Present* (Brill 2009).

<sup>94</sup> Gunton (n 92); Bourne (n 64) at 98-101.

<sup>95</sup> According to an early liturgical handbook from Waldgrave, quoted in John E Witte Jr & Thomas C Arthur, 'The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment' (1993) 10(2) *Journal of Law and Religion* 433 at 443.

<sup>96</sup> Witte & Arthur *ibid* at 265.

<sup>97</sup> Luther, *Werke, Kritische Gesamtausgabe*, quoted in Witte & Arthur (n 95) at 437-438.

<sup>98</sup> Levine (n 82) at 1681.

<sup>99</sup> On the communal nature of Protestantism, see Witte Jr, 'Introduction' in Witte Jr and Alexander (n 9) 25.

<sup>100</sup> Roland Mushat Frye, 'Prince Hamlet and The Protestant Confessional' (1982) 39(1) *Theology Today* 27 at 33.

cruelty, it was an act of utmost kindness, aimed at communicating to Gertrude her unseen fault so that she might acknowledge and correct it.<sup>101</sup> Repentance – the recognition of guilt, the turning away from evil, and the future avoidance of sin – were the vital goals pursued by Hamlet’s chastisement. Hence, when a wretched Gertrude tells Hamlet he has ‘cleft [her] heart in twain’ he responds, in earnest, ‘O, throw away the worser part of it, / And live the purer with the other half’.<sup>102</sup>

These comparisons show that when punishment is understood as comprising atonement, censure and repentance as parts of an overarching whole that is aimed at contrition and reform, it is well-suited to addressing the dual nature of culpability outlined above. Where a sin has been consciously committed, a sinner might be moved to repent before any punishment, in the sense of expiation (sacrifices in the Judaic context or penitential works in the Catholic context) is undertaken. Where a sin is committed unconsciously, however, punishment, in the sense of condemnation, *precedes* the expiation. As demonstrated by the Judaic belief in divinely inflicted suffering and the Protestant practices of inducing despair, the purpose of this hard treatment is to bring the sufferer to an *ex post facto* recognition of her culpable wrongdoing, thereby inducing remorse and moving her to repent and seek forgiveness. The wellbeing of the offender is therefore always at the centre of the process and the possibility of turning away from sin, either independently or with divine assistance, is key to making sense of blame and punishment. In each case the aim is the same: to move from a culpable transgression – objective guilt – to an affective response – positive guilt – in order to commence a process of change within the offender. This is not to lose sight of the fact that it is the objective guilt that triggers the process to begin with and that part of the rationale for punishing is to uphold the integrity of the law and to offer expiation for the wrong done. It is merely to bring out the fact that what punishment is for – what it is that merits censure – and what it is *for* – what it is supposed to bring about – are inseparable considerations.

## 5. Questioning Culpability: Implications for Criminal Law Theory

With the benefit of these comparative insights, it is now possible to consider what lessons these theological observations on guilt and sin might hold for contemporary criminal law theorists. By offering a more holistic view of culpability they help make sense of our desire, and tendency, to hold people criminally accountable and punishable for negligent (inadvertently reckless) conduct. They suggest some limits on these practices though. On a positive conception of human agency, such as that found in mainstream Judaism and in Catholicism, blame and punishment is appropriate only when an offender could have conformed to the required standard but did not. On a negative conception of human agency, blame is appropriate only when the offender might plausibly come to conform to the required standard *and* her punishment is geared towards helping her see and move past her fault. This latter point has particularly clear implications for our longstanding tendency to apportion blame for negligence according to an objective standard. It also highlights the necessary, and two-way, connection between culpability and punishment.

That a lack of consciousness, or some other ‘mental state’, does not necessarily preclude a determination of fault does not imply, however, that states of consciousness, particularly intention, do not constitute part of what the punishment is for – what merits

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<sup>101</sup> Ibid at 34-35.

<sup>102</sup> Ibid at 36.

censure – when they are present. The longstanding theological practice of treating purposive, rebellious acts as particularly reprehensible suggests that the significance of intention goes beyond determining accountability. It confirms the more general insight that intention is not, as is sometimes suggested, synonymous with voluntariness or consciousness<sup>103</sup> and suggests that it is not synonymous with ‘fault’ either.<sup>104</sup> What this history draws out is the role of intention in augmenting culpability on the basis of disdain, rather than heightened awareness of the law or the consequences of one’s actions. In the case of the religious traditions examined, the disdain is directed towards God and God’s laws but it could equally be conceived as disdain toward the secular law, one’s legal duties, or the legal rights of others.<sup>105</sup> Interpreted this way, the significance of intention lies in its association with an offender’s purpose and the reasons for her conduct. In this respect, it has some affinity with the argument that in ‘harmful direct agency’ the relevant intention is the intention to involve a non-consenting other in a plan to further one’s own purposes, rather than the intention to harm that other.<sup>106</sup>

Aligning intention with purpose and reasons is not the same as suggesting that it, or consciousness, is necessarily the same as either a guilty conscience or remorse.<sup>107</sup> When culpability is tied to inner states this is sometimes taken to imply that the law requires proof that the offender experienced a guilty conscience or remorse either at the time she committed the act or at the time responsibility is attributed to her. Indeed, some have linked this requirement with the ‘Judeo-Christian moral code’.<sup>108</sup> As should now be clear, the Judeo-Christian soteriological tradition does not, in itself, demand either requirement.<sup>109</sup> Where sin is defined as that which offends against conscience, culpability could be said to rest on the offender’s guilty conscience but this *might* be presumed from the commission of sinful conduct<sup>110</sup> and is considered distinct from remorse, which arises later, if at all. In other instances of sin that are committed unconsciously, a guilty conscience *follows* the sinful conduct and then prompts remorse. In other words, the guilty conscience is produced by attributing accountability and inflicting punishment; it is not a requirement for either of these activities.

This confusion over the place and meaning of subjective guilt within the Judaic-Christian tradition and within criminal law thinking more generally perhaps helps explain some of the recent calls for its rejection. Replicating many of Fletcher’s concerns, Tatjana Hörnle has recently argued that it would be possible, and indeed desirable, to dispense with the requirement of ‘guilt’ while retaining other elements of

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<sup>103</sup> See L A Zaibert, ‘Intentionality, Voluntariness, and Culpability: A Historical-Philosophical Analysis’ (1998) 1 *Buffalo Criminal Law Review* 459.

<sup>104</sup> On the history of using ‘intention’ this way, see Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and the Modern Criminal Law* (OUP 2016) ch 6, especially 177.

<sup>105</sup> E.g. S P Garvey ‘When Should a Mistake of Fact Excuse?’ (2009) *Cornell Faculty of Law Publications* Paper 251.

<sup>106</sup> Dana Kay Nelkin and Samuel C Rickless, ‘The Relevance of Intention to Criminal Wrongdoing’ (2016) 10 *Criminal Law and Philosophy* 745.

<sup>107</sup> On the overlap between consciousness and conscience, see Cottingham (n 87) 729-730.

<sup>108</sup> See Jeremy M Miller, ‘*Mens Rea* Quagmire: The Conscience or Consciousness of the Criminal Law?’, which suggests that the Model Penal Code ‘eliminated the necessity of proving “evilness”, thus excising the moral/conscience aspect of the common law terms’ and that the root of the common law is the Judeo-Christian moral code. According to Miller, ‘the Code indicated that the issue was not how *evil* a person felt while performing the crime – but rather the awareness the perpetrator had that what he or she was doing would result in the prohibited activity’ (at 27-28).

<sup>109</sup> On how Canon lawyers, rejecting Anselm, attempted to inquire directly into the mind, heart and soul of the accused, see Berman, *The Formation of the Western Legal Tradition* (n 5) 189-194.

<sup>110</sup> Depending on one’s views on the moral content of laws and humans’ inherent moral knowledge.



our blaming practices. The main target of her argument is choice theory, or the principle of alternative possibilities (PAP) – the idea that moral and legal blame is only legitimate if the person blamed could have decided differently – which she denigrates on the basis that it does not cohere with neurological evidence that suggests that some elements of human decision making (which some scientists consider to be determinative) are beyond conscious reflection.<sup>111</sup> Her criticism extends to other ways of linking blame to inner states too, including older and contemporary character theories, which she proclaims to be substitutes for God’s ‘whole person’ assessment of individuals.<sup>112</sup> Rejecting the need for any such surrogate, Hörnle contends that it is legitimate to blame an offender simply because she has done wrong in disregarding her social duties and another’s rights. For Hörnle, wrongdoing and blame are, unlike ‘guilt’, ‘not just historical developments that could or should be reversed’; they should, and can, be preserved while treating ‘people’s moral and emotional inner lives like a black box’.<sup>113</sup> This would not, she believes, mean treating all crimes as equally blameworthy or determining blame on the basis of harm alone. On her recommendations, attacks would still be distinguished from endangerment, with the former considered more heinous, but the distinction would turn on whether a third party would describe the conduct as directly targeting another person in a hostile way.<sup>114</sup>

These are intriguing proposals and it is easy to sympathize with Hörnle’s motivations. As noted in section 2, there remains a subjectivist bias within much criminal law scholarship and there are problems with purporting to prove mental states as if they were distinct entities. Yet the richer account of guilt developed in this paper, which points to the unseverable association that exists between objective and positive guilt, suggests some flaws in her suggestions. These centre on the fact that without *any* concern for an offender’s inner state, blame and punishment begin to look inconsistent and potentially harsh. To see the inconsistency, consider the claims that criminal wrongdoing comprises disregarding victims as co-citizens and that directly targeting another person in a hostile way is the most heinous species of criminal wrongdoing. The notion of disregard seems to require consciousness, i.e. the conscious rejection of the rights of others, and would therefore seem to preclude liability for negligent (or inadvertently reckless) conduct.<sup>115</sup> Yet Hörnle would endorse neither of these implications. She clearly rejects the idea of basing blame on conscious choice and she accepts that negligence can be sufficient to classify an act as a crime.<sup>116</sup> Ironically, there are of course *religious* models that can accommodate what Hörnle proposes. As comes out most clearly within negative anthropology Judaism and Protestantism, a lack of consciousness does not preclude blame for sin, but key to this blaming arrangement is affective recognition of one’s wrongdoing and the possibility of future change – the possibility that, with divine assistance, a sinner might come to see her fault and adhere to the law. In other words, it requires a concern with inner states.

It is this concern with change and inner states that makes these soteriological models akin to communicative, rather than expressivist, theories of punishment and it is this that tempers their potential severity. Unlike expressivist theories of punishment, which are ‘one-way streets’ for condemning the breach of collective moral

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<sup>111</sup> Hörnle (n 15) at 1, 6-8.

<sup>112</sup> Ibid at 14.

<sup>113</sup> Ibid at 13, 19.

<sup>114</sup> Ibid at 23.

<sup>115</sup> See Fletcher’s discussion of Hegelian approaches, such as Brudner’s, that reach these conclusions (Fletcher (n 12) 56; 313-314).

<sup>116</sup> Hörnle (n 15) at 22.

commitments, communicative theories aim to engage the offender in a dialogue and thus are concerned with the offender's response.<sup>117</sup> In the case of the soteriological models studied, this communication takes the form of an invitation to undertake repentance – to experience remorse and moral change. As such, these models depend on belief in the possibility of inner change and must be invested in actualizing this. As Bourne's critique of Antony Duff's secular penance demonstrates, the absence of either of these components will render a communicative theory of punishment deficient. In Duff's case, his theory is hampered by discomfort over inculcating virtue and shaping character<sup>118</sup> and his relative indifference as to whether the offender expresses genuine remorse.<sup>119</sup> In a similar way, Hörnle's lack of concern for inner states and her doubts about free will and whether character can be shaped<sup>120</sup> tend to undermine her theory of blame, which she claims is based on communication.<sup>121</sup> Perhaps Hörnle would maintain that she is concerned only with behavioural change, rather than change of any deeper sort, but it is not clear that it is possible to draw distinctions in this way. The resolve that is required for any kind of change is located within, so even if wholesale character change is not in contemplation there must be some concern with interiority.<sup>122</sup> On top of this, since culpability is at least partly based on the failure to meet normative standards, rather than to obey particular rules, coming to avoid blame often involves an attitudinal shift.

This lack, or partial, concern for inner states is what renders Duff and Hörnle's accounts of punishment problematic and potentially harsh. Both seem to employ a strict sense of justice that demands retribution<sup>123</sup> but insufficiently concerned with forward-looking consequences. It is perhaps no coincidence that this variety of justice was famously borne of an attempt, by Kant, to replicate many theological assumptions about justice while rejecting the Christian framework that supported them.<sup>124</sup> In a similar way, though framed as an emancipation from religious thinking, Hörnle's recommendations remain tied to a set of theological concepts whose deep logic dictates the limits of what is acceptable. These parameters are not easily escaped nor, I would argue, should we try to escape them; instead, we should try harder to understand and integrate them into contemporary discourse. This promises to alter the discursive landscape considerably. At present, the bare, Kantian paradigm of justice dominates

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<sup>117</sup> See, for example, Joshua Glasgow, 'The Expressivist Theory of Punishment Defended' (2014) 34 *Law and Philosophy* 601, which points out that expressive punishment does not necessarily entail blame (at 609).

<sup>118</sup> Bourne (n 64) at 89.

<sup>119</sup> *Ibid* at 93.

<sup>120</sup> Hörnle (n 15) at 3, 11.

<sup>121</sup> For Hörnle, excuses are based on an inability to be involved in meaningful communication (*ibid* at 17).

<sup>122</sup> It is not clear that Hörnle's theory of blame even requires belief in the possibility of behavioural change. She notes that the brain is adaptable and that humans can be influenced by education and moral claims (*ibid* at footnote 23) but she sees lack of impulse control as irrelevant and would blame those who have this impediment (*ibid* at 19). For an *expressivist* account of blame that might support punishing such individuals see Marion Godman and Anneli Jefferson, 'On Blaming and Punishing Psychopaths' (2017) 11 *Criminal Law and Philosophy* 127. Note that the possibility of behavioural change is central to blaming psychopaths and that the expressions of blame are not directed at the wrongdoer but at the wider community (at 138-139).

<sup>123</sup> That Hörnle is dealing in desert is clear from her comment that 'The judgement: "X has committed a wrong and deserves blame for it" retains its sense even if the additional "and he could have decided otherwise" is omitted' (Hörnle (n 15) at 13).

<sup>124</sup> On Kant's ethical framework, which sees consequentialist criteria for punishment as irreconcilable with the demands of strict justice, see Alex Tuckness and John M Parrish, *The Decline of Mercy in Public Life* (CUP 2014) chapter 8, 227.

discussions, which is why retributive theories are accused of “‘stuffing’” their accounts with ‘intrinsic goals that are quasi-utilitarian’<sup>125</sup> and why the affective blame associated with retributive punishment has attracted criticism.<sup>126</sup> But these reprovals do not apply to the conception of divine justice that is based on a unity between love and punishment – between wrath and reconciliation<sup>127</sup> – that is typically missing from contemporary accounts that contrast ‘doing justice’ with other, future-regarding aims.<sup>128</sup>

This alternative conception of justice manages to retain desert, blame or censure<sup>129</sup> without losing the more positive goals of reform and rehabilitation, and it is not exclusively associated with individual subjective fault. Whereas contemporary iterations of retributive justice, even those that ‘stuff’ their accounts with consequentialist side-constraints, have been deployed in the service of a narrow, backwards-facing conception of criminal responsibility, this alternative conception is perfectly capable of accommodating the more relational, prospective account of responsibility that recognizes crimes as setting objective standards for conduct.<sup>130</sup> Keen observers have pointed to the limitations of the subjective approach to responsibility but the explanation provided tends to replicate the same disintegrated view of just punishment that leads to the sidelining of objective liability in the first place. When the subjective approach is criticized for having ‘focused on the fairness of attribution and punishment, rather than responsibility more generally’,<sup>131</sup> this presupposes a contrast that arguably only exists when the fairness is presupposed to accord with the hollowed-out version of justice that has come to prevail. As I have tried to show in the preceding sections, when the aims of punishment are understood more broadly not only can we see what it might take to render our punishing practices more humane, we can also account for, and more deeply understand, our ethical and practical need to censure negligent conduct. In other words, we are able to escape the constraints of subjective responsibility without losing sight of the importance of trying to render punishment just.

In both cases, the solution lies in recognizing the inherent relationality that characterizes every stage of our censuring practices and accepting the responsibility this generates at both ends of the blaming relation. When we consider the manifold ways we fail in our obligations to one another – however widely this set of obligations extends – it becomes clear that these manifest both disdain and indifference. But since many of us exhibit this kind of behaviour (albeit not always with criminal consequences) and since we are all implicated in the structural inequalities that can promote it, there is a real need to take account of these fallibilities when thinking about how punishment is performed and justified. One way to do this is to take seriously the

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<sup>125</sup> Flanders (n 16) 337.

<sup>126</sup> Nicola Lacey and Hannah Pickard, ‘From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm’ (2012) 33(1) OJLS 1.

<sup>127</sup> See Tuckness and Parrish (n 124).

<sup>128</sup> There are some exceptions, such as Jonathan Jacobs’, ‘Resentment, Punitiveness, and Forgiveness: An Exploration of the Moral Psychology of Punishment’ in Jonathan Jacobs & Jonathan Jackson, *Routledge Handbook of Criminal Justice Ethics* (Routledge 2016), which points out the educative function of resentment that is linked to motivating reform.

<sup>129</sup> For a sense of what it might require to move away from these commitments, see Christopher Slobogin, ‘Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism’ (2016) *William & Mary Law Review* 57 1505.

<sup>130</sup> On the association between relational societies and objective liability see Rita Anne McNamara et al, ‘Weighing Outcome vs Intent Across Societies: How Cultural Models of Mind Shape Moral Reasoning’ <https://psyarxiv.com/kesbu/>

<sup>131</sup> Farmer (n 104) 195.

idea that punishment is a form of communication and is therefore more than an expression of censure.<sup>132</sup> Accepting this means there is no room to claim that punishment is unconcerned with bringing about the internal responses that ought to accompany a finding of objective guilt and recognition that one has done wrong, which might in turn open up the possibility of reconciliation.<sup>133</sup> Although the state cannot demand genuine remorse or reform and must only punish so far as is deserved, the formal satisfaction of whatever obligations and restrictions it imposes is not enough to satisfy the communicative justification of this punishment. If an offender merely engages in the mechanistic performance of these injunctions there may be nothing more the state can demand of her but, *pace* Duff, this does not mean that she can be considered reconciled.<sup>134</sup> For this reason, the forms of punishment issued by the state ought to be designed so as to enhance the likelihood that deep reform should occur. At the very least, they ought not to minimize or eradicate the possibility of reform and rehabilitation.<sup>135</sup>

This is likely to necessitate the active involvement of others. As the example of the Protestant confessional makes clear, anyone can help another see her fault and try to move past it: ‘each person...needs the law and the association with others to drive her to repentance – every person is inherently communal and belongs to a community’.<sup>136</sup> We all require assistance (even if it is not divine) in reorienting our attitudes and conduct so as to have greater regard for others, and even if punishment plays only an indirect role in encouraging these processes it is a role worth promoting.<sup>137</sup> Appropriately, in light more general integrative ambitions of this article, this attitudinal reorientation occurs by way of a process of integration. Research shows that full rehabilitation is akin to religious conversion – the intellectual, moral and, ultimately, spiritual change through which the self moves from being divided to unified. As the ego is decentred and diminished, the heart is enlarged and compassion grows.<sup>138</sup> This conversion involves learning to ‘unthink’ or ‘unknow’ the automatic responses that characterized one’s prior existence, and entails a broadening of perspective to become ‘cognizant...of the symbolic universe that shelters and legitimates one’s ideas regarding the world’.<sup>139</sup>

## 6. Conclusion

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<sup>132</sup> For a thoughtful critique of communicative theories of punishment that are premised on a monovalent assumption of mutual respect and formal equality, see Henrique Carvalho, *The Preventive Turn in Criminal Law* (OUP 2017) ch 6.

<sup>133</sup> Cf Ambrose Lee, ‘Defending a Communicative Theory of Punishment: The Relationship Between Hard Treatment and Amends’ (2016) doi: 10.1093/ojls/gqw003, which argues that the liberal state aims only at the foundational element of repentance, i.e. the recognition and judgement by an offender that she has done wrong but does not aim to produce the ‘emotional toils of guilt’. Lee’s position may stem from the fact that he partly models his account on Duff’s theory of punishment, which, despite its self-description, is more expressivist than communicative.

<sup>134</sup> See Bourne (n 64), arguing that genuine repentance can remain the aim of punishment despite our inability to identify it.

<sup>135</sup> Jeffrie G Murphy, ‘Christian Love and Criminal Punishment’ in Witte Jr and Alexander (n 9) 225.

<sup>136</sup> John Witte Jr, ‘Introduction’ in Witte Jr and Alexander (n 9) 25.

<sup>137</sup> On the indirect role of punishment in such matters, see Justin Tiwald, ‘Punishment and Autonomous Shame in Confucian Thought’ (2017) 36(1) *Criminal Justice Ethics* 45. On how punishment might incorporate these aims see the discussion of reintegrative shaming and its development in Jody Clay-Warner, ‘Crime and Emotions’ in J E Stets and J H Turner (eds), *Handbook of the Sociology of Emotions: Vol II* (Springer 2014) 481-483.

<sup>138</sup> Andrew Skotnicki, ‘Religion, Conversion, and Rehabilitation’ (2014) 33(2) *Criminal Justice Ethics* 104 at 106, 111-121 (the term ‘spiritual’ has no necessary connotation of religious belief (111)).

<sup>139</sup> *Ibid* at 116-118.

When we extrapolate these lessons outward from the penitent offender and apply them to the way we think as criminal law theorists, the advantages of attending to the theological roots of our criminal justice practices become even clearer. A wider range of disciplinary perspectives can illuminate and force us to question the assumptions we bring to thinking about criminal culpability and reveal how the practice of considering discrete aspects of the blaming enterprise in isolation is unduly restrictive and, frankly, distorting. As criminal law theorists, we need to be open to hearing the lessons offered by cognate spheres of knowledge, even if they speak to us in a seemingly outmoded tongue.

To be clear, this does not entail attempting to transpose theological beliefs into legal principles, weakening the separation of church and state or even embracing any particular religious norms. The ethical insights can be applied independently of any faith in God, though they will require substantially more investment in the possibility of community than mainstream liberal criminal law theory allows<sup>140</sup> and greater emphasis on obligations than rights-oriented contemporary legal systems typically embody.<sup>141</sup> Nevertheless, there are undeniable limits to how far these lessons might be incorporated to any system of law, particularly secular state law, and costs in attempting to do so. As Diamantides and others have argued, the ethical responsibility we have for others' suffering is absolute, and all suffering is beyond meaning and redemption. To try make this suffering meaningful and to try to tame it – tendencies ascribed to law and politics under the Western paradigm of Christianised economic-political theology – is to fall prey to a logic of perpetual management that unsuccessfully attempts to synthesize infinite compassion and finite law.<sup>142</sup>

This is a powerful critique but should not obscure the extent to which this failure occurs in varying degrees. Our absolute ethical responsibility to one another is by its nature irreducible but not all attempts to capture it within law are equal. Given this, and the reality that ours is a society in which law reflects, reinforces, and even creates our obligations towards one another, it is important to attend to the ways in which our thinking about and using law does this. In the context of criminal law, this means taking seriously the appeal of our intuitive desire to censure offenders, to reflect on what it means for such offenders to be guilty, and to think critically about what is entailed in trying to make sense of these issues.<sup>143</sup> This requires interrogating the parallel blaming practices from outside the legal realm that have both shaped our law and the way we conceive of the concepts and processes on which these practices rest. It also requires a rejection of the assertion that justifications for criminal law and punishment should be 'beyond metaphysics'.<sup>144</sup> Even if we endorse the (contestable) claim that deterrence

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<sup>140</sup> On this point, see Stephen P Garvey, 'Punishment as Atonement' (1999) 46 *University of California at Los Angeles Law Review* 1801 at 1803.

<sup>141</sup> See Robert R Cover, 'A Jewish Jurisprudence of the Social Order' (1987) 5(1) *Journal of Law and Religion* 65-74.

<sup>142</sup> Marinos Diamantides, 'Law and Compassion: Between Ethics and Economy, Philosophical Speculation and Arche-ology' (2017) 13(2) *International Journal of Law in Context* 197. On the inability of criminal law to make full sense of the suffering of victims or offenders, see Benjamin B Berger, 'On the Book of Job, Justice and the Precariousness of Criminal Law' (2008) 4(1) *Law, Culture and the Humanities* 98.

<sup>143</sup> On the need for this kind of inquiry that focuses on an internal assessment of the law's blaming practices, while recognizing that these are informed by 'religious and moral institutions', see Lindsay Farmer, 'Censure: Moral and Sociological' in Anthony Amatrudo (ed), *Social Censure and Critical Criminology: After Sumner* (Palgrave MacMillan 2017).

<sup>144</sup> Flanders (n 16) at 63.

and social control are the only aims that are capable of overlapping consensus within modern society, these aims unavoidably involve ‘shaping and forming people’ in accordance with norms we consider valuable. This in turn means that questions of free will, motivation, and what we owe one another remain central. These are properly subjects of public discourse and not merely of personal conviction.<sup>145</sup> It is in the spirit of furthering this discourse that this article is offered.

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<sup>145</sup> Cf Flanders *ibid.*