

GOD'S JUST VENGEANCE

Crime, violence and the rhetoric of salvation

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CHAPTER I

Religion and retribution

Christianity is Parcel of the Laws of England: Therefore to reproach the Christian Religion is to speak in Subversion of the Law.

Matthew Hale, Lord Chief Justice

By the satisfaction of justice, I mean the retribution of so much pain for so much guilt; which is the dispensation we expect at the hand of God, and which we are accustomed to consider as the order of things that perfect justice dictates and requires.

William Paley

John Fletcher, of Madeley, is one of the most attractive figures of the eighteenth-century English church. Born and brought up in Switzerland, and attending university at Geneva, he learned English only after coming to Britain in his early twenties, and his early sermons, at any rate, were delivered with so thick an accent that English congregations found him difficult to understand. He had intended to be a soldier, but a series of accidents prevented him, and on coming to England he came under Wesley's influence, took up residence in Madeley, and after ordination by the Bishop of Bangor began to assist the incumbent. About Madeley it was observed that it was 'remarkable for little else than the ignorance and profaneness of its inhabitants, among whom respect to men was as rarely observed as piety towards God'. When the vicar died in 1760 Fletcher was offered the living and accepted, even though he was simultaneously offered one of much greater value. He remained at Madeley for the rest of his life, twenty-five years. He was an indefatigable visitor, and when people maintained that they could not wake up on Sunday

mornings in order to get to church he took to going round the entire parish with a handbell, beginning at four o'clock in the morning. The year after his induction he formed a religious society within the parish, which met in private houses, the rules of which were as rigorous as those of any monastic community, though it was typical of Fletcher that it included the provision not to be unkind to those who chose not to join the society. Amongst the rules we also find the injunction to 'do good to the Bodies of all Men; by giving food to the Hungry, cloathing to the naked, visiting the sick, and helping those in trouble'. Fletcher himself took this so seriously that, according to an early biographer, 'it frequently unfurnished his house, and sometimes left him destitute of the most common necessaries ... That he might feed the hungry, he led a life of abstinence and self denial; that he might cover the naked, he clothed himself in the most homely attire; and that he might cherish such as were perishing in a state of extreme distress he submitted to hardships of a very trying nature.'¹ These included struggling for almost his entire ministry against the tuberculosis which eventually killed him. If there was ever an Anglican St Francis, Fletcher is the man. When John Wesley preached at his funeral, in 1785, he declared that he never expected to meet so holy a man this side of eternity. This helps us to understand why, when the brother of his servant girl was sentenced to death in March 1773, he at once asked Fletcher to intervene.

The name of the youth in question was John Wilkes. His father had died when he was still a child, and his mother bound him apprentice to a collier who himself died in a pit accident, though not before introducing the boy to the pleasures of cock fighting and gaming. At the age of fifteen he was arrested and whipped for stealing fowls. He then broke into a house, and finally robbed a man of a watch and some money on the public highway. Under the Black Act both housebreaking in daytime and robbery on the highway were capital offences. Still not nineteen, he was arrested and sentenced. When he appealed for Fletcher's help to have the sentence commuted, the vicar refused. 'I neither can nor will

¹ Joseph Benson, *Life of J. W. de la Flechere* (London, 1805).

meddle in that affair', he wrote, 'nor have I any probability of success if I did.'

Apply then *yourself*, night and day, to the *king of heaven* for grace and mercy. If you cry to him, from the bottom of your heart, as a condemned dying man, who deserves hell as well as the gallows; if you sincerely confess your crimes, and beg the Son of God, the Lord Jesus Christ, to intercede for you, it is not too late to get your soul reprieved: he will speak for you to God Almighty: he will pardon *all* your sins: he will wash you in his most precious blood: he will stand by you in your extremity: he will deliver you out of the hands of the *hellish* executioner; and though you have lived the life of the wicked, he will help you to die the death of the penitent . . . Consider him [Jesus] as hanging upon the cross by the nails that fastened him there. See him bearing your curse, your shame, your punishment. Behold him opening his arms of mercy to take you in, letting out his vital blood to wash away your sins.

After the boy's execution Fletcher later published this letter, and the story of his repentance and conversion, together with a litany for use by prisoners condemned to death.²

Wesley's Journal, and early Methodist history, is full of this kind of scene. Both John and Charles Wesley began visiting in Oxford Gaol as early as 1730. We read in the Journal entry for 25 April 1739 how John Wesley preached to the prisoners in Bristol: 'I was insensibly led without any previous design to declare strongly and explicitly that "God willeth all men to be saved." Immediately one, and another, and another sunk to the earth: they dropped on every side as thunderstruck.' Charles Wesley's Journal for July of the previous year records his ministry in Newgate. On the night before the execution of nine prisoners, 'We wrestled in mighty prayer . . . Joy was visible in all their faces.

² *The Penitent Thief or A Narrative of Two Women, fearing God, who visited in prison a Highwayman, Executed at Stafford, April 3rd 1773* (London, 1773). In the hymns he proposed for condemned prisoners we find the following verses:

I own my punishment is just
I suffer for my evil here,
But in *thy* suffering, Lord, I trust
Thine, only *Thine*, my soul can clear.

This is the faith I humbly seek,
The faith in thine all cleansing blood:
That blood which does for sinners speak
O let it speak for me to God.

We sang “Behold the Saviour of Mankind: Nailed to the shameful tree. How vast the love that him inclined, To bleed and die for thee.” It was one of the most triumphant hours I have known.’ The next morning he accompanied them to the gallows: “They were all cheerful, full of comfort, peace and triumph, assuredly persuaded that Christ had died for them and waited to receive them into paradise . . . I never saw such calm triumph, such incredible indifference to dying.’ He returned home, he wrote, ‘Full of peace and confidence in our friends’ happiness. That hour under the gallows was the most blessed hour of my life.’³

When, at the end of May 1831, two men were hanged, one for sheep stealing and one for stealing in a dwelling house, even though no violence had been used, the *Spectator* commented: ‘In England “law grinds the poor” – and why? The remainder of the line supplies the ready answer – “rich men make the law”! There is the secret of our bloody code – of the perverse ingenuity by which its abominations have so long been defended – of the dogged obstinacy with which all attempts to wash them away has been withstood! “Whoso stealeth a sheep, let him die the death” says the statute: could so monstrous a law have been enacted had our legislators been chosen by the people of England? But our lawmakers hitherto have been our landlords.’⁴ Fletcher, the Wesleys, and their followers were genuinely concerned for the poor – that is not in doubt. John Wesley may have been an old-fashioned high Tory, but he was concerned to do something about poverty and frequently made unpopular (and fairly simplistic) suggestions to the Government in the newspapers. What was it, then, which prevented them from seeing what the editors of the *Spectator* so clearly perceived? How was it that they could see people like Wilkes, whose hopeless background they perfectly understood, go to the gallows for offences which were trivial and which involved no violence against the person, without exerting themselves to have the sentence commuted? Fletcher’s one

³ Cf. P. Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (Harmondsworth, Penguin, 1991), pp. 214–15.

⁴ *Spectator*, 4: 152 (28 May 1831). Cited by L. Radzinowicz in *A History of English Criminal Law and its Administration from 1750*, vol. 1 (London, Stevens, 1948), p. 600. The allusion is to Goldsmith, *The Deserted Village*: ‘Each wanton judge new penal statutes draw, / Laws grind the poor, and rich men rule / the law.’

concern, as we see it in the pamphlet, was that the boy repented of his sin, and this is what appears in the Journals of both Wesleys.⁵ The *Spectator* editorial was, of course, sixty years on, but many of Fletcher and Wesley's contemporaries had already raised the question of penal reform. Eden's *Principles of Penal Law*, which advocated extremely sparing use of the death penalty, and which attacked the inhumanity and irrationality of large parts of the criminal law, had appeared in 1771. How is it that the question whether the law might be wrong, or even wicked, does not arise for these good Christian people? How could they come away from scenes of judicial murder feeling that this was 'the most blessed day of their lives'?

Mutatis mutandis the same question can be raised with respect to earlier theologians. In Anselm's day, at the end of the eleventh century, the life of a stag was worth more than that of a serf, but, although he was sensitive to the needs of 'Christ's poor', Anselm nowhere adverts to the fact. This was not a blindness shared by all. Two generations later, in 1159, John of Salisbury makes a spirited attack on the forest laws, precisely in the name of the Christ who died for all, but by and large this was not the concern of the great theologians.

A number of reasons for this failure can be adduced. One is that 'social blindfolds' prevented even saintly figures like Anselm from really seeing what was going on. Anselm, Archbishop of Canterbury when *Cur Deus Homo?* appeared, might find himself in conflict with the king on the grounds of sexual morality, or on the question of who appoints bishops, but not on the grounds of criminal justice. Bishops and archbishops could hardly read Scripture except from the position of those who exercise power. However genuinely reluctant to take office (and there is no doubt at all where Anselm's heart lay), once in post it was they who underwrote the legitimacy of rulers.

One can also point to the idealist character of almost all

⁵ P. J. R. King argues that good character, youth, poverty and the absence of violence were taken into account in deciding on reprieve, but this was clearly not the case for Wilkes, nor did these considerations bear on Fletcher, who had, he argued, helped save one young man from the gallows who had since turned out 'very bad'. 'Decision-Makers and Decision-Making in the English Criminal Law, 1750-1800', *Historical Journal*, 27 (1984), 25-58.

Western theology. Idealism functions to direct attention away from the messiness and injustice of ordinary life to 'eternal' realities and truths. It puts a phantasmal object in place of the real human being. So the Christ of doctrine was far removed from the Galilean preacher, with his teaching about forgiveness, who mingled with the poor, and ideas about making up the number of fallen angels took the place of concrete attention to the miseries and oppression of the poor.

Again, Louis Dumont draws our attention to the fact that today we are individuals in the world, *inworldly* individuals, in his terms, whereas the early Christians, and figures like Anselm, were *outworldly*, characterised by renunciation of the world. In his view the change from one to the other begins in the mid eighth century and culminates with Calvin.⁶ We still find it, however, in the pietist theology of the eighteenth and nineteenth centuries. Further reasons for this blindness, at least after the Reformation, include the character of Enthusiasm, and theological debates about law, authority, and the nature of God.

Amongst all these factors I wish to suggest that the satisfaction theory of the atonement has a role which must not be underestimated. This theory formed the very heart not only of Enthusiast but of Establishment theology. On the cross, according to the *Book of Common Prayer*, Christ made a 'full, perfect, and sufficient sacrifice, oblation and satisfaction, for the sins of the whole world'. The doctrine of satisfaction here implied drew on legal notions. Together with debates about natural and divine law, and the theology of justification, it formed part of a formidable body of legal-theological rhetoric which exercised a potent ideological function. It is this function which I hope to explore in this book. I wish to do three things. First, to look at the way satisfaction theory changed in response to changing accounts of criminal law. Second, to ask about the validity of the presuppositions behind it, and in particular to try and understand what is meant by expiation. I shall try and show the ways in which expiation and retribution have been

⁶ L. Dumont, 'The Christian Beginnings of Modern Individualism', in *The Category of the Person*, ed. M. Carrithers, S. Collins and S. Lukes (Cambridge, Cambridge University Press, 1985), pp. 93ff.

read together in the Christian tradition. Third, in the light of this, to ask how a Christian theology of the atonement *ought* to bear on penal thinking. I shall argue that whilst a powerful tradition in Christian atonement theology reinforced retributive attitudes, an alternative tradition, as I hope to show more squarely rooted in the founding texts, always existed to critique these. In understanding the roots of retributivism I hope at the same time to contribute to its deconstruction. Though the bulk of my argument will be narrative I must begin, not with history, but by taking a little further the suggestion that the doctrine of satisfaction formed part of the 'ideology' of Western Christendom.

THEOLOGY, IDEOLOGY AND CULTURAL THEORY

All theology is ideology. This is true in the tautologous sense in which Marx first uses the word 'ideology' in *The German Ideology* to mean all forms of discourse in any given society, from poetry to metaphysics.⁷ By extension we can use the word to characterise the articulation of the position of any specific group or person, or the point of view of a particular text, so that we can speak of Anabaptist or Methodist ideology, or the ideology of Blake's *Jerusalem*. It is also frequently appropriate, however, in the strong and usually pejorative sense in which Marx used the word, to speak of the role which forms of discourse may play in justifying particular social interests.⁸ In this sense it has to be said that Christian theology constituted the most potent form of ideology in Western society for at least a thousand years, up to the eighteenth and nineteenth centuries, and its ideological importance is by no means dead. In this strong sense satisfaction theory played an important ideological role. It was both influenced by, and influenced, penal thinking. It represented a construal of the crucifixion, by no means inevitable, which reinforced retributive thinking, according to which sin or crime have to be punished, and cannot properly be dealt with in any other way.

⁷ K. Marx and F. Engels, *Collected Works*, vol. v (Moscow, 1976), p. 30.

⁸ K. Marx, *Political Writings, II* (Harmondsworth, Penguin, 1973), p. 37.

In a series of observations which are not elaborated at length Marx characterised the relation of ideology to specific modes of production in terms of the relation of base to superstructure. 'What else does the history of ideas prove', asks the Communist Manifesto, 'than that intellectual production changes its character in proportion as material production is changed? The ruling ideas of each age have been the ideas of its ruling class.'⁹ Subsequent discussion has wished to insist on a dialectical interaction between ideas and forms of society, which is in any case the most obvious reading of the *Theses on Feuerbach*. David Nicholls has recently offered us a compelling account of such a dialectical interplay in exploring the relationship between ideas of God and different polities. Images for God may be borrowed from political discourse, he argues, but they then develop a life of their own and in turn come to affect political ideas. Thus, 'Theological rhetoric, child of political experience, may also be mother of political change.'¹⁰ At the heart of Nicholls' case are analogies for God, such as king, lord or judge, and models and allegorical inferences which take these analogies further. Such analogies constitute what cultural theory speaks of as 'mentalities' or ways of thinking, and these are the focus of Nicholls' account. When we turn to satisfaction theory, however, we need to broaden our understanding of ideology to include cultural representations and practices. Under 'ideology' are included not only mentalities but also 'sensibilities', or ways of feeling, which constitute 'structures of affect'. Thus we have mentalities, a framework of belief, in the work of the great theologians, but even more importantly we find in the imaging of the cross in Western art, carried to the remotest corners of Europe in cathedrals and parish churches, in hymnology, and in decisively important construals of the Christian liturgy, a structure of affect, embracing rich and poor, of great power. That this pattern of sensibilities was focussed week in week out by *ritual* was vitally important, for 'rituals do not just "express" emotions – they arouse them and organize their content; they provide a kind of

⁹ K. Marx, *Political Writings, I, The Revolutions of 1848* (Harmondsworth, Penguin, 1973), p. 85.

¹⁰ D. Nicholls, *Deity and Domination* (London, Routledge, 1989), p. 14.

didactic theatre through which the onlooker is taught what to feel, how to react, which sentiments are called for.¹¹

The account of cultural theory to which I am referring is laid out in Norbert Elias' *The Civilizing Process*, and developed with regard to the sociology of punishment by David Garland. Impetus for this development came from the Dutch historian Pieter Spierenberg, who challenged Foucault's account of the rise of the penitentiary. Where Foucault discounted humanitarian impulses, Spierenberg argued that the change in punishment from public torture to imprisonment was bound up with changes in sensibility evident from 1600 onwards.¹² Like all contemporary theories of ideology such cultural theories recognise a dialectic between theory and practice. In its cognitive aspect, Garland argues, culture embraces 'all those conceptions and values, categories and distinctions, frameworks of ideas and systems of belief which human beings use to construe their world and render it orderly and meaningful'.¹³ As such it is inextricably bound up with material forms of action and ways of life, so that the 'interwoven webs of significance', which make up the fabric of a culture develop in a dialectical relationship with social patterns of action. Amongst other things punishments and penal institutions 'help shape the overarching culture and contribute to the generation and re-generation of its terms' – including, of course, the formulation of atonement theology.¹⁴ At the same time we need to recognise 'the incorrigible complexity and overdetermination of the cultural realm as it relates to practice'. While it may be easy to show in broad terms the influence of a particular cultural form upon penal practice, he notes, 'the actual route by which one comes to influence the other, and the exact nature of that influence, are often much less easy to specify'.¹⁵ For this reason there is no master key to understanding the relation of ideology and praxis or, in this case, theology and

¹¹ David Garland, *Punishment and Modern Society* (henceforth cited as *PMS*) (Oxford, Clarendon Press, 1990), p. 67.

¹² P. Spierenberg, *The Spectacle of Suffering: Executions and the Evolution of Repression* (Cambridge, Cambridge University Press, 1984); N. Elias, *The Civilizing Process* (Oxford, Blackwell, 1994).

¹³ Garland, *PMS*, p. 195.

¹⁴ *ibid.*, p. 249.

¹⁵ *ibid.*, p. 209.

penal practice. The sociology of punishment has drawn on Marx, Durkheim and Weber, and Foucault has extended the discussion to take in the question of discipline and conformity in society as a whole. In my view all of these frameworks of analysis provide essential insights into understanding how and why society punishes, and to recognise this is to respect the complexity of cultural data rather than to seek to tame critical discourse through a petit bourgeois synthesis.¹⁶

Garland argues that socially constructed sensibilities and mentalities have major implications for the way in which we punish offenders. 'These cultural patterns structure the ways in which we think about criminals, providing the intellectual frameworks ... through which we see these individuals, understand their motivations, and dispose of them as cases.'¹⁷ If we wish to see how theology and penal practice have interacted, this form of cultural analysis at once suggests itself. Theology and piety form subsets of mentalities and sensibilities and also influence the ways we think about criminals. In both mentalities and sensibilities an image of judicial murder, the cross, bestrode Western culture from the eleventh to the eighteenth centuries. How did this bear on understandings of penality? Michael Ignatieff's study of the rise of the prison, unlike Foucault's, gives many examples of the way in which religious sensibilities influenced new penal thinking, and they could even be claimed to have played a decisive role.¹⁸ The question of the impact of religious sensibilities, or the structure of affect surrounding the cross, on penal practice, and the correlative effects of the development of criminal law on understandings of the atonement is then the theme of this study which can be taken as an extended footnote to specialist accounts by sociologists of punishment.

¹⁶ So Adrian Howe on David Garland's *Punishment and Modern Society* in *Punish and Critique* (London, Routledge, 1994), p. 70. Garland cites Peter Gay: "'overdetermination" is in fact nothing more than the sensible recognition that a variety of causes – a variety, not infinity – enters into the making of all historical events, and that each ingredient in historical experience can be counted on to have a variety – not infinity – of functions'.

¹⁷ Garland, *PMS*, p. 195.

¹⁸ M. Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750–1850* (henceforth cited as *JMP*) (Harmondsworth, Penguin, 1989), cf. pp. 49, 56, 84, 152–3, and see chapter 7 below.

Satisfaction theory, finding expression both in art and liturgy, as well as intellectual discourse, has functioned in the way that Malinowski described myth. Myth, he said, is 'a narrative resurrection of a primeval reality, told in satisfaction of deep religious wants, moral cravings, social submissions, assertions, even practical requirements . . . it expresses, enhances and codifies belief; it safeguards and enforces morality; it vouches for the efficiency of ritual and contains practical rules for the guidance of men.'¹⁹ So construed, myth is the bearer of cultural meaning and just so has satisfaction theory functioned. It has decisively informed that culture which constitutes the framework for social action.

One reason satisfaction theory was, and remains, so powerful is that in so many areas it is true to human experience. The need to make expiation or atonement for wrongdoing seems to be one of the most powerful human impulses, operating both on the individual and the collective level. If the problems of guilt and violence and the need to deal with them are not definitive of human culture, then they certainly are of civilisation, i.e. the attempt of human beings to live together in settled communities. Part of the power of Christianity as a missionary religion is that its central symbol, the cross, targets both guilt and violence, and offers a remedy to both through the 'bearing' of guilt and the refusal to meet violence with counter-violence. That it is a *symbol* which is central, and not a doctrine or a philosophy, is important, for the cross focusses feelings of guilt, shame and repentance which go far beyond words to the very roots of human culture and the individual psyche. That it squarely faces the universal human problem of guilt and violence is its claim to be redemptive. Satisfaction theory in particular addressed the need for order both in society and in the human soul; it addressed the sense of justice and the need to express moral outrage; it gave voice to the experience that suffering might sometimes be redemptive; above all it was a means of dealing with guilt. All of these things were brought together by the satisfaction theory, adumbrated at each celebration of the eucharist, painted in representations of the passion, given voice in the hymns of pietism. The power of this

¹⁹ B. Malinowski, 'Myth in Primitive Psychology', in *Myth, Science and Religion and Other Essays* (Westport, Conn., Negro Universities Press, 1971), p. 101.

combination of factors was enormous. No artist or ideologue could have dreamed up anything remotely as effective.

I do not suggest, of course, that satisfaction theory arose simply to meet a societal need. The relation of mentalities to social and economic structures is, as Garland insists, highly complex and resistant to a simple unravelling. On the other hand it seems clear that there are connections, and in this case it is true that the need to punish, to torture, to hang, to imprison was never quite self-evident. Even in the days when punishment was a popular spectacle there were those who condemned its use, as we shall see, and the attitude of the crowds which turned up to watch executions was ambivalent. Moral and metaphysical justifications for these acts were therefore always sought. In England 'The Church by Law Established provided the intellectual and theological justification for hanging . . . Had the church denounced it, it would have withered and died.'²⁰ The theology of satisfaction, I contend, provided one of the subtlest and most profound of such justifications, not only for hanging but for retributive punishment in general.

I shall attempt to explore the relation of satisfaction theory to penal practice through a narrative which runs from the eleventh to the nineteenth century, but before doing so I need to clarify what is meant by retributivism, and outline its theological roots, in the remainder of this chapter and in the two chapters which follow. Having considered the relation of religion and law, sin and crime, I shall ask, in a preliminary way, what structure of affect arose from the dominance of a particular construal of the crucifixion. Those of us who are conditioned to think of Christianity as a civilising and progressive influence need to be aware of its shadowside, to which Nietzsche and, more recently, Girard have drawn attention. Why is it that, in the United States today, surveys of public opinion show that Christians tend to favour capital punishment slightly more than the overall population?²¹ Could it be that the preaching of the cross not only desensitized us to judicial violence but even lent it sanction?

²⁰ H. Potter, *Hanging in Judgement* (London, SCM, 1993), p. vii.

²¹ H. Prejean, *Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States* (New York, Random House, 1993), p. 124.

RELIGION AND LAW

In the law books of the Old Testament, cultic and what we now call civil and criminal law are all inextricably interrelated, as we shall see in detail in the next chapter. The framework of all these laws is an apodictic narrative: 'God said'. Law as a whole is understood as revelation, even though it is certain that the different laws emerged over many centuries in a variety of cultures. In this way Israel expressed an ultimate sanction for its law codes, and this connection between law and religion is taken for granted in the ancient texts of many cultures. 'In early law . . . a supernatural presidency is supposed to consecrate and keep together all the cardinal institutions of those times, the State, the Race, and the Family.'²² Even for Plato, religion provides the ultimate metaphysical justification for human laws.²³ For the Stoics, who were pantheists, the whole cosmos expressed divine rationality, and thus discernment of the world's immanent rationality was discernment of how human beings should live. Natural law was the codification of this discernment. Roman law was profoundly affected by Stoicism, which, through the writings of Cicero and Seneca, came to influence Christianity.

The provision of ultimate justification for morality, or for law, is only one way of conceiving the relationship between religion and law, however. Religion and law are related at the deepest level, I shall argue, as being equally concerned with the question of what it is which enables and sustains human community. All theories of law are concerned with setting out the conditions under which the life of a given community is thought to be sustainable, a task implied in the etymology of the Greek word for law, *nomos*. It derives from *nemo*, 'to distribute', 'deal out', in the sense of assigning land or pasture. When qualified it comes to express ethical judgements: to grant equally, exercise fairness, be impartial.²⁴ 'Human nature cannot by any means subsist without the association of individuals', wrote Hume, 'and that association

²² H. S. Maine, *Ancient Law* (London, John Murray, 1906), p. 5.

²³ Plato, *Laws* x.

²⁴ See H. H. Esser in *Dictionary of New Testament Theology* (Exeter, Paternoster Press, 1975), vol. II, p. 438.

never could have place were no regard paid to the laws of equity and justice.²⁵ Human community, in other words, is only ultimately sustainable when morally founded. Tyrannies collapse because they run against the grain of human community.

Both Judaism and Christianity claim that God has revealed the true meaning of human life, and that an essential part of that meaning is 'life together'. Both law and religion, therefore, in different ways, embody normative views of the human, moral perceptions which underwrite a vision of human community.²⁶ The connection between law and morality has been taken for granted by all Christian reflection on law, and finds its most typical expression in Aquinas' hierarchy of divine, natural and positive law, where natural law reflects the divine law, and positive law which is worthy of the name reflects natural law. In the background is the confluence of Stoicism and the Mosaic law, understood as God's divinely revealed will for human community. When Aristotle's emphasis on the appeal to reason by law is added, as by Aquinas, then we can say that law is a rational enterprise which addresses and respects the citizen as a rational and responsible agent, and makes moral claims in moral terms about what it is which enables life together.²⁷ 'Law is nothing other than an ordinance of reason for the common good made by the authority who has care of the community.'²⁸

Aquinas' hierarchy of laws was echoed by Blackstone in his *Commentaries*, written at precisely the time of our opening story, though stated in a characteristically eighteenth-century form. Blackstone began by defining law as a rule of action prescribed by a superior to an inferior, a view which looks back through Hobbes to Ockham and theological nominalism. He glossed this, however, to make it compatible with natural law. 'Man considered as a creature must *necessarily* be *subject* to the *laws* of

²⁵ Hume, *Treatise of Human Nature* III.ii.

²⁶ The tension between law and gospel, as understood by Augustine and later Western theorists, is not a rejection of law so much as a demand that we need to go beyond it. Law represents as it were a surface dimension which we need to internalise and radicalise if we are to be truly moral.

²⁷ R. A. Duff, *Trials and Punishments* (Cambridge, Cambridge University Press, 1986), p. 89.

²⁸ *Summa Theologiae* 1a 2ae 90.4. I use the New Blackfriars edition (60 vols., London, Eyre & Spottiswoode, 1964–81).

his creator, for he is entirely a *dependent* being ... as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will. This will of his maker is called the *Law* of Nature.²⁹ Bentham objected to this: 'there are no such things as any "precepts", nothing by which man is "*commanded*" to do any of those acts pretended to be enjoined by the pretended law of Nature. If any man knows of any let him produce them.'³⁰ As opposed to what he took to be the vagaries of English case law he wanted a rational system of laws founded on the principles of utility, an idea he took from Beccaria. Bentham initiated a debate, which continues to the present day, between 'positivist' philosophers of law and those who maintain that law rests overtly on moral principle. Bentham's most famous successor, John Austin, echoed Blackstone in defining laws 'strictly so called' as the commands of political superiors to inferiors, and insisted on the separation of law and morality. 'The existence of law is one thing; its merit or demerit another.'³¹ The best-known contemporary proponent of this position, H. L. A. Hart, defines legal positivism as 'the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality'.³²

Definitions like this can be misleading, as neither Hart nor other positivists have wished to deny intimate connections between law and morality. Hart in effect reinstates natural law as comprising those 'rules of conduct which any social organization must contain if it is to be viable'.³³ These include systems of 'forbearances', respect for persons and property based on an understanding of the 'approximate equality' of persons, and the fact that human beings are motivated by 'limited altruism'. These are considerably more minimal than the 'basic goods' presupposed in John Finnis' reworking of natural law, but they move in

²⁹ W. Blackstone, *Commentaries on the Laws of England* (1769), vol. 1, p. 38.

³⁰ J. Bentham, *A Comment on the Commentaries*, ed. C. W. Everett (Oxford, Clarendon Press, 1928), p. 38.

³¹ J. Austin, *The Province of Jurisprudence Determined* (London, Weidenfeld & Nicolson, 1954), p. 184.

³² H. L. A. Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961), p. 181.

³³ *ibid.*, p. 188.

the same direction.³⁴ Both ask what constitutes human flourishing and make non-cynical judgements about human motivation. Such judgements mark legal positivism off from the Sophists whom Plato contested, who also believed that law was simply a matter of convention, but used this argument to justify the tyranny of the strong. De-coupling law and morality, then, is purely in the interests of analytical clarity. Hart believes that rather than argue, as Augustine and Aquinas did, that bad law is no law, the formula 'This is law but too iniquitous to obey or apply' makes for clearer thinking.³⁵ In Hart's view the sense that there is that beyond the legal system which judges it (i.e. a moral code) is better protected by this approach than by the approach which believes that nothing iniquitous can anywhere have the status of law. In jurisprudence we need to distinguish between social control enforced by purely moral sanctions, by brute force, and by law. Those who insist on the identity between law and morality make the understanding of the specific realm of law difficult.

Part of the problem with the positivist account of law is that it is counterintuitive. As Hart himself notes, 'The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals.'³⁶ It is this sense which Ronald Dworkin has appealed to, over many years, in insisting that principles are appealed to in sentencing, rather than a simple clarification and application of the law.³⁷ Antony Duff points up the connection between law and morality by asking why it was that someone had to be 'fit to be hanged'. It was universally agreed that it was immoral to hang the insane. 'A creature unprepar'd, unmeet for death', comments the Duke of the drunken Barnadine, in *Measure for Measure*; 'to transport him, in the mind he is were damnable.'³⁸ The reason for this, Duff

³⁴ J. Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980). Finnis proposes life, knowledge, play, aesthetic experience, sociability, practical reasonableness and religion as basic human goods.

³⁵ Hart, *The Concept of Law*, pp. 205ff. Cf. Augustine, *De Libero Arbitrio* 5; Aquinas, *Summa Theologiae* 1a 2ae Qu. 95 arts. 2, 4.

³⁶ Hart, *The Concept of Law*, p. 199.

³⁷ See *Law's Empire* (Cambridge, Mass., 1986).

³⁸ Act 4, sc. 3.