Punishment and Atonement

Retrieving Anselmian Jurisprudence

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Statement of Academic Integrity

I, the undersigned, confirm that the following thesis, submitted to the School of Law in the University of Durham in partial fulfilment of the MJur degree has been composed solely by the candidate. All quotations have been distinguished by quotation marks and the sources of information specifically acknowledged.

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Abstract

Even though legal positivism has tended to distance law from theology with its separation thesis, in the recent literature discussion of the relationship between law and religion has become a topic of scholarly attention once more. Today there is a flourishing body of work at the interstices between these two disciplines. This thesis contributes to this area of research by examining how a key theme in Christian theology, that of the doctrine of atonement or reconciliation, may have a bearing on several central issues in contemporary punishment theory. The introductory chapter sets the scene by staking out the conceptual space for the subsequent chapters, drawing on recent work at the intersection of political philosophy, law, and religion. Chapter 2 provides a working definition of punishment and its justification, as well as an account of relevant issues in the doctrine of atonement. Chapter 3 focuses more specifically on the work of the medieval divine, Anselm of Canterbury (1033-1109 CE), whose treatise on atonement, *Cur Deus Homo* (Why the God Human), is one of the most influential treatments of the doctrine. The chapter considers his understanding of atonement as satisfaction, as well as his notions of punishment and forgiveness. Chapter 4 deals with the way the American philosopher Katherin A. Rogers has recently appropriated Anselm's work for an account of legal punishment that she calls the *character creation view*. Her work demonstrates one way in which Anselm's intellectual legacy can be used constructively for thinking about nodal issues in punishment theory. The chapter critically interacts with her retrieval of a broadly Anselmian account of punishment, considering both its strengths and weaknesses. The upshot is that there continue to be ways in which law and religion can learn from each other, and that a specific theological tradition—in this case, Anselmianism—may provide important conceptual resources for current thinking about punishment and its alternatives in legal theory.

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CHAPTER ONE

Introduction

At the beginning of his classic article in punishment theory, 'Varieties of Retribution,' John Cottingham writes that 'In the Pauline doctrine of the atonement, the passion (suffering) of Christ is supposed to "pay for" the offences of mankind.' In a parenthetical comment he goes on to say, 'this is merely an example of the belief that suffering pays for wrong; I do not mean to suggest that the repayment version of retributivism is really an atonement theory. *There could not be an atonement theory of punishment; atonement is something voluntarily undertaken, punishment something exacted*.'[1] The thought seems to be this: the Christian doctrine of atonement may draw on a version of retributive justification, but even if it does it should not be confused with punishment theory. For atonement is voluntary, the action of the agent herself; punishment is involuntary, an act imposed upon the agent by another.

Is Cottingham right about this? Can the doctrine of atonement, one of the central planks of Christian theology, provide resources with which to tackle the problem of punishment in a legal context? It is the burden of this thesis that it can. Although Cottingham is right that atonement doctrine in Christian theology is thought to be the voluntary action of Christ in order to bring about human salvation, it is not clear that punishment is always involuntary and always imposed on the agent in question by another.[2] There may even be ways in which atonement theology might helpfully inform current ways of thinking about punishment in law.[3] Unfortunately, these days theology and law are often placed in rather different conceptual spaces. If they are not always opposed to one another, they are still frequently set at odds. This is particularly true of the sort of positivist tradition in law that stems from the linguistic-philosophical work of H. L. A. Hart and his intellectual progeny. According to Hart's way of thinking, legal theory is descriptive, not normative. It is about getting a clearer picture of the shape of legal doctrines, not about stipulating how we ought to live.[4] Law and morality need to be kept distinct. This is the basis for *the separation thesis*, familiar to undergraduate lawyers

[1] John Cottingham, 'Varieties of Retribution' *The Philosophical Quarterly* 29.116 (1979): 238-246; 238. Emphasis added.
[2] A point made by Linda Radzik in her study, *Making Amends: Atonement in Morality, Law, and Politics* (Oxford: Oxford University Press, 2009).
[3] Aside from the work of Radzik, several prominent legal theorists have taken up aspects of atonement thinking in their work on criminal punishment, as we shall see. This includes such works as R. A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1991), and Michael Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Oxford University Press, 2010), ch. 3 'The Moral Worth of Retribution.'
[4] H. L. A. Hart, *The Concept of Law.* Second Edition (Oxford: Oxford University Press, 1961). In this respect he was an heir of the work of John Austin who wrote that 'the existence of the law is one thing; its merit or demerit is another.' Austin, *The Province of Jurisprudence Determined,* edited by W.W. Rumble (Cambridge: Cambridge University Press, 1995 [1832]), 157.

from their introductory jurisprudence classes. On one side stands Hart, the stalwart positivist defender of the separation of law and morality.[5] On the other side stand theorists like Lon Fuller, a modern representative of a revived natural law tradition that sees law and morality as intimately connected—even if, on his conception of natural law, it is not fundamentally about some divine fiat written into the very fabric of creation as is the case in the medieval natural law tradition stemming from Thomas Aquinas.[6] On this separation thesis hangs much debate about the shape of law and its purpose in modern jurisprudence. What is the place of the law? Does it have the kind of restricted purview of positivism, or is the remit of law rather more expansive, as Fuller or even Thomas Aquinas, believed? Should morality and law be intertwined? Does the law make normative judgments? These questions go to the heart of the matter.

Turning the clock back from Fuller to Aquinas in the high Middle Ages, we find a rich and nuanced account of the role of natural law in jurisprudence that draws unashamedly upon the Christian tradition.[7] These days, religious thinkers are often rather more circumspect, and lawyers much less likely to reach for theological resources with which to furnish their views about the nature or purpose of the law. Yet, there are still those willing to make the case for a religious dimension to law, or even the theology of law, and in recent times the literature on law and religion has begun to flourish once more.[8] The textbook example of the mid-twentieth century debate between Hart and Fuller makes it clear that law and morality are difficult to keep apart. The same is true, so it seems to me, with respect to law and religion. Although a case can certainly be made for a naturalistic approach to the law as a social practice arising in human societies that has no essential connection to religious beliefs, it is also true to say that much black letter law in European, British, and American jurisdictions is deeply influenced by the Judeo-Christian tradition, even when this is not acknowledged. In his important study of the history of the formation of the Western legal tradition Harold Berman even goes as far as to say that 'Western legal science is a secular theology, which

[5] See H. L. A. Hart, 'Positivism and the Separation of Law and Morals' in *Harvard Law Review* 71.4 (1958): 593-629.
[6] See Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).
[7] See, Aquinas' Treatise on Law in *Summa Theologiae I.II Q. 90-108.* This remains the foundation of much Roman Catholic Canon Law.
[8] According to John Witte, one of the main actors in the resurgence of interest in law and religion, the study of law and religion has 'exploded around the world' in the past two generations. See John Witte, 'The Study of Law and Religion in the United States: An Interim Report' in *Ecclesiastical Law Journal* 14 (2012): 327-354; 327. This is evident from the number of academic journals in this area, such as the *Journal of Law and Religion* published by Emory University in collaboration with Cambridge University Press, the *Oxford Journal of Law and Religion*, and Brill's *Journal of Law, Religion and State,* as well as a number of academic monograph series, such as the Cambridge Studies in Law and Christianity, the Emory Studies in Law and Religion Series, and the Brill Research Perspectives on Law and Religion series. It is also evident in the various research centres that have sprung up in recent decades devoted to the relationship between law and religion in its various guises. The flagship centre is at Emory University, but there is also The Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics at Pepperdine University in California, and the centre for Law and Religion directed by Professor Norman Doe at Cardiff University. The International Center for Law and Religion Studies at Brigham Young University in Utah has a helpful website listing resources in this area. See https://www.iclrs.org/religlaw/ (last accessed at 21/06/24). A useful primer in this area is Russell Sandberg, *Law and Religion* (Cambridge: Cambridge University Press, 2011).

often makes no sense because its theological presuppositions are no longer accepted.' Later in the same passage, he expands on this point:

> The legal systems of all Western countries, and of all nonwestern countries that have come under the influence of Western law, are a secular residue of religious attitudes and assumptions which historically found expressions first in the liturgy and rituals and doctrine of the church and thereafter in the institutions and concepts and values of the law. When these historical roots are not understood, many parts of the law appear to lack any underlying source of validity.[9]

This basic point about the secularization of theological ideas in the law has been made by a number of twentieth century legal scholars. One of the most celebrated examples is that of the controversial German jurist Carl Schmitt who writes,

> All significant concepts of the modern theory of the state are secularised theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts.[10]

But even if we grant the historic connection between religion and law in general, and the theological influence of the Judeo-Christian tradition in particular upon Western (especially European, British, and North American) law, allowing that religion or even a particular religious tradition should continue to have an influence in modern legal jurisdictions is a much more contentious proposition. In other words, it is one thing to claim that there is a religious foundation to modern Western law, even, perhaps, that such legal traditions are indicative of a 'secularised theology.' But it is quite another thing to claim that there should be a continuing religious influence

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[9] Harold J. Berman, *Law and Revolution I: The Formation of Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), 165-166. Martin E. Marty makes a similar point in his article, 'The Religious Foundations of Law' in *Emory Law Journal* 54 Special Issue (2005): 291-323. This has been echoed more recently by Rafael Domingo. He writes, 'Secular legal systems are Western legal systems, and Western legal systems are historically and traditionally deeply theological.' Domingo, *God and the Secular Legal System.* Cambridge Studies in Law and Christianity (Cambridge: Cambridge University Press, 2016), 69. In this connection, see also Timothy Gorringe, *God's Just Vengeance: Crime, Violence and the Rhetoric of Salvation* (Cambridge: Cambridge University Press, 1997). For a clear example of a naturalistic approach to law, see Brian Leiter, *Naturalising Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007).

[10] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty,* trans. George Schwab (Chicago: Chicago University Press, 2005 [1922]), 36. Schmitt's work was influential, but his legacy is, to say the least, problematic given his involvement with National Socialism. As Lars Vinx writes, 'Schmitt was an acute observer and analyst of the weaknesses of liberal constitutionalism and liberal cosmopolitanism. But there can be little doubt that his preferred cure turned out to be infinitely worse than the disease.' Vinx, "Carl Schmitt", *The Stanford Encyclopedia of Philosophy* (Summer 2025 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <https://plato.stanford.edu/archives/sum2025/entries/schmitt/>. Much as I deplore the fact that Schmitt was actively involved in the Nazi regime, his political stance does not mean he is wrong about the gradual historical secularization of Western law.

upon the shape of modern Western law. As with the separation thesis, this involves the difference between historical and descriptive claims about law, and normative judgments.

This point has not been lost on recent theorists about punishment. One notable example is that of Durham legal theorist, Thom Brooks.[11] In this connection, he points to the link between criminalization and punishment. Some theorists (such as natural law theorists) make the link in the following way: certain acts should be criminalized *because* they are immoral. This is *legal moralism*. It is a view that has an initial attraction, as Brooks himself acknowledges. For surely there are obvious instances of acts that, so it seems, all reasonable people would consider both wrong in the sense of being morally inappropriate or impermissible and worthy of legal censure. Clear examples include things like murder, rape, and theft. Not only do most reasonable people consider these things morally wrong; we think they should be made criminal acts because they are, as Antony Duff puts it, 'public wrongs—wrongs that concern the whole polity.'[12]

A distinction often made with respect to criminalization and punishment has to do with crimes that are *mala in se* and those that are *mala prohibita*. Crimes that are *mala in se* ('wrong in themselves' or intrinsically wrong) are things like murder, rape, and theft that are normally thought to be immoral independent of the law.[13] That is, even if there were no law in a particular jurisdiction prohibiting these things, we would consider them to be impermissible acts *because* we consider them to be immoral. It is wrong to murder someone in cold blood, other things being equal, because we think it is immoral to deprive another person of life without cause irrespective of whether it is also a criminal act. But the same is not true for crimes that are said to be *mala prohibita*. These are crimes prohibited by law but not necessarily regarded as immoral independent of the sanction of law. Classic examples, as Brooks points out, have to do with traffic violations. It is illegal to exceed the speed limit when driving down a deserted country road with no obvious hazards in view, but whether it is also immoral is moot. More controversial examples only highlight the difficulties in making the connection between law and morality stick, so to speak. Take abortion or the legalization of drug use. Some will regard these as things that should fall under the description of *mala in se* crimes; others would consider them to be *mala prohibita* at best. (The recent overturning of Roe vs. Wade in the USA is a good example of this,[14] as is the decriminalization of marijuana in some US states.[15]) So far, so good. Clearly there is *some* overlap between moral wrongs and criminality, and this connection seems relatively straightforward in those cases which offer clear examples, such as rapine, murder,

[11] Brooks, *Punishment* (London: Routledge, 2012), Introduction. There is a second edition of this work, but I will refer to the first edition in what follows.
[12] See R. A. Duff, 'Towards a Theory of Criminal Law?' *Proceedings of the Aristotelian Society: Supplementary Volume* LXXXIV (2010): 1-28 at 10. cited in Brooks, *Punishment,* 7.
[13] See the discussion in Brooks, *Punishment,* 6-10, which I am drawing upon here.
[14] See *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).
[15] See the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA) Proposition 64 (Cal. 2016). The text can be found at: https://courts.ca.gov/sites/default/files/courts/default/2024-12/btb24-3i-1.pdf (last accessed 01/03/2025).

and theft. But counterexamples abound and undercut the appeal to the connection between law and morality when it comes to criminalization. Brooks puts it in terms of what he calls *the naturalist fallacy*, namely, that 'there is no necessary connection between crime and morality, even if there is often this connection.'[16]

Suppose that is right. This in-and-of-itself does not mean religious or theological concepts cannot provide conceptual resources for legal theory. For one might think, like Brooks, that the naturalist fallacy is true and still think that legal theory can benefit from conceptual resources provided by adjacent disciplines concerned with similar matters such as punishment, forgiveness, and restitution. That is exactly what I propose in this work.

Law, religion, and liberalism

The present thesis provides an account of how the doctrine of atonement as a theological idea may provide conceptual resources for jurisprudential reasoning about punishment theory. I think that the historic connection between theology and law and the continuing resonances between these two disciplines merits careful consideration, especially when it comes to a topic that both disciplines have an important stake in, namely, the theory of punishment. However, my aim in this work is a modest one. I do not presume that contemporary law *must* have a religious foundation or that it needs to return to its theological roots. Nor do I espouse the complete separation of theology and law, as many contemporary 'secular' lawyers do. Rather, this work is motivated by a kind of middle way between these two opposing positions. It is akin to what Rafael Domingo calls a *theistic secular* approach to law.[17] In *God and the Secular Legal System*, he distinguishes three approaches to the relationship between religion, including theology, and law. The first two correspond to what I am calling the religious foundation of law and a contemporary secular approach. These he calls the *religious approach* to law and the *liberal approach* to law, respectively.[18] Let us turn to consider Domingo's views as a way of fleshing out the distinction between a religious and liberal (or 'secular') approach to the law.

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[16] Brooks, *Punishment*, 10. Following Hart, Brooks also claims that the fact that Western liberal democratic societies like the UK are religiously and morally pluralist suggests that there is often no moral consensus on a given issue; moral standards differ across a given society (Brooks, *Punishment*, 8). There is some truth to this, as the example of illegal drugs and abortion make clear. However, it strikes me that it might be better to speak in terms of paradigms and limit cases here, rather than making general statements about societies as a whole. There are clear examples of *mala in se* crimes, like murder, rape, and theft, that are not normally considered matters that are 'relative' to a given community or moral standard within society. There are also clear examples of *mala prohibita* crimes that may be thought of differently by different constituencies. What is at stake is not the distinction between crimes that are bad in themselves or bad because prohibited by law, but whether a given act falls under one or other of these descriptions. In a pluralist society, which crimes fall under *mala in se* or *mala prohibita* will sometimes be the subject of debate. But no constituency or community seriously thinks that murder, rape, and theft are crimes that should be thought to be merely *mala prohibita*. This suggests that even in a pluralist society there is a stable core of beliefs about what is both immoral and criminal behaviour, even if there are other actions that whose categorisation is more controversial.

[17] Domingo, *God and the Secular Legal System*, 10.

[18] Ibid., 4-6.

The religious approach is characterized by the subordination of human law to divine positive law and morality. The idea is that law not only has had a historically religious foundation but ought to have a religious foundation today as well. Often this is characterized by repristinating or retrieving a position taken in what is thought to have been some past golden age, whether that is when the idea of a deity was acknowledged in society at large, or as encoded in some foundational political document such as the Constitution of the United States of America and its Amendments. The 'Radical Orthodoxy' of theologians like John Milbank is a good example of this approach in theology.[19] Alasdair MacIntyre's Thomistic appeal to distinct, tradition-based approaches to moral and political philosophy is another example.[20] But it may also be construed in a milder fashion as a step away from a more robustly secular approach to law and toward an understanding of law that acknowledges its dependence upon religious assumptions that transcend any given legal code or jurisdiction. A sophisticated attempt to provide a moderate argument for the religious approach can be found in the work of political philosopher, Christopher Eberle. He writes that 'each citizen should feel free to support coercive laws on the basis of her religious convictions alone—so long as she conscientiously regards her religious convictions as providing a sufficient basis for those laws.'[21] It is this sort of religious approach to the making of political decisions that Domingo finds problematic precisely because it appeals to religious views that are partisan.[22]

But the main problem with the religious approach, as Domingo sees it, is that it is no longer relevant in modern pluralist Western societies. The religious concepts and beliefs that may have given rise to legal doctrines that inform Western sensibilities are no longer fit for purpose in societies where we acknowledge and make room for persons of many different faiths, and none. For this reason, he says, secular legal systems 'demand an intrinsic secular justification, not simply a religious one.'[23]

Let us turn to the liberal approach. As Domingo understands it, this is the sort of view one finds in political philosophy indebted to the liberal tradition, and especially in its modern guise, to

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[19] See John Milbank's repristinating of medieval thought prior to Duns Scotus in *Theology and Social Theory: Beyond Secular Reason*. Second Edition (Oxford: Blackwell, 2006 [1990]).

[20] See MacIntyre's influential trilogy, *After Virtue* (Notre Dame: University of Notre Dame Press, 1981), *Whose Justice? Which Rationality?* (London: Duckworth, 1988), And *Three Rival Versions of Moral Inquiry: Encyclopaedia, Genealogy, and* Tradition (Notre Dame: University of Notre Dame Press, 1990).

[21] Christopher J. Eberle, *Religious Conviction in Liberal* Politics (Cambridge: Cambridge University Press, 2002), 333. One of the main take-aways from Eberle's work is that religious grounds for political views should not necessarily be a reason to be suspicious of the view in question, despite the claims of much modern liberalism to the contrary.

[22] In this connection, theological writers who want to reconceive the debate about political philosophy and religion in Augustinian terms so as to make the ideal polis a kind of eschatological aspiration offer little help to those wanting solutions to pressing political and legal issues with religion in the here and now. See, e.g., Kristen Deede Johnson, who writes at the conclusion of her monograph on these matters that 'Christianity has a considerable contribution to make to political theory, most importantly by reminding us that many of the goals that we currently hold for the political realm cannot be realized outside of participation in the Triune God who reigns in the Heavenly City.' Deede Johnson, *Theology, Political Theory, and Pluralism: Beyond Tolerance and Difference* (Cambridge: Cambridge University Press, 2009), 260.

[23] Domingo, *God and the Secular Legal System,* 5.

the magisterial work of John Rawls.[24] Rawls's famous 'veil of ignorance' thought experiment is a way of illustrating his conception of justice as fairness in what he calls the 'original position' of a hypothetical state of nature prior to the formation of a political community. He says that in making political decisions for the whole community individuals must stand behind a veil that screens their religious and personal preferences, as well as natural abilities, status, fortune, and so on.[25] Thus, in coming to collective political judgments, personal preferences that may not be shared by all (religion being an obvious example) form no part of decisions made in the public space. Neither in terms of our justification for political actions, nor the assumptions that inform political doctrines, should we smuggle in such things as our religious convictions. For the public space in which political decisions are made must be neutral on those topics that we may legitimately disagree upon, and that are within the individual rather than the collective purview. The idea is that for political decisions to be representative and equitable they must not be influenced by matters that give preferential treatment to a particular minority, such as the theological views espoused by persons of a religious persuasion.

To take a concrete example, on this Rawlsian way of thinking, it would be inappropriate for a political community to insist upon a particular religious observance for all its citizens or require adherence to a faith or creed. Other things being equal, such matters are private, not public, concerns. From this idea has arisen the notion that public reasoning pertaining to the life of the political community should remain neutral or noncommittal on matters that are reserved to private concerns, provided those concerns do not have problematic or harmful social implications. This has come to be known as *public reason liberalism* because the idea is that the justification offered for a particular view in the public square must only appeal to principles that no reasonable person could be expected to reject.[26] Given that reasonable people disagree on matters of religion, this in effect puts religious

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[24] See John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971). It is worth nothing that in his later work, Rawls attempts to row back from some of the implications of his earlier views. Of significance for the present work are his remarks about 'reasonable pluralism,' which he came to see as a natural outcome of the liberalism and emphasis upon individual freedom that had characterized his earlier work. He writes, 'A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines, but by a pluralism of incompatible yet reasonable comprehensive doctrines…. Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.' Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), xvi.

[25] Rawls writes, 'Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.' *A Theory of Justice*, 12.

[26] See Nicholas Wolterstorff, *Understanding Liberal Democracy: Essays in Political Philosophy* (Oxford: Oxford University Press, 2012), Introduction. As Jeffrey Stout observes, in the original hardback version of Rawl's lecture series, *Political Liberalism, Expanded Edition.* Columbia Classics in Philosophy series (New York: Columbia University Press, 2005 [1993]), Rawls stipulated that 'our reasoning in the public forum should appeal strictly to ideals and principles that no reasonable person could reasonably reject.' See Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2003), 65. This is public reason liberalism.

reasons beyond the purview of public reasoning, behind the veil of ignorance. For public reasoning must remain neutral on matters that reasonable people disagree about. As Domingo puts it, 'If both religion and irreligion are valuable, religion should be irrelevant to the life of the political community, according to the principle of neutrality. This neutrality with no preference inexorably reduces the role of religion in the public sphere. In fact, the liberal approach is the last great attempt to restore freedom of religion by identifying it with freedom from religion.'[27]

However, as Domingo sees it, the liberal approach commits the opposite error from the religious approach. It's reification of political neutrality in matters of conscience, which includes religious belief and practice, belies both a *de facto* agnosticism and even atheism in relation to religious views as well as confusion in case law. He maintains that the recent history of American and European jurisdictions demonstrates a lack of coherence in dealing with religious concerns that are sometimes legislated for in ways that are patently inconsistent. For example, the U.S. Supreme Court's decision allowing the display of the 10 Commandments in a state capitol building in Texas, while banning the display of the 10 Commandments in a Kentucky state courthouse, both of which decisions were released on the same day in 2005.[28]

The theistic secular approach is Domingo's proposal for a kind of *via media*. It is a theistic position because he holds that the law (of a given jurisdiction) should recognize the concept of God as a *legal person*, rather than a *legal thing*.[29] In this respect, he draws on a longstanding legal distinction between persons and things that goes back to Roman law. Religion is a thing; it is a social and communal practice. God is not. Rather, if there is a deity then that being is a person—or is at least personal or person-like in some way analogous to creaturely persons. For legal purposes, says Domingo, this means that God should be treated as a *metalegal concept*. This is not to confuse persons and concepts. Rather, it is to treat the *notion* of a deity like a range of other metalegal concepts, such as dignity and equality, that inform legal theory, doctrine, and practice, but which do not originate in legal theory, doctrine, or practice. Such things are ideas that illuminate various topics in law and are recognized as important concepts that bear upon particular laws or bodies of law (such as human rights law). But they are not legal notions, strictly speaking. They do not originate from within the law but are imported into legal discussion from elsewhere. In a similar fashion, the notion of a personal deity should be thought of as an extra-legal item that may nevertheless illuminate important issues in law.

In this respect, Domingo's proposal is rather like the distinction between ethics as the study of normative moral issues like virtue or habit, and metaethical issues that are concerned with the

[27] Domingo, *God and the Secular Legal System,* 7.
[28] See Domingo, *God and the Secular Legal System,* 8-9. Relevant cases are *Van Orden vs. Perry* 545 U.S. 677 (2005), and *McCreary County vs. ACLU of Kentucky* 545 U.S. 844 (2005), respectively.
[29] See Domingo, *God and the Secular Legal System*, Introduction and ch. 1.

conceptual foundations that inform normative ethics, such as notions of value or justice. Whereas the philosopher concerned with metaethics asks questions about what ethics *is*, in terms of its foundations, status, and scope, the study of ethics *itself* is the study of moral notions, principles, and doctrines. The metaethicist wants to know what ethics is about. By contrast, the ethicist is interested in addressing actual problems in moral philosophy or theology. In a similar way, Domingo maintains that God is a kind of metalegal concept that informs or illuminates legal theory, doctrine, and practice, but is not itself a constituent of legal theory, doctrine, or practice. He remarks that this metalegal concept of God 'locates God as an optional starting and ending point beyond the legal system. God should be neither taken away nor legalized; God should be simply recognized by legal systems.'[30]

Now, it is important not to misconstrue what Domingo is saying here. Allowing for the provision of a particular metalegal concept, even if it is the concept of a putative person such as God, is not the same as belief in God or even acknowledging the existence of God. Take for instance, the way in which insurers typically provide for 'acts of God' when offering clients house insurance. The concept of an act of God is a way of indicating that a particular range of possible misfortunes that may befall the person insured do not fall under the remit of the insurance contract. For instance, if a person's house is devastated by a flash flood or suddenly subsides because of a heretofore unknown sinkhole, such events normally count as 'acts of God.' The client cannot claim on such mishaps precisely because they fall outside the normal provision of the insurance bond. Now, of course, such arrangements in modern insurance practice inherit ways of speaking and thinking that owe much to language and beliefs harking back to the early modern period, when it used to be commonly thought that God brings about all things by means of divine providence (on the basis of biblical passages like Deut. 29:29, Prov. 16:33 or Eph. 1). Where a sudden or unusual weather event happened, say, it would have been ascribed to the providence of God. The notion of 'acts of God' persists today even in circumstances where many people no longer believe in the existence of God as a kind of conceptual residue of earlier times. In invoking 'acts of God' one is calling to mind a particular class of events that the insurer cannot reasonably be expected to underwrite because they are so unexpected and unusual (and, potentially, expensive). We retain the concept, but we are not necessarily committed to the theological notion that informed it.

Domingo is allowing for the use of God in legal theory, doctrine, and practice in a similar fashion, namely, as a concept: the concept of a person that is metalegal and that may illuminate and inform the law, but that is not itself a legal notion. Today, many people in the complex liberal democracies of the West no longer believe in God let alone the theistic concept of God that can be found in the Judeo-Christian tradition that held sway when much of our current black letter law was

[30] Ibid., 11.

written.[31] Nevertheless, the concept of God may still act as a kind of placeholder in a range of different contexts whether someone believes in the existence of supernatural entities or not. But what is envisaged by this placeholder metalegal concept of the divine? Domingo writes,

> By "God" I mean the most fundamental, profound, basic, uncreated, and original reality…. He is a living God, not just a simple construction of the mind. He is a unique and infinite Supreme Being, creator and sustainer of the universe, and the ultimate source of morality. He is the wholly Other, there perfectly good, and the absolute ground of everything. He is a personal being, but is neither anthropomorphised not otherwise limited. He is neither male nor female, but both man and woman are in his image. He is omnipotent, omniscient, and omnipresent, but not spatially extended for he has no body.[32]

This is what philosophers call a broadly theistic notion of God. For it presumes God is a mind-independent entity that creates and sustains the cosmos, and has those traditional attributes ascribed to the deity in theistic religions such as those of the Abrahamic faiths of Judaism, Christianity, and Islam. That said, such a concept of God is consistent with versions of monotheism other than that found in the Abrahamic faiths, such as deism. But it is a theistic notion of God, broadly construed. Of course, other religious traditions may have different ideas of the divine that are non-theistic or that do not have a significant religious place for divinities at all (as in some of the more austere versions of Buddhism). That may be accommodated in law with other metalegal notions of a religious nature. Domingo's point is that the concept of God he has in mind is one that is broadly theistic and is the sort of view that informed much of the legal tradition of contemporary Western liberal democracies.

His view is also 'secular,' however. That is, it presumes no reasoning that requires an appeal to extralegal authority, such as that found in religious traditions, and in political communities for whom such arrangements are regarded as appropriate or even foundational, such as theocracies. On his view, a secular legal system is 'a system not based on religion (i.e., a system in which there is a structural and substantive separation of religious sources from legal sources).'[33] That said, his understanding of secularity in this connection does not imply a strict neutrality on matters religious, as we have already intimated much contemporary liberal political theory does. Someone may have a theistic worldview and still participate in a secular legal system for such a view is consistent with

[31] Having said that, the idea that western democracies are all overwhelmingly 'secular' in outlook is not a view supported by the data. The USA is a well-known counterexample of a large, complex democratic nation that does not appear to be gradually moving toward a more 'secular' outlook. The recently published survey data from the Pew Research Center's current iteration of the longitudinal *Religious Landscape Study* still pegs a significant majority of the population of the United States as religiously affiliated. See: https://www.pewresearch.org/religious-landscape-study/ (last accessed 02/03/25). This contrasts with the data in, say, Australia, which is often thought of as one of the most secular modern democratic countries. But even there it is still the case that the majority report being religiously affiliated as of 2021. See the report of the Australian Bureau of Statistics census of 2021 located at: https://www.abs.gov.au/articles/religious-affiliation-australia (last accessed 02/03/25).

[32] Domingo, *God and the Secular Legal System,* 10.

[33] Domingo, *God and the Secular Legal System*, 2.

secular legal reasoning that may utilize extralegal concepts like God, without being committed to sources of religious authority or legitimation. Problems arise when secularism is assimilated to a notion of *irreligion:* 'A legal system committed to secularism as a substantive irreligious position becomes irreligious and no longer secular in the relevant sense.'[34]

So, Domingo's target is a kind of *secularism-lite.* It is not a substantive notion, which is liable to degenerate into question-begging. In other words, secularism that has built into it the idea that irreligion is the only reasonable view to hold on matters of faith is already committed to a substantive theological view from the get-go, namely, the position of irreligion. We might say that irreligion as a theological position is baked into such a conception of secularism. Irreligion is not a non-theological, value-neutral position, a kind of view from nowhere by means of which the reasonable secularist may survey the varieties of religious commitment with serene detachment. Rather, it is an intrinsically substantive philosophical view about matters of religion, one that is irreligious rather than religious in nature. But of course, this is question-begging if the secularist claims to be committed to both irreligion and a neutral approach to matters of religious commitment.[35] In a similar way, atheism (in its modern guise) is a theological position—or more properly, an atheological position—because it is a substantive view about matters theological. It is just that the atheist believes there are no supernatural beings. But this is itself a theological, not a non-theological, position.[36] Instead of such a substantive notion of secularism with its attendant problems, Domingo opts for secularism as a system of legal reasoning that does not depend in substantive ways upon religious sources or authorities, as would be the case in theocracies. Hence, we may speak of his approach as presuming a sort of conceptually thin secularism or secularism-lite.

There is much to like in Domingo's irenic proposal. It cleverly side-steps problems raised by secularists against those of a religious persuasion while conceding that religious ideas have historically informed much black letter law and continue to be important to many who have a religious affiliation today. By appealing to theological notions such as that of a Deity as metalegal concepts he hopes to be able to continue to access the religious ideas that have shaped Western legal traditions without raising the fear that in doing so he is smuggling into legal discourse religious and theological ideas that will be objected to by at least some of the wider population. For those who are happy to adopt the project of public reason liberalism, Domingo's approach has some appeal. In this respect, one can read Rawls and Domingo side-by-side. He adapts something like a Rawlsian framework,

[34] Ibid., 3.
[35] This is a common criticism of Rawl's version of public reason liberalism. For instance, Stout in his critique of the Rawlsian position states 'Rawls allows those behind the veil of ignorance to have access to a "thin" conception of the good, but his critics hold that in drawing the line between a thin conception and their own comprehensive doctrines, he is begging the question in favor of his own liberal views.' Stout, *Democracy and Tradition*, 66.
[36] As we shall see, Rawls's mature position is alive to this concern. See John Rawls, 'The Idea of Public Reason Revisited' *The University of Chicago Law Review* 64.3 (1997): 765-807.

adjusting it to accommodate theological metalegal concepts like the broadly theistic concept of God. Put slightly differently, someone sympathetic to Domingo's approach may stand within the bounds of public reason liberalism. He does not dispute that there must be a common notion of justice and reason that all can agree to in order to make headway in matters legal and political. His point is that given that sort of political and legal framework, we can still hang on to theological ideas that may yet inform our legal theories provided we accord them a particular status as metalegal concepts. Rawls makes a similar point in his later work when he distinguishes between public reason and secular reason, both of which he gives a substantive sense. He writes,

> We must distinguish public reason from what is sometimes referred to as secular reason and secular values. These are not the same as public reason. For I define secular reason as reasoning in terms of comprehensive nonreligious doctrines. Such doctrines and values are much too broad to serve the purposes of public reason. Political values are not moral doctrines, however available or accessible these may be to our reason and common sense reflection. Moral doctrines are on a level with religion and first philosophy. By contrast, liberal political principles and values, although intrinsically moral values, are specified by liberal political conceptions of justice and fall under the category of the political.[37]

Thus, no religious or moral doctrines including what Rawls calls 'secular reason,' can be interpolated into public reason. These notions must remain distinct. Religious reason and secular reason are both to be distinguished from the sort of public reason required for Rawlsian liberalism.

However, for some political thinkers, this is to attempt to adapt a vision of liberalism that is fundamentally mistaken about the place of religion in the public square and (therefore) in law. Public reason liberalism works if one adopts a Rawlsian veil of ignorance approach to reasoning in the public square, and a concomitant view about what constitutes 'reasonableness' in such public discourse. As Rawls puts it, 'knowing that people are reasonable where others are concerned, we know that they are willing to govern their conduct by a principle from which they and others can reason in common.'[38] Reasonable people, on this way of thinking, are those willing to subscribe to general principles or standards to which all those who hold to the social contract can accede. Rawls writes, 'Persons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so. Those norms they view as reasonable for everyone to accept and therefore as justifiable to them'[39] He goes on to say that by contrast, 'people are unreasonable in

[37] Rawls, 'The Idea of Public Reason Revisited,' 775-776.
[38] Rawls, *Political Liberalism*, 49, n. 1.
[39] Ibid., 49.

the same basic aspect when they plan to engage in cooperative schemes but are unwilling to honor, or even to propose ... any general principles or standards for specifying fair terms of cooperation.'[40]

But as Jeffrey Stout argues, this Rawlsian account of 'reasonableness' in public discourse 'implicitly imputes *unreasonableness* to everyone who opts out of the contractarian project, regardless of the *reasons* they might have for doing so.'[41] Similar criticisms have been raised by others. For instance, in his 1995 Presidential Address to the American Philosophical Association (Central Division), Notre Dame philosopher Philip Quinn says 'if justification of restrictive laws or policies can be conducted only in terms of moral considerations no citizen of a pluralistic democracy can reasonably reject, then in a pluralistic democracy such as ours very few restrictive laws or policies could be morally justified,' which, if true, is hardly a welcome conclusion for the liberal![42]

But all is not lost. One way forward would be to opt something like the *equal political voice liberalism* of Nicholas Wolterstorff, which preserves a liberal democratic polity yet without the requirement that religious ideas should be reserved to the private sphere, beloved of recent political liberals such as Rawls and Wolterstorff's interlocutor, Robert Audi. On Wolterstorff's way of thinking, liberalism is a family of views, all of which base political decisions taken in the public square on a source independent of any and all religious considerations.[43] Now, the liberal need not adopt the notion that religion and state be separate in order to remain neutral on matters that are reserved to the private sphere, like religious views. A more generous way to think about these things would be to opt instead for impartiality. To remain impartial on religious questions would still be to remain neutral on competing religious claims. But such an approach does not require the distinct separation of church and state favoured by many American liberals. Wolterstorff thinks that the state may remain neutral, and impartial in religious matters. But he does not think that Rawls's veil of ignorance must be adopted by liberals in the original position of Rawls's famous thought experiment. Rather, according to Wolterstorff, we may bring our different private views to the public square and argue it out with those of other persuasions. What matters is that we work together to political consensus in the public square *whatever our reasons* for a particular political view.

An example will help make the point. Suppose a Roman Catholic thinks abortion is morally wrong because the Church teaches this. Based on this belief, she can argue for a reduction to the term of abortions in utero, making her argument using religious reasons. But she must do so in dialogue with those who will adopt other views that are not based in whole or in part on religious reasons, such

[40] Ibid., 50.
[41] Stout, *Democracy and Tradition*, 67.
[42] Quinn, 'Political Liberalisms and Their Exclusions of the Religious' in Philip L. Quinn, *Essays in Philosophy of Religion,* ed. Christian B. Miller (Oxford: Oxford University Press, 2006), 165-186; 171.
[43] Here I draw on the succinct discussion of this point in Wolterstorff, 'The Role of Religion in Decision and Discussion of Political Issues' in Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (London: Rowman & Littlefield, 1997), 72-78.

as those who, for purely nonreligious reasons think that abortion should be legal for a much longer term, at least in part in order to preserve the rights of women to choose whether they want a child or not. According to Wolterstorff, the religious reasons brought to bear in such circumstances do not need to be substitutable for non-religious reasons to be politically viable, as some contemporary liberals suggest. The Roman Catholic can argue for a political position on religious grounds, and she does not need to 'translate' her reasons into those acceptable to those liberals who require the public square to be free from 'private' religious concerns.

Wolterstorff's suggestion amounts to removing the veil of ignorance that, in Rawls's original position thought experiment stands between citizens of the polis and the public square. In so doing, he does away with the distinction between 'private' and 'public' reasons as well as between 'secular' and 'religious' reasons that have been touted by recent philosophers in the liberal tradition. The polity remains in place, but the veil of ignorance is removed.[44]

These are complex matters, and the debate is far from over. But where does this leave us? Which of these versions of liberalism, if any, should inform how we think about these matters? Happily, this is not a matter we need to resolve to pursue our work here. Whether one wishes to keep religious reasons behind the veil of ignorance or not, in matters of law we can adopt the sort of theistic secularism Domingo suggests in order to work around these issues. In other words, by adopting a theistic secular approach we avoid having to engage the sort of worries about public reason besetting recent accounts of liberalism indebted to Rawls. Such matters are still of considerable political and legal importance. But we need not resolve these issues to tackle ways in which religious ideas can inform the making of law if we reserve such religious ideas to the metalegal place that Domingo provides for them. For Domingo's framework is independent of the question about which, if any, of the varieties of liberalism on offer today make the best sense of how to relate religious reasons to political argument. Even if one were a hard-nosed Rawlsian, one could still maintain that the law may be informed by metalegal concepts, provided they do not privilege a partisan account of legal doctrine. In other words, Domingo's proposal is consistent with public reason liberalism.

A theistic secular approach

As previously intimated, I propose to adopt something like a theistic secular approach to the question of whether atonement theology may inform current ways of thinking about punishment in law that is helpful and illuminating. That is, I propose to argue that theological notions about the doctrine of atonement culled from Christian thought can be of use in punishment theory, and specifically

[44] Wolterstorff, *Understanding Liberal Democracy* is his most sustained mature account of these matters. Also of relevance in this connection is his work *The Mighty and the Almighty: An Essay in Political* Theology (Cambridge: Cambridge University Press, 2012), based on his Stone Lectures at Princeton Theological Seminary.

discussion of legal punishment. But I do not think this is a case of subordinating law to religion or even of fitting legal notions to some theological procrustean bed. Rather, the idea is to see whether the cluster of ideas driving much historic discussion of atonement theology in the Christian tradition may be of help in making sense of contemporary punishment theory. The role played by the theological concepts are ancillary to the legal issues. It is not a matter of theology colonizing law. To this extent, I think that Domingo is right to speak of a theistic secularism. Law should not be bound to things such as religion because religious ideas are often tradition-specific and are not shared by all members of a given political community. Since (I presume, in keeping with liberalism) law is supposed to be a way of providing a means by which all members of a particular polis may live together equitably, tradition-specific religious doctrine should not form the basis of substantive legal claims and positions in law.[45] Nevertheless, religious and theological views may be of help in making sense of legal notions or theories, especially where the concepts in question are ones that are shared between law and religion. For why should we cut ourselves off from a source of potential assistance in making sense of legal concepts just because that source is a religious one? We would not do this in the case of moral concepts such as utilitarianism, which have been profoundly influential upon legal doctrines such as punishment even though it is clearly a controversial moral position that is not accepted by all parties. In a similar fashion, *mutatis mutandis*, I am suggesting the 'secular' lawyer can help herself to theological notions, such as the idea of atonement or making amends, which may inform or resource her legal thinking provided she is clear about the role such religious concepts play, and the limits that are placed upon their use in a liberal democracy.

However, the relationship between theology and law in the case of punishment theory is rather more complex than a simple division of labour approach to this matter would seem to imply. It is not just that there are theological ideas about atonement and punishment, and legal ideas about atonement and punishment with the two occupying different spheres of influence that do not overlap in any way—rather like paleontologist Stephen Jay Gould's idea that religion and science do not compete with each other because they represent non-overlapping magisterial or NOMA.[46] For theology and law are intertwined with one another. There are at least two reasons for this. The first, to which we have already referred is that Western legal systems have their origins in theological contexts. So, law in Western jurisdictions have a theological inheritance; laws have not developed independently of theological concerns and continue to reflect them in various ways. The second reason for thinking

[45] Objection: the claim that 'tradition-specific religious doctrine should not form the basis of substantive legal claims and positions in law' is itself a religious view. So, this too is question-begging. I would distinguish here between first order claims that are themselves religious in nature, and second order claims that are claims about first order religious claims. To borrow a Wittgensteinian idea, what we are after is something like a grammar for making claims about religion in law. We are not seeking to adjudicate between competing religious claims in law or even to take a particular religious view in law.

[46] See Stephen Jay Gould, *Rock of Ages: Science and Religion in the Fulness of Life* (New York: Ballantine Books, 2002). Gould's use of the acronym NOMA has passed into the nomenclature of the religion and science literature.

law and theology are intertwined is that legal notions of punishment have been woven into much traditional atonement theology, and concepts taken from the theological context of atonement have found their way into legal thought.[47] Thus, atonement theology and punishment theory are already bound together in some respects, and there has been a long history of conceptual traffic between the two. Still, there is a question about what this entails as well as what we think it *should* entail (if anything). As I have said, my task is modest: to show how atonement theology *may* be helpful and illuminating for legal theory.

Earlier I said that my own approach is 'something like the theistic secular approach' of Domingo, and, as I have indicated, I am following the broad strokes of his way of thinking here. However, whereas Domingo is focused mainly on what he calls 'suprarational' concepts that are metalegal and yet may still be used within law, such as his understanding of the concept of God, I am concerned with more distinctively *Christian* theological notions particular to that religious tradition, which are not shared even in the other Abrahamic faiths. I regard this as an extension of Domingo's approach rather than something distinct from it. Domingo maintains that metalegal concepts may inform law without wedding the law to religious doctrines. I am simply suggesting that a central and defining theological doctrine in a particular religious tradition, that of atonement in Christianity, may provide further metalegal grist to the legal mill. As Linda Radzik has recently shown,[48] the use of a theological concept like atonement may well be of considerable help in providing conceptual resources in law and in politics. Though her approach is philosophical rather than theological, and though she is concerned principally with the moral dimension to atonement doctrine, it is still true to say that her work is another recent example of something like the approach I am concerned with here. In her work as well as this one, the motivation is to bring to bear salient conceptual resources from one intellectual discipline to another historically closely related one.

The results of this analysis are, I think, illuminating and instructive. Whether the theological claims may materially affect legal theory about punishment is something that is beyond the scope of a short work like this one. Nevertheless, I hope they might, given the shared history and common source for much Western law in the traditions of Judeo-Christian theology.

The shape of things to come

This brings me to the shape of the rest of the work. The second chapter, on punishment and atonement, provides some orientation. In a thesis focused on punishment theory, it is important to give some account of both the meaning of punishment in a legal context, as well as its justification. The chapter begins with an account of both these things. Taking up previous work I have done in this area for my

[47] As I indicated above, this is the burden of Gorringe's book, *God's Just Vengeance.*
[48] In her study, *Making Amends*.

Aberdeen LLM thesis and drawing on the discussion of legal punishment in mid-twentieth century anglophone jurisprudence (the so-called Flew-Benn-Hart account), I set out a working definition of punishment. This includes an expressivist element to punishment,[49] and this for two reasons. First, because it seems to me that reprobation is indeed an important constituent in an adequate account of legal punishment. Society does indeed indicate disapproval, sometimes even disgust, at the crime committed and this should be accounted for in our understanding of the nature of legal punishment. But also, this feature of some accounts of legal punishment reflects an important theological notion about divine reprobation, a consideration that will be important in the rest of the thesis.

Having set out a working definition of legal punishment, I then rehearse some of the traditional justifications for punishment. These comprise retribution, ultilitarian, and 'mixed' or hybrid views. This taxonomy is often rehearsed in textbook treatments of the topic.[50] Each has its shortcomings, though I shall indicate my own preference for a kind of hybrid account, which we shall return to in later chapters. Like many people working on punishment theory today, it seems to me that an adequate account of the justification of punishment must take account of more than one reason for its justification. For, there is both a backward-looking and forward-looking aspect to why we think it is appropriate to punish.

With these issues made tolerably clear, the second part of the chapter switches from legal theory to theology in order to give some account of the Christian doctrine of atonement.[51] This is the idea, of central importance to the Christian faith, that human beings are alienated from God their creator as a consequence of human dereliction and sin and are in need of some act by means of which they may be reconciled to Godself. This act is traditionally thought impossible for mere human beings to accomplish. For, being both finite and mired in moral torpor, human beings are in no position to bring about their own salvation. Thus, so the traditional theological story goes, God provides the required act of salvation by means of Christ. He can represent human beings because he is fully human, possessing a complete human nature. He is also able to represent God's interests in this matter, because he is a divine person—according to this traditional theological consensus, the Second

[49] Expressivism in this context connotes the reprobation of a particular action often in terms of what philosopher Peter Strawson called 'reactive attitudes.' That is, attitudes by means of which we hold certain individuals responsible for particular kinds of action. The classic example he uses is resentment. See P. F. Strawson, 'Freedom and Resentment,' *Proceedings of the British Academy* 48 (1962): 187-211. For concerns about the role expressivism plays in punishment theory see, e.g., Heidi M. Hurd, 'Expressing Doubts about Expressivism' *University of Chicago Legal Forum* 1 (2005): 405-435.

[50] See, e.g., Brian Bix, *Jurisprudence: Theory and Context.* Fifth Edition (Durham, NC: Carolina Academic Press, 2009), ch. 9, and Raymond Wacks, *Understanding Jurisprudence.* Fourth Edition (Oxford: Oxford University Press, 2015 [2005]), ch. 12.

[51] Richard Swinburne's excellent study, *Responsibility and Atonement* (Oxford: Oxford University Press, 1989), is a good example of a work that goes in the opposite direction, beginning with philosophical, moral, and legal concepts pertaining to punishment and atonement, and then applying them to the Christian doctrine of atonement. This only underlines the close relationship between theology and law and the way in which on the topic of atonement they can be mutually supportive and informative disciplines.

Person of the Trinity. It is as the God-human, or God Incarnate, that Christ brings about human reconciliation with Godself.[52]

So much for the traditional story of atonement. What is important to understand for present purposes is that this act of atonement that culminates in the death of Christ on the cross has traditionally been understood to be in some sense a punitive act. Christ is often said to be *punished* in the place of fallen humanity as their vicar and representative; or Christ is said to have *satisfied* God by means of providing a meritorious action that may be accounted to the ledger of humanity, or is a *penal example* of what God would have to do were God to punish humans for their sin as is morally appropriate, or is a substitute whose penitential act provides a kind of perfect *apology* for human wickedness. These are some of the main traditional justifications for the atonement.[53] It takes only a few moments of reflection to see that the complex of moral and philosophical ideas that they imply may be relevant in a juridical context. Indeed, if Berman, Schmitt, Gorringe, and Domingo are right, this is what we should expect given that there is a complex historic relationship between theology and law, and especially between atonement theology and punishment theory.

With the conceptual elements necessary for the prosecution of the thesis in place, the third chapter turns to the conceptual heart of the project. This involves setting out an account of legal punishment that is inspired by the work of the great medieval theologian, Anselm of Canterbury (1033-1109 CE). Not only is he one of the greatest Christian theologians, evidenced by the posthumous award of the title *doctor magnificus* as a doctor or teachers of the Church. In addition, he also wrote arguably the most influential work on atonement, *Cur Deus Homo* (Why the God-Human). What is more, as writers like Timothy Gorringe have argued, his views have had considerable influence in the development of jurisprudence too. In the third chapter I set out some of the key ideas in Anselm's account of atonement, focusing on his ideas about atonement, punishment, and forgiveness. Then, in the fourth chapter we turn to the construction of an Anselmian view of punishment that draws on his work, repaired and amended for a contemporary audience. An important foil for my own work in this regard is the recent engagement with Anselm in the character creation view of punishment expounded and defended by the American philosopher, Katherin A. Rogers. Using her account, I set out to show that an Anselmian view has much to contribute to contemporary theories of legal punishment.

[52] This theological rationale for the incarnation and atonement can be traced back to the influential work of Anselm of Canterbury, *Cur Deus Homo* (*Why the God-Human*). The best translation in print is Thomas Williams, *Anselm: The Complete Treatises* (Indianapolis: Hackett, 2022), 245-328. Anselm will be the interlocutor with whom we are particularly concerned in the later part of this thesis.

[53] I have elaborated upon them in Crisp, *Approaching the Atonement: The Reconciling Work of Christ* (Downers Grove: IVP Academic, 2020), and *Participation and Atonement: An Analytic and Constructive Account* (Grand Rapids: Baker Academic, 2022).

At the end of the fourth chapter, I draw together the different threads of the foregoing thesis, and offers some reflections on the implications of the view for which I argue here. It seems to me that there are several important ways in which theological discussion of atonement may contribute to contemporary discussion of criminal punishment. These are: in clarifying the scope of forgiveness relative to a view about the nature of punishment; in providing conceptual resources for thinking about the way punishment may provide atonement for sin committed, including reconciliation between alienated parties; and in providing resources for thinking about alternatives to the sort of retributive accounts of punishment that still dominate much of the mainstream jurisprudence on this topic. In this way through consideration of a particular and pertinent topic shared between theology and law, I hope to have made some progress towards demonstrating how the contribution of theology to law may yield results that illuminate and in important respects take forward discussion of some key issues in contemporary punishment theory.

CHAPTER TWO

Punishment and Atonement

We begin by giving some account of the two central ideas of this thesis, namely, punishment and atonement. The practice of punishment requires both definition and justification. It requires definition because it is important to ascertain what falls under the description of punishment and what does not in a work concerned with the relationship between punishment and atonement. And it requires justification because punishment involves harming another person. Atonement is a theological term, but one that has legal resonance. Exactly what is meant by it will have important implications for ascertaining the extent to which it might be helpfully translated to the context of jurisprudence.

In this chapter I will offer a working definition of punishment and survey the major options in its justification. I will also give an overview of a family of atonement doctrines that have legal implications. The goal of the chapter is to have sufficiently clear ideas of the scope of these two concepts that they may be put to good use in giving an account of the role the language of atonement can play in discussion of punishment in the context of legal theory in subsequent chapters of the thesis.

To this end, the first section of the chapter sets out a working definition of punishment, drawing on the recent literature in jurisprudence in order to do so. Then, in a second section, I will consider the three families of views that represent standard attempts to justify criminal punishment. These are retributivism, utilitarianism, and what are often called 'mixed' or 'hybrid' accounts that include retributivist and utilitarian aspects—though they might equally be called 'mashup' views, rather like mash-up literature in popular culture.[54] Each of these terms captures the central idea behind this third sort of view, namely, that they adopt aspects of different historic justifications for punishment in a more complex whole. In a third section, I set out a working definition of atonement in its theological context, which also draws on recent philosophical literature that applies it to legal theory. In the conclusion, I draw these different threads together to pose the central question of the thesis, that is, how the theological notion of atonement may be used to resource contemporary punishment theory. This then sets the scene for the subsequent chapters of the work.

[54] I have written about 'mashup' versions of atonement doctrine elsewhere in Crisp *Approaching the Atonement*. A classic literary mashup is, of course, *Pride, and Prejudice, and Zombies* by Jane Austen with Seth Graeme-Smith (Philadelphia: Quirk Books, 2009), whose first line 'It is a truth universally acknowledged that a zombie in possession of brains must be in want of more brains' is indicative of the genre.

Legal Punishment

There is a large and complex cross-disciplinary literature on punishment theory that includes sociological, philosophical, and theological treatments of the topic. Here is not the place to survey that literature as whole.[55] Instead, I will make a ruling on how punishment will be understood in this thesis. This is not a matter of mere stipulation, however. It is a way of construing punishment that draws on the existing legal theory literature in order to provide a working definition that is fit for purpose in subsequent chapters. I will then explicate and defend its different constituents. As we shall see, some aspects of the view I articulate here are controversial. That is to be expected. After all, what substantive intellectual claim is not? But it is, I think, a way of understanding punishment that reflects a kind of consensus in much of the recent literature. It is also a way of thinking about punishment that fits with the way in which it is used in much traditional theological discussion of the topic as well. That is also an important consideration in this work, and bears on the way in which theological discussion of punishment (especially in discussion of the atonement) may also contribute to contemporary discussion of legal punishment, as we shall see.[56]

Let me begin by providing a working definition. Punishment occurs in all sorts of walks of life and under many different circumstances. A child is punished for her bad behaviour by having certain privileges revoked for a short period by her parents; a politician is punished by being rusticated from parliament on account of failing to give an honest account of his action to his peers; organisations like churches or businesses punish their members by applying certain sanctions like exclusion or preventing promotion or the withholding of privileges; and so on.[57] As Thom Brooks observes, 'There can be no punishment without a crime—and the justification of punishment is bound up with that of its linked offence.'[58] These different sorts of punishment may be informal or formal, but they are not usually subject to the law (in the institutional sense of the law, rather than things like

[55] There are a number of works that serve as an introduction to this area. Helpful overviews of the issues can be found in Antony Duff and Zachary Hoskins, 'Legal Punishment, '*Stanford Encyclopedia of Philosophy* (2024), located at: https://plato.stanford.edu/archives/spr2024/entries/legal-punishment/ (last accessed 19/06/24). For more thorough treatments, see David Boonin *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008); Thom Brooks, *Punishment*; David Ellis, *The Philosophy of Punishment.* St Andrews Studies in Philosophy and Public Affairs (Exeter, Imprint Academic, 2012); and Michael Zimmerman, *The Immorality of Punishment* (Peterborough, ON: Broadview Press, 2011). (The literature on punishment theory is considerable. I have simply pointed to a number of representative recent studies that address the main philosophical issues with care, and that I have found helpful.) A modern classic sociological account of punishment that still repays study is David Garland's work, *Punishment and Modern Society* (Chicago: University of Chicago Press, 1990). In theology, Timothy Gorringe's *God's Just Vengeance*, remains an important overview of the influence of theological ideas upon punishment theory.

[56] To anticipate: an instance of a controversial aspect of what follows is that some modern punishment theorists question whether punishment should have an expressivist function. But this is very much part of the theological tradition, where God's punishment of human beings is closely connected to the Deity's disapproval of human sin. Thus, punishment in its traditional theological guise has an expressivist or, perhaps, reprobative function. More on that in due course.

[57] Similar examples are given in Christopher Bennett and Kimberley Brownlee's essay, 'Punishment' in John Tasioulas, ed. *The Cambridge Companion to the Philosophy of Law* (Cambridge: Cambridge University Press, 2020), 253-270; 253-254. But it is a common enough trope in the literature on legal punishment.

[58] Thom Brooks, 'A Précis of *Punishment*' in *Philosophy and Public Issues (New Series)* 5.1. (2015): 3-23; 5.

'moral law' or 'custom' or 'code of practice'). Our focus is on *legal* punishment and its sanctions, and their theological equivalents.[59] Not only does this apply in law, but it also has theological valence inasmuch as God is thought to be the ultimate legal authority and/or its source.[60] We can express a working definition of legal punishment thus:

> LEGAL PUNISHMENT: the intentional infliction of harm on a morally responsible agent (the offender), the quality, severity, and consistency of which is calibrated to the nature and seriousness of the offence committed, by an appropriately constituted legal authority for an offence, usually the transgression of some rule, command or law, in order to convey an appropriate expression of disapproval, reprobation, or condemnation.[61]

This can be analysed in terms of its constituents. These are, intentional harm; the fit between harm and offence; legal authority; the offence; and reprobation. Note that LEGAL PUNISHMENT is intended to be neutral on the question of the justification of punishment, which I take to be an issue that is not included in the concept itself. This is a fairly common distinction in contemporary discussion of punishment theory[62] as well as in other legal and moral matters. For instance, in international law and political theory there is a question about what constitutes hostilities between two or more nations in war, and a distinct question about whether there is a justification for one nation declaring or being in a state of war with another. This has become a matter of renewed interest in

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[59] For an overview of issues pertaining to law and theology, see John Witte (2022) 'Law and Theology in the Western Legal Tradition' in Brendan N. Wolfe et al., eds. *St Andrews Encyclopaedia of Theology*, located at: https://www.saet.ac.uk/Christianity/LawandTheologyintheWesternLegalTradition (last accessed 19/06/24). More specific overviews of law in the Hebrew Bible/Old Testament and New Testament can also be found in the *St Andrews Encyclopaedia of* Theology. See William S. Morrow (2024) 'Law in the Old Testament', in Brendan N. Wolfe et al., eds. *St Andrews Encyclopaedia of Theology* https://www.saet.ac.uk/Christianity/LawintheOldTestament, and Matthew V. Novenson (2023) 'Law in the New Testament', in Brendan N. Wolfe et al., eds. *St Andrews Encyclopaedia of Theology*, https://www.saet.ac.uk/Christianity/LawintheNewTestament. Of broader interest in this connection is the discussion in Domingo, *God and the Secular Legal System*—which was discussed in the Introduction.

[60] Compare: judges of a supreme court may be the ultimate legal authority in a given jurisdiction, yet (*pace* American legal realists like Oliver Wendell Holmes) they are not normally thought to be the source of the law. But in theological discussion the Deity is conventionally thought to be both the final arbiter of the law and its source. Two common reasons given for this sort of view are that 'law' in this context is equivalent to positive divine law (where some sort of theological voluntarism is in view), or because it is an expression of the divine nature which is essentially just (where some sort of theological intellectualism is in view).

[61] I set out and defended an earlier version of LEGL PUNISHMENT in my LLM thesis, entitled 'Just Desert? An Assessment of Moderate Free Will Scepticism About Punishment' (University of Aberdeen, 2020). The thesis is available online at: https://abdn.primo.exlibrisgroup.com/discovery/delivery/44ABE_INST:44ABE_VU1/12160055780005941 (last accessed 01/03/2025). This earlier discussion draws on the work of Anthony Flew, S. I. Benn, and H. L. A. Hart, in the debate about punishment theory that took place in Anglophone legal philosophy in the 1950s. The upshot of this has become known as the Flew-Benn-Hart definition of punishment and has been influential in much later work on punishment theory. (See, e.g., the discussion by Thomas McPherson, 'Punishment: Definition and Justification' in *Analysis* 28.1 (1967): 21-27, which sums up much of this debate.) I am drawing on that work here, though this iteration is (I hope) an improvement upon my earlier gloss on the Flew-Benn-Hart definition in some important respects that reflects some more recent accounts of punishment, e.g., the work of Boonin, Brooks, Duff, Ellis, and Zimmerman.

[62] See, e.g., Boonin, *The Problem of Punishment*, and Zimmerman, *The Immorality of Punishment*. In their essay on 'Punishment' Bennett and Brownlee make much the same point. They focus on three questions about legal punishment, namely, why punish, who may legitimately punish, and who may legitimately be punished, for what, and how much? Commenting on these questions they observe, 'the answers to these questions depend on the philosophical approach one takes to the overall justifiability of punishment.' ('Punishment,' 255.)

Europe since the action of Russian armed forces against the people of Ukraine in 2022, which Russian political authorities regard as a 'special military operation'—that is, a kind of supposed pre-emptive defensive action rather than a war of aggression. But whether the conflict is a war, and whether it is justified (even, whether pre-emptive defensive actions are justified in moral and military terms) are distinct, though related, matters.[63] In a similar fashion, punishment and its justification are distinct, though (closely) related. With these caveats in mind, let us proceed to the exposition of each conjunct of LEGAL PUNISHMENT.

First: there is the question of *intentional harm*. The main purpose of legal punishment is to ensure that the offender is harmed. This harm is not a mere byproduct of some other action, like, say, the harm that is done to a person's body when a surgeon cuts out cancerous tissue. In the case of the surgery, the rationale for the procedure is to save not to damage or hurt the patient. The harm done in carrying out the procedure is an unintended byproduct of the intention to remove tissue that will eventually kill the person in question if it is not excised. Punishment is not like that. The intention in punishing is to cause harm to the offender.[64] It is precisely because this is the intended outcome that punishment requires significant justification. We want to have a very good reason for sanctioning an act the intended outcome of which is to directly harm a person in such a way as to make them worse off through an imposition of some state (such as a custodial sentence), or the withholding of some good (such as deprivation of freedom).

Second, we turn to the question of the *fit between harm and offence*. Some legal theorists and philosophers claim that if a crime is calibrated to a specific punishment so as to ensure some putative 'fit' between the two, then this has important implications for the justification of the punishment concerned. In other words, this condition implies certain outcomes that require a justification that has a particular shape, so to speak. The thought is this. If we calibrate a crime with a punishment, then we must have in mind some axiological scale that can determine which crimes fit which punishments, going from the least serious to the most serious. For instance, we will think that, say, murder requires a more severe punishment than does theft, other things being equal. For murder is a crime that involves depriving a person of life, whereas theft is a crime that only deprives a person of property. And normally we would think a person's life is much more valuable than their property—however valuable that property may be. Thus, handing down a fixed fine of £50,000 for murder while sentencing a thief to 25 years in gaol without parole for stealing a Gaugin from the home of a media

[63] For a helpful political-theological perspective on some of the issues raised by contemporary politics, military strategy, and just war theory that predates the current conflict between Russia and Ukraine, see Oliver O'Donovan *The Just War Revisited.* Current Issues in Theology 2 (Cambridge: Cambridge University Press, 2003). Russia's so-called 'special military operation' in Ukraine was announced in a presidential address aired on Russian state television to the nation on February 22nd, 2022. The address can be viewed at: https://en.wikipedia.org/wiki/On_conducting_a_special_military_operation (last accessed 12/06/23).

[64] This is something discussed by Boonin in *The Problem of Punishment,* 7-24. But it is a commonplace assumption in the literature.

mogul should (on this view) be regarded as travesties of justice. And at least part of the reason why we would think such judgments travesties is that they are not calibrated appropriately. In other words, we have the intuition, funded by a kind of commonsense axiology or theory of value, that a crime as serious as murder should yield a much more severe punishment than theft. For this reason, we would expect that the conviction of a murderer would lead to a long custodial sentence whereas the punishment meted out to the thief should be less severe, because a more lenient sanction is warranted given the nature of the crime committed.

Now, here is the question: does this notion of a 'fit' between crime and punishment tip the scales in favour of a particular justification for punishment? Thom Brooks thinks so. He reasons that if proportionality is baked into a theory of punishment it must have both a retributivist (backwards looking) and utilitarian (forwards looking) element. The retributivist element has to do with the desert of the offender. They deserve punishment because they have intentionally and knowingly committed the crime in question. But if the sort of punishment meted out is calibrated according to a scale of severity, then it looks like there is a utilitarian component too. For the punishment is said to be appropriate in the case of the murderer provided it is the most severe, and more severe than that given to the thief.[65] But is that right? Michael Davis argues that it is not. He maintains that 'the fit between punishment and crime is independent of the actual or probable consequences of the particular punishment or the particular statutory penalty.'[66] This, he thinks, is quite different from utilitarian justifications for punishment that make 'the fit between punishment and crime depends upon the actual or probable consequences of the particular punishment of statutory penalty.'[67] That seems plausible. In other words, the idea that the punishment must fit the crime is a notion that appears to be independent of the actual or probably consequences of the punishment. For the calibration of the two may be done according to an axiological scale that does not take consequences into account. However, irrespective of whether this notion of proportionality implies one or other justification for punishment or a kind of mix of several sorts of justifications as Brooks suggests, all that is needed for our purposes at present is the idea that it is an important consideration for a sufficient account of legal punishment. And it does seem to me that some kind of axiology is built into the punishments meted out in given jurisdictions—one that presumes there must be proportionality between crime and punishment.

Third, there is the matter of *legal authority*. Legal punishment must be carried out according to the rule of law; it must be *authorised*. Thus, vengeance is not a species of legal punishment. For

[65] Thom Brooks, *Punishment*, 32-33. Brooks is making the point that those who think of themselves as 'proportional retributivists' are actually not pure retributivists because their justification for punishment has a utilitarian component. Nevertheless, his point can be reframed for our purposes in the way I have done so here.
[66] Michael Davis, 'Making Punishment Fit the Crime' *Ethics 93.4* (1983): 726-752; 727.
[67] Davis, 'Making Punishment Fit the Crime' 727.

the act of vengeance is often not properly calibrated to the offence so there is not, or is not necessarily, a 'fit' between crime and punishment. What is more, it is not carried out by a legally constituted authority according to the rule of law—it is, we might say, an extra-judicial act. Conceivably, a duly constituted legal authority such as a judge could carry out an act of vengeance as a private citizen or vigilante. But in such circumstances, though the action is brought about by an appropriate legal authority, it is not carried out according to the rule of law. So, it would not be authorised. Thus, it is not sufficient for legal punishment to be carried out by a duly designated legal authority. That authority must also be acting according to the rule of law, functioning as part of the machinery of the rule of law, not outside of it.

Fourth, there is *the offence*. For the application of legal punishment there must be some prior action that infringes the law—the offence—for which appropriate punishment is administered. It is important that the agent in question is morally responsible. In law, this concerns the principle of *mens rea,* which pertains to intentionality. The idea is that the offender is responsible for having committed a crime if it was done intentionally and provided the offender is *compos mentis* (of sound mind) so as to be able to be held liable for the crime committed. Matters are quite different if a person unintentionally commits a crime or unwittingly commits a crime, just as things are different if the person who commits a crime is not mentally competent or is otherwise incapable of making a morally responsible decision.[68] What is more, there should be a connection between the offence committed and the person punished.[69] That is, we would normally expect that the person punished is the one who committed the crime in question. Something has gone amiss if an innocent party suffers the harm that should be endured by the offender. We will return to this point in discussing utilitarian justifications for punishment.

Fifth and finally, there is the issue of what I am calling *reprobation*. That is, there should normally be some sense in which the condemnation of the offender's action is communicated in the punishment inflicted. This condition has been taken up in the recent literature by theorists like R. A. Duff.[70] Although it is not without critics, it is, I think, a widely held view and one that can be found in the broader literature on punishment theory.[71] As I am understanding it here, reprobation is not (or

[68] See, e.g., the three case studies in John Callender, 'Causality and Responsibility in Mentally Disordered Offenders' in Elizabeth Shaw, Derk Pereboom, and Gregg D. Caruso, eds. *Free Will Skepticism in Law and Society* (Cambridge: Cambridge University Press, 2019), 177-191, and the discussion of psychopathy and moral responsibility by Elizabeth Shaw in 'Psychopathy, Moral Understanding and Criminal Responsibility' *European Journal of Current Legal Issues* 22.2. (2016): 1-21. Shaw discusses ways in which empirical tests may bear upon the question of whether psychopaths can be relieved from moral responsibility as is the case with some other serious mental disorders that fall within the remit of the insanity defence. UK law concerning mental health and criminal responsibility derives from M'Naghten's Rule, established in the mid-nineteenth century ([1843] UKHL J16), the full judgment for which can be found online: https://www.bailii.org/uk/cases/UKHL/1843/J16.html (last accessed Jun 20th 2025).

[69] Thom Brooks makes this point in *Punishment,* 4.

[70] See R. A. Duff, *Punishment, Communication, and Community.* Studies in Crime and Public Policy (New York: Oxford University Press, 2001).

[71] See, e.g., Boonin, *The Problem of Punishment.*

not necessarily) mere expressivism but has, as Duff puts it, a two-way component. He says, 'communication requires someone to or with whom we try to communicate. It aims to engage that person as an active participant in the process who will receive and respond to the communication, and it appears to the other's reason and understanding'.[72] By contrast, *expressivism*, as that term has been understood in the punishment literature, is typically understood as having a unidirectional function. It is a kind of performative act by means of which the community in which the offender committed his crime express their disapproval of it via the censure (and harm) of punishment. Reprobation could be understood in both of these ways, as expressing some disapproval and in attempting to communicate that to the perpetrator of the crime with the hope that they might respond in some appropriate way to the punishment inflicted. But whether it is understood in terms of mere expressivism or as something more complex, like Duff's notion of communication, the idea is that by means of the very act of imposing punishment the community conveys disapproval of the offenders' action.

Justifying legal punishment

Providing a working definition of punishment is one thing. Giving some account of the justification for punishment is (so it seems to me) a distinct but closely related task. In the literature on punishment theory, it is typical to distinguish three broad genera of justification. These are versions of retribution; utilitarianism; and hybrid theories that bring together aspects of both a retributive and utilitarian way of thinking about punishment. Let us consider each of these in turn.

As I have already intimated in passing in the previous section, *retribution* is a backwards looking justification for punishment. That is, its focus is on what has happened in the past, specifically, on the crime committed by the individual or persons in question. The retributivist looks back to that crime and seeks to provide some reason for punishing those who have committed it. Most versions of retribution are also tied to a particular notion of desert. As Michael Moore puts it,

> Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because the offender deserves it. Moral responsibility ('desert') in such a view is not only necessary for justified punishment, it is also sufficient…. For a retributivist, the moral responsibility of an offender also gives society the duty to punish.[73]

The idea is that those who have committed the crime in question are culpable (*mens rea*), and *deserve* to be punished. Thus, on most versions of retribution, culpability is intimately related to

[72] Duff, *Punishment, Communication, and Community*, 79.
[73] Michael Moore, *Placing Blame*, 91.

desert.[74] The person who is culpable for the crime in question is normally thought to be morally responsible. It is because a person is morally responsible for a given crime that they may be said to deserve the punishment that is visited upon them. Thus, implicit in much retributivist theory is the notion of a kind of 'fit' between the crime and its punishment we encountered in the previous section.[75] The punishment served upon the offender must be proportioned to the crime committed. This is (at least in large measure) what the 'fit' between crime and punishment entails. Thus, to return to our earlier example, we might think that vengeance is a species of retribution that is extra-legal in nature. But unlike retribution that is carried out within the bounds of law, vengeance is not necessarily proportioned to the crime committed. So, there is a 'fit' understood in terms of a proportionate response; but there is also a 'fit' in terms of the relation between the crime and the law itself: the appropriate legislation needs to be brought to bear in a particular case.

Retributivist justifications are often divided into *positive* and *negative* species. Positive retributivists hold the conditions just given: punishment must be focused on what is deserved in a proportionate response that is aimed at harming only the guilty party. It is a decidedly non-consequentialist view in the sense that considerations of deterrence or other implications for future crime should not affect the judgment made concerning the crime or the offender. By contrast, negative retributionists may affirm the same core claims about justification but add that punishment should only be served where there is some additional deterrent or other consequentialist good that will be encouraged or brought about by the act of punishment.[76] Casting this distinction in terms of 'positive' and 'negative' retribution is not particularly helpful because these terms do little to illuminate the central difference between these two approaches to justification. The core difference turns on whether the version of retributivism in view is *teleological* or *non-teleological.*[77] In other words, it depends

[74] This has been true in much historic discussion, and in the work of some prominent modern defenders of retributivism, like Moore. However, in the recent literature desert is often decoupled from culpability. The thought is that someone's act may deserve a particular response even if they are not (entirely) morally responsible for the act in question due to factors beyond their control (such as moral luck). See, e.g., Geoffrey Cupit 'Desert and Responsibility' *Canadian Journal of Philosophy* 26.1 (1996): 83-99, and the essays in *The Oxford Handbook of Moral Responsibility*, eds. Dana Kay Nelkin and Derk Pereboom (Oxford: Oxford University Press, 2022).

[75] This is true of much but not all recent discussion of retributivism, which is a large and variegated family of views about the justification of punishment. I am not in the business of plotting all the different variants here. Happily, that work has been done by others. See, e.g., John Cottingham 'Varieties of Retribution' and Nigel Walker, 'Even More Varieties of Retribution, *Philosophy* 74. 290 (1999): 595-605. See also the papers collected in *Retribution*, ed. Thom Brooks (London: Routledge, 2014), which includes Cottingham's seminal article on the subject.

[76] For a helpful discussion of this distinction, see R. A. Duff, 'Crime and Punishment' in *The Routledge Encyclopaedia of Philosophy* (London: Routledge, 1998), https://www.rep.routledge.com/articles/thematic/crime-and-punishment/v-1. DOI: 10.4324/9780415249126-T002-1 (last accessed June 19th 2025). He writes, ' Positive retributivists hold that the guilty should be punished as they deserve, even if this will achieve no consequential good. Negative retributivists hold that only the guilty may be punished, but that they should be punished only if their punishment will be beneficial.' (From the article summary.)

[77] C.L. Ten, who was a pupil of H. L. A. Hart, writes about teleological and non-teleological versions of retributivism, drawing on the work of Robert Nozick in his (still helpful) introduction to the theory of punishment. But he doesn't relate this to positive and negative retributivism in quite the way I do here, though one might argue that this is implicit in his account. See Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (Oxford: Oxford University Press, 1987), 44-45.

on whether there is some further end in view in addition to punishment that is a proportionate desert for the past crime of the offender. But once that is clear, it should also be clear that teleological forms of retributivism are not, in fact, *pure* retributivist justifications, but hybrid justifications. For they are not concerned merely with a backwards-looking justification for punishment, which they do not deem sufficient independent of some further (consequentialist) goal. We will return to this matter shortly, when considering hybrid accounts.

As even this brief overview shows, there is a variety of versions of retribution, and we have attempted no more than a sketch of a number of core constituents of most versions of the doctrine. In fact, some critics maintain that there are so many different versions of retributivism that there is little to connect them except the idea that 'all such theories try to establish a link between punishment and wrongdoing.'[78] Suffice it to say that its defenders think there is rather more that unites this family of theories, as I have tried to indicate. The varieties of retributivism are well-known and widely understood, the differences often having to do with providing a complete justification for punishment in addition to the general ideas of being backwards-looking, and being concerned with 'fit,' proportionality, desert, and culpability. It has been a very popular approach to justifying punishment and remains perhaps the most widely canvassed account in contemporary legal theory, though it is not without problems—including worries about whether it is sufficient to justify punishment purely on retributivist grounds, independent of teleological (i.e., consequentialist) considerations.[79]

This brings us in the second place to *utilitarianism*. Like retributivism, this is a broad term under which sit a number of different justifications for criminal punishment that feed into distinct doctrines of punishment, such as deterrence, consequentialism, or rehabilitation. Deterrence is the idea that punishment is made at least in part in order to deter others from similar acts. One example of this might be the use of stocks in medieval Europe as a means of publicly shaming an offender in order to deter others from following suit. The person in the stocks is made a public spectacle in order to show others what happens to those who, say, steal a loaf of bread and are caught. In this context consequentialism has to do with punishment as the bringing about of some greater good, an end to which the harsh treatment of punishment is a means. A classic worry about such consequentialist justification is that some greater good state of affairs could be brought about without the punishment of the offender. For instance, suppose historians discover that someone executed for a particularly grisly murder in Victorian London was innocent of the crime, which was committed by his twin

[78] Ten, *Crime, Guilt, and Punishment*, 38.

[79] Quite a lot of recent criticism of retributivism focuses on problems to do with the ascription of desert. The worry is that it is difficult to specify what desert amounts to, and how one can make that 'stick' to the offender in a basic sense—that is independent of contractual or consequential considerations. See, e.g., the discussion by K. E. Boxer in *Rethinking Responsibility* (Oxford: Oxford University Press, 2013), chs. 4-5. A more critical account of desert in this connection can be found in Stephen Kershnar, *Desert Collapses: Why No One Deserves Anything.* Routledge Studies in Ethics and Moral Theory (London: Routledge, 2022).

brother who predeceased him through natural causes. Yet, let us suppose, the extant data indicates that because of the high media profile of the case brought against the innocent twin, the murder rate in England in the decade after the reporting of his execution dropped significantly. Though the offender was not the one punished, it could still be argued on consequentialist grounds that the harm to which the innocent twin was subjected was justified. For it brought about a greater good, namely, the reduction in the crime rate for the decade after his demise. But this is surely a travesty of justice, not an instance of it. The reason for this is obvious: harming the innocent rather than the guilty is objectively morally wrong whatever the consequences.[80] Utilitarians must provide ways of blocking this kind of objection in order to preclude harming the innocent. Though this is feasible, such measures do raise further concerns about whether qualifying a utilitarian justification in this way would undercut its claim to be a *purely* consequentialist theory. For an account that prevents legal harm coming to the innocent *a priori* is not necessarily consistently consequentialist in its aims.[81]

Some theorists place rehabilitation and reform accounts under the description of utilitarian justifications.[82] This is because rehabilitation and reform accounts that are indeed justifications for punishment rather than alternatives to punishment, are focused on outcomes and are therefore forward-looking and concerned with maximising the good for both the offender, society, and often the victim as well. However, given that these views are often treated as distinct rationales for punishment and are sometimes actually an alternative to punishment rather than rationales for punishment, we will come to them last.

Before saying more about rehabilitation and reform, we turn in the third place to *'mixed' or 'hybrid' theories*. These tend to combine aspects of a backwards looking justification for punishment with aspects of a forward looking justification. For instance, it might be argued that although punishment is meted out for actions done in the past, the nature of that punishment should have a forward looking component so as to deter future perpetrators. This, as we have already seen, is precisely the sort of view adopted by teleological or 'negative' versions of retributivism. But clearly,

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[80] The claim about objective moral wrongs could be criticised. Those who deny that there are objective moral wrongs (such as error theorists or moral non-cognitivists) will reject the claim that there are objective moral wrongs. Although this is a position defended in the literature in moral philosophy, it does seem to me to have obvious problems—such as that the error theory itself is normally taken to be an objective moral fact, or at least, a fact about the properties of particular states of affairs. One (basically, legal positivist) work around to this objection would be to say that it is a convention in black letter law that only those who have committed the offence can be convicted of it. Thus, even if one objects to the idea that there are objective moral facts and states of affairs, one must accede to the way in which the law *functions*. And in black letter law in most jurisdictions, the convention is that *only* the person liable for the offence can be punished for the crime committed. This would preclude harming the innocent according to the rule of law.

[81] Note that I am avoiding using the term 'punishing the innocent.' This is because to use the term would be begging the question at issue, namely, whether the innocent can be punished. In my view, the innocent cannot be punished strictly speaking, though they can be subject to the harm that would be punishment if it were inflicted on the offender. This is not a matter of mere semantics. Much hangs on whether one thinks one can punish the innocent, as this objection to pure consequentialist justifications for punishment highlights.

[82] For instance, Ten, folds rehabilitation and reform into his discussion of utilitarian justifications for punishment in *Crime, Guilt, and Punishment,* ch. 2. Brooks, however, treats rehabilitation and reform separately in *Punishment*, ch. 3.

if a given justification for punishment helps itself to both backwards looking and forward looking reasons for punishment, it is neither a purely retributivist nor a purely consequentialist, account. Naturally, the hybrid theorist may simply shrug her shoulders at this point: so what? Whether a justification for punishment falls under one description or another is not germane to the issue of providing a justification *adequate* for the harm of punishment. It is just a matter of categorisation, like the lepidopterist organising his collection zoologically according to family, genus, and species. And that is right: categorising justifications for punishment have limited usefulness. But they are not *useless*. For it is important to be clear about the sort of justification being offered. The point of categorising things in this way is not just that some views are hybrids of both retributive and utilitarian justifications. It is also, and more importantly, that any given justification for punishment needs to be coherent. Critically analysing a given justification for punishment is at least in part about ascertaining whether a proposed theory passes muster in this respect. And hybrid accounts have a higher bar to meet precisely because they attempt to bring together aspects of existing theories that are usually thought to be incommensurate.

In addition to negative retribution (which I have categorised as a hybrid account), there are other important contenders in this conceptual space. H. L. A. Hart's hybrid account has been particularly influential. He argued that punishment must serve social goods like deterrence, so that legislation should have a consequentialist, forward-looking aim. However, he also thought that punishment should only be inflicted on the offender by the judiciary, thereby avoiding worries about harming the innocent that have dogged historic utilitarian justifications. His key idea was that the right *aim* in punishing is consequentialist whereas the right answer to the *distribution* of punishment (i.e., who is punished) is had by retributivism. The general justifying aim of punishment cannot be merely retributive. But its rationale for the distribution of punishment is what is needed to ensure only the offender is punished. Thus, he avers, his hybrid account is better than historic retributive or consequentialist justifications because it is predicated on a clearer understanding of the nature and aim of punishment as well as its appropriate recipients.[83]

A more recent hybrid justification is the Unified Theory of Thom Brooks. His argument is a modern version of the theory of rights (i.e., jurisprudence) espoused by Hegel and some of the German Idealists of the nineteenth century, as well as some of the British Idealists like T. H. Green. The core claim is that though different penal theories may be incompatible, different penal goals may sit together under the umbrella of a unified theory of punishment.[84] Such a theory could have retributive, utilitarian, and rehabilitative goals as part of a wider attempt to protect individual legal

[83] See H. L. A. Hart, *Punishment and Responsibility: Essay in the Philosophy of Law.* Second Edition (Oxford: Oxford University Press, 2008 [1967]), ch 1. Brooks has a helpful discussion and comparison with John Rawls in *Punishment*, ch. 5.
[84] Brooks, Punishment, 126.

rights that the criminal law seeks to protect. Indeed, Hegel thinks that punishment 'restores the right' that has been infringed.[85] Some such rights will be more central in a given legal system than others—rather like in a spider's web, some nodes on the web are more central than others. But the law as a whole is a system that works together, just as the web-nodes are parts of the larger whole. Brooks writes,

> Crimes are rights violations that threaten the substantial freedoms protected by law. Punishment is the response to crime. Punishment aims at the protection of individual legal rights threatened by crime. The goal of punishment is not to make people morally good, but rather to provide for the protection of individual legal rights. Punishment is about the protection of rights.[86]

Thus, some crimes will be treated more severely than others, depending on how central they are to the system of law. Murder requires a significantly greater penalty than does larceny, because the legal rights infringed by murder are more serious. But importantly, there must be a connection between punishment and crime. More specifically, the crime must itself fall under the description of criminalisation in a given penal code or jurisdiction. There can be no punishment if the crime itself is not stated in law. Brooks again:

> Punishment is a response to crime. We must understand one in relation to the other. Furthermore, the justification of punishment requires the justification of crime. This point is worth highlighting: if we cannot justify a particular criminal act or omission, then we cannot justify its punishment. There can be no just punishment for an unjust crime. If punishment is a response to crime, then criminalization must be justified for the punishment of crimes to be justified.[87]

There may be concerns about whether rights can be restored by punishment. Provided 'restoration' has a sufficiently broad interpretation, it might be that punishment annuls the infringement of a legal right by punishing it. The thought would seem to be that punishing the offender for infringing or annulling the right of another restores a kind of rectoral balance. Suppose punishment does have a consequentialist component (deterring others, perhaps), and a retributivist aim (punishing the offender for what s/he has done), as well as perhaps a rehabilitating function (communicating to the offender the seriousness of their crime in the hope of changing their behaviour). It may be that each of these penal goals is commensurate with one another in a unified theory of punishment that justifies these several goals in terms of the restoration of legal rights. But it is not so clear that this is *sufficient* as an explanation of punishment. For, to take the case of murder,

[85] See Ten, *Crime, Guilt, and Punishment,* 39-40.
[86] Brooks, *Punishment*, 128.
[87] Ibid., 127. I am reading Brooks's claim about 'unjust crimes' here to mean: not justified in law.

it is not clear how the legal right to life for the victim is restored by punishment. Nor is it clear how punishment might 'annul' the infringement of that right. It may offer some sort of nominal compensation. But clearly, compensation is not the same as punishment. (If I compensate someone for the damage caused to their vehicle in a road traffic accident I am not in so doing *punished* for colliding with their car.) Nevertheless, Brooks's unified theory is an important recent restatement and refinement of a long tradition of a Hegelian rights-based approach to justifying punishment.

As previously mentioned, in addition to these three broad genera of justifications for punishment there are other accounts that are sometimes offered as further alternatives—*rehabilitation* and *reform*.[88] Rehabilitation theories focus on the need to provide interventions such as cognitive behavioural therapy, education, and vocational retraining in order to assist offenders in coming to understand the seriousness of their crimes and help them to become productive members of society when they are released (in the case of those serving custodial sentences). Reform accounts seek a similar outcome: the change of behaviours that have resulted in punishment through redirecting offenders to more productive occupations and better, more balanced views of themselves and their relation to broader society.

There is much that is commendable in these approaches, though there is debate about what we might call 'proof of concept,' that is, how effective they actually are.[89] However, more salient for our purposes is that they do not seem to me to present distinct justifications for punishment. They are either component parts of a hybrid theory and so fall under that description; or they are not justifications for punishment at all. If they are folded into a broader justification for punishment, then they do not stand on their own as distinct accounts but are variations on hybrid theories. For instance, it might be argued that although there must be some appropriate sense in which punishment inflicts a harm upon the offender, there must also be an attempt to rehabilitate the offender so that he or she may be successfully reintegrated into society upon being released from gaol. In that case, rehabilitation is an aspect of a hybrid account. Similarly, one might argue that the harm of punishment should be coupled with an attempt to reform the offender to tackle the likelihood of recidivism, once the punishment has been served. But this too is a hybrid account. I suppose it is conceivable that an offender might be sentenced to a form of punishment that is itself a kind of harm that brings about

[88] There is also the question of *restorative justice.* But this is not a theory of punishment since it rejects the idea of punishment and custodial sentencing, focusing instead on what is referred to as *restorative conferences* between the offender, the victim, and representatives of broader society. The idea of such conferences is to bring about reconciliation between the alienated parties in the hope that this process may restore the offender to society and bring about healing and reparation for the victim. Now, as Brooks points out in his overview of the topic, rejecting custodial sentencing and the judicial process does not necessarily mean a view does not include a notion of punishment. For, on the view of LEGAL PUNISHMENT I have set out above, custodial sentencing is not a part of the definition. However, harm is, and it is not clear that restorative justice includes a notion of harm. It is better thought of as a component of a hybrid doctrine. For Brooks's helpful overview, see *Punishment,* ch. 4.

[89] Brooks remarks, 'While rehabilitation theories continue to offer us a fresh approach, its promise remains unfulfilled and its possibility is potentially suspect.' *Punishment,* 51.

reform or rehabilitation. A classic example of this in literature is the harm inflicted upon Alex the Droog in Anthony Burgess's dystopian novel, *A Clockwork Orange*.[90] After being caught and sentenced for a series of appallingly violent crimes committed as part of a gang of youths, Alex agrees to undergo a series of aversion 'therapies' called the Ludovico Technique, in order to commute his sentence. This process in effect re-programmes Alex's violent predilection so that he becomes conditioned to feel nauseous at the very idea of committing antisocial acts. Burgess's fictional example would count as an instance of rehabilitation and reform. But the process of rehabilitation or reform is itself a kind of harm to which the offender is subjected, thereby collapsing rehabilitation and reform into the harm of punishment.

Where rehabilitation and reform are understood to be alternatives to punishment, they are not relevant for present purposes. For if punishment is not in view, we are dealing with an *alternative* to punishment and the justification of that alternative. Important though discussion of such things may be (and I think such discussion is very important), it fall outside our remit. This includes important recent research in jurisprudence about alternatives to punishment that have been put forward by punishment sceptics like Elizabeth Shaw, Derk Pereboom, and Gregg Caruso.[91] For they are not interested in punishment, which they think is unjustified because human beings are not morally responsible agents. Instead, they are concerned with alternatives to punishment on the assumption that some kind of *hard incompatibilism* is true.[92] The alternative they have pressed is a kind of quarantine model that removes offenders from society in a custodial-like context where they may be held until such time as they are deemed capable of returning to society. This is like quarantine, where infected persons are set apart from the rest of society for some period for the good of both. But, importantly, the rationale for this process is premised on the claim that humans are not *agents*. That is not a premise we will grant in this work. For the notion of punishment, like the notion of atonement, requires the assumption that human beings as the referents of these two concepts may normally be held morally responsible for actions they intend. Only agents may be punished or receive the benefits of an act of atonement.

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[90] Anthony Burgess, *A Clockwork Orange* (London: Heinemann, 1962).

[91] See, e.g., Derk Pereboom, *Living Without Free Will* (Cambridge: Cambridge University Press, 2001), and Elizabeth Shaw, Derk Pereboom and Gregg D. Caruso, eds. *Free Will Skepticism in Law and Society.* The most comprehensive treatment of this view to date is Gregg D. Caruso, *Rejecting Retributivism: Free Will, Punishment, and Criminal Justice* (Oxford: Oxford University Press, 2021). I dealt with moderate versions of free will scepticism in my Aberdeen LLM thesis, 'Just Desert?'.

[92] Hard incompatibilism is a thesis about human free will and moral responsibility. *Incompatibilism* is the thesis that free will and moral responsibility is incompatible with determinism. *Hard determinism* is the thesis that the past and the laws of nature determine exactly one future outcome. *Hard incompatibilism* combines aspects of both views. Its defenders claim that humans lack the sort of freedom necessary for moral responsibility. It is sceptical about free will and sympathetic to the idea that some sort of hard determinism obtains (thereby in effect excluding compatibilist views that allow that free will is in principle consistent with determinism). On hard incompatibilism, humans are not agents in the sense of being the subjects of *basic* desert, that is being deserving of praise and blame for their actions irrespective of other considerations, whether contractual or consequentialist. Thus, the hard incompatibilist does not think human beings are morally responsible agents. For further explication, see Pereboom, *Living Without Free Will*.

Atonement

In the first section of this chapter I argued that punishment, especially legal punishment, can be understood as

> LEGAL PUNISHMENT: the intentional infliction of harm on an offender, the quality, severity, and consistency of which is calibrated to the nature and seriousness of the offence committed, by an appropriately constituted legal authority for a prior offence, usually the transgression of some rule, command or law, in order to convey an appropriate expressivist function of disapproval, reprobation, or condemnation.

Although, as we saw, aspects of this working definition might be challenged (e.g., the place it gives to an expressionist function of punishment), it is sufficient for present purposes as a working definition. It is a way of construing (legal) punishment that is at least defensible and represents a fairly well-established view in the literature, even if aspects of it may still be the subject of discussion and debate.

We turn now to the notion of atonement. In its context in Christian theology this is the idea that God somehow brings about reconciliation with human beings through the work of Christ. It is about being at one with God, hence *at-one-ment*.[93] As Eleonore Stump has recently put it, atonement is 'the doctrine that attributes at-onement, somehow, to Christ.'[94] But exactly how this reconciled state is achieved is a matter of theological dispute. Much of this discussion focuses upon the crucifixion of Christ, which is typically said to be the culmination of the work of reconciliation. For by means of Christ's death on the cross (though not necessarily solely by means of this act), human beings are said to be reconciled to God from whom they have been alienated by human dereliction and sin.

Can we say more by way of circumscribing the notion of atonement in view? Perhaps we can. In the recent literature, philosopher Joshua Thurow has argued that the sort of reconciliation in view in the theological context has to do with *reducing the rift* that exists between the person who has committed the alienating act ('the author') and the victim.[95] The question is whether the author is successful in attempting to close this relational gap. This also makes room for degrees or levels of atonement. Someone could attempt reconciliation and meet with only partial success or atone for one

[93] I have discussed this further in Crisp, *Approaching the Atonement* and *Participation and Atonement.* This is a fairly uncontroversial way of characterising the doctrine of atonement. Compare Joshua C. Thurow, 'Atonement,' in Edward N. Zalta & Uri Nodelman eds., *The Stanford Encyclopedia of Philosophy* (2023), located at: https://plato.stanford.edu/archives/sum2023/entries/atonement/ (last accessed 19/06/24), which is currently the most comprehensive short overview of the topic in the recent literature. However, the most comprehensive account of historic views of the doctrine in English is still R. S. Franks, *The Work of Christ: A Historical Study of Christian Doctrine* (London: Thomas Nelson and Sons, 1962).

[94] Eleonore Stump, *Atonement.* Oxford Studies in Analytic Theology (Oxford: Oxford University Press, 2018), 7.

[95] See Thurow, 'Atonement.'

wrong and not another in a complex case of atonement.[96] Consider, for example, a case in which a person dishonours another by stealing some artefact that has symbolic or ritual value—a ring or robe or staff, perhaps. One might return the artefact in an attempt to bring about reconciliation yet without also offering some penitential act that redresses the loss of honour. The moral dimension to at least some acts of atonement are brought out more clearly by Linda Radzik, whom Thurow also discusses. She prefers to speak of 'making amends' rather than atonement, but the idea is very similar, namely, *the performance of whatever is morally required to respond to a wrong committed*.[97] Thurow also discusses the notion of expiation or cleansing from sin that is employed in much of the Christian tradition when speaking about atonement. Here the idea is that an atoning act purifies a person from the guilt associated with having committed some wrong against another. In doing the atoning act the moral stain caused by sin is (somehow) blotted out.[98]

Whether it is the notion of reconciliation and rift-healing that is central or the performance of a (morally) appropriate responsive action, the core idea of atonement as somehow attempting to bridge the gulf between two agents alienated by some morally impermissible act or sin is central in theological discussion of the topic. It is this idea that informs the account that follows.

Some atonement theorists have argued that a complete act of reconciliation includes several distinct parts or aspects. In the late 1980s the British philosopher of religion Richard Swinburne argued in his influential book, *Responsibility and Atonement*, that these different aspects are repentance, apology, reparation, and penance.[99] He is clear that not every mistake or misdemeanour requires all four of these components.[100] But for a serious moral breach, each of these components should be present in order to ensure reconciliation between alienated parties. Let us briefly consider each of these four aspects of his account in turn.

Repentance has two aspects. The first is recognition of the fact that the person who has acted wrongly did in fact do wrong. The second aspect involves turning away from the thing that has caused offence and seeking to go in the opposite direction. This notion of a moral volte-face is derived from the New Testament Greek word used in this context, *metanoia*.[101] Apology involves the act, usually a speech act—that is a form of words that also brings about an action—by means of which the one who has transgressed indicates their contrition and makes apology. The convention, as Swinburne

[96] Ibid., §1.2.
[97] Ibid., and Radzik, *Making Amends*, 7.
[98] Thurow, 'Atonement,' §1.2.
[99] See Swinburne, *Responsibility and Atonement*, 81-90.
[100] 'Not all are needed in every case. For some wrongs reparation is inappropriate—there is not reparation for an insult; for the less serious wrongs penance is not needed; but sincere apology is always needed. In the case of subjective guilt, [that is, cases where it is the agent who has intentionally caused the harm herself] apology must be accompanied by repentance of the kind described' by which he seems to mean, all four aspects of his account of atonement. Swinburne, *Responsibility and Atonement*, 84.
[101] Swinburne, *Responsibility and Atonement,* 82.

notes, is to say some form of words like 'I am sorry' or 'I sincerely apologise.'[102] Reparation is the attempt to make amends by means of compensation. Swinburne gives the example of replacing a vase that is inadvertently broken. But the point is that the perpetrator seeks to bridge the gulf created by her transgressive act by some responsive act that shows her desire to make amends, often in some practical way. Finally, penance is the aspect of atonement that involves some act beyond reparation that demonstrates the reality of a change of heart. In medieval Christian spirituality this often meant some act of physical mortification to demonstrate the intention to form new patterns of behaviour. As Swinburne puts it, it is a 'token of sorrow' that is 'more than mere compensation,' such as interest on a loan by a friend or a bunch of flowers accompanying the replacement vase.[103] It is 'a performative act' that demonstrates her 'disowning' of the wrong she has previously committed.[104] Once the perpetrator has performed the act of atonement it is for the victim of the crime to forgive, which is also a performative responsive act such as the conventional 'I forgive you.' Swinburne writes, 'An agent's guilt is removed when his repentance, reparation, apology and penance find their response in the victim's forgiveness.'[105] Forgiveness is not an obligation, he thinks, and may be withheld. If that happens, it does not prevent guilt from disappearing provided the guilty party has offered appropriate atonement. Once atonement is completed, whether forgiveness is offered or not, the guilt attached to the act of the perpetrator eventually dissipates. There are aspects of this account of forgiveness that seem peculiar to me, and we will return to this in the next chapter. But for now, it is sufficient to see that for Swinburne forgiveness is a responsive act to atonement that may be performed by the victim and must be performed by those who have put themselves under an obligation to do so, as, he thinks, is the case with persons of faith.[106]

To sum up thus far: atonement is about healing the rift between two or more parties. It involves 'making amends,' as Radzik puts it. According to Swinburne, the notion of making amends normally involves four constituents, repentance, apology, reparation, and penance. This is then followed by forgiveness. So much for defining terms. What about the conceptual content of atonement?

It should be clear even to the theological neophyte that atonement is a central and defining teaching at the heart of Christian thought. It is also a doctrine that has had enormous impact on western culture, including western conceptions of punishment and associated moral concepts such as

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[102] Swinburne, *Responsibility and Atonement*, 83.
[103] Swinburne, *Responsibility and Atonement,* 83-84.
[104] Swinburne, *Responsibility and Atonement*, 84. Although Swinburne's book is now more than thirty five years old (*mirabile dictu*!), it remains an important touchstone in recent discussion of the topic that has been taken up in subsequent discussion in both philosophy and theology. See, e.g., the work of Linda Radzik that is influenced by it, and my own recent treatment of atonement in Crisp, *Participation and Atonement.* It has also been taken up in legal discussion of atonement as well. See, e.g., Stephen Garvey 'Punishment as Atonement, '*UCLA Law Review* 46 (1999): 1801-1858.
[105] Swinburne, *Responsibility and Atonement,* 85.
[106] Swinburne, *Responsibility and Atonement,* 87-88. The person of faith is under such an obligation because 'God's forgiveness can only be had by those prepared to forgive others' so that 'Christians who accept God's forgiveness' as outlined in the Lord's Prayer, 'thereby undertake the obligation to forgive others.' Ibid.

guilt, moral responsibility, and transgression. As theologian Timothy Gorringe says in his important study of the relationship between theology and punishment theory, 'the rites and symbols of Christianity have been the means by which Western culture has sought to master the intractable features of human existence. These intractable features have included, at their centre, wickedness, guilt, and punishment.'[107] One does not need to subscribe to the view that 'The suffering Christ, an icon of the wickedness of judicial punishment, became the focus of its legality, and of the need for the offender to suffer as he did'[108] in order to agree with the more general observation about the influence of theological notions upon Western conceptions of punishment. Nevertheless, I think that Gorringe is substantially correct in his assessment. Atonement theology provides important conceptual resources for thinking about punishment.[109] It is a point that has been recognised by those with a sociological interest in punishment theory as well, such as David Garland. In his classic study *Punishment and Modern Society*, he writes

> the intractable problems of social and human existence provide a rich soil for the development of myths, rites, and symbols as culture strive to control and make sense of these difficult areas of experience. Punishment—as an archetypal feature of human existence—figures prominently in some of the most important cultural artefacts of Western society, including classical drama, traditional cosmologies, *religions such as Christianity,* and heresies such as psychoanalysis. The practical business of punishing offenders thus takes place within a cultural space which is already laden with meaning and which lends itself easily to symbolic use.[110]

It is this wider theological 'cultural space' that we are concerned with here. The idea is to provide some context—in this case, *theological* context—for the concept of atonement, in order to see how its use and development in theology might provide tools for thinking about punishment theory in subsequent chapters of the thesis.[111]

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[107] Timothy Gorringe, *God's Just Vengeance,* 23. Although it was written more than 25 years ago, much in this work remains as relevant today as it did then. His subsequent work in this area builds on this earlier study in interesting ways. See Gorringe, *Crime: Changing Society and the Churches* (London: SPCK, 2004).
[108] Ibid.
[109] This is one theme in Gorringe's study. However, the main thrust of his work is to point to ways in which atonement theology, especially those strains that affirm punishment and violence, have fed into Western culture and especially legal thought and practice, in ways that are problematic.
[110] Garland, *Punishment and Modern Society,* 274. Emphasis added.
[111] It is also important to give an account of atonement theology that pays careful attention to the actual content of what Christian doctrine entails, rather than the caricatures that have sometimes prevailed in the legal literature that utilises atonement imagery and doctrine. For only when we have some understanding of the varieties of approaches to the Christian doctrine of atonement will we be in a position to ascertain whether it may provide resources for contemporary punishment theory. For an account of atonement theology that is problematic in just this sense, see, e.g., Stephen Garvey 'Punishment as Atonement.' It is worth noting that his survey of atonement theology at the beginning of his article perpetrates numerous mistakes, e.g., that the Apostle Paul defended the ransom account of atonement (!), and that the medieval Parisian divine, Peter Abelard, defended a doctrine of moral exemplarism (though, to be fair to Garvey, the latter is a common mistake in the theological literature). He also describes Anselm of Canterbury's view as one according to which Christ is part man and part God—which is a travesty of the Anselmian position (and the doctrine of incarnation

To begin with, it is important to note that not all theological accounts of atonement understand it as an act that is punitive in nature, though the language of punishment has certainly been influential in the development of central strands of the doctrine in the history of Christian thought. For this reason, at the outset, I will exclude from consideration theological views that deny Christ's atonement is bound up with penal language and concepts. This is important because much (though certainly not all) of the recent theological and philosophical literature on this topic has been directed against traditional doctrines of atonement that presume there is some relation between Christ's saving work and punishment.[112] This is either because critics of such traditional views maintain that atonement has nothing to do with punishment (because, say, it is about the way in which Christ's action sets a moral example that should be imitated rather than as a punitive means by which God brings about reconciliation with estranged human beings[113]), or because it is held that there are serious moral problems with implicating God in any act of violence—such as the torture, crucifixion, and death of Christ.[114]

Now, these modern concerns are important, and I have tackled them head-on elsewhere.[115] For now, I propose to set these worries to one side in order to give some account of a family of views about the atonement that are, in many respects, the most influential in the Christian tradition, that are punitive in nature, and that bear upon punishment theory.[116] Let us call this genera of atonement

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more generally) that even a passing familiarity with Anselm's *Cur Deus Homo* would have dispelled. (Garvey, 'Punishment as Atonement,' 1808-1809).

[112] That said, as we shall see, there are a number of important recent treatments of the doctrine of atonement that attempt to defend versions of traditional punitive accounts. Examples include the work of Khaled Anatolios, *Deification Through the Cross: An Eastern Orthodox Theology of Salvation* (Grand Rapids: Eerdmans, 2022); Hans Boersma, *Violence, Hospitality, and the Cross: Reappropriating the Atonement Tradition* (Grand Rapids: Bake Academic, 2006); William Lane Craig, *Atonement and the Death of Christ: An Exegetical, Historical, and Philosophical Exploration* (Waco: Baylor University Press, 2020); Adonis Vidu, *Atonement, Law and Justice: The cross in Historical and Cultural. Contexts* (Grand Rapids: Baker Academic, 2014); Jada Tweet Strabbing 'The Permissibility of the Atonement as Penal Substitution' in Jonathan L. Kvanvig, ed., *Oxford Studies in Philosophy of Religion, Vol. 7* (Oxford: Oxford University Press, 2016), 239-270; and Richard Swinburne, *Responsibility and Atonement*.

[113] See, e.g., Oliver Crisp, 'Moral Exemplarism and Atonement,' *Scottish Journal of Theology* 73.2 (2020): 137-149; and Meghan D. Page and Allison Krile Thornton, 'Have We No Shame? A Moral Exemplar Account of Atonement' in *Faith and Philosophy* 38.4 (2021): 409-430. For a historic treatment of these issues, see Hastings Rashdall, *The Idea of Atonement in Christian Theology, Being the Bampton Lectures for 1915* (London: Macmillan and Co., 1919).

[114] The literature that raises these concerns about violence and atonement is large. Representative examples include: Joanna Carlson Brown and Rebecca Parker, 'For God So Loved the World?' in Joanne Carlson Brown and Carole R. Bohn, eds. *Christianity, Patriarchy, and Abuse: A Feminist Critique* (New York: The Pilgrim Press, 1989), 1-30; Robin Collins, 'Girard and Atonement: An Incarnational Theory of Mimetic Participation' in Willard M. Swartley, ed. *Violence Renounced: René Girard, Biblical Studies, and Peacemaking* (Telford, PA: Pandora Press, 2000); Kathryn Pogin, 'Conceptualising the Atonement' in Michelle Panchuk and Michael C. Rea, eds., *Voices from The Edge: Centering Marginalized Perspectives in Analytic Theology*. Oxford Studies in Analytic Theology (Oxford: Oxford University Press, 2020), 166-182; Darby Kathleen Ray, *Deceiving the Devil: Atonement, Abuse, and Ransom* (Cleveland, OH: Pilgrim Press, 1988); and J. Denny Weaver, *The Nonviolent Atonement.* Second Edition (Grand Rapids: Eerdmans, 2011 [2001]).

[115] See Crisp, *Approaching the* Atonement, and *Participation and Atonement.*

[116] I will also set aside doctrines of atonement that construe Christ's work as a ransom, rather than in penal terms. The classic exposition of this view, which is once more a popular option in the contemporary literature, is Gustaf Aulén, *Christus Victor. An Historical Study of the Three Main Types of the Idea of Atonement* (London: SPCK, 1931). I discuss this view in detail in Crisp, *Participation and Atonement.*

views, *satisfaction doctrines of atonement.*[117] Such satisfaction doctrines represent a cluster of views that have at their heart the idea that Christ's saving work somehow *satisfies* God, thereby bringing about or at least making possible human reconciliation with the divine. On this broad way of construing it, a view falls under the description of satisfaction provided it has to do with *an act by means of which the conditions of a moral or legal standard are met or satisfied*.[118] Applied to Christian theology, the idea would be that the reconciling work of Christ in the doctrine of atonement, however that is understood, is an act by means of which the conditions of a moral and/or legal standard are met or satisfied—in this case, a moral and/or legal standard provided by the Deity.

This broad understanding of satisfaction applies to a number of different atonement doctrines, each of which argue for what we might call different mechanisms of atonement. By an 'atonement mechanism' I mean how atonement is said to be brought about. The doctrines that fall under this broad description of satisfaction are distinguished by the different accounts they have of the way in which Christ's work is an atonement for human sin and dereliction. Some presume satisfaction is made by one means, others that it is brought about by a different and incommensurate means. But in each case, the idea is that it is some act of satisfaction that delivers a doctrine of reconciliation or making amends.

Now, among this cluster or family of doctrines that share the idea that some notion of satisfaction is requisite to atonement, we could place the more narrowly construed doctrines of atonement that normally go by the label 'satisfaction' accounts in textbooks on the doctrine of atonement. This is what we might think of as one species of the family of satisfaction doctrines. It is just that (rather confusingly) this species of atonement doctrine is the one normally referred to by the moniker 'satisfaction.' This is a kind of historical accident, however. It is just that as it is usually reported, the satisfaction family of atonement doctrines is usually conflated with one instance of the doctrine. This is the quintessential historic doctrine of satisfaction that was made famous by the medieval archbishop Anselm of Canterbury in his great work, *Cur Deus Homo* (Why the God-Human). His was a doctrine taken up and developed in later Christian theology by thinkers such as Thomas Aquinas and, in more recent times, Richard Swinburne (among others).[119] According to this narrow doctrine of satisfaction (that is, the species rather than the family of views that I am calling satisfactions doctrines), Christ's atonement is the means by which God's honour is restored and the

[117] This term was first suggested to me by Dr Danielle W. Jansen, who uses it in her PhD dissertation, 'Beautifully tortured? The problem of divine wrath in the atoning work of Christ' (University of St Andrews, 2024). See the abstract located at: https://research-repository.st-andrews.ac.uk/handle/10023/29819 (last accessed, 19/06/24). I am grateful to her for very helpful discussion of this matter.

[118] I have taken this, with modification, from Crisp, *Participation and Atonement*, 191.

[119] See Anselm, *Cur Deus Homo* in Anselm, *The Complete Treatises*; Thomas Aquinas, *Summa Theologiae* III. Q. 46; Richard Swinburne, *Responsibility and Atonement*. My own account is also a broadly Anselmian one. See Crisp, *Participation and Atonement.*

moral consequences of human sin are met and defeated. His atonement is a work of supererogation that is not required of him but is a gift the merits of which are transmitted to those who are united to him by faith, and who appropriate its benefits through the sacraments administered by the Church, especially baptism and the Eucharist.[120]

But we could also group under the broad description of satisfaction (that is, the broader umbrella term that includes a range of atonement doctrines) views like penal substitution and related notions such as the 'Grotian' moral government doctrine,[121] and even John McLeod Campbell's notion of vicarious penitence.[122] In its classical formulation, penal substitution is the view according to which Christ is said to be punished in the place of human beings in order that they may be reconciled to Godself. The moral government view is a kind of penal non-substitution account of atonement, where Christ is a penal example whose death is used by God as the moral governor of the cosmos to show what would be visited upon human beings in the absence of such an exemplar. The vicarious penitence account is a version of non-penal substitution, whereby Christ offers up a vicarious act of penitence on behalf of all human beings that satisfies God as a consequence of which human beings may be reconciled to Godself.[123]

Thus, on this way of grouping things, we have a family of atonement views that share a broad commitment to the notion that Christ's atonement is a way of satisfying or meeting some moral standard that is required in order for human beings to be reconciled with God from whom they are estranged through sin. In this way, the theological application of satisfaction is an instance of the notion that satisfaction is an act by means of which the conditions of a moral or legal standard are met. Under the terms of this broad understanding, satisfaction may be provided two ways, either by punishment or by some supererogatory act of sufficient merit offered in place of human sin by the

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[120] For more detailed discussion of this point, see Crisp, *Participation and Atonement.*

[121] The 'Grotian' or moral government doctrine of atonement is usually thought to have its source in the work of the seventeenth century Dutch jurist, philosopher, and divine, Hugo Grotius (1583-1645). However, whether Grotius was a 'Grotian' on the atonement is disputed. For an English translation of Grotius's 1617 treatise, *Defensio fidei catholicae de satisfactione Christi. Adversus Faustum Socinum Senesum* see Hugo Grotius, *A Defence of the Catholic Faith Concerning the Satisfaction of Christ Against Faustus Socinus,* trans. Frank Hugh Foster (Andover, MA: Warren F. Draper, 1889). For discussion of this view, see Obbie Tyler Todd, *The Moral Governmental Theory of Atonement: Re-envisioning Penal Substitution* (Eugene, OR: Cascade, 2021). A helpful overview of Grotius's achievements can be found in Jon Miller, 'Hugo Grotius,' (2021) in Edward N. Zalta, ed. *The Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/archives/spr2021/entries/grotius/. (Last accessed 01/07/25.)

[122] John McLeod Campbell (1800-1872) was a nineteenth century Scottish minister and theologian. The work that made his name and got him defrocked from the Kirk is *The Nature of the Atonement* (Grand Rapids: Eerdmans, 1996 [1856]). It has been taken up in subsequent theology, in the work of the twentieth century Anglican divine, R. C. Moberly, *Atonement and Personality* (New York: Longmans, Green & Co., 1901), and more recently has been championed by the Scottish theologians Thomas F. Torrance and James B. Torrance.

[123] I have argued for this in previous work. See, e.g., Crisp, 'Penal non-Substitution 'in *Journal of Theological Studies* NS 59 (2008): 140-168; Crisp 'Non-penal Substitution' in *Retrieving Doctrine: Essays in Reformed Theology* (Downers Grove, IL: IVP Academic, 2011), 92-115; Crisp, *Approaching the Atonement*; and Crisp, *Participation and Atonement.* The most comprehensive treatment of the theological use of penal substitution in the contemporary literature is Craig, *Atonement and the Death of Christ*.

right sort of individual.[124] (To anticipate: according to Anselm's argument in *Cur Deus Homo*, such a person would have to be both fully human and fully divine—hence, the eponymous God-human or God-man of his treatise).

Both these ways of thinking about atonement, whether via punishment or via supererogatory act, involve a mechanism of reconciliation according to which the conditions of a moral or legal standard are met—in this case, the condition of divine justice. This is the sort of view associated with Anselm and latterly, Thomas Aquinas, and modern authors like Richard Swinburne.[125] To distinguish this particular or narrow account of the atonement from the more general family of views to which it belongs, all of which involve some notion of satisfaction, I will call this view *Anselmian satisfaction*.[126] On this way of thinking, atonement involves a meritorious act of supererogation on the part of Christ. It is emphatically *not* a punishment.[127] Nevertheless, the language of punishment, understood in essentially retributivist terms as backwards-looking, authorised by God as the proper legal power, dependent on a notion of desert, and expressing divine disapproval of human sin, is what motivates this way of thinking about atonement.[128] It is just that the act of atonement itself is not such a punishment, but an alternative to such punishment.

In the case of penal substitution, the act of satisfaction involves either punishment or at least suffering the penal consequences of what would be punishment if it were served upon the guilty parties—namely, fallen human beings. We might say that in the case of penal substitution, instead of thinking that atonement is an alternative to the punishment of human sin as is the case with Anselmian satisfaction, we have atonement *as* punishment (or at least, suffering penal consequences morally equivalent to punishment). In other words, on this view atonement and punishment are collapsed into

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[124] This is often misunderstood in the literature. For instance, Eleonore Stump in *Atonement* conflates satisfaction as a family of atonement views with the ways in which satisfaction is said to be brought about in particular doctrines of atonement. The same is true of Radzik who conflates three ways of achieving satisfaction in *Making Amends,* 29. This is important because much depends on what we might call the mechanism of atonement, and that mechanism differs from one view to another even where they are all instances of one genus of atonement doctrine such as satisfaction. We will return to this point in the next chapter.

[125] A helpful discussion of the influence of Anselm's views on subsequent ideas of justice and mercy, including the work of Abelard and Aquinas, as well as Luther and Calvin, can be found in Alex Tuckness and John M. Parish, *The Decline of Mercy in Public Life* (Cambridge: Cambridge University Press, 2014), ch. 4.

[126] It might be objected that there are significant differences between Anselm's understanding of satisfaction on the one hand, and that of Thomas Aquinas and Richard Swinburne on the other. Perhaps the chief difference in terms of the mechanism of atonement is that for Anselm God *must* punish sin or be satisfied by some supererogatory meritorious act, whereas for Aquinas and Swinburne, it is only that God *may* punish sin or be satisfied in this manner. It is morally possible for God to set satisfaction aside for forgiveness, as far as both Aquinas and Swinburne are concerned. However, although this is an important difference between the two strands of satisfaction with a capital 'S,' they aren't salient for our purposes since we are not concerned with the theological issue of whether God *must* or merely *may* punish sin, but with the notion of satisfaction as such. So I will retain talk of Anselmian satisfaction since Anselm introduces this language into the theological lexicon. I have discussed the differences between Anselmian and Thomistic accounts of satisfaction in Crisp, *Participation and Atonement.*

[127] *Pace* those who, like Eleonore Stump, fail to make this clear. See her treatment of these matters in *Atonement.*

[128] In this way, as I am understanding it here, the theological application of satisfaction utilises a version of LEGAL PUNISHMENT.

one moral category: it is by means of the punishment of Christ or at least by means of Christ suffering of the penal consequences of human sin that human beings are reconciled to Godself.

The governmental account of atonement takes the penal element of atonement seriously—Christ suffers the penal consequences that would be punishment if they were visited upon fallen human beings instead of Christ. But he suffers this as an example of what would happen if God were to punish human beings as they ought to be punished, strictly speaking. Christ's atonement serves two purposes on this way of thinking. It is a penal example, to show what would obtain if human beings were punished as they ought to be. It is also a vindication of the moral government of God who must demonstrate the seriousness of human sin and the need for some act of atonement in order to display the heinous consequences of breaking the moral law. The governmental account is a kind of deterrence view of punishment—or at least, a view that has a deterrence element built into it, though it is not a purely consequentialist view. We might think of it as a kind of hybrid view of punishment since the idea is that human beings deserve to be punished in a retributivist sense. Yet Christ suffers in their place as an example of what should happen to human sinners, and to deter future sin.

Finally, in the vicarious penitence view, which I have said is a kind of non-penal substitutionary account of atonement, Christ is substituted for fallen human beings standing in their place, so to speak, and being accountable for their sin. Nevertheless, he is not culpable for human sin for he is without sin and is not personally guilty of sin (not bearing the vitiated moral condition of original sin or committing actual sin). His substitutionary work is non-penal. It is penitential, being a kind of extended act of apology on behalf of fallen human beings that is vicarious, reparative, and accounts for human sin in an act that God treats as morally equivalent for the purposes of atonement. God is satisfied by this act. Like the Anselmian version of satisfaction, atonement is not about punishment. Rather, it is an alternative to punishment. And like these other accounts of atonement the mechanism by means of which reconciliation with God is made possible is the satisfaction of a moral demand. It is just that in this case, that demand is met by a satisfaction that is penitential rather than expiatory, as with Anselm, Aquinas, and Swinburne.

Having given a brief overview of the satisfaction family of atonement doctrines, we may ask: are there ways in which the theological notion of atonement has been applied to issues in punishment theory in non-theological, perhaps even legal, contexts? Indeed, there are. One of the best recent examples can be found in the work of philosopher Linda Radzik. She has explored an understanding of atonement shorn of much of its theological connotations and applied to several issues in law and politics.[129] Radzik begins her treatment with some bafflement about the meaning of atonement.

[129] Linda Radzik, *Making Amends.*

Agreeing that the dictionary definition of atonement is about at-one-ment, she notes that atonement is also often associated with suffering. The 'demand for atonement' she writes 'is usually perceived as threatening—a demand for punishment—rather than a call to the resumption of friendly relations'[130] as per the understanding of atonement as reconciliation. She goes on to say, 'The explanation for this dual set of associations is that suffering has often been demanded as a precondition for reconciliation. Over time, the end and the means have become disassociated.'[131] It may be that this misunderstanding becomes much easier to perpetrate if we remove atonement from its theological context. But if atonement is set within its proper theological context the language of reconciliation and suffering both make sense. For the idea is that Christ's vicarious action in human salvation brings about salvation through his own suffering. It is *redemption*. This latter term Radzik has a surer grip on, noting after recounting its theological origins that in a secular context it suggests the 'restoration of status, standing, or value.'[132] I have argued that in Christian doctrine, atonement is typically understood as the means by which redemption is brought about for fallen human beings. This obtains via reconciliation, and the act of reconciliation needed in order to redeem humanity is precisely the act of atonement. Nevertheless, Radzik does see that there is a difference between atonement and punishment. She locates this difference in the way atonement has to do with an action the wrongdoer does, whereas punishment is normally imposed upon the wrongdoer by another.[133] That said, she does allow that atonement may be self-punishment or equivalent to self-punishment—an admission that paves the way to one of the central themes of her work.[134] But here too there is conceptual fuzziness that greater attention to the theological context of atonement could have prevented.

As I have already indicated in this section, atonement and punishment are distinct though overlapping concepts, depending on the mechanism of atonement under consideration. Atonement *may* be brought about by punishment according to the defender of penal substitution. It *cannot* be brought about by punishment according to the advocate of Anselmian satisfaction. Much depends upon what it is that is said to *satisfy* the demands of divine positive law or of the divine nature (depending on the version of satisfaction in view).[135] For those who hold to some version of an Anselmian satisfaction doctrine, atonement is not something the wrongdoer *can* perform because of the morally vitiated state in which all fallen human beings find themselves. So, atonement is not brought about by the wrongdoer but by some other agent acting vicariously (i.e., Christ). And,

[130] Radzik, *Making Amends*, 6.
[131] Ibid. Stump picks up on Radzik's bafflement at the beginning of *Atonement*, 7.
[132] Radzik, *Making Amends*, 6.
[133] Ibid., 7. This echoes John Cottingham's remarks quoted in the Introduction to this thesis.
[134] Ibid.
[135] Anselm speaks rather of the satisfaction of divine honour in *Cur Deus Homo*. He also thinks that God must punish sin because the deity is essentially just—indeed, is justice itself—and as a consequence cannot wink at sin. These are important considerations in weighing Anselm's version of satisfaction.

although Radzik is right to say that punishment is normally imposed on the wrongdoer by another agent, that is not what happens in those theological accounts of atonement that collapse atonement into punishment (e.g., punishment versions of penal substitution). For in those doctrines, Christ is punished for human sin, and it is this punishment that brings about atonement. Yet the punishment concerned is something he voluntarily assumes as a penal substitute. It is not imposed by some other agent, but is an intra-trinitarian 'transaction' between God the Father and God the Son.[136] Since God is the appropriate legal power who may rightly impose such punishment, and since on the traditional versions of penal substitution Christ is indeed punished for human sin, it is not the case on this view that punishment is imposed by another agent, nor that it is something distinct from atonement. For the idea is that atonement may be brought about by means of the punishment of the right sort of innocent substitute—specifically, Christ. The thought is that as simultaneously both divine and human, Christ may represent humanity to God and God to humanity, thereby short-circuiting the need for atonement to be brought about by someone other than the guilty parties, which are fallen humans.

The Sequel

This completes our initial overview of punishment theories, their justification, and the doctrine of atonement. With these distinct notions made tolerably clear, we may proceed to the next step of considering the work of Anselm of Canterbury more carefully as the theological point of departure for a constructive Anselm-inspired or Anselmian account of legal punishment. Critical and constructive engagement with his work will form the basis of the final substantive chapter of the thesis. But before we get there, we need to have a more detailed understanding of the shape of his views on atonement, punishment, and forgiveness. To this we now turn.

[136] Transactional language in satisfaction accounts of atonement led to them being labelled 'commercial' accounts of atonement in the nineteenth century. See, e.g., A. A. Hodge, *The Atonement* (Philadelphia: Presbyterian Board of Publication, 1867). Whether a punishment can be something for which one volunteers as an innocent bystander, as it were, is a matter to which we shall return later in the thesis. But on the face of it, this is a very odd claim.

CHAPTER THREE

Anselm on Atonement, Punishment, and Forgiveness

In this chapter I will do some ground clearing in order to set out the constructive heart of this thesis, which is the task of the following chapter. Thus far, I have argued that Christian theology may provide resources for thinking about key issues in jurisprudence, especially when it comes to punishment theory. As I noted in the Introduction, in recent times a number of legal philosophers and historians have commented upon the fact that Western legal traditions are deeply influenced by theological ideas and even that theological concepts have funded and fructified emerging legal notions, especially in criminal law. This continues to the present day. Thus, for example, the American legal theorist John Witte Jr. writes,

> The spheres of law and religion also continue to cross-over and cross-fertilize each other. Law and religion remain conceptually related. They both draw upon prevailing concepts of the nature of being and order, the person and community, and knowledge and truth. They both embrace closely analogous doctrines of sin and crime, covenant and contract, righteousness and justice that invariably bleed together in the mind of the legislator, judge, and juror. Law and religion are methodologically related.[137]

This judgement has been echoed by theologians as well. In writing about the cross-fertilisation of concepts of justice and atonement in law and religion in the Western legal traditions the Anglican theologian Timothy Gorringe says this:

> The connection of [the] satisfaction theory [of atonement in theology] with the retributive theory of punishment was a commonplace of late nineteenth-century theology…. In fact, satisfaction theory emerged, in the eleventh century, at exactly the same time as the criminal law took shape. The two reacted upon each other. Theology drew on legal notions and legal discussion, as the history of satisfaction doctrine makes clear, and law turned to theology for metaphysical justification.[138]

As Gorringe's study unfolds it quickly becomes clear that he is no friend to either retributive accounts of punishment or the satisfaction account of atonement—both of which we will be concerned with in

[137] John Witte Jr. 'Law and Theology in the Western Legal Tradition.' A short historical survey of the way in which law and religion have interacted in the English jurisdiction can be found in Julian Rivers, *The Law of Organised Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010), ch. 1. An in-depth analysis of law in the biblical traditions from the point of view of a contemporary lawyer can be found in J. P. Burnside *God, Justice and Society: Aspects of Law and Legality in the Bible* (Oxford: Oxford University Press, 2011).
[138] Gorringe, *God's Just Vengeance*, 22.

this chapter. But the historical point remains: the two were entwined at an early stage and developed symbiotically in medieval Western theological and legal thought.

History is one thing. But to pick up upon Witte's observation, what, if anything, may religious ideas and even theology have to contribute to punishment theory *today*? Returning once more to Rafael Domingo's notion of God—and by extension, theological notions more generally—as metalegal concepts that might inform jurisprudence,[139] in this chapter I will set out one way of thinking about punishment that draws deeply upon a particular theological vision of the Christian doctrine of atonement that we encountered in the previous chapter, namely, the doctrine of *Anselmian satisfaction*. To recap: this doctrine was first systematically developed by the great medieval doctor of the Church and Archbishop of Canterbury, Anselm (1033-1109).[140] Anselm's account of atonement as satisfaction, which is arguably the most influential treatment of the mechanism of divine-human reconciliation in the history of Christian doctrine, provides a coherent vision of the work of Christ in which the notion of punishment plays a key role.[141] In fact, as I indicated in the overview of the doctrine of atonement provided in the preceding chapter, his account gives us a theological framework for thinking about punishment theory that may help make sense of a number of contested notions in jurisprudence, such as reparation for wrongdoing. It also sets punishment theory into a broader moral context that illuminates our understanding of other, closely related moral concepts such as forgiveness and desert.[142]

In laying out this account, what I am concerned to do is set the scene, so to speak, for a constructive view of how an Anselmian or Anselm-inspired understanding of punishment may be of service in contemporary jurisprudence—which I shall turn to in the next chapter. I am not primarily concerned with detailed Anselm exegesis, though we are concerned to give an account of Anselm's

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[139] See Domingo, *God and the Secular Legal System.* We discussed these ideas in Domingo's work in the Introduction.

[140] Although he was originally from Aosta in Italy, Anselm spent most of his adult life in the Benedictine Monastery in Bec, Northern France, and latterly as Archbishop of Canterbury. The standard biography of Anselm is R. W. Southern, *Anselm: A Portrait in a Landscape* (Cambridge: Cambridge University Press, 1990). A helpful recent overview of Anselm's life and work can be found in Thomas Williams's article, 'Anselm of Canterbury' in *The Stanford Encyclopedia of Philosophy* (2025) Edward N. Zalta & Uri Nodelman, eds., URL = <https://plato.stanford.edu/archives/sum2025/entries/anselm/> (last accessed 15/07/25).

[141] I have discussed the major models of atonement (including that of Anselm) in Crisp, *Approaching the Atonement.* The best short overview of Anselm's thought in print is Sandra Visser and Thomas Williams, *Anselm.* Great Medieval Thinkers (Oxford: Oxford University Press, 2009). The best current detailed treatment of his work and thought is Eileen C. Sweeney, *Anselm of Canterbury and the Desire for the Word* (Washington, D.C.: Catholic University of America, Press, 2012). Other helpful resources include: David Brown, 'Anselm on the Atonement' in Brian Davies and Brian Leftow, eds. *The Cambridge Companion to Anselm of Canterbury* (Cambridge: Cambridge University Press, 2004), ch. 12; and (older, but still useful) John McIntyre, *St Anselm and His Critics: A Re-Interpretation of the Cur Deus Homo* (Edinburgh: Oliver & Boyd, 1954).

[142] Political scientists Alex Tuckness and John Parrish go as far as to say that 'Immanuel Kant, drawing on a handful of predecessors such as Samuel Clarke, Richard Price, and Adam Smith, and more importantly, key tenets from Anselm's philosophy that had up to that point been associated almost exclusively with *divine* eternal punishment, more or less invented retributivism as we know it in contemporary political philosophy.' Tuckness and Parrish, 'Retributivism After Anselm' *The Saint Anselm Journal* 31.1 (2017): 17-38; 17. They develop this idea of the secularisation of Anselm's punishment theory at greater length in their book, *The Decline of Mercy in Public Life*.

views in this chapter. But that is a steppingstone toward the constructive task of the following chapter. I should also say, in keeping with previous methodological remarks in this thesis that I think it is important that where I do draw directly on Anselm I do so in a responsible and charitable way. It seems to me that an Anselmian account provides a perspective on the nature of punishment that may be of service in contemporary legal discussions of this matter, even when those discussions are not concerned with a theological justification for punishment. We might say that what I am after here is a retrieval of aspects of Anselm's thought, qualified and repaired where necessary to make it applicable in contemporary legal theory. As American philosopher Katherin A. Rogers puts it, 'The Anselmian embraces the basic outline initially proposed by Anselm, and then attempts to fill it in and build upon it.' [143] Such retrieval, which is a common practice in contemporary theology and philosophy,[144] is concerned with enlarging the conceptual resources available to those working in a particular area today. But a similar method could be applied to other areas of intellectual inquiry. Transposed into the context of jurisprudence, we can put it like this: retrieving the ideas of past thinkers may fructify legal theory today by helping us make better sense of areas of contemporary philosophical concern, such as the justification of punishment in a legal context. That is what I propose to do in this chapter.

We proceed as follows. In the first section, I give an overview of Anselm's understanding of punishment and atonement drawing on several of his treatises but in particular his major work, *Cur Deus Homo*.[145] Building on this, the second section looks more closely at Anselm's notions of forgiveness and retribution. The conclusion then segues to the final chapter, in which we will use Anselm's approach to assemble a contemporary account of punishment theory that draws on the recent work of the American philosopher, Katherin Rogers.

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[143] Katherin A. Rogers, *Freedom and Self-Creation: Anselmian Libertarianism* (Oxford: Oxford University Press, 2015), 2. As we shall see, this is not the first attempt to do such retrieval with Anselm's work and apply it to punishment theory. Rogers has already attempted this, and her work will provide a foil for the argument that follows.

[144] See, e.g., (in order of publication date) John Webster 'Theologies of Retrieval' in John B. Webster, Iain R. Torrance, and Kathryn Tanner, eds. *The Oxford Handbook of Systematic Theology* (Oxford: Oxford University Press, 2007), 583-599; Oliver D. Crisp, *Retrieving Doctrine: Essays in Reformed Theology* (Downers Grove: IVP Academic, 2011); Michael Allen and Scott R. Swain, *Reformed Catholicity: The Promise Of Retrieval For Theology And Biblical Interpretation* (Grand Rapids: Baker Academic, 2015); and Kent Eilers and W. David Buschart, *Theology as Retrieval: Receiving The Past, Renewing the Church* (Downers Grove: IVP Academic, 2015).

[145] The critical edition of Anselm's works is *S. Anselmi, Cantuariensis Archepiscopi, Opera Omnia, Tomus Primus et Tomus Secundus,* ed. F. S. Schmitt (Stuttgart: Friedrich Frommann Verlag, 1984 [1968]). I use the recent English translation of Anselm's works by Thomas Williams, entitled *Anselm: The Complete Treatises*, which is the best translation in print. (The edition published by Oxford University Press that is widely used, and which is the work of several different translators, is of varying quality and contains a number of errors. No translation is perfect, of course. But to my mind Williams's translation is the best in print.) In what follows I will simply refer to the relevant section of Anselm's work for ease of reference, e.g. '*Cur Deus Homo* I. 15, and give the page reference to the Williams translation.

Anselm on punishment and atonement

The details of Anselm's theological context need not concern us here.[146] This is not because his context or intellectual milieu is unimportant, but because we are primarily interested in retrieving the conceptual shape of his argument for atonement in relation to his understanding of punishment and forgiveness, for jurisprudential purposes. That said, it is important not to misrepresent Anselm's account or caricature it—and Anselm's work has suffered from many such misrepresentations over the centuries that appeal to his theological context in order to disparage or dismiss aspects of his argument.[147] As we progress I will take care to indicate where the views I am expressing can be found in Anselm's work, and where they diverge always with an eye to presenting Anselm's reasoning responsibly.[148]

As we saw in our overview in the previous chapter, Anselm's doctrine of atonement is called the satisfaction account, though in older manuals of Christian theology it is sometimes referred to as the commercial or transactional account.[149] This is because at the heart of his view is the idea that there is a transaction between God the Father and God the Son in bringing about atonement for human sin. For Anselm, central to the right understanding of atonement is the idea that for fallen humanity to be reconciled to Godself some act of satisfaction is required. The thought is that where two parties are estranged from one another because one party has committed a sin or crime against the other, the offender must proffer some satisfaction that makes amends for the sin or crime committed. Here satisfaction is understood in terms of compensation or reparation. What is more, the act of satisfaction needs to be of a particular sort, that is, an act that meets the conditions of some (suitable) moral or legal standard that may 'bridge' the gulf between offender and the one offended against, thereby repairing the breach between the two. In this connection, Tuckness and Parrish write that 'Anselm's

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[146] I have dealt with the theological shape of Anselm's doctrine elsewhere. See Crisp, *Approaching the Atonement,* ch. 4, and idem, *Participation and Atonement*, ch. 5. For more on the context of Anselm's work, including his work on atonement, see Giles E. M. Gasper, *Anselm of Canterbury and His Theological Inheritance* (London: Routledge, 2004), especially ch. 6.

[147] One of the most overrated and oft-repeated objections to Anselm's doctrine is that it is ineluctably medieval. His feudal context is said to fund and shape the way he conceives of atonement as dishonouring God. But once we remove his ideas from its cultural scaffolding, they cease to be persuasive. But this is just a sophisticated version of the genetic fallacy: the intellectual origins of an idea do not necessarily tell against its veracity; the two things, though related, are conceptually distinct. That said, not all objections to Anselm's work are weightless as recent feminist theology has amply demonstrated. See, e.g., the influential criticism to be found in Joanne Carlson Brown and Rebecca Parker's in classic essay, 'For God So Loved the World?' in Joanne Carlson Brown and Carole R. Bohn, eds. *Christianity, Patriarchy, and Abuse: A Feminist Critique* (New York: The Pilgrim Press, 1989), 1-30. I discuss this criticism in Crisp, *Approaching the Atonement*, ch. 8.

[148] I should note that Anselm's body of work is small (only 11 relatively short major works and some letters and fragments) and was written over a relatively short time from midlife to his death. There is little development or change in Anselm's thought, and he often refers readers to other works in which he develops a point that is only mentioned in passing in a different context. Thus, his corpus is both a manageable size, and relatively stable, conceptually speaking. In this connection, Visser and Williams observe that 'Anselm's thoughts do not really develop in any noticeable way; there is no early, middle, and late period, or anything like that…. So in general it is perfectly legitimate to use works from any period of his life to figure out what Anselm thought on a given issue.' Visser and Williams, *Anselm,* 5. That is what I propose to do here.

[149] See, e.g., Hodge, *The Atonement.*

use of the concept of "satisfaction," so central to medieval theology, draws our attention to the debt metaphor because it is the language of restitution: someone has been wronged and is therefore owed compensation of some sort.'[150] That seems right. Anselm is interested in satisfaction as an action that meets a standard, and in so doing provides compensation and restitution. This core principle of satisfaction can be put more formally, thus:

> SATISFACTION: an act by means of which the conditions of a moral or legal standard are met, providing compensation and restitution in order to reconcile estranged parties.

The idea is that reconciliation requires some act, normally offered to the offended party, that may compensate for the offence and restore relations between the offender and the offended. Now, for Anselm, the breach in question is between God and humanity. The nature of this breach turns on the concept of sin, which for present purposes we can characterise as a failure to conform to, or a transgression of, divine (moral) law.[151] The presumption, in common with Christian theology more generally, is that human beings have all sinned in some sense. The divine law to which Anselm appeals is understood in primarily positivist terms, as divine commands rather than as some sort of moral law that is woven into the world God creates, as is presumed in historic natural law theories like that of Thomas Aquinas.[152] So, human beings have all sinned against God contravening divine positive law, which requires some act of satisfaction in order for this breach to be repaired.

The means of making amends needs to meet the standard of SATISFACTION, and in the Christian *theological* context in which Anselm worked, the idea is that the penalty for sin of any kind (however trivial or severe) is ultimately separation from God. (The biblical basis for this claim comes from passages like Rom 6: 23, which says that 'the wages of sin is death, but the gift of God is eternal life.'[153]) Thus, a suitable act of satisfaction that meets the requirements set forth by divine fiat must include death as the penalty that is fixed for human disobedience. This, we might say, is the harsh treatment all those who commit sin are liable to suffer. In *Cur Deus Homo*, sin is understood as dishonouring God. Anselm writes, 'Necessarily, then, when God's honour is taken away, either it is paid back or else punishment follows. Otherwise, either God would not be just toward himself, or he

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[150] Tuckness and Parrish, *The Decline of Mercy in Public Life,* 113.

[151] I paraphrase the *Westminster Shorter Catechism* here. This echoes the biblical idea of *hamartia*, that is, missing the mark. There is a huge literature on the topic of sin in Christian theology, which we need not delve into here. Interested readers might begin by consulting J. B. Stump and Chad Meister, eds. *Original Sin and the Fall: Five Views* (Downers Grove: IVP Academic, 2020), and Thomas H. McCall, *Against God and Nature: The Doctrine of Sin* (Wheaton: Crossway, 2019). See also Oliver D. Crisp, 'Original Sin and Atonement' in Thomas P. Flint and Michael C. Rea, eds. *The Oxford Handbook of Philosophical Theology* (Oxford: Oxford University Press, 2009), 430-451. The working definition of sin I give in the body of the thesis is ecumenically well-grounded as the contributions to *Original Sin and the Fall* demonstrate.

[152] For a helpful recent discussion of these matters, see Mark Murphy, *God and Moral Law: On the Theistic Explanation of Morality* (Oxford: Oxford University Press, 2011), especially ch. 3.

[153] The full verse reads as follows: 'τὰ γὰρ ὀψώνια τῆς ἁμαρτίας θάνατος, τὸ δὲ χάρισμα τοῦ θεοῦ ζωὴ αἰώνιος ἐν Χριστῷ Ἰησοῦ τῷ κυρίῳ ἡμῶν.'

would lack the power to enforce either repayment, or punishment. And it is impious to think such a thing.'[154] It is the fact that sin dishonours God that requires satisfaction—which brings about the 'restoration' of divine honour. However, this is not because human sin actually harms the Deity in some way, for Anselm holds that God is incapable of being affected by things created. Rather, the thought is that human sin is an affront to divine honour in principle, even though it actually has no deleterious effect upon the divine nature. Put differently, although human sin dishonours God and requires satisfaction to be made, the dishonour in question does not harm or affect God in any intrinsic way. God remains the impartial and immutable (indeed, impassible) judge of human creatures.[155]

How may the dishonour of sin be expunged? According to Anselm, there are two ways in which satisfaction for sin can be provided. The first is in the punishment of the person or persons who have sinned. This would mean suffering the harsh treatment of death—and here death is not merely a physical event but an act that separates the human from the beneficence of her creator everlastingly. The alternative to this unpleasant outcome is that some suitable substitute provides an act of sufficient value that may be acceptable in lieu of punishment. This alternative to punishment cannot be an act that is *required* of the person who offers it. It must be an act that is *supererogatory* in nature—that is, is above and beyond what is required.[156] For if the act in question is required, because it falls under the description of SATISFACTION that pertains to the breach of human sin, then it cannot be offered as an atonement. For an act of atonement involves generating some merit that may be proffered instead of satisfaction by punishment. But such a merit can only be generated by someone who does not already owe all she is and all she does to God because of human sin.

Now, says Anselm, the only candidate who can act in this way on behalf of the whole of humanity is another human. Yet the candidate human cannot be sinful for then s/he would already owe all she has and does to God. So, she must be a sinless human. What is more, for the act in question to generate a merit sufficient to off-set the demerit of human sin, the act must be performed by a person who has an infinite value, so that their action can generate an infinite merit (or at least, a merit of a value sufficient to balance out the demerit of human sin). No mere human can do this, so Anselm avers. Thus, what is required for atonement is a candidate who is both fully and sinlessly human, and fully divine—which is to say, what is needed is a God-human, such as Christians have traditionally presumed is to be found in the doctrine of the incarnation.[157] As Sandra Visser and Thomas Williams put it, 'By offering his life for the honour of God … [Christ] gave God something of infinite value that could not be demanded from him as an obligation; consequently, he is entitled to a reward from

[154] Anselm, *Cur Deus Homo* I. 13, p. 269 in the Williams translation.
[155] See *Cur Deus Homo* I. 14-15, pp. 269-271.
[156] *Cur Deus Homo* II. 18, pp. 321-324.
[157] This is a very compressed version of the central argument of *Cur Deus Homo* II.

God. That reward is the mechanism by which the infinite value of Christ's life is applied to discharge the debt of sin.'[158]

The conceit of framing his account in this form '*remoto Christo*,' as he puts it in the beginning of *Cur Deus Homo*—that is, setting to one side the doctrine of incarnation and inquiring instead about the conditions needed for atonement to obtain—is something like a theological thought experiment. 'Suppose that we consider the conditions necessary for human salvation,' Anselm is in effect saying. 'And suppose we do so in principle, granting only that human beings all sin and fall short of God's glory and as a consequence require some act of reconciliation to Godself: what might the conditions for salvation be? How might the story of salvation go?'[159] Whether Anselm's r*emoto Christo* thought-experimental approach to the doctrine of atonement is an appropriate or helpful way of framing matters has been the subject of theological debate ever since he proposed it.[160]

For our purposes, what is important to understand from Anselm's doctrine of atonement are two core claims. The first of these is that atonement and punishment are two distinct but related means by which SATISFACTION may be offered to repair the breach in divine-human relations. Recall that Anselm thinks that 'when God's honour is taken away, either it is paid back [via some act of satisfaction] or else punishment follows. Otherwise, either God would not be just toward himself, or he would lack the power to enforce either repayment, or punishment.'[161] This has often been misunderstood in the philosophical-theological literature. For instance, in her recent magisterial treatment of the doctrine of atonement the American philosopher and medievalist Eleonore Stump persistently conflates punishment and satisfaction in her accounting of Anselm's doctrine. She even confuses his way of construing atonement with a related but distinct family of views called penal substitution.[162] She writes,

> according to interpretations [of atonement] of the Anselmian kind, what God does to act compatibly with his goodness or justice is in fact to fail to punish the guilty or to exact the

[158] Visser and Williams, *Anselm,* 231.
[159] See Anselm's preface to *Cur Deus Homo*, p. 246. There he says that he seeks to prove 'by necessary reasons—leaving Christ out of the picture [*remoto Christo*], as if nothing concerning him had ever taken place—that it is impossible for any human being to be saved apart from Christ.'
[160] Some critics of Anselm's work have worried that his approach is too speculative and philosophical and not nearly sufficiently grounded in appropriate sources of theological authority, such as Scripture and tradition. Here is not the place to pursue such worries, but it seems to me that they can be met if we understand Anselm's approach as something like a thought experiment concerning the conditions for salvation according to the broad tenets of medieval Catholic theology.
[161] *Cur Deus Homo* I. 13, p. 269.
[162] According to defenders of penal substitution, Christ's saving work involves him standing in the place of fallen human beings and taking upon himself the punishment that is due to them for their sin and dereliction. Some critics of this view have argued that it seems unjust for an innocent (Christ) to be punished in the place of the guilty (fallen humanity). In response, some defenders of penal substitution have opted for a weaker account, according to which Christ bears only the penal consequences of human sin, not the punishment for human sin strictly speaking. In contemporary legal terms, we might say that on this weaker view Christ bears the harsh treatment that would be a punishment if it were visited upon guilty human beings though it is not, in fact, that punishment. Thus, there is a kind of legal fiction at the heart of this view. For recent discussion that makes the connection between atonement theology and jurisprudence in this respect, see Craig, *Atonement and the Death of Christ,* and Crisp, *Participation and Atonement*119-146.

> payment of the debt or the penance from those who owe it since sinful human beings do not get the punishment they deserve or pay the debt or penance they owe. Worse yet, instead of punishing the guilty or exacting payment or penance from the sinful who owe it, God visits their merited punishment on the innocent or exacts the payment of their moral debt or penance from someone who does not owe it…. How is justice or goodness served by punishing a completely innocent person or exacting from him what he does not owe?[163]

But this is not what Anselm says. As we have just seen, on Anselm's way of thinking, atonement and punishment are not co-extensive. Punishment is an *alternative* to atonement, and that atonement must be made by a suitable candidate who is able to provide an act of sufficient merit to balance out human sin. Given that on Anselm's understanding of the plight of humanity, all human beings are sinful and owe all they are and all they do to God already, no *mere* human is a suitable candidate for an atoning act. It is for this reason that the God-human is required. For, by his reckoning, only someone who is both fully human and fully divine can bring about reconciliation by providing an act of sufficient merit to atone for sin on behalf of the rest of humanity, thereby repairing the breach between divine and human relations.

Another recent misunderstanding of Anselm in this connection can be found in Linda Radzik's monograph, *Making Amends*. She makes two mistakes that are important. The first is that she claims Anselm's account implies that 'an overabundance of merit can be transferred from one being to another.'[164] The second is that Anselm's doctrine of satisfaction is the same as the doctrine of penal substitution. She writes that penal substitution or vicarious punishment 'is without doubt the most controversial aspect of satisfaction theory among contemporary theologians.'[165] As to the first claim, Anselm's view does not imply the transference of merit from one person to another. Indeed, Anselm is opposed to the notion that punishment or merit is in principle transferrable from one person to another, which is one reason why his account of atonement is not an account of divine punishment. As we have seen, he claims that Christ acts vicariously on behalf of fallen human beings by bringing about satisfaction in an act of perfect supererogation that generates a superabundant merit. Its merit is infinitely greater than the demerit of human sin because it is the act of one who is both divine and human at one-and-the-same-time. The merit generated by this vicarious act may then be accepted by God the Father in lieu of punishment. There is no transfer of merit here. There is rather a kind of 'transaction' between the divine persons based on a supererogatory act that has an infinite value or merit that is used vicariously and reparatively. It is the difference between someone making a transaction on your behalf (such as the payment of a fine or other penalty), and a person standing in the place of another or representing another (as in the substitution of a player in a game of football or

[163] Stump, *Atonement*, 24.
[164] Radzik, *Making Amends,* 28.
[165] Ibid., 29.

the representation of an absent client by an authorised agent in a business deal). Clearly, these things are not the same, and the differences between them are legally salient.

The second mistake Radzik makes is rather like that made by Stump: she conflates satisfaction and penal substitution. This is important because the two accounts of atonement have at their heart distinct mechanisms by means of which reconciliation is brought about. In the case of satisfaction, the mechanism is the vicarious act of supererogatory merit that is made reparative in the transaction between God the Father and God the Son. In the case of penal substitution, the mechanism is either (a) the punishment of the Son on behalf of fallen human beings, or (b) the Son taking upon himself the penal consequences (i.e., harm) of human sin that would be punishment if served upon fallen human beings, but which cannot be punishment in the case of Christ because he is innocent of sin. The first version of penal substitution is usually called the *punishment version* of the doctrine. The second version is referred to as the *penal consequences version*.[166] If Christ is punished, then this is clearly inconsistent with Anselmian satisfaction. For satisfaction is an alternative to punishment, as previously stated in connection with Stump's misunderstanding. If Christ suffers the penal consequences of human sin that is not a punishment, strictly speaking. But it is still inconsistent with Anselm's doctrine because he conceives of atonement as a vicarious meritorious act of supererogation offered to God the Father in the place of punishment. Atonement is not punishment; nor is it the penal consequences or harm that is suffered in the place of punishment. Thus, whereas in penal substitution the atonement is understood to be a substitutionary act—Christ standing in for fallen humanity—in Anselm's doctrine it is merely a vicarious act. Clarifying these mistakes helps us to see the scope and nature of Anselm's account of reconciliation more clearly, in distinction from near-relative doctrines such as penal substitution.

Anselm on forgiveness and retribution

The second core claim of Anselm's doctrine relevant for our purposes is that satisfaction for sin must be kept distinct from forgiveness. Although he does not offer anything like a complete account of forgiveness, it seems from what he does say here and there that Anselm thinks of forgiveness along the lines of *foregoing compensation or reparation*. That is: to forgive someone is to set to one side the claim upon the offender that the person offended has in order to make suitable reparations for the harm done. According to Anselm, it is not merely that God does not, as a matter of fact, forgive human sin. It is rather that God *cannot* forgive sin in this way. For, according to Anselm, God is essentially just, that is, just in very nature. In fact, on his way of thinking, God is justice itself. We might say with Anselm that justice is an essential divine attribute that is identical with the divine

[166] I have discussed this in detail in Crisp, *Participation and Atonement.*

nature (a very strong metaphysical claim indeed, but not untypical of much traditional, orthodox Christian thought in this regard [167]). Because God is essentially just the penalty of sin cannot be remitted without satisfaction being made, either in punishment or atonement. For, so Anselm seems to think, if God were to forgive sin without punishment or satisfaction being made, God would be acting unjustly. Since it is impossible for God to act unjustly (because God is *essentially* just), God cannot forgive sin without punishment or satisfaction being made for sin. Thus Anselm:

> Forgiving sin in this way is the same as not punishing it. But to order [that is, to organise, or regulate] sin in the right way when no recompense is made just is to punish sin. So if sin is not punished, it is left unordered…. But it is not fitting for God to leave anything unordered in his kingdom…. So, it is not fitting for God to leave sin unpunished in this way.[168]

Later defenders of satisfaction like Thomas Aquinas or, more recently, Richard Swinburne, have sought to ameliorate this rather harsh line, preferring instead to claim that God *may* punish sin but that God may also forgive it.[169] This is not Anselm's view, however.

Now, like many historic Christian thinkers, Anselm conceives of divine justice in retributive terms.[170] He holds that human sin requires punishment in virtue of the fact that in sinning against God human beings dishonour God. Behind this claim seems to be what in the contemporary moral philosophy literature would be called a notion of *desert*. That is, human beings deserve to be punished because they are moral agents and have committed sin against their creator. Anselm seems to think that any sin, no matter how trivial, incurs an everlasting penalty because it is directed against a being of infinite worth and goodness, namely, God. More precisely, he holds that all sin is committed against God and that all sin incurs an infinite demerit because of the value and status of the person against whom the sin is committed.

These two related moral claims now appear much less secure than they may have done in the eleventh century. Whether all human sin is committed against God seems at least moot (surely at least some sin is directed against other creatures and not against God?). And, whether the gravity of a

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[167] The argument for this claim can be found in Anselm, *Monologion* 16-17, pp. 44-46. The broader claim has to do with classical theism and its view of the divine nature as metaphysically non-composite or simple. For elucidation of this point, see Thomas Aquinas, *Summa Theologica*, trans. Brothers of the English Dominican Province (New York: Benziger Bros., 1948), 5 vols., I. Qs. 3, 21. For a recent version exploration of various facets of this view, see the essays collected in Jonathan Fuqua and Robert C. Koons, eds. *Classical Theism: New Essays on the Metaphysics of God*. Routledge Studies in the Philosophy of Religion (New York: Routledge, 2023). For a recent restatement of a classical theistic view, see Thomas Joseph White, O.P., *The Trinity: On the Nature and Mystery of the One God* (Washington, D.C.: The Catholic University of America Press, 2022).

[168] Anselm, *Cur Deus Homo* I.12, pp. 266-267.

[169] The obvious objection to such reasoning is: why does God require atonement or punishment of sin if it may simply be forgiven? The answer (of both Aquinas and Swinburne) is that God opts to punish sin or require satisfaction for it because God wants to convey to creatures the moral seriousness of their wrongdoing. This is not a view that would have cut much ice with Anselm. Aquinas's position is set out in his *Summa Theologiae*. Richard Swinburne's views can be found in *Responsibility and Atonement*.

[170] I have discussed this in more detail in Crisp, 'Divine Retribution: A Defence' in *Sophia* 42 (2003): 35-52.

particular sin or crime is calibrated to the value placed upon the person against whom the offence is committed seems dubious. Many people no longer have the intuition that *just in virtue of her social standing or status* the death of a head of state is more morally serious than the death of a mere citizen. Of course, the social and political implications of the death of a head of state is normally much more significant than that of a mere citizen. But that is another matter. Nevertheless, for our purposes all we need is the idea that a sin or crime that is intentionally committed by a moral agent incurs a penalty that requires satisfaction. Although Anselm doesn't formalise his understanding of retribution in his works, something like the following version of retribution seems consistent with much of what he does say:

> PURE RETRIBUTIVISM: A nonconsequentialist approach to the justification of punishment that is backwards looking, that is, concerned with the sinful act and its history. At the heart of this view is the notion of desert. Usually such views include a principle of responsibility (calibrating *mens rea* to *actus reus*), a principle of proportionality (that ensures the relative gravity of punishment is proportionate to the moral gravity of the offence), and a principle of just requital (that ensures that the intentional harsh treatment endured for a criminal act voluntarily undertaken by the offender is morally good).[171]

We may now outline the main tenets of Anselm's argument for satisfaction in the following summary statement:

> (1) God is essentially just.
> (2) Divine distributive justice is retributive in nature.
> (3) Sin is heinous; it derogates from God's honour.
> (4) The penalty for sin must be sufficient requital for human sin.
> (5) The penalty for sin may be met in one of two ways: the punishment of sin; or some appropriate supererogatory act of sufficient value that it may be accepted as a satisfaction for human sin.
> (6) The atonement is hypothetically necessary for satisfaction [that is, it is necessary on the supposition that God ordains the salvation of human beings].
> (7) God cannot forgive sin independent of satisfaction.
> (8) The atonement 'restores' divine honour; it is sufficient requital for human sin.
> (9) The benefits of atonement are appropriated by means of the sacramental life of the Church.[172]

Conclusion

In the last chapter we considered the nature of punishment and its justification, providing a working definition of legal punishment, and then sketched an overview of the doctrine of atonement. These elements provide the conceptual background needed in order to pursue our task of resourcing contemporary punishment theory with ideas borrowed and adapted from theology. In this chapter, we took the next step, focusing in on the work of one influential historic theologian whose work was

[171] Borrowed from Crisp, *Participation and Atonement,* 98-99.
[172] Adapted from Crisp, *Participation and Atonement*, 97.

showcased in that overview, namely, Anselm of Canterbury. Our task was to give an account of some of the most important aspects of his doctrine of atonement that will be of use in the context of contemporary jurisprudence. Particular attention was given to his ideas about atonement or making amends, punishment, and forgiveness. In the process, we also had cause to rebut several persistent mistakes about the shape of his view that continue to be made in the contemporary philosophical and legal literature. Having furnished ourselves with this information, we may turn in the next chapter to the attempt to retrieve a broadly Anselmian approach to punishment, in critical dialogue with Katherin Rogers.

CHAPTER FOUR

Anselmian Punishment Theory

In the previous chapter, we saw that according to Anselm's view of atonement as satisfaction, sin must either be punished in the person of the perpetrator or atoned for by an act of supererogation performed by a suitable candidate that satisfies the moral standard set by divine positive law. Forgiveness, understood as the foregoing of reparation, is excluded since it is infeasible for God to forgive sin absent punishment or atonement. Satisfaction is required to restore the broken relationship between humanity and the Deity. We are now able to develop this framework in a more Anselm*ian* direction, transposing the core insights provided by Anselm from a theological to a more jurisprudential register. Our question is this: how might these insights of be help in thinking about punishment theory? That is the focus of this chapter.

An Anselmian account of punishment, atonement, and forgiveness

This is not the first attempt in the recent literature to harness Anselm's approach to satisfaction in a bid to resource contemporary punishment theory. Katherin Rogers has spent some time developing such a view across several published articles and books. She calls her approach the *character creation theory* but makes clear that it has its origins in Anselm's thought, adapted and amended as needed for a contemporary legal context. She writes,

> It turns out that Anselm provides a series of plausible theses about human choice, action, and responsibility, out of which a viable theory of punishment, what I call the Character Creation Theory, can be constructed—a theory which satisfies our various intuitions about punishment at least as well as other retributivist views, but which can make sense of the appropriateness of forgiveness.[173]

She develops both a version of the character creation theory that she draws directly from Anselm, as well as a more Anselm-inspired—or Anselmian, as I am using the term here—version of as well.[174] Now, it is important to note that Rogers is interested in the *philosophical* shape of Anselm's work and in the Anselmian version she develops from him for contemporary punishment theory. Her

[173] Katherin A. Rogers, 'Anselm on the Character Creation Theory of Punishment' *Saint Anselm Journal* 4.2 (2007): 1-8; 2. See also Rogers, 'Retribution, Forgiveness, and the Character Creation Theory of Punishment' *Social Theory and Practice* 33 (2007), 75–103; Rogers, *Anselm on Freedom* (Oxford: Oxford University Press, 2008); and Rogers, *Freedom and Self-Creation,* especially ch. 8.

[174] The Anselmian version is her longer essay, 'Retribution, Forgiveness, and the Character Creation Theory of Punishment.'

interests are not primarily theological. Nevertheless, it is a truism that in the work of medieval thinkers, theological and philosophical ideas are bound up in a composite whole. Calling Anselm a 'philosopher' is anachronistic precisely because he did not view the philosophical ideas he developed as independent of the theology he wrote—as anyone familiar with his work will quickly ascertain. The two were aspects of one seamless task, namely his faith seeking understanding project, showcased in his *Proslogion*, and his search for what he called the 'reason [or rule] of faith' (*ratio fidei*).[175] One may attempt a transposition of the medieval ideas into a contemporary idiom, and that is what Rogers does try to do. However, care must be taken in doing so. For one might worry that in retrieving Anselm's argument for contemporary punishment theory we may end up doing violence to his thought, distorting it in the process. This is a concern commonly expressed by theologians who think that one cannot ignore the theological context in which such work arose. The idea of theological or philosophical retrieval of past ideas, so the objection goes, often ends up being equivalent to conceptual strip-mining: taking what is thought useful from a historic thinker but paying no attention to the context and culture in which the ideas arose.

As my comments about conceptual retrieval earlier in this thesis intimated, I have some sympathy for these concerns. Getting the history right when tackling the ideas and arguments of thinkers in the past is often essential to rightly comprehending the shape and scope of their projects. No one is well served by intellectual caricature; on this I think historically responsible scholarship agrees. But the way this concern is framed represents a false dichotomy. Responsible scholarship that seeks to retrieve ideas from the past for contemporary constructive work in a discipline such as theology, philosophy, or law, should be carried out in a manner that is cognisant of the need to be historically responsible to the sources used. That does not always mean we get the interpretation of a given thinker right. But it does mean a charitable and hermeneutically sensitive approach to these matters is requisite.

Now, Rogers is both a scholar of medieval thought and a Christian philosopher interested in contemporary arguments and ideas. Though her interpretation of Anselm may at times be objected to, she is not attempting to caricature his work. It seems to me to be perfectly responsible to do what she does in giving a more historically focused rendition of an argument as well as a retrieval of the

[175] Anselm prefaces *Proslogion* with these words, 'thinking that what I had rejoiced to discover [vis. The central 'ontological' argument for the existence of God with which the work opens] would please a reader if it were written down, I wrote about it and a number of other things in the work that follows, adopting the role of someone trying to raise his mind to the contemplation of God and seeking to understand what he believes.' Anselm, Prologue to the *Proslogion*, p. 96 in the Williams translation. The idea of faith seeking understanding (*fides quarens intellectum*) Anselm adapted from Augustine (*credo ut intelligam*). It is one of the ironies of history that his so-called ontological argument for the existence of God (as Kant dubbed it) is set in the context of a treatise that is framed in the form of a prayer—hardly the dispassionate armchair philosopher Anselm is sometimes caricatured as being! A helpful recent work that explores this theme is Gavin Ortlund, *Anselm's Pursuit of Joy: A Commentary on the Proslogion* (Washington, D.C.: Catholic University of America Press, 2020).

central ideas in a contemporary context, adjusted and amended to better serve the very different needs of the present time. So, let us consider both aspects of her project synoptically with a view to using her work as a foil for the development of an Anselmian punishment theory.

The character creation account

Rogers's character creation theory depends on several claims. The first of these is an endorsement of the need for punishment as desert for an offence, familiar in the retribution literature. This should come as no surprise given that, as we have already seen in previous chapters, Anselm is clearly a retributivist of sorts about punishment. His doctrine of satisfaction depends on a notion of desert. The assumption on which his entire account of atonement turns is that human beings are the appropriate targets of Christ's reconciling work because they have sinned and are deserving of punishment as created moral agents. Similarly, Rogers writes 'the wicked deserve unhappiness. Punishment is justified because the one with bad character ought to suffer.'[176] But it is not the PURE RETRIBUTIVISM we encountered at the end of the last chapter that she is interested in, which is entirely backwards looking in its justification of punishment. Rather, her theory 'is a "present looking" theory. It is not the past which is gone, or the future which has not yet arrived, which justifies punishment. Rather what justifies punishment is the condition of the offender in the present—at the time he is punished.'[177] It is important to understand just how innovative this is. What it amounts to, is the claim that it is the state of a person *now* that grounds or justifies punishment, not, or not merely, what they have done in the past as per much traditional retributivism.

Now, there are at least two ways we could construe this central claim of the character creation account. The first is a *moderate version* of the view. On this way of interpreting it, Rogers is suggesting that although an offender may be legally punished for their past crime, what they have done in the past is not *the only* consideration when it comes to thinking about their ongoing punishment in the present. Perhaps it is not even the *primary* consideration. Nevertheless, it is the current state of the offender that matters *most* in determining the severity of an offender's ongoing punishment. Such a moderating gloss on Rogers's remarks would keep her account within the ambit of retributivism, as a kind of 'mixed' or hybrid retributivism. For it would preserve a role for the past offence in justifying the punishment currently being suffered by the offender. This is how she does in fact understand the application of her view to a political context—to which we shall return later in the chapter.

But at first glance her view suggests this is not what Rogers has in mind. Rather, she seems to be saying that it is *only* the present state of the offender that justifies punishment, not the past (as

[176] Rogers, 'Anselm on the Character Creation Theory of Punishment,' 2.
[177] Ibid.

with PURE RETRIBUTIVISM), and not the future (as with consequentialism). On this second way of construing her view, it looks superficially like a version of retributivism but is not in fact a version of retributivism. Neither is it a version of consequentialism, since it is grounded in the present, not the future nor in counterfactuals that are future-oriented. It is not a hybrid view either, strictly speaking. Although it could be moderated to include a retributivist element, and perhaps even a consequentialist element, on this way of understanding her, the central claim of the character creation view locates the justification of punishment squarely and wholly in the present. How things are *now* is what grounds the harm suffered by the offender in legal punishment. Call this second interpretation, the *hard-present version* of the view. We will return to these two versions of the character creation view later in the chapter.

This notion that punishment should be 'present-looking' rather than either 'backwards looking,' like PURE RETRIBUTIVISM, or 'forward looking' like a pure version of consequentialism, is, she thinks, an idea that can be found in Anselm's work. In his treatise *On The Virginal Conception and Original Sin*, Anselm says that it is the will of the person that is sinful and culpable for a particular action, not the action itself nor its consequences. He writes:

> Consider both an action by which something comes into being—an action that exists only so long as something is coming into being and passes out of existence once that thing has been brought about—and the product that comes into being and remains in existence. For example, when someone writes what ought not to be written, the action of writing passes out of existence, but it brings into being certain marks that remain in existence. If the action were a sin, then once the action passed out of existence, the sin likewise would pass out of existence and would no longer exist. And if the product were a sin, then as long as the product remained in existence, the sin would never be wiped away. Yet in fact we observe that very often sins are not destroyed when the action is destroyed, and that they are destroyed even though the product is not destroyed. Hence, neither the action that passes out of existence nor the product that remains in existence is ever a sin.[178]

Anselm's argument in this passage is that actions only exist for the time it takes to perform them. If I undertake to write a letter, say, then that action occurs during the time it takes me to pick up my pen, put it to paper, and write out the words of the letter. Once I have finished the writing and put my pen down once more, the action is completed. It no longer exists. Suppose my letter was a tissue of lies and opprobrium written to cast aspersions upon an acquaintance known to my correspondent. Then, if it were the action itself that was immoral or indiscreet, once I had completed the writing of the letter, the sin would cease. But according to Anselm, it is not the act of composition that makes the letter immoral or indiscreet. Nor is it the output of that act—that is, the letter itself. Once composed, it exists and may do its work if it is posted to the intended recipient. But the letter is

[178] Anselm *On the Virginal Conception and On Original Sin*, 4, p. 335 in Thomas Williams's translation.

an artefact, and artefacts are (normally) neither moral or immoral in and of themselves.[179] They are just the literary remains of the act of composition. But if it is not the act of composition that is immoral, nor the output of that act in the letter itself, what *is* immoral about the letter? Surely, says Anselm, it is the *willing* of its composition. In other words, it is the exercise of agency in volition that makes an action culpable. But that is not something wholly in the past (like the act of composition) nor a consequence of that action (the letter). Rather, it is something that is present and continues to be present going forward, for it pertains to the agent who composes it.

But note that Anselm does not claim in this passage that the *present* exercise of volition is what is salient. He claims merely that it is the exercise of volition that makes an action praise or blameworthy. This is important. For it seems that the passage in Anselm from which she takes inspiration for her character creation account of punishment does not appear to support the radical relocation of the justification for punishment to the present tense that is required for the hard-present version of character creation; it seems much more consonant with something like the moderate account.

Nevertheless, this passage from Anselm is important for the claim Rogers goes on to make, which is that offences may be 'forgiven,' by which she seems to mean *commuted*. She writes, 'For want of a better term I shall adopt "forgiveness" to mean the legal choice to punish less because the one under sentence has come to deserve less punishment.'[180] The central idea here is that there are reasons why a person may have their punishment reduced if they demonstrate repentance and contrition for some past sin and a desire to make reparation in the present. But *commuting* a punishment because of extenuating circumstances or because of evidence of contrition and penitence after having committed the crime is not the same as *forgiving* a person their sin or crime.[181] Here is why. Forgiveness is usually thought to involve setting to one side *the prerogative to punish* or at least

[179] Note the qualification here, which I have added. To Anselm it might be objected that some artefacts *are* immoral. For instance, an obscene image or photograph. To this objection the Anselmian might reply that it is not the image itself that is obscene, strictly speaking, but the use to which it is put by the agent who makes it and/or distributes it. But that is consistent with the claim that it is the agent who wills to make and/or distribute the image that is deserving of praise or blame, not the act of making it nor (strictly speaking) the artefact itself. But I am inclined to think that this is not a terribly plausible response. Some images are truly ghastly and surely obscene independent of any use to which they are put. Hence my inclusion of a qualification in the sentence above.

[180] Rogers, 'Retribution, Forgiveness, and the Character Creation Theory of Punishment,' 76.

[181] The literature on forgiveness is considerable. Two helpful treatments in jurisprudence are the influential treatment by Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988), and, more recently, Christopher Bennett, 'The Alteration Thesis: Forgiveness as a Normative Power' *Philosophy and Public Affairs* 46.2 (2018): 207-233. (Bennett has a longstanding research interest in punishment theory, e.g., his monograph *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge: Cambridge University Press, 2008).) An excellent recent symposium on forgiveness is Brandon Warmke, Dana Kay Nelkin, and Michael McKenna, eds. *Forgiveness and Its Moral Dimensions* (Oxford: Oxford University Press, 2021). Rogers's use of the term 'forgiveness' in her character creation view is not one that falls under the description of forgiveness as it is typically understood in this literature. Hence my suggestion of 'commuting' instead of 'forgiving,' which also has relevant legal resonance, and which (so it seems to me) avoids mischaracterising forgiveness.

setting aside *resentment toward the offender*.[182] And it is often thought to have a normative dimension too, altering the situation created by wrongdoing.[183] But none of these notions is in view in Rogers's use of the term in her character creation account. What she means by 'forgiveness' is what is typically meant by the commuting of a sentence in law. For to commute a sentence is to reduce the penalty applied to an offender. It does not do away with the punishment itself. Rather, it reduces punishment in view of extenuating circumstances—that is, taking into consideration some reason that gives grounds for a sentence to be reduced. And that is just what Rogers has in mind. She writes 'I will use "forgiveness" to mean the choice to punish less because the offender has come to deserve less punishment.'[184] Here she is thinking of someone who, though guilty of a crime, comes to regret and repent of the crime, and seeks ways to make amends for it after the fact. But plainly, forgiveness is *not* what is entailed by the reduction of a penalty in view of extenuating circumstances. Forgiveness involves setting aside the very idea of a penalty or of the resentment that usually motivates the desire for a penalty to be applied. For these reasons, I will refer to Rogers's notion of 'forgiving' sin and crimes as the commuting of punishment because this term better expresses what she means to convey. It also avoids confusing Rogers's eccentric use of 'forgiveness' with Anselm's idea of forgiveness, which, as we have already seen in the previous chapter, he thinks of as in opposition to punishment, rather than as being exercised by means of punishment, even if it is punishment whose harm is reduced in being commuted.

Let us turn next to the question of desert. This is something Rogers regards as unanalyzable. That is, it is a notion that depends on moral intuitions that are conceptually brute or primitive.[185] She

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[182] For a helpful account of these two ways of conceiving forgiveness in the context of the doctrine of atonement, see Jonathan Rutledge, *Forgiveness and Atonement: Christ's Restorative Sacrifice.* Routledge Studies in Analytic and Systematic Theology (London: Routledge, 2022), especially ch. 3.

[183] As Bennett says in his treatment of forgiveness in terms of what he labels the *Alteration Thesis*, forgiveness has *normative power* (involving the 'exercise of power to create, waive or alter secondary obligations related to the wrongdoing'); is *pluralist* (because varying obligations and circumstances mean there is a plurality of the forms of forgiveness); and involves *commitment* (namely, undertaking 'an obligation no longer to treat the wrongdoer as standing under those obligations'). See Bennett, 'The Alteration Thesis,' 207-208. An important feature of Bennett's account is that forgiveness is not merely a psychological phenomenon—and that, I think, fits very nicely with the theological presuppositions of the Anselmian.

[184] Rogers, 'Anselm on the Character Creation Theory of Punishment,' 1.

[185] It is common among Anglo-American philosophers to reason based on intuitions. Indeed, some analytic philosophers have argued that without the assumption that our intuitions are innocent until proven guilty, it is difficult to know how we can reason in substantive ways about many important things like logic, arithmetic, morality, and philosophy itself. But intuitions are brute. They are a kind of 'seeming,' as in 'well, that's just how things seem to me.' How are we to ground the assumption that intuitions are innocent until proven guilty? That is a thorny metaphilosophical question. One option is to say it is unanalyzable: that is, there is no further explanation. Another is to push back against reasoning on the basis of intuition, arguing for some alternative (an option that has begun to be explored in some recent philosophy of science). One worry here is that of infinite regress: surely our reasoning has to be grounded in *something*? The option of many theistic philosophers is to ground the appeal to intuition in a design plan ordained by God. In other words, our capacity to reason based on intuition is built into us by the deity who formed us. This view is often associated with the work of Alvin Plantinga. (See his *Warranted Christian Belief* (New York: Oxford University Press, 2000.).) For an intriguing assessment of it, see Robert C. Koons, '(Q) The General Argument from Intuition' in Jerry L. Walls and Trent Dougherty, eds. *Two Dozen (or so) Arguments for God: The Plantinga Project* (Oxford: Oxford University Press, 2018),

acknowledges that not everyone shares such intuitions. Like some other modern retributivists, she hopes that this intuition may be 'pumped' by thought experiments that may sway the sceptical. For instance, suppose a sane, responsible agent is properly convicted of a heinous crime—perhaps rape or the cold-blooded murder of a child. There is overwhelming evidence of the crime being committed by this person, and that they did so with premeditation and without psychological or pharmaceutical impediment. Now, if the sanction applied by the state is one that has the appearance of harm, but which in fact provides the offender with a life of constant pleasure (say, a custodial sentence but in a facility that gives inmates access to daily spar treatments, massage therapies, a full fitness suite, the full range of streamed subscription television platforms, and the diet of their choice cooked by Michelin-standard chefs), most people would have the intuition that something was amiss. Justice is not being served. And this intuition can be pumped to generate the thought that the reason why most people will think this sanction is inappropriate is because the offender deserves to suffer for the crime they have committed. That is, in the case of a heinous crime, we tend to think that the only appropriate sanction is one that involves harm because there is some sort of intuitive connection between the heinousness of the act committed and the sanction this deserves.[186]

However, desert is a necessary but not sufficient condition for legal punishment. For *legal* punishment must be warranted, not merely deserved. As Rogers observes, 'That you deserve to suffer does not necessarily entail that the state, society, or anyone is obliged or even permitted to give you what you deserve.'[187] For not every immoral or inappropriate or even wrong action is punishable *by law*. This is an important consideration in determining the limits of legal punishment.

To see this, consider a hypothetical case (like the one Rogers provides) in which a manager forms an intense dislike for someone in her office through no fault of their own. When this poor unfortunate makes a formal application to be promoted, the manager deliberately sabotages her chances of success. Yet in doing so she disguises her real intent so that the applicant fails to get promotion while she, as manager, is in no way implicated in the process that led to that outcome. Having been apprised of the particulars of this situation, our natural response is to think that the manager deserves some sort of recompense for her mismanagement of the situation—perhaps even, some punishment. But no legal punishment is warranted in this case because there is no evidence of wrongdoing that may be prosecuted in law. Thus, desert is not a sufficient condition for legal

239-258. For an excellent book length treatment of many of these issues, see Michael Bergmann, *Radical Skepticism & Epistemic Intuition* (Oxford: Oxford University Press, 2021).

[186] I am riffing on the example provided by Rogers in 'Retribution, Forgiveness, and the Character Creation Theory of Punishment,' 78-79. It is worth pointing out that this sort of intuition pump, though familiar in the jurisprudence literature, has been challenged in some work on the notion of desert. See, e.g., Boxer, *Rethinking Responsibility*, Caruso, *Rejecting Retributivism,* and Kershnar, *Desert Collapses.*

[187] Ibid., 82.

punishment. Some further warrant is needed. In this case, some evidence of wrongdoing that indicates the manager was clearly culpable for her handling of the matter that falls under the remit of the law.

A further claim Rogers makes, is that responsibility and culpability depend on a strong doctrine of human freedom. This is why her view is called the character creation approach. As Rogers puts it, 'I christen my view the Character Creation Theory of Punishment due to this principle that you create your character through your choices.'[188] Once again, she maintains that this is consonant with Anselm, who defends a particular version of what today would be called a libertarian account of human free will. She writes, 'Anselm holds that a choice which is determined by the agent's character may be considered *a se* if the character itself is the product of the agent's past *a se* choices.'[189] One way to characterise libertarianism in this context is as the view that humans have free will; that free will is incompatible with determinism; and that determinism is false. Thus, libertarianism about human free will denies that choices that are free and for which human beings are morally responsible (and culpable) can be determined.[190]

It is sometimes claimed that this is a common pre-philosophical view, and perhaps the default view among those who have not been trained in philosophy. Robert Kane, who has been an important defender of libertarianism in recent Anglo-American philosophy typifies this sort of view. He writes 'Ordinary persons might grant that many everyday freedoms are compatible with determinism and still wonder if there is not also some deeper freedom—the freedom to have an *ultimate* say in what we choose or desire to do in the first place—that is incompatible with determinism…. this deeper freedom is what was traditionally meant by "free *will.*"'[191] Whether libertarianism is what is meant by this 'ultimate' notion of free will and whether it is a kind of pre-philosophical default is a moot point in the literature.[192] But it is certainly often *thought* to be such a default. This is true even when such a view is the target of challenge. Thus, for example, in a recent symposium on free will

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[188] Rogers, 'Anselm on the Character Creation Theory of Punishment,' 3.

[189] Rogers, *Freedom and Self-Creation*, 13. Choices that are '*a se*' in the sense used here are choices made from oneself independent of anything else, not '*per accidens*,' that is, by means of some other contingent thing.

[190] In the recent philosophical literature, determinism is often characterised as the thesis that the past plus the laws of nature yield a single future. This way of construing determinism is owed to Peter van Inwagen in his influential monograph, *An Essay on Free Will* (Oxford: Oxford University Press, 1986). The literature on free will is enormous and has developed in significant ways in the last 40 years. Three helpful overviews can be found in Robert Kane, *Free Will: A Contemporary Introduction* (Oxford: Oxford University Press, 2005); Kevin Timpe, *Free Will: Sourcehood and its Alternatives.* Second Edition (London: Bloomsbury, 2012); and Michael McKenna and Derk Pereboom, *Free Will: A Contemporary Introduction* (London: Routledge, 2016). For a useful recent collection of essays on the theological connection with free will see Aku Visala and Olli-Pekka Vainio, eds. *Theological Perspectives on Free Will: Compatibility, Christology, and Community.* Routledge Studies in Analytic and Systematic Theology (London: Routledge, 2024).

[191] Robert Kane, 'Responsibility, Luck, and Chance: Reflections on Free Will and Indeterminism' reprinted in John Martin Fischer, ed. *Free Will: Critical Concepts in Philosophy Vol. III Libertarianism, Alternative Possibilities, and Moral Responsibility* (London: Routledge, 2005), 143-163; 144. He has defended this view at greater length in Kane, *The Significant of Free Will* (Oxford: Oxford University Press, 1999).

[192] As recent work in experimental philosophy has demonstrated. See, e.g., Thomas Nadelhoffer, Dena Gromet, Geoffrey Goodwin, Eddy Nahmias, Chandra Sripada, and Walter Sinnott-Armstrong 'The Mind, the Brain, and the Law' in Thomas Nadelhoffer, ed. *The Future of Punishment* (New York: Oxford University Press, 2013), 194-212.

scepticism and the law, Gregg Caruso, Elizabeth Shaw, and Derk Pereboom write, 'the criminal law is founded on the idea that most normal, rational persons can be held morally responsible for their actions since they have freely chosen them—if this is mistaken, the entire foundation of the criminal law is defective.'[193]

For present purposes, let us presume that at least some versions of libertarian free will are both coherent and plausible ways of thinking about human free will and moral responsibility. We do not need to make a judgment about whether libertarianism is also a *true* account of human freedom. A view can be both coherent and plausible, and yet false—such as the ancient Ptolemaic cosmology that was supplanted by heliocentrism. And one can articulate and defend a candidate view without endorsing it; in fact, one might think there is virtue in considering a proposition from various angles with charity and care, even if one does not endorse it. This is commonplace in the contemporary Anglo-American philosophical literature, and I propose to do just that here. Versions of libertarianism are live options in the current philosophical literature and have been ably defended by a range of different philosophers for centuries. Given that there is no consensus on the metaphysics of free will, and versions of libertarianism have a long pedigree and are widely regarded by competent scholars as viable and defensible, libertarianism remains a plausible option. That is sufficient for present purposes.[194]

Now, Rogers defends an account of free will that draws upon the work of Anselm. His views are found in several different places in his corpus but are expounded with some care in his treatise *De Libertate Arbitrii* (*On the Freedom of Choice*).[195] He had what by today's standards would count as an unusual view of freedom of choice, which relates it to truth. Freedom, he thinks, has to do with *rectitude*, that is, 'proper conformity' to a right standard. As Nicholas Wolterstorff puts it, Anselm's doctrine is about 'measuring up.'[196] Anselm defines free will as the *'capacity [power] for preserving*

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[193] Gregg D. Caruso, Elizabeth Shaw, and Derk Pereboom, 'Free Will Skepticism in Law and Society: An Overview,' in Shaw, Pereboom, and Caruso, eds. *Free Will Skepticism in Law and Society*, 11. Emphases added. The authors go on to cite the US Supreme Court in this connection, exemplifying the point being made: 'A "universal and persistent" foundation stone in our system of law, and particularly in our approach to punishment, sentencing, and incarceration, is the belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."' *United States* v. *Grayson*, 438 U.S. 41 at 52 (1978), quoting *Morissette* v. *United States*, 342 U.S. 246, 250 (1957).

[194] For the record: when it comes to the metaphysics of free will, I am a compatibilist (i.e., someone who thinks human free will is in principle compatible with determinism) rather than a libertarian. For a sketch of my own position, see, Oliver Crisp, 'Meticulous Providence,' in Oliver D. Crisp and Fred Sander, eds. *Divine Action and Providence: Explorations in Constructive Dogmatics*. Proceedings of the Seventh Los Angeles Theology Conference, 2019 (Grand Rapids: Zondervan Academic, 2019), 21-39.

[195] From this point onward I will refer to Anselm's works, such as *De Libertate Arbitrii,* in parenthesis in the body of the text by abbreviated title (DLA), followed by the chapter in which the reference appears.

[196] Nicholas Wolterstorff, 'True Words' in Alan G. Padgett and Patrick R. Keifert, eds. *But Is It All True? The Bible and The Question of Truth* (Grand Rapids: Eerdmans, 2006), 34-43. On p. 42 of this essay he writes, 'let me offer my own suggestion [about truth], which comes rather close to Anselm's. I suggest that the root notion of truth is that of something's measuring up—that is, measuring up in being or excellence…. When we speak of "a true so-and-so," we are implicitly drawing a contrast between this so-and-so that measures up and other so-and-so's that do not, or would not, measure up.

rectitude of the will for the sake of rectitude itself' (DLA, 3, emphasis added). In Chapter 13 of his work, he makes it clear that he thinks this definition is *perfecta* or complete, that is, gives the necessary and sufficient conditions for what freedom consists in. He says, 'But since the foregoing definition is perfected by genus and difference such that it can contain neither more nor less than what we call freedom, nothing should be added or subtracted from it.' (DLA, 13.)

Later in DLA Anselm glosses his definition as follows. By *power* or capacity is meant 'the genus of liberty' (i.e., the taxonomic unit, or family or type, of liberty; to have power is to have liberty). By *preserving* is meant a second distinction, separating out one sort of power, the power of preserving a thing, from other sorts of powers, like the power to laugh or walk. When he speaks of *rectitude* he means a further refinement, by which we see that the power involved is one pertaining to 'rightness' not to something else (e.g. the power to preserve gold, or to preserve Indian tigers, or whatever). The *will* has to do with a specification of what sort of rectitude is involved, i.e. a rectitude or 'rightness' of will, not a 'rightness' of, say, an opinion, or of a mathematical formula. Next, when he speaks of rectitude of will *for the sake of rectitude itself* he means rightness for the sake of rightness, not for the sake of something else, or for some other end, e.g. the power to preserve the 'rightness' of the will naturally, or preserving the 'rightness' of the will for the sake of financial gain, or something like that. (Anselm gives the example of a dog that preserves rectitude of will naturally by loving its master. But, in his view, a dog is not a rational creature like a human being. It does not preserve rectitude of will for the sake of rectitude itself, as rational animals can.)

But what does he mean by *rectitude* of will? It seems an odd thing to equate freedom of choice with rectitude. In his treatise *De Veritate* or *On Truth* (hereinafter, DV), Anselm explains that rectitude of will is equivalent to truth *in the will* or *willing what one ought to will*, what is truthful (he explicitly equates truth with rectitude). The Devil, he remarks, abandoned the truth through an act of will (see Jn 8: 44). In the case of his sin, the truth he abandoned was

> Nothing but rectitude. For if, so long as he wills what he ought, which is why he was given a will, he was in rectitude and in truth, and when he willed what he ought not, he deserted rectitude and truth, such truth can only be understood as rectitude since both truth and rectitude of will were nothing other than to will what he ought. (DV 4.)

Thus rectitude, what is right, is equated with truth. In which case, we can rephrase Anselm's definition as follows:

What exactly that contrast is, will differ from case to case…. One has to gather from the context what contrast it is that the speaker had in mind, and hence what sort of failure to measure up he meant to call attention to.'

> FREE WILL: this is the power of preserving the truthfulness of the will (i.e. what the will was meant to be) for the sake of the truthfulness of the will itself (i.e. for the sake of what the will was meant to be).

For, say Sandra Visser and Thomas Williams in commenting on this aspect of Anselm's work, 'Just as the truth or rectitude of a statement is the statement's doing what statements were made to do, the truth or rectitude of will is the will's doing what wills were made to do.'[197] (DV 12.) Later Anselm equates rectitude with justice and moral evaluation:

> S. When the just man wills what he ought, he preserves rectitude of will for no other reason than to preserve it. But one who wills what he ought to only when forced or persuaded by extraneous reward can be said to preserve rectitude, not for its own sake, but for the sake of something else.
> T. Therefore the will is just when it preserves its rectitude for the sake of rectitude itself. (DV 12.)

This implies that freedom of choice involves the power to preserve rectitude of will for the sake of rectitude itself as well as the power for justice and moral praiseworthiness. In other words, a truly free choice is one that has rectitude, justice and moral praiseworthiness. But there is also an epistemic component to Anselm's doctrine. The truly free creature is one that wills what she ought, what is just, what is right (= rectitude) because she knows it is right. So, freedom of choice in the highest sense is the preserve of rational creatures, like humans and angels. In which case, we could finesse our initial rephrasing of Anselm's definition in this way:

> ANSELMIAN FREE WILL: freedom of choice is the power of preserving what we ought to will (the truthfulness of what we were meant to be) for the sake of what we ought to will itself (i.e. for the sake of the truth of what we were meant to be).

Now, the following things should be clear from this brief overview of Anselm's account of human free will. First, he thinks that rational creatures have freedom just in case they have the power to make self-initiated choices. In the contemporary literature on the metaphysics of free will this is usually cast in terms of the notion of *sourcehood*.[198] Anselm, along with other libertarians, claims that rational creatures like humans have freedom of will provided they are the *source* of their choice. If their choice can be traced beyond their own act of willing then their choice was not free in the relevant sense, and they are not responsible for their action—or at least, their responsibility is diminished corresponding to the extent to which their act of will is traceable beyond themselves to

[197] Sandra Visser and Thomas Williams, 'Anselm's Account of Freedom 'in Brian Davies and Brian Leftow, eds. *The Cambridge Companion to Anselm* (Cambridge: Cambridge University Press, 2004), 179-203; 181.
[198] See Timpe, *Free Will.*

some other prior cause. Second, he holds the there is an important connection between free choice, rectitude, truth, justice and morality, such that freedom is the power of preserving the rightness of the will for the sake of that rightness itself. There are other aspects of Anselm's account of human freedom that we would need to provide were we attempting to give a comprehensive treatment of his view of free will. But for present purposes, what we have should be sufficient.[199]

Retributivism and character creation

Next, having outlined the major assumptions with which Rogers approaches the task of constructing her Anselmian character creation view, namely, desert for punishment, the present-tense justification of punishment, the notion of commuting punishment in certain circumstances, and the requirement of a particular sort of agent-causal libertarian account of human free will, let us consider the relationship of her account to retributivism in more detail. As I have already indicated, her character creation theory of punishment is, in fact, a form of 'impure' or 'mixed' moral retributivism. She writes,

> I assume a simple political model in which the main purposes of the state are protecting the rights of its citizens and keeping order. I hold that, although all of the wicked deserve unhappiness, the state must appeal to consequentialist reasons like prevention and deterrence to justify its actually giving particular offenders what they in fact deserve. In its secular version, then, the theory is an "impure" or "mixed" retributivism which can help itself to consequentialist reasoning regarding the role of "legal" punishment.[200]

Let us unpack this a little. Her position encompasses widely held retributivist assumptions such as that only the offender is punishable for a crime; that the offending action should be voluntary (in the agent-causal libertarian sense), and one for which the offender can be held morally responsible (the *mens rea* condition). She also thinks there must be proportionality between punishment and crime, and that the punishment must come after the offence.[201] The kind of retributivism she is interested in (and which she thinks reflects Anselm's approach) is what she calls *moral retributivism*. In this context moral retributivism is the notion, which we have already encountered in introducing

[199] For instance, Anselm's account doesn't appear to *require* a principle of alternate possibilities (PAP) for a choice to be free in the relevant sense, though this is a matter of dispute in the secondary literature. (Rogers denies this; Visser and Williams affirm it.) PAP is the principle that a person is morally responsible for what she has done only if she could have done otherwise. For further discussion of this point, see Visser and Williams, 'Anselm's Account of Freedom,' and Rogers, *Anselm on Freedom*. But compare Rogers, *Freedom and Self-Creation*, and *Anselm on Freedom*. See also David Robb, 'Moral Responsibility and the Principle of Alternative Possibilities,' in *The Stanford Encyclopedia of Philosophy* (Winter 2023), Edward N. Zalta & Uri Nodelman eds., URL = <https://plato.stanford.edu/archives/win2023/entries/alternative-possibilities/>. (Last accessed 17/07/25.)

[200] Rogers, 'Anselm on the Character Creation Theory of Punishment,' 3.

[201] Rogers, 'Retribution, Forgiveness, and the Character Creation Theory of Punishment,' 77. She thinks that her view is able to account for several other widespread moral intuitions about punishment. These are that brutal punishment should be prohibited, and that crimes successfully executed should be punished more severely than ones that were merely attempts. (Ibid.)

her view, that 'the justification of punishment involves the claim that the wicked deserve to suffer on account of their bad character.'[202] It is, she admits, not a justification for legal punishment that has found support in the jurisprudence literature, though she thinks her Anselmian argument makes a case for taking such a view much more seriously than is commonly the case. She writes, 'my theory is at least as successful as other retributivist theories in grounding our intuitions about punishment, but its main advantage is that it succeeds, where other retributivist theories are at a loss, in explaining why repentance ought to be taken seriously in assessing desert.'[203]

Rogers proposes that the power of the state to punish is limited to the purpose of protecting rights of citizens and keeping order.[204] The justification for legal punishment, then, cannot be just that a person deserves punishment or censure. There must also be some additional condition having to do with the state's role in protecting rights and keeping order. Thus, although the reason a person is punished is a question of desert—they did it, and they acted as morally responsible agents in the prosecution of their action—for legal punishment to be appropriate there must also be a consequentialist component to the justification required. Rogers writes, 'My position, then, incorporating this simple political model, is an "impure" or "mixed" retributivism that can help itself to consequentialist reasoning regarding the role of legal punishment.'[205] The consequentialist component has to do with the political purposes of the state in punishing, which pertain to rights and keeping order. In short, if a person breaks the law and may be held morally responsible for their action, and if that crime is of sufficient seriousness that it merits legal sanction (because it violates the rights of other citizens or disrupts civic order), then it is punishable by the state.[206]

Thus far we have considered several fundamental assumptions that inform Rogers's Anselmian punishment theory, and the sort of retributivism she endorses, in the context of what she calls a 'simple political model' in which the role of the state in punishing wrongdoers is about the protection of rights and the preservation of order. But what about her account makes it a 'character creation' view? She maintains that her account develops an idea latent in Anselm's thought, that the significant moral choices a person makes are character-forming. By making the choices we do, we shape the characters we have over time. So, consistently free morally significant choices for the good will develop an overall well-formed character, whereas consistently poor free morally significant choices will lead to an overall malformed character. Borrowing the term 'self-forming willings' from Robert Kane's work on the metaphysics of free will, Rogers writes that 'these [morally significant

[202] Rogers, 'Retribution, Forgiveness, and the Character Creation Theory of Punishment,' 75.
[203] Ibid. This may be right though her account is not the *only* recent attempt to take repentance seriously in a legal context. See, e.g., the work of Radzik, Bennett, and Duff, which we have already encountered.
[204] Rogers, 'Retribution, Forgiveness, and the Character Creation Theory of Punishment,' 75.
[205] Ibid., 84.
[206] Ibid., 82-83.

free] choices are "self-forming willings" by which we build our characters over time and make ourselves into the people that we are.'[207]

To illustrate this aspect of her account, let us consider two similar hypothetical scenarios. In the first, an adult man—call him, with a nod to notorious examples in the history of true crime, *Dr Crippen*—is tried and convicted based on overwhelming evidence for the premeditated murder of his partner.[208] He is sentenced to a long period of incarceration, which he serves. Although he is not a problematic prisoner and serves his time peaceably, he shows no real sign of repentance for his crime even up to the day he is released from prison as an old man.

Now, for the second scenario. The circumstances are almost identical. That is, like the first scenario, the second centres on another adult man whom we will call *Dr Krippen*. He is also tried and convicted based on overwhelming evidence for the premeditated murder of his partner, and is sentenced to a long period of incarceration, which he serves. However, unlike Dr Crippen, Krippen shows real remorse, and a pronounced sense of guilt anguish over his crime. Over the course of his incarceration makes visible efforts to reform and to become a better person. Once he is released, he devotes himself to works of mercy in an act of penitence, serving as a volunteer in various capacities in his local community, including working in a homeless hostel.

Rogers would have us think of these two similar individuals rather differently. On her way of thinking, both men have formed their characters through free and morally significant choices over time. Both have made very bad choices that have led them to become murderers. Yet in the case of Dr Crippen, this does not lead to any remorse or sense of guilt. Nor does it lead him to mend his ways. As far as we know he remains unrepentant until his dying day. His punishment, so Rogers maintains, is just. There is a fit between crime and punishment, and it is appropriately focused on the person who has committed the crime, for what he did in the past in his right mind, based on morally significant free choices that shaped his character in such a way that he ended up murdering his partner. The same is not true of Dr Krippen, however. He did make poor morally significant free choices that led him to commit a similar crime to Dr Crippen. But thereafter their paths diverge. Krippen realizes the horror of his crime, feels remorse, guilt, is repentant, and seeks some kind of reparation through living a better life in prison, which continues in his works of service to his community once he is released. Rogers suggests that we should treat Dr Krippen differently from Dr Crippen. Because he is demonstrably penitent and has sought to live a useful and changed life in prison, his sentence should be reviewed. In her estimation, such a person would seem to be a good candidate for having his

[207] Rogers, 'Retribution, Forgiveness, and the Character Creation Theory of Punishment,' 80.
[208] See, for example, the recent bestseller by Hallie Rubenhold, *Story of a Murder: The Wives, The Mistresses and Dr* Crippen (London: Penguin Random House, 2025), and David James Smith, *Supper with The Crippens: A New Investigation into One of The Most Notorious Domestic Murders in History* (London: Orion Publishing, 2005). Of course, the historic Dr Crippen was hanged rather than given a long custodial sentence, as I have it in the thought experiment above.

punishment commuted (= 'forgiven'). That is, if his case were to be reviewed, say, fifteen years into a life sentence and it be found that he was an exemplary and penitent prisoner demonstrably transformed for the better from the hardened murderer who entered the prison, he should be treated differently than Dr Crippen who exhibits no such change. She writes,

> In the course of building your character, it seems possible to repudiate past wrongdoing, to regret it so deeply and hate it so utterly that it no longer casts its shadow over you. It seems possible to convert from being wicked to being good. And since it is moral status that grounds desert and the good do not deserve suffering, genuine repentance should lesson [sic] or negate punishment…. The character creation theorist … can argue that a long time spent being good is evidence of a significant change in character for the better. And since what grounds desert is present moral character, the offender who demonstrates a much better moral character than he did at the time he committed the crime deserves less punishment than he would have at that time.[209]

Recall that it is present moral character that grounds desert on the character creation view, not, as with PURE RETRIBUTIVISM, the past offence. Dr Crippen continues to make poor choices that continue to shape his character toward wickedness. So, there is no reason to mitigate his punishment. He is culpable for his past action and nothing about his character after that event indicates any change of heart. But there is such evidence in the case of Dr Krippen. It is because his character fifteen years later is so changed for the better that it is appropriate to consider commuting his sentence.

Now, there are several ways to object to Rogers's conclusion about commuting punishment in the face of clear evidence of present penitence for past sin. One option would be to adopt a different justification for legal punishment. One could still be a retributivist, and thus an Anselmian, but appeal to another version of retributivism. For instance, one could, like legal scholar Michael Moore, adopt a what Rogers calls a 'payback' version of retributivism. This is a justification consistent with PURE RETRIBUTIVISM, according to which the justification for punishment is that the offender should be harmed in proportion to the harm caused to the victim. What is deserved depends upon the nature of the offence, which is in the past. He maintains that to 'say that a person deserves punishment is to say that he has culpably done wrong.' Moreover, 'culpability … focuses on the mental states of the actor at the time of the wrongful act.'[210] The punishment suffered cannot be ameliorated by subsequent penitence; what is relevant for the purposes of desert is the past harm of the offence, not what happens in the life of the offender thereafter.

Another way to rebut Rogers's concerns about commuting punishment for penitent offenders is to deny that such offenders deserve to have their punishments commuted. This may be a way of

[209] Rogers, 'Retribution, Forgiveness, and the Character Creation Theory of Punishment,' 95, 96.
[210] Michael Moore, *Placing Blame,* 168, 404. Rogers discusses this point in 'Retribution, Forgiveness, and the Character Creation Theory of Punishment,' 81.

reinforcing the appeal to a 'payback' version of retribution, like that advocated by Moore. Then the idea would be that it is only the past offence that is salient for the grounding of desert and the fit between crime and punishment and penitent offenders do not deserve to have their punishments commuted precisely because they were the agents responsible for the past crime in the first place. But one could also run this concern independently of a payback retributivism.

A third option would be to appeal to consequentialist considerations. Even if one concedes to Rogers that desert should be grounded in the present state of the offender, and not just considerations arising from the nature of the past offence, one might still think the state has a responsibility to be seen to deal severely with crime. Then, even if strictly speaking there are grounds for considering commuting the punishment of a penitent offender, there may still be overriding political reasons for the state to continue the harm of incarceration, such as 'being tough on crime.' The harm suffered by such penitent offenders might not be punishment, strictly speaking. But it would be harm that is justified for consequentialist reasons.[211]

Much here depends on whether one shares the intuition that drives much of Rogers's character creation view that demonstrable penitence after the fact may, under certain circumstances, be a sufficient reason to revisit the sentence for a given crime and commute it. If one thinks, as she does, that we do in some fundamental sense create our characters through morally significant free choices, and if we can undergo the kind of moral transformation suggested by cases like that of Dr Krippen on the basis of contrition, repentance, and a desire to make amends, then it makes sense to think that her present-tense account of desert has some value. Even if a person deserved the strongest punishment upon being convicted of their offence, it may be that a significant change of circumstances further down the line, so to speak, may mean revisiting that judgment is appropriate. Such a position may also have positive consequences for both the offender and society. But it is not without its costs.

Taking stock

Before considering objections to the character creation view, let us pause to review what we have gleaned thus far. We have seen that Rogers sets out an account of legal punishment, drawing deeply from the work of Anselm of Canterbury to do so. Yet she does not do so slavishly. She amends and repairs and even extends aspects of a broadly Anselmian way of thinking about several key issues that bear upon punishment to fashion what she thinks of as an account that may be serviceable in the contemporary legal debate about the conceptual shape of punishment and its justification. In other

[211] Rogers discusses several of these options in 'Retribution, Forgiveness, and the Character Creation Theory of Punishment,' 96.

words, she attempts an Anselm-inspired or Anselmian theory, which she dubs the character creation view.

I have discussed what I take to be the main load-bearing structures of her argument. These are: a commitment to an agent-causal account of human free will similar to that of Anselm; a particular view of the nature of punishment that is concerned with desert for crimes committed in the past by the offender that fall under the remit of the law; a hybrid account of retribution that allows for a consequentialist aspect to punishment; a simple political model in which the main purposes of the state are protecting the rights of its citizens and keeping order; the idea that significantly free moral choices for which a person is responsible shapes an individual's character for good or ill; the idea that what grounds desert is the present shape of one's character not merely the seriousness of a person's past crime, which amounts to a denial of payback retributivism; and the notion that on the basis of the present grounding of desert, a person's punishment may be commuted (= 'forgiven' in Rogers's nomenclature).

Is this a coherent picture? Earlier I teased out two versions of Rogers's innovative idea that desert is grounded in the present state of a person's character. It is now clear in light of a fuller consideration of the different aspects of her account that she opts for the moderate construal of that view, which is consistent with hybrid retributivism, not the hard version that is inconsistent with it. Yet it is this innovation that is both the strength and weakness of the view. It is its strength in the sense that it is what makes her view what we might describe as a character creation account of desert for punishment. To put it another way, it is what warrants her own description of the view as a species of *moral* retributivism. But it is also a weakness precisely because it requires a judgment about the ongoing severity of legal punishment given extenuating circumstances such as evidence of true contrition and penitence—which are notions rich with theological resonance. How one might judge such contrition and penitence, and whether it is appropriate to let such considerations affect the severity and duration of a punishment for a past crime are questions that go to the heart of her Anselmian view.

Assessing the character creation account

We are now in a position to offer a critical assessment of the character creation view. Here we must bear in mind several things that were introduced to the discussion earlier in the thesis. These are matters that are both formal as well as material in nature. On the formal side of things, we are concerned with method, ascertaining whether contemporary discussion of punishment theory may be helped by borrowing ideas from adjacent disciplines that are treated in a metalegal way (to borrow Domingo's term once more), as concepts that may throw new light on discussion in jurisprudence.

But we are also concerned with matters of a more material nature. These have to do with the nature of legal punishment and its justification. We shall consider these matters in turn.

(a) Libertarian free will and the simple political model

To begin with, let us consider the relevant metalegal issues Rogers's account raises. The two that stand out are her defence of an Anselm-inspired account of libertarian morally significant free choice, and her 'simple political model.' Earlier, I said that libertarianism in the free will literature is a defensible view, which is a live option in the philosophical literature on action theory. I also indicated that there is a lively debate in the jurisprudence literature about the place of free will in the making of judgments about moral responsibility and culpability. Indeed, in the recent literature the notion of free will and the notion of moral responsibility have come apart.[212] There is a serious debate about moral responsibility independent of the question of free will. But the two are clearly closely related issues. Rogers is an implacable opponent of those in the philosophical, psychological, and legal communities who are sceptical about human free will or even deny it.[213] The topic of free will is also theologically relevant. Although there have been a small minority of Christian theologians whose views seem to deny human free will,[214] the overwhelming majority have defended the view that humans are moral agents and do have free will in some sense. The reason is not hard to find. Without human agency and free will it is difficult to see how human beings may be held responsible for their sins, which is a linchpin of the Christian doctrine of salvation, not to mention the doctrine of sin.

Anselm's account of free will is both an important feature of his own work, and a necessary component of Rogers's character creation view. For only if we are moral agents who are capable of making morally significant free choices of a libertarian sort on at least some occasions are we in a position to be agents whose actions may form our characters in some fashion. Recall that Anselm's view of free will as the preservation of rectitude for its own sake can be put like this:

> ANSELMIAN FREE WILL: freedom of choice is the power of preserving what we ought to will (the truthfulness of what we were meant to be) for the sake of what we ought to will itself (i.e. for the sake of the truth of what we were meant to be).

Rogers's position is consistent with this Anselmian insight. One might object to Anselm and Rogers on the shape of the libertarian view they defend. One might even reject human agency and

[212] See, e.g., the essays in Dana Kay Nelkin and Derk Pereboom, eds. *The Oxford Handbook of Moral Responsibility* (Oxford: Oxford University Press, 2022).

[213] She has recently written a book on the topic, in addition to the various things she says while setting out her character creation view. See Rogers, *The Experimental Approach to Free Will: Free Will in The Laboratory* (London: Routledge, 2022).

[214] I have in mind Protestant thinkers like the magisterial Reformer Huldrych Zwingli (1484-1531) and the New England theologian, Jonathan Edwards (1703-1758), both of whom were theological determinists of (what appears to be) a hard variety. I have discussed this matter in Crisp, 'Hard Zwinglianism,' currently unpublished.

moral responsibility as some legal theorists have begun to do in the recent literature. But, as Rogers points out, doing so requires such an enormous revision to how we think of ourselves, as well as how social institutions like the law work that adopting some sort of free will scepticism or hard determinism seems like the counsel of despair.[215] At least this much seems true: Anselm and Rogers set out an account of human free will that is plausible, and that fits well with the sort of human agency presumed by much black letter law.

The same seems true of her simple political model. By which I mean, what she presumes in this model is sufficiently conceptually 'thin' that is commits her to little that could not be defended according to the canons of political philosophy. The idea that the main purpose of the state is to protect the rights of citizens and keep order is not unimpeachable, of course, but it is hardly controversial. More problematic is her claim that her hybrid retributivism includes a consequentialist element that means prevention and deterrence may factor into the justification of particular legal punishments. For she is clear that one implication of this is that the state may, under certain circumstances, visit the penal consequences of a crime upon an innocent person. She writes,

> In fact, although it makes me uncomfortable, nothing in my argument here will rule out the possibility that the state might be justified, for consequentialist reasons, in causing harm to someone who has committed a crime, but who is not wicked and so does not in fact deserve the suffering.[216]

This is a common worry for theories of punishment that include a consequentialist element. But I am not entirely clear why her view *must* include this, if, as she stipulates, her account of legal punishment has the provision that punishment must be of the offender, and not another. For, then, it is built into her view that only the offender deserves punishment. Naturally, there will be cases where the state mistakenly 'punishes' an innocent person. (She distinguishes this Pickwickean sense of punishment by distinguishing between 'punishment' and 'punishment,*' which is not, I think, an altogether helpful way to demarcate the two things.[217]) Miscarriages of justice cannot be excluded in any theory of punishment. But, as lawyers often say, one does not make law on the basis of exceptions. It seems to me that Rogers would be better advised to reject the implication that the character creation view implies the state may, under certain circumstances, visit the penal consequences of a crime upon an innocent person. All she needs to say is that miscarriages of justice may apply, and innocent people may be wrongly convicted and 'punished' by the state in its attempt to protect the rights of citizens and keep order. But if desert is a property of offenders, which she

[215] I offered a more substantial critique of free will scepticism as it has been applied to punishment theory in my Aberdeen LLM thesis.
[216] Rogers, 'Retribution, Forgiveness, and the Character Creation Theory of Punishment,' 84.
[217] Ibid.

maintains, then it is offenders that should be punished. Prevention and Deterrence are not well-served when the penal consequences of punishment are misapplied. That is a travesty of justice not an instance of it.[218]

(b) The coherence of the character creation view

Let us turn to matters of a more material nature, pertaining to the substance of Rogers's character creation view. Here the most pressing question is whether her view is coherent. She defends a hybrid retributivism that includes the notion of desert applied to the offender (not to another), a 'fit' between crime and punishment (denying brutal punishment), and the (partial) grounding of desert in the present in order to motivate a notion of commuting punishment, which she terms 'forgiveness.' Punishment is not merely about payback, she avers. It is also about judging whether a person still deserves the punishment meted out in the past, which is a matter of character creation. Punishment may be commuted for evident contrition and penitence, as my hypothetical example of Drs Crippen and Krippen sought to illustrate.

Now, earlier I suggested that her idea that desert is grounded in the present could be taken in one of two ways. The first, moderate account is consistent with hybrid retributivism because it only partially grounds desert in the present. The second, hard-present account is not consistent with hybrid retributivism because it wholly grounds desert in the present. Despite some infelicities of expression, taken as a whole, her view is clearly an instance of a moderate rather than a hard-present view of desert-grounding. Now, on the face of it, the moderate grounding of desert in the present seems consistent with a hybrid retributivism. But it does raise some concerns. Here is one that seems especially pressing. In the course of serving a legal punishment, when should the commuting of a sentence become feasible? Should the offender be able to have his sentence commuted *immediately* after being sentenced? That seems impractical and potentially morally dubious as well, given the shape of Rogers's character creation view. For the thought is surely that a person has to demonstrate contrition and remorse through the exercise of morally significant free will after the events for which they are being punished. In which case, commuting a sentence immediately after it has been handed out seems overhasty, for there has not been enough time (or evidence) of the right sort of character creation in order to form a judgment about circumstances that may ameliorate the length or severity of an offender's punishment. But when should such considerations become legally salient? That is rather more difficult to say. Making some sort of provision for the commuting of punishment surely

[218] Rogers writes 'I take it that punishment* could only be morally permissible in extreme cases.' (Ibid.) Fair enough. An action may be morally permissible without it being just. There are plenty of examples of laws that make certain actions permissible that we would think are actually unjust, as debates about the death penalty or legal abortion make clear. It might have been better had Rogers simply said that. As it stands, her remarks could be misinterpreted as being more permissive than they are.

requires a framework for making judgments of this sort that includes a reasonable timeframe. One worry is that any such timeframe will appear arbitrary and could be challenged. 'How can you be sure that Dr Krippen is indeed contrite for his offence, and truly penitent at this point in his sentence? How can we know that it is not merely a charade he is performing in order to reduce his time in custody?' Such questions are important for the implementation of these considerations in black letter law. Parole boards already do some of this work; it might be possible to beef-up their role in order to meet the concerns Rogers has, but is that desirable? The same is true, *mutatis mutandis,* for the severity of a punishment. Commute it to what? We might say. If the crime is premeditated uxoricide, as in the case of Dr Krippen, then even if there is strong circumstantial evidence of contrition and penitence over a long period of time while incarcerated, it is still the case that he has taken a life. The payback retributivist is surely right to worry that commuting a sentence for such crime places the onus on the character and behaviour of the offender, not on the heinousness of the offence. It would be an invidious account of punishment that redirected us from the objective moral harm of something like Dr Crippen's crime to focus on the subjective moral development of Crippen himself. Contrition and penitence, as well as reform and moral transformation are worthy goals, and programmes that make this possible are surely to be encouraged. But whether this should be at the cost of privileging such remedial efforts over the 'payback' of desert is another matter—especially when it is the loss of human life that is in view.

(c) An Ansemlian approach?

Next, let us turn to the Anselmian credentials of Rogers's character creation view. There is a difference between a view being a natural development out of an earlier one, and a view being sparked by another, though it is quite distinct from the earlier position. To give some examples, as I noted in the Introduction, the legal positivism of H. L. A. Hart is a development of the positivism of the nineteenth century legal theorist, John Austin. Hart's positivism owed much to that of Austin, but it was not identical with Austin's view; it was a further iteration of an existing position. By contrast, the consequentialism of, say, Jeremy Bentham (mentor of sorts to both Austin and Hart), was developed at least in part as an alternative to the justification for punishment offered by those who, like Immanuel Kant, were thorough-going retributivists. We might say that consequentialism has retributivism as its point of departure.

The agent causal view Rogers proposes is certainly very similar to that of Anselm, and draws on important insights he develops, as we have seen. It may not be identical with Anselm's view, but it is certainly indebted to his account in important respects. And, as Anselm's corpus makes clear, his concerns about human agency were theological through and through. For, it is because we are created in the divine image that we are agents, and it is because we are creatures who go astray that we need

salvation. Transposed into a more contemporary jurisprudential register, Anselm's concern about human agency and the value of moral responsible choices is crucial to issues in legal punishment. Without it, as a number of modern punishment sceptics have admitted, there is no real hope of retaining the structure of black letter criminal law as we have it. So, to the extent that Rogers's view adopts Anselmian insights about libertarian agent causation it is indeed a retrieval of Anselmian insights that are thoroughly theological.

But what about the other aspects of Anselm's theology that we tackled in the previous chapter? What of his views about punishment, atonement, and forgiveness? Recall that according to Anselm, punishment and atonement depend upon a notion of satisfaction, which we expressed like this:

> SATISFACTION: an act by means of which the conditions of a moral or legal standard are met, providing compensation and restitution in order to reconcile estranged parties.

Recall also, that Anselm's view is that the only way in which human sin and dereliction can be addressed is by means of punishment or an act of atonement that generates a supererogatory merit that may satisfy instead of punishment. Forgiveness is excluded from his understanding of atonement because that would be to forego punishment, setting it to one side. And that is metaphysically impossible for God because the Deity is essentially just, and foregoing punishment is equivalent to foregoing the exercise of perfect justice, which is infeasible for God. As he puts it in *Cur Deus Homo*:

> Forgiving sin in this way is the same as not punishing it. But to order [that is, to organise, or regulate] sin in the right way when no recompense is made just is to punish sin. So if sin is not punished, it is left unordered…. But it is not fitting for God to leave anything unordered in his kingdom…. So, it is not fitting for God to leave sin unpunished in this way.[219]

It is also worth reiterating that in assessing Anselm's doctrine, we saw that his views on punishment were thoroughly retributivist in nature. Although he doesn't set out a formal account of retribution, something like the following account appears to be consistent with what he does say:

> PURE RETRIBUTIVISM: A nonconsequentialist approach to the justification of punishment that is backward-looking, that is, concerned with the sinful act and its history. At the heart of this view is the notion of desert. Usually such views include a principle of responsibility (calibrating *mens rea* to *actus reus*), a principle of proportionality (that ensures the relative gravity of punishment is proportionate to the moral gravity of the offence), and a principle of just requital (that ensures that the intentional harsh treatment endured for a criminal act voluntarily undertaken by the offender is morally good).

[219] Anselm, *Cur Deus Homo* I.12, pp. 266-267.

All this led to the following summary statement of Anselm's position in *Cur Deus Homo:*

> (1) God is essentially just.
> (2) Divine distributive justice is retributive in nature.
> (3) Sin is heinous; it derogates from God's honour.
> (4) The penalty for sin must be sufficient requital for human sin.
> (5) The penalty for sin may be met in one of two ways: the punishment of sin; or some appropriate supererogatory act of sufficient value that it may be accepted as a satisfaction for human sin.
> (6) The atonement is hypothetically necessary for satisfaction [that is, it is necessary on the supposition that God ordains the salvation of human beings].
> (7) God cannot forgive sin independent of satisfaction.
> (8) The atonement 'restores' divine honour; it is sufficient requital for human sin.
> (9) The benefits of atonement are appropriated by means of the sacramental life of the Church

Now, Rogers does not draw on *Cur Deus Homo* for her character creation view of punishment in a significant way.[220] Nevertheless, the concepts at work in Anselm's view of atonement are relevant to what she does say. Her hybrid retributivism is commensurate with punishment as SATISFACTION. And, despite what she says about 'forgiveness,' her view is consistent with Anselm's understanding of forgiveness as the foregoing of punishment, provided we speak in terms of commuting punishment on the character creation account rather than 'forgiving' it.

The most glaring difference with the historic Anselm is the very aspect of her work that is most distinctive, namely the partial present-tense grounding of desert. As we saw, in his work *On The Virginal Conception and Original Sin,* Anselm thinks that it is the exercise of agency in volition that makes an action culpable. But that is not something wholly in the past (like the act of composing a letter) nor a consequence of that action (the letter itself as an artefact). Rather, it is something that is present and continues to be present going forward, for it pertains to the agent who composes it. Although she thinks that she can find support for her hybrid account in Anselm's understanding of volition, his view doesn't actually underwrite a notion of present-tense desert, whether that is the moderate version that she factors into her hybrid retributivism or the wholly present version that is inconsistent with her broader commitments. This represents her most significant innovation, which is central to her notion of moral retributivism, though it is a development of an Anselmian theme. But it, along with her moderation of retribution to include consequentialist elements might be thought of as a way of 'amending' or 'repairing' Anselmian insights to make them fit for contemporary purpose. If we think of her approach in this charitable manner, then it seems that she does consistently draw on Anselm for her view, even when she ends up developing her thinking beyond what he actually says. But that is not terribly surprising. Whereas Anselm was dealing with a medieval theological

[220] Nevertheless, her broader body of work is suffused with Anselmian themes, including his work on atonement. She is one of the most active 'Anselmians' in recent philosophical-theological scholarship.

context in which his focus was on sin and redemption, and the relationship between a perfect being and very imperfect creatures, Rogers is addressing herself to her peers in legal scholarship, and the secular academy more generally. Adapting Anselm is surely part of that task.

Conclusion

In this chapter we have focused on one recent and sustained attempt to articulate an Anselmian account of legal punishment, namely, that of Katherin Rogers. Her character creation view is a hybrid version of moral retributivism that draws deeply upon key insights from Anselm regarding human freedom, and the need for desert in punishment. There is much to like in Rogers's view. She succeeds in showing how an Anselmian view can form the basis of a plausible theory of legal punishment. The major innovation in her view, namely, the issue of partially grounding desert in the present in order to motivate the commuting of punishment under certain extenuating circumstances to do with the contrition and penitence of the offender raises some concerns, to be sure. But they do not seem insurmountable. Although there are aspects of Anselm's view she does not adopt, and ways in which she amends and repairs his position in order to suit the context of contemporary legal theory, what she offers is deeply marked by her engagement with the eleventh century archbishop. Though her character creation view is not principally a religious account, it is certainly informed and shaped by deeply theological concerns—the concerns that motivated her medieval forebear. In this way, so it seems to me, her view counts as an instance of a punishment theory that draws on metalegal concepts (in this case, theological-philosophical concepts) in order to fashion a serviceable view of legal punishment.

We began this thesis with an introductory chapter in which I sketched out the relevance of theological and religious ideas for 'secular' jurisprudence. With the closing of this chapter, we draw the thesis to an end. Although Rogers's account is not without its shortcomings, she has, I think, made a good case for a punishment theory that meets the requirements with which we started. That is sufficient to consider the upshot a success, under the terms that were set out as we began. 'Anselmian jurisprudence,' if we might be permitted the term, is one instance of the way in which religiously motivated ideas may continue to fructify the discussion of a central and pressing concern in jurisprudence, namely, the shape and justification of legal punishment.

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