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Craig A. Stern

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*Craig A. Stern**

> Ye have heard that it was said by them of old time, Thou shalt not commit adultery: But I say unto you, that whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart.
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> —The Gospel According to Saint Matthew, Chapter 5, Verses 27 & 28.[1]

Humans are religious beings. Everything we do expresses fundamental presuppositions. We cannot escape often revealing our views of life and death, right and wrong, freedom and constraint; views based ultimately on faith, not demonstration. That law and morality bespeak religious doctrine, therefore, is no surprise.[2]

One would think, then, that religious doctrine might be consulted when trying to understand a supposedly intractable problem of law and morality. Regarding such problems, we often consult history, economics, sociology, or psychology.[3] These sources are valuable indeed. But, should we ignore the religion of the judges who formulated, the lawyers

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*Associate Professor, Regent University Law School. B.A., 1975, Yale University; J.D., 1978, University of Virginia. The author thanks Mary Bunch, Lee Copeland, Bob Cynkar, James Duane, Gary Greig, Chris Kachouroff, Joe Kickasola, Keith Rothfus, Mike Schutt, Jeff Tuomala, John Tuskey, Eric Welsh, Rod Williams, Regent University, and my beloved and loving family, for their assistance and support.

1. All citations to the Bible in this Article refer to the King James Version. *N.B.*: In this version, italics indicate words supplied by the translators without a verbal equivalent in the original texts.

2. *See, e.g.*, John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433, 434 (1994). Professors Witte and Arthur explain that

> [j]urists and theologians, statesmen and churchmen collaborated closely in the formulation of modern Anglo-American theories of crime and punishment. The concepts of crime and criminal law which they developed drew upon analogous concepts of sin and natural law. The measures and purposes of criminal punishment which they chose drew on parallel models of divine punishment and ecclesiastical discipline.

Id.

3. Professor Jerome Hall has emphasized the usefulness of history in understanding the doctrine of criminal attempt, the subject of this Article, asserting also that "social and psychological factors have had great influence upon the law of criminal attempt." JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 558 (2d ed. 1960).

who argued, and the legislators who adopted the legal principles? Legal historian Harold Berman has explained how the Western legal tradition as a whole reflects the faith of Western Christendom.[4] Might not that faith also find expression in specific rules of law and their connection to moral principles?

This Article examines a difficult question of law and morality, a question that is not lacking for scholarly comment. It has been favored by remarks from Plato[5] and from Adam Smith.[6] It has been debated by lawyers, legislators, historians, and moral philosophers.[7] What it has yet to receive, however, is consideration explicitly from the aspect of the Christian faith.[8] This Article is a foray into that field.

I. A DIFFICULT QUESTION

Consider the following hypotheticals. Alexander, intending to kill Carl, takes careful aim, fires, and inflicts a wound that proves instantly fatal. Alexandra, intending to kill Carol, takes careful aim, fires, and inflicts the merest dent in Carol's bicycle. Alexander and Alexandra share equal intention, skill, and equipment. But the wind unexpectedly blows askant Alexandra's bullet, saving Carol's life. If both shooters suffer arrest and conviction for their shots, Alexander likely will face the death penalty or a long prison term, while Alexandra will receive a relatively short prison term. A difference in wind has rendered Alexander guilty of murder, Alexandra of attempted murder.

Whatever the theory of criminal law and punishment, these results appear anomalous, if not unjust. Both shooters harbored the same intent,

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4. *See generally* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

5. *See infra* note 110 (citing Plato's discussion of the connection between providence and civil punishment).

6. *See infra* note 21 and accompanying text (discussing Adam Smith's statements on the subject).

7. In a study of the diverse approaches to our question, a "problem [that] has concerned and occupied generations of philosophers and jurists," one scholar confessed to having nothing new to say and "no thoroughly satisfying resolution to the issue." Björn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 BYU L. REV. 553, 553. In his view, "hardly any significant progress has been made in this area in the last two hundred years." *Id.*

8. Certainly, all commentators bring their religions to bear when considering such questions, and many of these commentators likely are Christians. Yet, the difficult question considered in this Article is so intractable as to yield fully only to an explicitly theological examination. The general Christian "capital" usually present in legal and moral discussions within Christendom, and perhaps especially within the United States, has not proved equal to the task.

both indulged in the same conduct and both imposed the same risks. Though the difference between the resultant loss of life and the dent in a bicycle is of extreme importance to questions of compensation central to tort law, why should this difference matter in criminal law at all? The conduct to be deterred is identical for both actors. Both manifest equal need for reform or incapacitation. Both seem to deserve equal punishment for the wickedness of their intent and conduct. Can the wind really matter so much?[9] The criminal law of perhaps every jurisdiction in the United States would treat Alexander and Alexandra very differently.[10]

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9. Of course, this formulation of the question presupposes the importance of mens rea in assessing criminality. That importance itself derives from Christian influence. *See* GILLIS ERENIUS, CRIMINAL NEGLIGENCE AND INDIVIDUALITY 30 (1976).

> Even if this harsh rule [of liability for harmful acts *simpliciter*] prevailed in the Anglo-Saxon codes, we may find a tendency to pay attention to the culpability of the perpetrator. This was undoubtedly due to ecclesiastical influence. The Church naturally looked primarily to the state of mind of the individual sinner.

Id. (footnote omitted); *see also* Martin R. Gardner, *The* Mens Rea *Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 654-55 (noting that Christian ethics influenced English criminal law to adopt the doctrine of mens rea, a term first used by Saint Augustine to express the relations of act, will, and culpability).

10. "Almost always, the penalty for an attempt to commit a capital crime or an offense for which the penalty is life imprisonment is set at a specific term of years of imprisonment." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 349 (2d ed. 1995) (stating that attempted felonies receive lesser punishment than completed ones). Unlike civil governments today, it seems that fourteenth-century England did punish attempted murder with the death penalty as equivalent to murder as influenced by Roman and canon law. *See* Albert Kiralfy, *Taking the Will for the Deed: The Mediaeval Criminal Attempt*, 13 J. LEGAL HIST. 95, 95 (1992). This practice revived later. *See* Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1524 (1974) ("During Coke's time, efforts were occasionally made to punish unsuccessful attempts to kill as murder, but this approach was considered too severe and soon abandoned.").

Early American jurist James Wilson taught that

> [t]he law of nature, it is admitted on all hands, measures crimes by the intentions, and not by the event. Should a standard, different from that which has been established by unerring wisdom, be adopted by uninformed man? Should not that rule, which is observed by the law divine, by laws which are human? . . . Is it not shocking to reason . . . and destructive of virtue, to contend, that the ill consequence of an act is more to be considered than its immorality? . . . The subtle distinctions, which casuists make between moral and political delinquencies, are offensive to common sense.

Witte & Arthur, *supra* note 2, at 463 n.93 (quoting JAMES WILSON, LECTURES ON LAW (1790-1792), *in* 2 THE WORKS OF JAMES WILSON 341, 343-44 (James D. Andrews ed., 1896)).

Sir William Blackstone explained that attempt is punished less than the completed offense in these words:

> For evil, the nearer we approach it, is the more disagreeable and shocking; so that it requires more obstinacy in wickedness to perpetrate an unlawful action,

The problem our shooters raise is known in philosophical quarters as the problem of moral luck,[11] an oxymoronic label designed to carry the weight of the philosophic analysis of the question. For how can the moral quality of an act or an actor hinge upon luck?

Many commentators, accordingly, argue that the law errs in this matter. Attempts, and especially complete attempts like Alexandra's, in which the actor has done all she thinks sufficient to commit the object offense, generally should merit a punishment equal to the object offense itself.[12]

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than barely to entertain the thought of it: and it is an encouragement to repentance and remorse, even till the last stage of any crime, that it never is too late to retract; and that if a man stops even here, it is better for him than if he proceeds: for which reason an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape, or murder.

4 WILLIAM BLACKSTONE, COMMENTARIES *14. This reason would not obtain in cases of completed attempts like Alexandra's. Would Blackstone therefore have held that she be punished the same as Alexander?

11. *See generally* MORAL LUCK (Daniel Statman ed., 1993). "The phrase indeed sounds strange." Bernard Williams, *Moral Luck*, *in* MORAL LUCK, *supra*, at 35, 36. The term is not unknown to courts of law. *See* Milner v. Apfel, 148 F.3d 812, 815 (7th Cir.), *cert. denied*, 119 S. Ct. 556 (1998) (discussing "moral luck"); United States v. Smith, 27 F.3d 649, 653 (D.C. Cir. 1994) (classifying consequences of criminal conduct as "moral luck"); United States v. Martinez, 16 F.3d 202, 206 (7th Cir. 1994) (noting that the "moral luck" of consequences pervades criminal law); International Ass'n of Heat & Frost Insulators Local 17 Pension Fund v. American Nat'l Bank & Trust Co., 13 F. Supp. 2d 753, 756 (N.D. Ill. 1998) (approving "moral luck principles"); United States v. Muntean, 870 F. Supp. 261, 263 (N.D. Ind. 1994) (construing a statute to minimize "moral luck"); *cf.* United States v. Tham, 118 F.3d 1501, 1507 (11th Cir. 1997) (quoting from *Martinez*).

12. *See, e.g.*, JEFFREY REIMAN, JUSTICE AND MODERN MORAL PHILOSOPHY 190 (1990). Reiman explains that

> [t]he lex talionis (and retributivism, generally) takes just punishment to be a function of what people deserve, and what people deserve is a function of what is in their control. Strictly speaking, the lex talionis calls for imposing on people suffering equivalent to that which they have intentionally attempted to impose on others, whether or not their attempts have, for reasons outside of their control, succeeded . . . .

Id.; *cf.* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 524 (2d ed. 1986) (approving the provision of the Model Penal Code that punishes attempts "to the same extent as the completed crime, except that a lower punishment is provided for attempts to commit capital crimes or the most serious felonies," citing MODEL PENAL CODE § 5.05(1) (1985)). *See generally* Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1 (1994) (contending that causing social harm, as opposed to the culpable risk of harm, is irrelevant to retributive desert); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988) (arguing that completed attempts generally deserve punishment equal to the analogous completed offenses); Lawrence C. Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 PHIL. & PUB. AFF. 262 (1974) (asserting that the social harm of criminal attempts is commensurate to that of completed offenses and therefore deserving of commensurate punishment); James J. Gobert, *The Fortuity of Consequence*, 4 CRIM. L.F. 1 (1993) (submitting that, in the punishment of attempt and other matters of the criminal

Others defend the predominant legal status quo,[13] asserting the need to

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law, the fortuity of resulting harm should pale in significance before moral culpability reflected in acts and mental state); Richard Parker, *Blame, Punishment and the Role of Result*, 21 AM. PHIL. Q. 269 (1984) (explaining that actual harm is irrelevant to criminal desert, desert that properly should reflect the likelihood of harm instead); Schulhofer, *supra* note 10 (stating that the moral culpability reflected in criminal law, including the law of attempt, has nothing to do with the presence or absence of resulting harm); J.C. Smith, *The Element of Chance in Criminal Liability*, 1971 CRIM. L. REV. 63 (approving the English rule that permits courts generally to punish attempts as severely as completed offenses and thus to eliminate the influence of the chance that affects the occurrence of harm); Kimberly D. Kessler, Comment, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183 (1994) (arguing that the criminal law should resist the influence of chance, and especially the chance that distinguishes between attempt and completed offense).

13. Professor Sanford H. Kadish argues that the doctrine that would punish Alexandra less than Alexander is "not rationally supportable notwithstanding its near universal acceptance in Western law, the support of many jurists and philosophers, and its resonance with the intuitions of lawyers and lay people alike." Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 679 (1994). He stops short, however, of arguing that the doctrine ought therefore to be abandoned, because he believes the doctrine is "ingrained in our moral sensibilities." *Id.* at 699. To abandon it as irrational would require that we first conclude that morality must be rational, and that abandoning the doctrine would have no untoward effect on other moral tenets.

> In view of the worries and uncertainties . . . —ultimate doubts about the standards of validity by which to judge our moral beliefs, and the real possibility of disturbing the patterns of our interconnected moral beliefs in unforeseeable and dangerous ways—one would be well-advised to tread warily in forcing radical changes in legal doctrine that too blatantly defy these popular beliefs ["in the significance of harm and retribution"].

Id. at 701. Kadish's humility leads him to discard irrationality as a criticism of legal doctrine, at least in this instance. *Cf.* Michael D. Bayles, *Punishment for Attempts*, 8 SOC. THEORY & PRAC. 19, 27 (1982) (finding none of the theoretical reasons sufficient to overturn the status quo of punishing attempts less than completed offenses).

Modern codifiers, including the drafters of the Model Penal Code, seem to use an approach similar to that of Professor Kadish. As Paul H. Robinson explains, modern codifiers favor an emphasis on the subjective aspect of crime—the state of mind of actors—rather than the common law favored objective aspect—the "resulting harm or evil." Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 5 J. CONTEMP. LEGAL ISSUES 299, 300 (1994). Yet, the subjectivists temper this inclination with objectivist elements, especially regarding grading. Objectivist grading, that is, punishing actors more when evil results ensue, finds support in popular morality. *See id.* at 305-07. Robinson finds that most modern jurisdictions, even if subjectivist in part, retain "an objectivist view as to grading." *Id.* at 321. Further, he concludes that,

> [a]mong these jurisdictions that do claim a subjectivist view of grading, such as the Model Penal Code, their codes are inconsistent and incomplete in implementing the subjectivist view. But, while their treatment of harm and evil in grading may seem seriously conflicted, the inconsistencies may well have been carefully calculated. The drafters may have appreciated that their subjectivist view of grading offenses does not match that of the community and that such a deviation from the community's view of just punishment could undercut the effectiveness of the criminal law in gaining compliance. Although they are good utilitarians, or perhaps because they are, subjectivist drafters generally produce

accommodate differing levels of resentment,[14] or the existence of uncertainty that intent and conduct in attempts really are equivalent to those of accomplished offenses.[15] Some defenders have developed recondite

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codes that appear to track community notions of deserved punishment, at least in their most visible features.

Id. at 321-22 (footnote omitted).

14. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 129-31 (1968). Hart explains that

> [a] more difficult question concerns the almost universal practice of legal systems of fixing a more severe punishment for the completed crime than for the mere attempt . . . .
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> The almost universal tendency in punishing to discriminate between attempts and completed crimes rests, I think, on a version of the retributive theory which has permeated certain branches of English law, and yet has on occasion been stigmatized even by English judges as illogical. This is the simple theory that it is a perfectly legitimate ground to grade punishments according to the amount of harm actually done, whether this was intended or not; "if he has done the harm he must pay for it, but if he has not done it he should pay less." To many people such a theory of punishment seems to confuse punishment with compensation, the amount of which should indeed be fixed in relation to harm done . . . .
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> My own belief is that this form of retributive theory appeals to something with deeper instinctive roots than the . . . principle [that a wrongdoer ought not to profit from his wrong]. Certainly the resentment felt by a victim actually injured is normally much greater than that felt by the intended [sic] victim who has escaped harm because an attempted crime has failed. Bishop Butler, in his sermon on resentment explains on this ground the distinction men draw between "an injury done" and one "which, though designed, was prevented, in cases where the guilt is perhaps the same." But again the question arises, if this form of retributive theory depends on the connexion [sic] between blame and resentment, whether the law should give effect to such a theory.

Id.

15. *See, e.g.*, Gail L. Heriot, *The Practical Role of Harm in the Criminal Law and the Law of Tort*, 5 J. CONTEMP. LEGAL ISSUES 145, 147-48 (1994) (arguing that harmful results do not affect moral desert, but do make us more certain that the offender deserves punishment for putting another at risk of harm); Paul F. Rothstein, *Causation in Torts, Crimes, and Moral Philosophy: A Reply to Professor Thomson*, 76 GEO. L.J. 151, 160 (1987) (arguing that consequences help us assess moral culpability by demonstrating the probability of dangerousness).

economic models,[16] theories from social contract,[17] or penal lotteries[18] to justify the differential in punishment. Some have tried to show that harmful results do in fact alter the moral situation, making the actor deserving of more punishment.[19] None of these efforts has proved success-

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16. *See, e.g.*, Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim-Centered Perspective*, 145 U. PA. L. REV. 299, 301 (1996) (suggesting that punishing attempts less than complete offenses creates incentives for victims not to overinvest in precautions); Samuel Kramer, Comment, *An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions*, 81 J. CRIM. L. & CRIMINOLOGY 398, 414 (1990) (proposing a "parabolic scheme of sanctions" to present appropriate incentives against crime from preparation through complete offense); Michael Davis, *Why Attempts Deserve Less Punishment than Complete Crimes*, 5 LAW & PHIL. 1, 12-13 (1986) (proposing the model of state auctions selling licenses to permit the otherwise unfair advantage of committing attempts and complete offenses). Davis' theory is a target of criticism in R.A. Duff, *Auctions, Lotteries, and the Punishment of Attempts*, 9 LAW & PHIL. 1 (1990). Davis proposes answers to Duff in Chapter 10 of his book *To Make the Punishment Fit the Crime* (1992).

17. *See, e.g.*, Charles R. Carr, *Punishing Attempts*, 62 PAC. PHIL. Q. 61, 66 (1981) (arguing that the social contract requires greater punishment for complete offenses than for attempts in order to correct the greater imbalance cause by the former).

18. *See* David Lewis, *The Punishment That Leaves Something to Chance*, 18 PHIL. & PUB. AFF. 53, 58-59 (1989) (rationalizing the greater punishment for completed offenses than for completed attempts by casting the practice as a penal lottery using harmful results instead of straws to match the culpable risk of harm imposed by the actor). Lewis's theory is a target of criticism in Duff's article, *supra* note 16, at 30.

19. *See* JACOB ADLER, THE URGINGS OF CONSCIENCE: A THEORY OF PUNISHMENT 162, 165 (1991) (differentiating attempt from completed offense not on the basis of pure desert, but on the basis of his "Rectification Principle" that assesses the "excess liberties arrogated by the offender"); DRESSLER, *supra* note 10, at 357 n.61 (arguing that criminal penalties should be proportioned to the actual degradation of victims).

Dressler notes that "by attempting to commit an offense, a criminal sends the demeaning message to the victim that the wrongdoer's rights and interests are more valuable than the victim's; however, by committing the offense, the victim or her property is *actually* degraded and her rights are diminished." *Id.* (citations omitted); *see also* HERBERT MORRIS, ON GUILT AND INNOCENCE 127 (1976) (advancing a distinction between blameworthiness and guilt). Morris explains that

> [t]he consummator owes more because he has taken and acquired more. He has not just the satisfaction attendant upon relinquishing the burden of self-restraint, but he has the satisfaction attendant upon realization of his desires [(i.e., violating another's rights)]. . . . He must then do something to reestablish the moral equilibrium resting on mutual exercise of restraint and he must do something to make amends for the particular harm to the individual.

Id.; *see also* Benjamin B. Sendor, *Restorative Retributivism*, 5 J. CONTEMP. LEGAL ISSUES 323, 362 (1994) (asserting a moral difference between a claimed threat and an actualized threat). Sendor explains that "an attempt represents an ineffective assertion of power and an unsuccessful effort to demean. In comparison to a completed crime, an attempt is merely a claim of power to control, merely a claim that the offender's interests have greater value than the victim's right." *Id.*; *see also* Daniel M. Mandil, Note, *Chance, Freedom, and Criminal Liability*, 87 COLUM. L. REV. 125, 139 (1987) (arguing that criminal liability hinges on the infringement of another's freedom). Mandil states:

ful, however. Perhaps most find themselves in the hybrid position that Adam Smith described in 1759:

> To the intention or affection of the heart, . . . to the propriety or impropriety, to the beneficence or hurtfulness of the design, all praise or blame, all approbation or disapprobation, of any kind, which can justly be bestowed upon any action, must ultimately belong.
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> When this maxim is thus proposed, in abstract and general terms, there is nobody who does not agree to it. Its self-evident justice is acknowledged by all the world, and there is not a dissenting voice among all mankind. Every body allows, that how different soever the accidental, the unintended and unforeseen consequences of different actions, yet, if the intentions or affections from which they arose were, on the one hand, equally proper and equally beneficent, or, on the other, equally improper and equally malevolent, the merit or demerit of the actions is still the same, and the agent is equally the suitable object either of gratitude or of resentment.
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> But how well soever we may seem to be persuaded of the truth of this equitable maxim, when we consider it after this manner, in abstract, yet when we come to particular cases, the actual consequences which happen to proceed from any action, have a very great effect upon our sentiments concerning its

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> Imposing liability vindicates the legal interests that the intentional act offended. Moreover, an infringement on the actor's freedom is justified because the act, in causing harm, infringed another's freedom. . . . The chance absence of harm in inchoate crimes appears to prevent the justified infringement on the actor's freedom, even though other social values require vindication.

Id. (One might ask whether, as the above excerpts may themselves suggest, these rationales are not rather more suited to the compensatory function of tort than to the punitive function of the criminal law.) *See also* Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1109 (1992) (arguing that criminal law should punish according to the degree of imposition—including resulting harm—the offender has placed upon others). Other theories suggest that resulting harm provides an additional evil for which an actor is responsible. *See generally* Gregory Mellema, *On Risk Taking and Moral Responsibility*, CRIM. JUST. ETHICS, Summer/Fall 1987, at 3. *But see generally* Judith Jarvis Thomson, *Morality and Bad Luck*, *in* MORAL LUCK, *supra* note 11, at 195 (distinguishing between blame for wrongs and blameworthiness of the person). Another theory proposes that completed wrongful acts—such as those that cause death—must be the primary moral focus of a deontological understanding of the criminal law because alternatives fail. *See* Heidi M. Hurd, *What in the World is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 160 (1994). Still other theories contend that the educational, communicative function of the criminal law requires that completed offenses be punished more severely than analogous attempts. *See* Duff, *supra* note 16, at 36; Mordechai Kremnitzer, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime? A Comment on Prof. Dr. Björn Burkhardt's Paper*, 4 BYU J. PUB. L. 81, 94 (1990).

> merit or demerit, and almost always either enhance or diminish our sense of both. Scarce, in any one instance, perhaps, will our sentiments be found, after examination, to be entirely regulated by this rule, which we all acknowledge ought entirely to regulate them.[20]

II. KANT HAVE IT BOTH WAYS?

Thus Adam Smith describes with precision a tension in our moral sentiments.[21] On the one hand, Alexander and Alexandra seem to deserve equal punishment, and yet, on the other hand, they do not.[22] One would surmise that these contrary sentiments spring from contrary sets of legal or moral presuppositions. Ultimately, one would determine that contrary religious faiths must be competing for hegemony. Such, however, is not the case.

Perhaps some resolution of this tension is suggested by Immanuel Kant.[23] Kant, probably the preeminent modern philosopher,[24] reasoned that the will is the true and pure seat of moral quality. According to Kant, "[n]othing in the world—indeed nothing even beyond the world—can possibly be conceived which could be called good without qualification except a *good will*."[25] Therefore, the goodness or evil of what is willed determines the goodness or evil of a human actor and the morality of his act: "[I]n the estimation of the total worth of our actions it always takes first place and is the condition of everything else."[26] Consequences

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20. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 93 (D.D. Raphael & A.L. Macfie eds., Oxford Univ. Press 1976) (1759); *see also id.* at 99-101 (applying the analysis to criminal attempts specifically).

21. *See id.* at 104-05 (discussing the "[i]rregularity of sentiments" resulting from consequences; noting that "the world judges by the event, and not by the design;" lamenting the "great discouragement of virtue" (emphasis removed)).

22. *See id.* at 105 (noting that, although most agree that the "event"(result) should not affect the evaluation, "when we come to particulars, we find that our sentiments are scarce in any one instance exactly conformable to what this equitable maxim would direct").

23. *See* Robert Paul Wolff, *Introduction to* KANT: A COLLECTION OF ESSAYS at xx-xxi (Robert Paul Wolff ed., 1967) (asserting that the political writings of Immanuel Kant present a unified and single approach to morality based on a "kingdom of ends").

24. *See id.* at ix. ("All philosophy before 1781 seems to flow into Kant's great system, and little that has appeared since cannot be traced back to his influence. It has been truly observed that in the modern world, one can philosophize against Kant or with him, but never without him.").

25. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 9 (Lewis White Beck trans., Liberal Arts Press 1959) (1785).

26. *Id.* at 13.

of the act are irrelevant to this assessment; only the will matters.[27] A famous passage explains:

> The good will is not good because of what it effects or accomplishes or because of its adequacy to achieve some proposed end; it is good only because of its willing, i.e., it is good of itself. And, regarded for itself, it is to be esteemed incomparably higher than anything which could be brought about by it in favor of any inclination or even of the sum total of all inclinations. Even if it should happen that, by a particularly unfortunate fate or by the niggardly provision of a stepmotherly nature, this will should be wholly lacking in power to accomplish its purpose, and if even the greatest effort should not avail it to achieve anything of its end, and if there remained only the good will (not as a mere wish but as the summoning of all the means in our power), it would sparkle like a jewel in its own right, as something that had its full worth in itself. Usefulness or fruitlessness can neither diminish nor augment this worth. Its usefulness would be only its setting, as it were, so as to enable us to handle it more conveniently in commerce or to attract the attention of those who are not yet connoisseurs, but not to recommend it to those who are experts or to determine its worth.[28]

If, for Kant, the will determines the goodness of a good act, the will also should determine the evilness of an evil act. What the evil will actually accomplish, or fails to accomplish, has no real bearing upon measuring the morality of the act.[29]

This view would seem to place Kant, retributivist as he was,[30] firmly in the camp of "equivalentists"—those who support equivalent punishment for attempted and completed offenses.[31] Because the will of the attempter must be to accomplish the offense, and Kant held that the will alone determines the morality of the act, equivalent punishment should

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27. *See id.* at 10-11 (noting the "absolute worth of the will alone").

28. *Id.* at 10.

29. *See id.* (concluding that the "[u]sefulness" of a willed act cannot affect the value of the will itself).

30. *See, e.g.*, ALAN W. NORRIE, LAW, IDEOLOGY AND PUNISHMENT 61 (1991) (concluding that for Kant "punishment was justified in terms only of" the "moral retributive justification"); C.L. TEN, CRIME, GUILT, AND PUNISHMENT 75 (1987) (asserting that Kant "subscribe[s] to a very strong retributive theory which maintains that the voluntary commission of a morally wrong act is both a necessary and sufficient condition of the legal authority's duty to punish the offender" and explaining that "[o]n this view, punishment is justified in the sense that it is required or obligatory").

31. *See* TEN, *supra* note 30, at 153-54 (discussing the principle of equivalence and noting distinctions between equivalent and utilitarian approaches to punishment).

follow.[32] And yet, Kant plainly holds that Alexander and Alexandra ought not to be punished in the same manner. Justice requires, instead, that the murderer, but apparently *not* the attempter, suffer death.[33] Kant rejects utilitarian or other consequentialist rationales for criminal punishment.[34] No, Alexander *deserves* death; Alexandra *deserves* something much less. How can one thinker of genius embrace simultaneously both the equivalentist and nonequivalentist positions?[35]

Kant's seemingly contradictory views on our difficult question do more than demonstrate the truth of Adam Smith's observation. Each of Kant's views finds a source deep within the Christian worldview.[36] That

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32. *See* LAFAVE & SCOTT, *supra* note 12, § 6.2(c), at 500-03 (discussing mental state for attempt). Even regarding offenses that themselves require a mens rea less than purpose, to be guilty of attempt one must purpose the conduct or result of that offense. *See id.* at 501. In a sense, therefore, the will of the attempter may be required to be *more* evil than that of the one who commits the object offense, but in any event, no *less* evil. *See id.*

33. *See* REIMAN, *supra* note 12, at 189. Reiman explains that

> Kant . . . is a strict retributivist, who holds that people must receive harm equivalent to what they have intentionally and unjustly inflicted: "Only the law of retribution (*jus talionis*) can determine exactly the kind and degree of punishment." Thus, if a man "has committed a murder, he must die." Moreover this punishment is due even when there is no hope of deterring others: "Even if a civil society were to dissolve itself by common agreement of all its members . . ., the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth."

Id. (citations omitted) (quoting IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101, 102 (Bob Merrill 1965) (1797)); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 518-21, 530-32 (1987) (questioning the existence of a coherent Kantian theory of retributive justice and discussing, among other things, Kant's use of the concept of bloodguilt and the concept of *jus talionis* to urge the death penalty for murders).

34. *See* NORRIE, *supra* note 30, at 39-40 (asserting that retributive justice predominates Kant's writings and that utilitarian or consequentialist theories supply no aspect of his justification for criminal punishment).

35. *See* Murphy, *supra* note 33, at 509, 531-32 (exploring this and other tensions Kant presents in his discussions of ethics and punishment, and concluding that Kant presents no coherent theory of punishment); *see also* NORRIE, *supra* note 30, at 54-55 (describing Kant's theory as "built on tension" and containing an "element of schizophrenia"). Perhaps Kant's thinking on this subject might seem less incoherent if taken in light of the present Article. *See infra* note 79 and accompanying text (explaining how the two theories can coexist rationally).

36. *Cf.* Judith Andre, *Nagel, Williams, and Moral Luck*, *in* MORAL LUCK, *supra* note 11, at 123, 125-27 (casting the Kantian view as inherently Christian in requiring a Supreme Judge to dispense reward and punishment); Daniel Statman, *Introduction*, *in* MORAL LUCK, *supra* note 11, at 1, 26 n.13. Statman notes that

> if Protestantism did indeed have some real influence on Kant, as some commentators believe, especially in its priority of 'faith' over 'works', to be expressed by Kant in the priority of the good will over one's fortunate actions, then our conception of morality being immune to luck might have some historical roots in religion after all.

worldview, too, embraces simultaneously both the equivalentist and non-equivalentist positions. Consequently, Kant is manifesting a consistently Christian approach. But is that approach itself consistent?

Kant never harmonizes his divergent views on will and punishment, nor does he explicitly discuss moral luck.[37] It has fallen to later thinkers to harmonize his views, or to accept one or the other, or some amalgam, of these two apparently contrary positions. Yet, if Kant basically follows Christian doctrine, why not consult that doctrine to solve the conundrum? If American legal and moral principles also embrace Christian doctrine on this difficult question, might not that explain the popularity—and possibly the soundness—of the position that finds Alexander and Alexandra equally guilty morally, but unequally guilty criminally?

III. THE SERMON ON THE MOUNT

Two fundamental Christian doctrines support the view that simultaneously finds Alexandra as morally guilty as Alexander and yet not deserving of equal criminal punishment. Both doctrines are central to the faith that largely shaped the laws and morals of America. Both find expression in the Sermon on the Mount.

The Sermon begins with the Beatitudes:

> Blessed *are* the poor in spirit: for theirs is the kingdom of heaven. Blessed *are* they that mourn: for they shall be comforted. Blessed *are* the meek: for they shall inherit the earth. Blessed *are* they which do hunger and thirst after righteousness: for they shall be filled. Blessed *are* the merciful: for they shall obtain mercy. Blessed *are* the pure in heart: for they shall see God. Blessed *are* the peacemakers: for they shall be called the children of God. Blessed *are* they which are persecuted for righteousness' sake: for theirs is the kingdom of heaven. Blessed are ye, when *men* shall revile you, and persecute *you*, and shall say all manner of evil against you falsely, for my sake. Rejoice, and be exceeding glad: for great *is* your reward in heaven: for so persecuted they the prophets which were before you.[38]

In this passage, Jesus teaches that God responds graciously to those living in the knowledge of their need of His grace. Blessing awaits those who understand they deserve no blessing. Those blessed, in turn, be-

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Id. (citation omitted).

37. *See* Statman, *supra* note 36, at 3-4 (discussing the concept of moral luck and emphasizing traditional objections to the concept as based in the Kantian theory of the "supreme value" of will).

38. *Matthew* 5:3-12.

come a blessing themselves, and so receive still more blessing. Understood in this way, the Christian life consists of receiving and mediating God's blessings.

Subsumed within this teaching, however, are the two doctrines that address our problem. These first words of the Sermon on the Mount presage the two central doctrines that untangle the riddle of moral luck as presented by the cases of Alexander and Alexandra. To understand one's need of God's grace, one must understand one's moral fault. For the Christian, it is moral fault that impoverishes, leaving us with no hope to attain our purpose and happiness apart from God's help. A true understanding of our moral fault, however, requires a true understanding of God's moral standards. The poor in spirit see their fault in comparison with God's design and measure for the true and full human life. They that mourn see the inestimable loss that humans experience in failing to attain to God's design and measure for human life. The meek and those who hunger and thirst for righteousness act in the knowledge of our loss and of God's eagerness to forgive, restore, and heal.[39] But all of these people must know the appropriate measure of God's will for the fullness of a human life. They must not confuse that measure with others. This appreciation for the perfection of our ordained humanness is the core of the first of the two doctrines that explain our apparent antinomy.

The core of the second doctrine also is suggested in the Beatitudes. Jesus teaches that the people he describes will be blessed and will receive various graces and rewards. The poor in spirit become the truly rich; mourners receive comfort; the meek, the hungry and thirsty, the others, all receive their blessings. If true, this teaching entails a God whose will is performed without fail, a loving God whose purposes always are executed. This teaching embraces the second doctrine in the form of Divine Providence, God's loving regulation of events according to His purpose.

As the remainder of the Sermon on the Mount expands upon the themes of the Beatitudes, it is no surprise that the two doctrines—the unique stringency of God's standard for "perfect humanness," and the beneficent omnipotence of God's Divine Providence—find more complete expression in the verses that follow.

The first doctrine occupies the better part of the fifth chapter of the Gospel according to Saint Matthew:

> Think not that I am come to destroy the law, or the prophets:

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39. *See id.* at 5:5-6. Those receiving this forgiveness, restoration, and healing become pure in heart, peacemakers, and, though persecuted for righteousness' and Christ's sake, will attain the Kingdom of Heaven. *See id.* at 5:8-10.

> I am not come to destroy, but to fulfil [sic]. For verily I say unto you, Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled. Whosoever therefore shall break one of these least commandments, and shall teach men so, he shall be called the least in the kingdom of heaven: but whosoever shall do and teach *them*, the same shall be called great in the kingdom of heaven. For I say unto you, That except your righteousness shall exceed *the righteousness* of the scribes and Pharisees, ye shall in no case enter into the kingdom of heaven. Ye have heard that it was said by them of old time, Thou shalt not kill; and whosoever shall kill shall be in danger of the judgment: But I say unto you, That whosoever is angry with his brother without a cause shall be in danger of the judgment: and whosoever shall say to his brother, Raca, shall be in danger of the council: but whosoever shall say, Thou fool, shall be in danger of hell fire.[40]

Jesus continues, warning that "[y]e have heard that it was said by them of old time, Thou shalt not commit adultery: But I say unto you, That whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart."[41]

God's standard for "perfect humanness" and its strictures occupy more of the sermon:

> It hath been said, Whosoever shall put away his wife, let him give her a writing of divorcement: But I say unto you, That whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery: and whosoever shall marry her that is divorced committeth adultery.
>
> Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all; neither by heaven; for it is God's throne: Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil.
>
> Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also. And if any man will sue thee at the law, and

40. *Id.* at 5:17-22.

41. *Id.* at 5:27-28.

> take away thy coat, let him have *thy* cloke also. And whosoever shall compel thee to go a mile, go with him twain. Give to him that asketh thee, and from him that would borrow of thee turn not thou away.
>
> Ye have heard that it hath been said, Thou shalt love thy neighbour, and hate thine enemy. But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you; That ye may be the children of your Father which is in heaven: for he maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust. For if ye love them which love you, what reward have ye? do not even the publicans the same? And if ye salute your brethren only, what do ye more *than others*? do not even the publicans so? Be ye therefore perfect, even as your Father which is in heaven is perfect.[42]

The import of these verses is to demonstrate the gap between the civil law and the moral law for humankind. Jesus does not criticize the law of the Torah, much less replace it. Everything he teaches was implicit in the Torah, as his listeners must have realized. What is especially striking in the passage, however, is the repeated and insistent call not to find moral justification in adherence to a civil law standard of behavior. One may not be committing murder, and yet hate; one may not be committing the act of adultery, and yet commit adultery in one's heart. Again, it is not that the civil law itself is defective—God himself ordained the civil law in this case.[43] Rather, Jesus warns of the confusion of the types of law, and of the appropriate forum—the judgment of goodness before men and the judgment of goodness before God.[44] Even God's rules for social governance do not establish perfect rules for human behavior, though, of course, they do plainly suggest them.

The Sermon on the Mount also expatiates on the theme of Divine Providence suggested in the Beatitudes:

> Ye have heard that it hath been said, Thou shalt love thy

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42. *Id.* at 5:31-48.

43. It may be that God Himself adheres to something like a *lex talionis* even in meting out his own justice. *See* Abraham Cronbach, *"Manner for Manner" in Dante*, 35 HEBREW UNION C. ANN. 193, 193 (1964) (discussing the notion that divine punishments and rewards are shaped according to the corresponding human acts).

44. Dean Herbert W. Titus has explained regarding the Sermon on the Mount that "[t]he mistake that the scribes and Pharisees had made was that if man was right before Israel's rulers, he was then right before God. It was a mistake of jurisdiction." HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES 71 (1994). Much of this Article was inspired by the work of Dean Titus.

> neighbour, and hate thine enemy. But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you; That ye may be the children of your Father which is in heaven: for he maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust.[45]

The encompassing regulation of Divine Providence is reflected further in the teaching on alms:

> Take heed that ye do not your alms before men, to be seen of them: otherwise ye have no reward of your Father which is in heaven. Therefore when thou doest *thine* alms, do not sound a trumpet before thee, as the hypocrites do in the synagogues and in the streets, that they may have glory of men. Verily I say unto you, They have their reward. But when thou doest alms, let not thy left hand know what thy right hand doeth: That thine alms may be in secret: and thy Father which seeth in secret himself shall reward thee openly.
>
> And when thou prayest, thou shalt not be as the hypocrites *are:* for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men. Verily I say unto you, They have their reward. But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly.[46]

The passage, and the reference to Divine Providence, continue:

> Moreover when ye fast, be not, as the hypocrites, of a sad countenance: for they disfigure their faces, that they may appear unto men to fast. Verily I say unto you, They have their reward. But thou, when thou fastest, anoint thine head, and wash thy face; That thou appear not unto men to fast, but unto thy Father which is in secret: and thy Father, which seeth in secret, shall reward thee openly.[47]

Divine Providence secures the complete fulfillment of every human need. The passage explains:

> Therefore I say unto you, Take no thought for your life, what ye shall eat, or what ye shall drink; nor yet for your body, what ye shall put on. Is not the life more than meat, and the body than raiment? Behold the fowls of the air: for they sow not, neither do they reap, nor gather into barns; yet your heavenly

45. *Matthew* 5:43-45.
46. *Id.* at 6:1-6.
47. *Id.* at 6:16-18.

> Father feedeth them: Are ye not much better than they? Which of you by taking thought can add one cubit unto his stature? And why take ye thought for raiment? Consider the lilies of the field, how they grow; they toil not, neither do they spin: And yet I say unto you, That even Solomon in all his glory was not arrayed like one of these. Wherefore, if God so clothe the grass of the field, which to day is, and to morrow is cast into the oven, *shall he* not much more *clothe* you, O ye of little faith?[48]

The passage proclaims that God governs the world. He regulates nature and also shapes the consequences of human acts. This truth is ever to be before us as we live out our lives. We are to behave as those who know that God rules, and that it is not ultimately we who establish the outcome of our conduct, but He.

IV. NEITHER MORAL NOR LUCK

This Article aspires to flesh out these two doctrines from the Sermon on the Mount. The whole of Holy Writ bears witness to a divergence between social standards of human conduct and the absolute standard of human perfection. So too does it bear witness to God's Providence. Some of this teaching receives attention later in this Article. But before embarking further, the connection between the doctrines found in the Sermon on the Mount and our cases of the murdering Alexander and the bicycle-denting Alexandra will be established.

First, the most just and perfect law for social use—for example, civil or church law—does not prescribe the total justice and perfection of ideal human behavior. Recognition of this principle does not necessarily entail the notion of inner-morality versus outer-legality, or the idea that law for society is instrumental and consequentialist while private morality is deontological, or some other such dichotomy. Rather, the principle may entail the Christian view that all authority comes from God, and that human authorities have various roles or ministries in recognizing, adopting, and applying law. The nature and purpose of law may not change from forum to forum, but the authority of a forum does. Justice remains a universal standard of law, no matter the forum, but no sublunary forum has commission to do total, absolute justice. That power is God's alone.

So the moral luck that seems to damn Alexander's act more than Alexandra's because the wind shapes the trajectory of bullets is not really *moral* luck at all. If, before God, their hearts, acts, or characters are

48. *Id.* at 6:25-30.

equally guilty, He will judge. But our human response, including the response of our laws, may with justice treat them as guilty of different offenses to be punished differently. Leaving absolute justice to God, a Christian approach understands that the human role in responding to these acts is limited. The luck is not moral, but "jurisdictional."

The Christian approach also, however, would not recognize moral luck as luck. If it were only luck that assigned the deadly aspect of Alexander's act both to God and to a jurisdiction ready to send him to death for it, and the deadly aspect of Alexandra's act to God alone, the justice of the jurisdictional rule might be questioned. After all, as far as human law is concerned, we are treating possibly equally evil acts unequally.[49] The jurisdictional understanding of moral luck proves too much if the jurisdictional rules are themselves arbitrary. Then God's justice becomes a human justice slush fund, licensing human authorities to do sporadic, partial justice, unjustly.

One factor that prevents this degeneration of a jurisdictional principle into a prescription for human injustice is the principled nature of the jurisdictional rule, a rule that itself is just. The other, and perhaps even more important factor when it comes to specific cases, is Divine Providence. That the possibly equally evil acts of Alexander and Alexandra deserve such unequal human responses is due to the wind that itself is under God's providential power. A Christian worldview understands that how the wind moves, in fact, how the world holds together at all, depends upon God's will. (It also understands, however, that Alexander, not God, murdered Carl.) God arrays the platform upon which human acts are performed. It is not luck, therefore, but Providence, that assigns cases to various fora, where God's justice may be administered in part according to jurisdictional rules that are themselves expressions of God's justice.

It appears, then, that a Christian view typified by the Sermon on the Mount may make sense of the moral luck conundrum. This view explains how we see Alexander and Alexandra as perhaps equally guilty in one sense, and yet not equally guilty in another, without compromising on standards of justice in either estimation. Before God and His absolute and complete standards of human moral perfection, Alexandra may be as guilty as Alexander. Before fellow humans in state, church, and other social contexts, and the limited authority they possess to accomplish limited justice as cases providentially come before them, Alexander may be

49. *See supra* notes 10-19 and accompanying text (discussing rationales for treating attempts differently from completed crimes, though the underlying act appears to be the same).

guiltier than Alexandra.

V. EVEN GOD'S CIVIL LAW HAS ITS LIMITS

A fundamental tenet of the Christian faith holds that in God reposes all authority.[50] Humans exercise authority only derivatively and within limits. Humans exercising the authority of civil government exercise only the authority that God allots to that ministry.

The biblical *locus classicus* on the authority of civil government explains the principle:

> [R]ulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same: For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to *execute* wrath upon him that doeth evil. Wherefore *ye* must needs be subject, not only for wrath, but also for conscience sake. For for [sic] this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing. Render therefore to all their dues: tribute to whom tribute *is due;* custom to whom custom; fear to whom fear; honour to whom honour.[51]

Civil rulers, as ministers of God, are to punish evil acts. There is no mention here of judging character, thought, or pure will. God Himself does that,[52] although humans do this to some degree, when disciplining children, or members of a church,[53] or in selecting persons for tasks or roles.

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50. *See Romans* 13:1-2 ("Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.").

51. *Id.* at 13:3-7; *see also* 1 *Peter* 2:13-14 (commanding Christians to "[s]ubmit [themselves] to every ordinance of man for the Lord's sake: whether it be to the king, as supreme; Or unto governors, as unto them that are sent by him for the punishment of evildoers, and for the praise of them that do well.").

52. *See* 1 *Samuel* 16:7 (teaching that "the LORD said unto Samuel, Look not on his countenance, or on the height of his stature: because I have refused him: for *the LORD seeth* not as man seeth; for man looketh on the outward apperance, but the LORD looketh on the heart").

53. In the early medieval church, documents assisted confessors in the then-novel practice of private confession of sin and penance. *See generally* MEDIEVAL HANDBOOKS OF PENANCE (John T. McNeill & Helena M. Gamer trans., 1990) (translating these documents). These handbooks, which worked in tandem with civil folklaw, *see* BERMAN, *supra* note 4, at 68-76 (discussing the development of penitential law and its effect on and interrelationship with civil folklaw), listed penances to be prescribed for all manner of sins, including evil thoughts and desires. *See* MEDIEVAL HANDBOOKS OF PENANCE, *supra*, at 88, 90, 92, 104, 108, 185-86, 303, 368.

The civil government, however, though it may ascertain character in filling its offices, may not punish faulty character. Its role is to punish wicked acts.[54]

But not *all* sinful acts are civil crimes, even in God's civil law for Israel.[55] Some sinful acts, even harmful sinful acts, were for God alone to judge and punish.[56] Similarly, not every criminal act within the cognizance of civil government was to be punished. Some criminal acts would escape detection. Furthermore, unless two or three witnesses could rise to testify in court, the crime was to go unpunished by civil government.[57] All evil acts were to come before God, however, either before God Himself or before God and His ministers of justice in civil government.[58] The touchstone of civil authority does not seem to be the heinousness, harmfulness, or any other measure of the moment of the offense;[59] rather,

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54. *See* 1 *Peter* 2:14 (admonishing Christians to obey civil governments sent by God "for the punishment of evildoers, and for the praise of them that do well").

55. *See* Roger Bern, *A Biblical Model for Analysis of Issues of Law and Public Policy: With Illustrative Application to Contracts, Antitrust, Remedies and Public Policy Issues*, 6 REGENT U. L. REV. 103, 116-24 (1995) (discussing jurisdictional considerations applicable in applying biblical principles: "[N]ot every sin is within the jurisdiction of Civil Government."). One should note that the instant Article draws upon the whole of the Bible to explore the teaching of the Sermon on the Mount pertinent to cases like Alexander's and Alexandra's. Like the Sermon itself, the entire Bible has profoundly influenced our morals and jurisprudence. For many, it remains a source of truth in these areas. To be sure, the Bible deserves careful exegesis. But this author vehemently disagrees with the claim that "[a]ny attempts to apply the principles of the Torah to the American legal system are incoherent and unjustified." Daniel A. Rudolph, *The Misguided Reliance in American Jurisprudence on Jewish Law to Support the Moral Legitimacy of Capital Punishment*, 33 AM. CRIM. L. REV. 437, 462 (1996).

56. *See* Craig A. Stern, *Things Not Nice: An Essay on Civil Government*, 8 REGENT U. L. REV. 1, 6-9 (1997) (relying especially upon *Leviticus* 18 and 20 to explain the limits of civil authority).

57. *See Numbers* 35:30 (imposing the requirement of more than one witness to impose a death sentence); *Deuteronomy* 17:6 (same), 19:15 (same, except apparently extended beyond capital cases).

58. *See* 2 RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY 13 (E. P. Dutton 1968) (1597) (enjoining those employed in "the public administration of justice" to be "in heart persuaded that justice is God's own work, and themselves his agents in this business, the sentence of right God's own verdict, and themselves his priests to deliver it" (footnote omitted)).

59. Failing to appreciate that the distinction between cases like Alexander's and Alexandra's is actually jurisdictional has introduced much confusion. It has driven commentators to search for a reason to hold Alexander's crime to be worse than Alexandra's, and so deserving of more punishment absolutely. That is a very difficult chore. Professor Joel Feinberg, after answering arguments some have made in support of the moral desert of greater punishment for greater actual harm, concluded,

> when we looked at some arguments for retention [of the traditional rule that "attaches more significance to the amount of actual harm caused than to the blameworthiness of the actor"] we discovered that none of them claim that the princi-

some other distinction is at work. Sometimes, it is obvious. The requirement of two or three witnesses seems designed to foster the reliability of civil judgments. Other distinctions are less perspicuous, like that between the civilly punishable and unpunishable offenses in *Leviticus* 20,[60] indicating that even the theocracy of Israel was to be modest in its jurisdiction. As seen in Scripture, God designed a disjunction between Israel's jurisdiction and His, between civil law and the total law of human behavior.[61]

Certainly the Lord God is at liberty, according to His loving righteous-

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> ple of proportionality is wrong in giving such an important role to moral blameworthiness. In fact, they all endorse the principle of proportionality but then go on to argue that the blameworthiness that punitive severity is to be proportionate to is determined by something else, namely the amount of actual harm produced by the offender's contribution in combination with the contribution of parts of the natural world over which the offender had little normal control. Giving good reasons for that proposition—that moral blameworthiness is itself grounded in actual harm caused—is such a heavy burden that it is no wonder the arguments we examined were so bad.

Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 131 (1995).

60. *See Leviticus* 20:1-27 (setting forth the punishment for the moral offenses listed in *Leviticus* 18). Some punishments were for Israel to exact, some for God alone. The rabbis, however, did not understand this chapter to preclude Israel also from punishing the offenses to be punished by God Himself. Rather, the rabbis read *Deuteronomy* 25:1-3, a passage regarding judicial beating for "the wicked man . . . worthy to be beaten . . . according to his fault," as authorizing beatings for such offenses. *See* 11 THE JEWISH ENCYCLOPEDIA 569 (Isidore Singer ed., 1905) (noting this use of beatings, and referencing *Deuteronomy* 25:2-3 as authority). This rabbinic understanding does not entail that these offenses are to be punished by a civil government other than Israel. Beating may be more in the nature of fatherly discipline entrusted to judges in Israel than in the nature of the punishment entrusted to the state in such passages as *Romans* 13:1-6 (describing the civil government's power as derived from God). *See, e.g., Proverbs* 13:24 ("He that spareth the rod hateth his son: but he that loveth him chasteneth him betimes."); 19:29 ("Judgments are prepared for scorners, and stripes for the back of fools."); 20:30 ("The blueness of a wound cleanseth away evil: so *do* stripes the inward parts of the belly."); 22:15 ("Foolishness *is* bound in the heart of a child; *but* the rod of correction shall drive it far from him."); 23:13-14 ("Withhold not correction from the child: for *if* thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shalt deliver his soul from hell."). For a study that explores the distinction between penal and educational contexts for common beliefs on the significance of harmful results, see Yoram Shachar, *The Fortuitous Gap in Law and Morality*, CRIM. JUST. ETHICS, Summer/Fall 1987, at 12.

61. *See* BERNARD S. JACKSON, *Liability for Mere Intention in Early Jewish Law*, *in* ESSAYS IN JEWISH AND COMPARATIVE LEGAL HISTORY 202 (1975). Jackson stated:

> [I]t is valid to draw two conclusions from the biblical [*i.e.*, Old Testament] texts. First, there is no evidence that liability for mere intention was ever applied in a human court. Second, and equally significant, the idea did exist that merely to intend a wrong was itself wrong. It was a principle employed in God's justice, but not, at this period, in the jurisprudence of man.

Id.

ness, to apportion offenses to civil jurisdiction or not. But His doing so is no justification for *our* doing so, unless we follow His pattern or some other just method. Does the Scripture, then, teach that results call for heightened civil punishment?[62] A complication in answering this important question derives from the nature of the biblical law involving wrongs that entail results.

Many wrongs to be punished by Israel are defined with respect to acts. Those listed in *Leviticus* 20, for example, describe various acts that are to be punished.[63] Such offenses, though useful in discerning generally the role of civil government, are not helpful in assessing the role of result as a signal for a response by the civil jurisdiction. When result does figure in biblical wrongs, however, the wrongs seem really more delictual than criminal; they are a combination of what we define as tort and crime. Because tort generally is concerned largely with the harm done to victims—often *results* of tortious acts—result plainly should figure prominently in determining the response of civil government. Passages like those from *Exodus* 21 that treat acts causing death differently from the same acts that cause lesser harm may not really support the use of results as a license for greater civil government response in the *criminal* law.[64]

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62. As to the moral significance of results, St. Thomas Aquinas held that the actual, as opposed to the forseeable, results of acts do not themselves "add to the moral good or evil of the outward action." 18 ST. THOMAS AQUINAS, SUMMA THEOLOGIAE: PRICIPLES OF MORALITY 99 (1a2ae. 20, 5) (Blackfriars 1966) (1267-73). Aquinas viewed something like the wind in Alexandra's case in this manner: "[I]f the result follows haphazardly and rarely, then it does not affect the morality of the act for better or for worse, for you do not pass judgment on matters by what is incidental to them, but by what they essentially imply." *Id.* at 101. Likewise, Bishop Joseph Butler, "according to Cardinal Newman 'the greatest name in the Anglican Church' and the author of the most famous volume of English theology," Ronald Bayne, *Introduction* to JOSEPH BUTLER, THE ANALOGY OF RELIGION, NATURAL AND REVEALED at vii (J.M. Dent 1906) (1736), considered the question:

> [W]ill and design . . . constitute the very nature of actions as such . . . . [T]hey are the object, and the only one, of the approving and disapproving faculty. Acting, conduct, behaviour, abstracted from all regard to what is in fact and event the consequence of it, is itself the natural object of the moral discernment . . . . Intention of such and such consequences, indeed, is always included; for it is part of the action itself: but though the intended good or bad consequences do not follow, we have exactly the same sense of the action as if they did.

Id. at 265.

63. *See Leviticus* 20:1-27 (listing wrongful acts, some of which Israel was to punish).

64. *See also Exodus* 21:23 ("[A]nd if any mischief follow, then thou shalt give life for life . . . ."); *id.* at 21:28-29:

> If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox *shall be* quit. But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman;

Rather, these statutes and judgments may teach compensation for resulting harm when a victim survives to be compensated, and the death penalty for certain fatal results when bloodguilt remains instead of a live victim.

There is, however, one biblical wrong that both appears more criminal than delictual and also speaks to the issue of results and, perhaps, attempt. This wrong, false testimony, is the subject of *Deuteronomy* 19:16-21:

> If a false witness rise up against any man to testify against him *that which is* wrong; Then both the men, between whom the controversy *is*, shall stand before the LORD, before the priests and the judges, which shall be in those days; And the judges shall make diligent inquisition: and, behold, *if* the witness *be* a false witness, *and* hath testified falsely against his brother; Then shall ye do unto him, as he had thought to have done unto his brother: so shalt thou put the evil away from among you. And those which remain shall hear, and fear, and shall henceforth commit no more any such evil among you. And thine eye shall not pity; *but* life *shall go* for life, eye for eye, tooth for tooth, hand for hand, foot for foot.[65]

One could view this offense as an attempt. By false testimony, the lying witness intends to use the court to inflict injury on his opponent. Seen this way, results matter not, for the offense has no requirement that the injury actually occur. The judgment against the false witness is for whatever "he had thought to have done unto his brother," according to the *lex talionis*.[66] Perhaps, then, civil government ought not to treat harmful results as deserving greater punishment. If so, Alexander and Alexandra would receive equal sentences.[67]

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the ox shall be stoned, and his owner also shall be put to death.

Compare Exodus 21:18-19:

> And if men strive together, and one smite another with a stone, or with *his* fist, and he die not, but keepeth *his* bed: If he rise again, and walk abroad upon his staff, then shall he that smote *him* be quit: only he shall pay *for* the loss of his time, and shall cause *him* to be thoroughly healed.

with id. at 21:12 ("He that smiteth a man, so that he die, shall be surely put to death.")

65. *Deuteronomy* 19:16-21.

66. *Id.* 19:19. *Lex talionis* is the law embodied in the expression "an eye for an eye." *See* BLACK'S LAW DICTIONARY 913 (6th ed. 1990).

67. Professor Vern S. Poythress has drawn this conclusion:

> What should we say about cases of attempted murder? The Mosaic law does not speak directly concerning the penalty for attempted murder, perhaps because it is difficult in many cases for judges to determine that a particular crime is attempted murder in distinction from attempt to cause serious injury (*Exodus* 21:18-9, 23-5). This case is therefore more doubtful in character. *Deuteronomy* 19:16-21 seems to indicate that the intention to do a thing, if legally demonstra-

The difficulty with this reading, however, is that, under it, Alexander and Alexandra would both be sentenced to death. Yet this action plainly would contradict *Exodus* 21. There, the nonfatal and fatal smitings were assigned very different judgments. Likewise, the *lex talionis* of *Deuteronomy* 19 seems to contradict that of *Exodus* 21. The former grades wrongs according to intent, the latter according to result. To harmonize these passages, the false witness statute must be understood to punish perjury specifically and not attempt generally. The abuse of the courts is the wrong, and it is complete in the giving of false testimony. Thus, the irrelevance of results and the severity of the judgments obtain irrespective of the impact on the target of the perjurer's testimony. The death penalty—if, as is likely, composition was not to be allowed here—would indicate the holiness of the administration of God's justice among His holy people, Israel. This statute, then, is of no help in assessing the relevance of results as a measure of the scope of the just response of civil government in criminal cases like those of Alexander and Alexandra.

While not answering our question regarding results, the Sermon on the Mount does teach that the law for civil government is not to be confused with the law of human behavior generally. The law of human behavior generally is stricter and more complete.[68] And the penalties for breach of that law are also more severe, including consignment to hell itself.[69] Rather than a statement of morality pure and simple, civil law instead is a statement of morality committed to the civil authority that administers only a portion of God's righteous wrath. Civil law, then, reflects both morality and jurisdictional concerns, even in a system of retributive criminal law. For the civil law to be just, both the morality and the jurisdictional principle must be just. What is not necessary, however, is that the jurisdictional principles themselves reflect absolute desert.[70]

There appear to be no biblical texts proving that results are a just touchstone for the exercise of greater punitive civil authority. Nevertheless, two related general biblical principles support the conclusion that

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ble, constitutes guilt on the same level as the actual doing of it. On this basis I deduce that attempted murder deserves the death penalty. As I have already observed, in this and other cases the maximum penalty is to be enforced only when (a) the crime is legally demonstrable beyond reasonable doubt; (b) there are no mitigating circumstances.

VERN S. POYTHRESS, THE SHADOW OF CHRIST IN THE LAW OF MOSES 172 (1991); *see also Leviticus* 24:19-20 (prescribing the *lex talionis* for actually causing a blemish).

68. *See Matthew* 5:28 (stating that one commits adultery under God's law merely by "lust" in his heart, as opposed to human law, which requires the overt act).

69. *See id.* at 5:27-30.

70. *See supra* notes 55-61 and accompanying text (discussing jurisdictional limitations on civil law).

Alexander deserves more civil punishment than Alexandra. First, God has placed humans within a moral setting where results have moral consequences.[71] Alexandra's act may be as evil as Alexander's, but the Bible would hold Alexander guilty of bloodguilt. Unlike tortious harm to a surviving victim, bloodguilt for an actual murder placed special responsibility upon Israel to do justice in executing the murderer.[72] The murder itself was understood to have a special moral aspect that required a civil response beyond that of an equally intended murderous smiting that failed to cause a death. Likewise, the Decalogue commands "Thou shalt not kill."[73] It is the murdering itself that is the complete wrong. To intend and act to cause murder, though possibly as heinous an evil as to intend and accomplish a murder, is in some respect a derivative evil. It is the murder that epitomizes the wrong, for humans at least, as we administer justice as God's viceregents in civil government.

Perhaps another aspect of this first principle lies in understanding the law as an evaluative as well as an imperative norm. "Thou shalt not kill" strikes us most as an imperative, commanding us not to murder. When

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71. *See* Duff, *supra* note 16, at 34-36 (arguing that by consequent harm an offender "[brings] evil into the world"); George P. Fletcher, *What is Punishment Imposed For?*, 5 J. CONTEMP. LEGAL ISSUES 101, 102-04 (1994) (suggesting that seeing punishment as a remedy for wrong supports taking harmful results into account); Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 237 (1994) (arguing that our sense of justice and the illogic of the argument from moral luck demonstrate that resulting harm from criminal conduct deserves extra punishment). *But see, e.g., supra* note 13 (opposing arguments that resulting harm has significance for retributive desert).

72. *See Numbers* 35:31-34. Here, God issues a categorical command:

> Moreover ye shall take no satisfaction for the life of a murderer, which *is* guilty of death: but he shall be surely put to death. And ye shall take no satisfaction for him that is fled to the city of his refuge, that he should come again to dwell in the land, until the death of the priest. So ye shall not pollute the land wherein ye *are*: for blood it defileth the land: and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it. Defile not therefore the land which ye shall inhabit, wherein I dwell: for I the LORD dwell among the children of Israel.

Id.

One would think that a commitment to the death penalty for murder would put a swift end to our problem, at least for cases like Alexander's and Alexandra's. Few would advocate the death penalty for any attempted murder. *But see supra* note 10 (discussing the sporadic medieval and 17th century practice in England of putting people to death for attempted murder). Presumably, the equivalentist would set the penalty for murder and attempted murder (or some new offense of deadly endangerment?) at some high, but non-capital level. *See* Kessler, *supra* note 12, at 2228-37 (discussing equivalentist options for punishment).

73. *Exodus* 20:13; *Deuteronomy* 5:17. "Kill" would be rendered "murder" in more contemporary English. Compare the translation of the New International Version: "You shall not murder." *Exodus* 20:13 (N.I.V.); *Deuteronomy* 5:17 (N.I.V.).

confronting a corpse and a murder, however, the commandment offers itself as a measure to assess the situation, and the deserts of the murderer. Results seem to call for their own response from civil government:

> Those who one-sidedly ascribe importance to the imperative norm overlook vitally important functions of criminal law—affirmation of the validity of the violated law, stabilization of behavioral expectations, reparation, prevention of persons taking the law into their own hands, etc. These functions do not emerge until after the breach of the norm. The law is not merely a means of prevention, but also—and perhaps primarily—an instrument for settlement of already existing social conflict. Under this view, social consequences of crime are decisive.[74]

While not altering the moral estimation of an offense according to strict retributive justice, results may prompt an enhanced retributive response from civil government as the human agency to evaluate criminal harm.

Similarly, a second principle supports the significance of results for civil penal jurisdiction. Though biblical criminal law requires human judges—or at least the "congregations" of the Cities of Refuge—to discern mens rea (e.g., the difference between a "smite" with "enmity" and a "thrust" "without enmity"),[75] the Bible also cautions that our abilities to perceive and act upon truth are limited. Presumably, the limited nature of civil jurisdiction itself reflects this fact.[76] God calls us to do justice in small measure—justice to be sure, but only in part. Results are significant for the civil jurisdiction because they clarify and help prove the evil of the intention and the act, not only for judge and jury, but also for criminal and community. Just as canonists and theologians value external acts not purely in themselves so much as for revelation of intentions,[77]

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74. Burkhardt, *supra* note 7, at 561 (footnotes omitted). Presumably, the use of law as an evaluative norm does not demand the utilitarian cast it receives here.

75. *See Numbers* 35:14-25 (elaborating the law of homicide).

76. *See* Bern, *supra* note 55, at 161-65 (arguing that biblical principles put unmeasurable damages—those for physical or emotional pain and suffering—beyond the scope of civil government); *cf.* NATHANIEL HAWTHORNE, *The Birth-mark in*, THE CENTENARY EDITION OF THE WORKS OF NATHANIEL HAWTHORNE 36-56 (Ohio State Univ. Press 1974) (1843) (telling a tale of the fatal consequences of one man's attempt to perfect his beloved).

77. The Church of the early middle ages seems to have prescribed more onerous penances for acts than for the simple sinful desire or intention to perform the acts. *See* MEDIEVAL HANDBOOKS OF PENANCE, *supra* note 53, *passim*. The Penitential of Finnian (Irish, *ca.* 525-50) explained:

> If anyone has thought evil and intended to do it, but opportunity has failed him, it is the same sin but not the same penalty; for example, if he intended fornication or murder, since the deed did not complete the intention he has, to be

> sure, sinned in his heart, but if he quickly does penance, he can be helped. This penance of his is half a year on an allowance, and he shall abstain from wine and meats for a whole year.

Id. at 88. It would seem from this excerpt that actions were seen as completions of intentions, perhaps viewing intention as a state embracing various aspects (including acts) until the intended goal was attained. Quick penance interrupts the intention, cutting the ill will short. The sin is the same, but the intensity and duration differ.

Five centuries later, Western Christendom saw a "profound alteration" in the concepts regarding individuals, an alteration that led to a deepened emphasis on "a person's inner state—his feelings, his motives, his reasoning capacity, and his sense of the moral." Lawrence Rosen, *Intentionality and the Concept of the Person*, *in*, 27 CRIMINAL JUSTICE: NOMOS 61 (J. Roland Pennock & John W. Chapman eds., 1985). Peter Abelard was the most extreme exponent of this emphasis, denying totally the moral significance of action. *See id.* at 62. He stated emphatically that

> "the addition of the performance of the deed adds nothing to increase the sin," [and said] that in good acts as well as bad everything is determined by our intention and consent: "It does not in fact matter to merit whether you give alms to the needy; charity may make you ready to give and the will may be there when the opportunity is missing and you no longer remain able to do so . . . ."

ROBERT SOKOLOWSKI, MORAL ACTION 211 (1985) (quoting Peter Abelard; internal citations omitted). For Abelard, there is no essential connection at all between act and morality, so human judgment must be pragmatic and not based upon moral desert. *See id.* at 212. Only a presumption of sinfulness might arise from acts. *See* BERMAN, *supra* note 4, at 189. Berman goes on to explain:

> Abelard's view that sinfulness may be presumed and only presumed, and therefore ignored, was rejected by the church. The canon lawyers [in the decades after Abelard] were concerned above all with measuring the offense against God. They saw the "external indicators" as God-given devices for that purpose, but they also went beyond them to a specific inquiry into the mind and heart and soul of the accused. They recognized that ecclesiastical law is applied in the earthly forum of the church, not in the heavenly forum, and that therefore it must proceed according to the criteria of objectivity and generality; nevertheless, they saw no essential conflict but rather a basic harmony between those criteria and the criteria of divine justice. Following their conceptions of God's own procedures, they were interested to determine *both* whether the accused intentionally committed a morally and socially offensive act in violation of a law *and* to what extent he thereby revealed a depraved mind and heart and soul.

Id. (footnote omitted). Within decades of these canonists, St. Thomas Aquinas would explain:

> If we are speaking of the goodness the outward deed gets from the act of will intending the end, then nothing is gained from its exteriorization, unless it means in effect that the act of will becomes better with good, or, as the case may be, worse with evil. This can come about in three ways. First, by number; for example, when a man wills a deed for a good or bad end, but at the time does not carry it out, and then afterwards, when he both intends and performs the deed, his act of will is doubled, and so too is its goodness or badness. Second, by extent; for example, one man may will to do something for a good or bad purpose and then stop short because of some obstacle, whereas another will press on until he has done it, so manifesting a more prolonged act of will for good or ill, and this accordingly is better or worse. Third, by intensity; because they are irksome or pleasurable some outward acts are such as to call for a greater or lesser effort of will. Clearly the more strongly the will is set on some good or evil so much the better or worse it is.

so results certify the deadliness of intent and act for us.[78]

These two principles help explain the tension described by Adam Smith and apparent in the work of Immanuel Kant.[79] On the absolute

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> If, however, we are speaking of the good or bad the outward deed gets from its matter and relevant circumstances, it then relates to the will as the term and goal of its act; in this manner it adds to the good or evil of the will, for every bent and motion is completed by reaching its term and attaining its goal. Hence an act of will is not complete unless given the opportunity it will finish the deed.
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> This may turn out to be impossible, nevertheless so long as the will is all set to carry through with the act if it can, then the fact that it remains unfinished is involuntary. What is [in]voluntary is counted neither for reward nor punishment in doing well or ill, and likewise there is no subtraction from reward or punishment when a man involuntarily does not succeed in carrying out a good or evil work.

18 AQUINAS, *supra* note 62, at 95, 97 (1a2ae. 20, 4) (footnotes omitted). For St. Thomas, the act is important especially as it reflects the condition of the will, but it appears to be more than a negligible matter for moral evaluation. Something of his approach is to be found in such remarks as Wharton's, on why the punishment of the attempt should be less than that for the completed offense: "The attempt involves neither the duration of premeditation, nor the obduracy of purpose, which belong to the crime when complete." FRANCIS WHARTON, PHILOSOPHY OF CRIMINAL LAW § 200, at 235 (1880); *cf.* 4 BLACKSTONE, *supra* note 10, at *14 (set forth in that note).

78. As one scholar noted:

> I believe that insofar as the harmed-based retributivists' view is based on the common intuition that offenders who cause harm should be punished more vigorously than otherwise identical offenders who do not, those intuitions may be explainable in terms that are irrelevant to desert. Specifically, the supposed moral intuition may not be a moral intutition at all, but simply an intuition about what is practical. When a person actually causes an injury, there is a greater reason to believe that his conduct posed an unreasonable risk of injury than there would have been in the absence of that injury—not overwhelmingly greater reason, but nonetheless greater. Desert may be the same for two wrongful actors, one of whom caused an injury and the other of whom did not, but as imperfect administrators of justice we may feel more comfortable punishing only the actor who caused harm to the full extent of this desert. He's the one we're sure of.

Heriot, *supra* note 15, at 147-48 (footnotes omitted); *see also* Rothstein, *supra* note 15, at 151 (arguing that consequences illumine moral judgments). Even some commentators that criticize boosting punishment for harmful consequences may admit their evidentiary value in establishing culpability. *See* Parker, *supra* note 12, at 273 ("In general, the production of a harmful result is *prima facie* evidence that the conduct which produced it was likely to produce it."); *cf.* Becker, *supra* note 12, at 292-93 (allowing result to establish negligence for lack of a reliable alternative); Norvin Richards, *Luck and Desert*, *in* MORAL LUCK, *supra* note 11, at 167 (arguing that moral luck actually affects our *judgments* of desert, and not actual desert itself); Michael J. Zimmerman, *Luck and Moral Responsibility*, *in* MORAL LUCK *supra* note 11, at 217 (arguing that harmful results indicate blame, but do not augment blame itself).

The present Article finds a jurisdictional principle where Heriot and Rothstein find only a practical consideration. Nevertheless, their analyses do expose a likely aspect of the former.

79. *See supra* notes 21-37 and accompanying text. Many of the apparent contradictions that lead Professor Murphy to find no coherent theory of punishment in Kant's writing, *see supra* note 35, might yield to these two principles and to the general jurisdic-

moral scale of wickedness, Alexander's and Alexandra's intentions and acts may be identical.[80] But for the wind only, they would both be murderers or attempters of murder. Their moral guilt may be identical. Nevertheless, we sense that they do not deserve equal criminal punishment. To murder and to attempt murder are not equal offenses. Between these two diverse assessments is a shift of perspective. The first reflects the perspective of God's government. As a matter of absolute morality, both actors may deserve the same punishment. The second assessment, however, reflects the perspective of human government.[81] There, the different results of the acts signal a different civil punishment, and perhaps other different human consequences.[82] Our responsibilities

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tional approach suggested here. The famous passage quoted at note 28, *supra*, may suggest as much. Though emphasizing the unique value of the will for assessing the moral quality of our actions, it does note that the "usefulness[, i.e., the faculty of the will actually to achieve its goal] would be only its setting, as it were, [the will itself being the sparkling jewel] so as to enable us to handle it more conveniently in commerce or to attract the attention of those who are not yet connoisseurs." KANT, *supra* note 25, at 10. While not detracting from absolute moral desert as the standard of perfect justice, the responsibilities and limitations of civil government require that it handle the setting more than the jewel itself.

80. Some medieval Christian commentators went so far as to suggest that even acts, let alone results, have no effect on the morality of the actor. *See* EDGAR SHEFFIELD BRIGHTMAN, MORAL LAWS 146-47 (1969); *see also supra* note 77 (discussing Abelard). Perhaps the chief contemporary exponent of the contrary position is Professor Michael S. Moore. For him, it is the doing of wrong acts that, in part, deserves moral blame. *See* MICHAEL S. MOORE, ACT AND CRIME 44-59 (1993); Michael S. Moore, *A Theory of Criminal Law Theories*, 10 TEL AVIV U. STUD. L. 115, 143, 177-84 (1990). Some question whether he has made his case. *See generally* Douglas N. Husak, *The Relevance of the Concept of Action to the Criminal Law*, 6 CRIM. L.F. 327 (1995) (reviewing MOORE, *supra*). The jurisdictional approach suggested by the Sermon on the Mount explains why wrongful acts may justly deserve criminal punishment though they independently may add little or nothing to moral blameworthiness.

81. Adam Smith himself offers the first explanation for the "irregularity of sentiment": he described that God designed it to support the distinction between His and human governance; though in his explanation Smith discusses actions and intentions only, not consequences. *See* SMITH, *supra* note 20, at 93.

82. *See* Nils Jareborg, *Criminal Attempts and Moral Luck*, 27 ISR. L. REV. 213, 225-26 (1993). Jareborg contends:

> Conduct ethics[, which includes a consideration of the harmful consequences of acts,] is the type of ethical metaphysics most suitable for dealing with large, anonymous moral communities and frequent types of acts. In assessing much of human behaviour there is simply no time for deep investigations and analyses. Normally we cannot count on loyal cooperation from the "suspect." A mentality ethics is simply impracticable for most of our everyday moral judgments. There must be something more tangible than a perhaps secret "inner life." A mentality ethics could function as a private morality (a morality where the idea of reciprocity within a moral community is absent), but hardly as a social morality. The historical background of the idea of a mentality ethics suggests that the most important aspect of morality is the relation to God, not the relation to other per-

and relationships in actual physical events, and our limited knowledge—perhaps a limited knowledge especially suited to those responsibilities and relationships—lead us to distinguish between the case of Alexander and the case of Alexandra. This conclusion is not to confess that God's view is truly moral and that of the "human jurisdiction" immoral.[83] Rather, the views encompass different realms and scopes of authority.[84]

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sons.

Id. *See generally* Mark Perlman, *Punishing Acts and Counting Consequences*, 37 ARIZ. L. REV. 227 (1995) (arguing that consequent harm is relevant to criminal punishment apart from the question of its relevance to morality); Judith Jarvis Thomson, *The Decline of Cause*, 76 GEO. L.J. 137 (1987) (distinguishing between assessing the moral qualities of persons and the moral qualities of acts, the latter depending in part on consequential harm and forming the basis for legal responsibility).

83. Though a variety of theories of punishment—deontological (retribution), consequentialist (deterrence, rehabilitation, incapacitation), or mixed—may support the analysis proposed in this Article, the retributive surely does. The retributive theory of criminal punishment best reflects God's justice. *See* Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice*, 38 AM. J. JURIS. 221 (1993). If civil government is to dispense a measure of God's justice, it too should adhere to the retributive approach. *See id.* at 221; *see also Romans* 13:1-6. *See generally* Jerome Hall, *Biblical Atonement and Modern Criminal Law*, 65 WASH. U. L.Q. 694 (1987) (discussing retributive and other interpretations of the atonement); E.L. (Stacey) Hebden Taylor, *Retribution, Responsibility and Freedom: The Fallacy of Modern Criminal Law From a Biblical-Christian Perspective*, 44 LAW & CONTEMP. PROBS. 51, 51 (1981) (calling for the rejection of an ascendant "therapeutic ideology of crime control and treatment" in favor of traditional biblical retributivism). Conversely,

> were a state to try to be morally neutral, it would be unable to inflict retributive punishment. The demands of retribution require a legal institution not only to take moral sides, but also to strive to implement a moral world in which people are treated with the respect their value requires.

Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1701 (1992); *see also* Jeffrie G. Murphy, *The State's Interest in Retribution*, 5 J. CONTEMP. LEGAL ISSUES 283, 283-87 (1994) (arguing that a thorough going retributivism is incompatible with a liberal theory of the state, a theory that elevates as supreme the values of liberty and individual rights). There is no suggestion in the Bible that human and divine justice differ in nature. Rather, the teaching is that human justice reflects divine justice. The jurisdiction of humans is limited, and the justice may be done with respect to only some matters, such as acts, but not pure will or character. But justice, both human and divine, "*execute[s]* wrath upon him that doeth evil." *Romans* 13:4.

It may be that this jurisdictional but non-essential distinction between the retributivism of God and that of His civil ministers may be described, in part at least, as one between "subjectivist" "intent-based retributivism" on the one hand, and, on the other, some hybrid of that and "objectivist" "harm-based retributivism." *See* Kevin Cole, *The Voodoo We Do: Harm, Impossibility, and the Reductionist Impulse*, 5 J. CONTEMP. LEGAL ISSUES 31, 31-32 (1994) (supporting "intent-based retributivism" against "harm-based retributivism" in the criminal law of impossible attempts).

84. Several opinions from the United States Supreme Court accord with this analysis. In rejecting an Eighth Amendment challenge to a Texas recidivist statute, the Court remarked, "if [the defendant] Rummel had attempted to defraud his victim of $50,000, but had failed, no money whatsoever would have changed hands; yet Rummel would be no less blameworthy, only less skillful, than if he had succeeded." Rummel v. Estelle, 445

The Sermon on the Mount emphasizes the difference between God's absolute justice and the more limited justice to be administered by human beings, including ministers in civil government. Christ does not teach that the two forms of justice are of a different nature, nor does he teach that humanly administered justice is to be despised in favor of the divinely administered.[85] Both realms of justice are truly just and express

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U.S. 263, 276 (1980). In *Booth v. Maryland*, 482 U.S. 496 (1987), the Court held that the Eighth Amendment prevents the introduction of a victim's impact statement during the sentencing phase of a capital murder trial. *See id.* at 508-09. The Court overruled *Booth* four years later in *Payne v. Tennessee*, 501 U.S. 808, 828-30 (1991). In *Booth*, Justice Scalia wrote the following in a dissent joined by three others:

> The Court holds that . . . considerations not relevant to "the defendant's 'personal responsibility and moral guilt'" cannot be taken into account in deciding whether a defendant who is eligible for the death penalty should receive it. It seems to me, however—and, I think, to most of mankind—that the amount of harm one causes does bear upon the extent of his "personal responsibility." We may take away the license of a driver who goes 60 miles an hour on a residential street; but we will put him in jail for manslaughter if, though his moral guilt is no greater, he is unlucky enough to kill someone during the escapade.
>
> Nor, despite what the Court says today, do we depart from this principle where capital punishment is concerned. The Court's opinion does not explain why a defendant's *eligibility* for the death sentence can (*and always does*) turn upon considerations not relevant to his moral quilt. If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires, he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater.

482 U.S. at 519 (Scalia, J., dissenting) (citations omitted). The *Payne* Court quoted from this passage to help explain that resulting harm affects the seriousness of an offense and the severity of its punishment, 501 U.S. at 819-21, though the Court later stated that such harm goes toward assessing "the defendant's moral culpability and blameworthiness." *Id.* at 825.

These opinions suggest that it is proper for civil government to consider harmful results in assessing just punishment, notwithstanding its irrelevance to a moral assessment of guilt. If murderers and attempted murderers are equally guilty morally, and yet we impose the death penalty upon murderers only, the result of death has worked a "jurisdictional" shift, assigning to the civil government a greater portion of the moral guilt to punish. *But see Model Penal Code Conference Transcript—Discussion Four*, 19 RUTGERS L.J. 797 (1988). Professor Ashworth remarked that

> [j]ust recently in England there was a driving accident which involved a small act of carelessness: A motorcyclist, turning right, failed to keep a proper lookout. He killed an old man, and the question came up to the court as to whether the fine should be increased because of the death that resulted from what was essentially a small act of carelessness, and the Lord Chief Justice . . . . said, essentially, that you look intrinsically to the carelessness, pay no attention to the death, the setting of the fine should depend solely on the carelessness . . . .

Id. at 809-10.

85. *See Matthew* 5:17-20. Jesus explained:

> Think not that I am come to destroy the law, or the prophets: I am not come to destroy, but to fulfil. For verily I say unto you, Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled. Whosoever therefore shall break one of these least commandments, and shall teach men so,

the same nature of justice. Civil rulers are ministers of the wrath of God Himself and their judgment must reflect His.[86] It is the scope of the justice, not its essence, that separates God's own from that share to be administered by civil government.[87]

If Alexander deserves more punishment from the civil government than does Alexandra, this will be because the wind has worked not "moral luck," but rather "jurisdictional luck," if it is luck at all. Results signal what share of God's justice is to be administered by humans, not the demands of total and absolute justice.[88]

VI. JUST LUCK

As the Sermon on the Mount teaches, much of biblical law explicitly expresses God's holiness and justice only in part. The partiality of the law does not embrace a distortion of God's standards, but only a limited application of them. The Sermon on the Mount requires that we see the

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> he shall be called the least in the kingdom of heaven: but whosoever shall do and teach *them*, the same shall be called great in the kingdom of heaven. For I say unto you, That except your righteousness shall exceed *the righteousness* of the scribes and Pharisees, ye shall in no case enter into the kingdom of heaven.

Id.

86. *See* Witte & Arthur, *supra* note 2, at 451. The authors assert the following:

> Like the theologians, early modern jurists accepted a general moral theory of government and criminal law. God has created a moral or natural law. . . . State magistrates are God's vice-regents in the world. They must represent and reflect God's authority and majesty on earth. The laws which they promulgate must encapsulate and elaborate the principles of God's moral law, particularly as it is set out in the Ten Commandments. The provisions of the criminal law, therefore, must perforce parallel the provisions of the moral law. The purposes of criminal punishment must perforce parallel the purposes of divine punishment. As William Blackstone put it, "the state's criminal law plays the same role in man's social life that God's moral law plays in man's spiritual life."

Id. (footnotes omitted).

87. There appears to be a tension between the jurisdictional understanding of criminal law and the classic understanding of retributive civil justice. The latter holds that

> people should be punished because of (and only in proportion to) their moral deserts. This means that legal doctrines (such as that requiring a voluntary act or that requiring punishable acts to be instances of wrongful act-types, like killings) are best interpreted so as to get at the moral deserts of offenders . . . .

Michael S. Moore, *More on Act and Crime*, 142 U. PA. L. REV. 1749, 1751 (1994). But jurisdictional concerns act in derogation of morality on the merits. Unless the civil jurisdiction is tantamount to God's, it is not simply to "get at the moral deserts of offenders." The most to be expected of it is to punish justly according to the *component* of desert assigned to its judgment.

88. *Cf.* Moore, *supra* note 71, at 281 ("Results matter . . . . Culpability sets the outer limits of desert and thus, of proportionate punishment. (Proximately) causing the harm intended or risked brings one's deserts up to those limits . . . wrongdoing is something of the poor relation to culpability.").

commands "Thou shalt not hate," or even "Thou shalt love," behind "Thou shalt not kill," and "Thou shalt not entertain lust" behind "Thou shalt not commit adultery." God's judgment according to the complete standards of human goodness is more searching, and more momentous, than that He has apportioned to human judges. Civil laws, however just, will not duplicate the laws God has ordained for humankind as applied by Himself.

As we have seen, then, the issue raised by the cases of Alexander and Alexandra is one of jurisdiction, not of moral desert pure and simple. Notwithstanding, if the standard of jurisdiction were arbitrary—such as, redheads merit half the civil punishment meted out to other comparable offenders, with the difference left to God alone to punish—the civil law would be unjust. The previous part of this Article essayed to establish that results in cases like those of Alexander and Alexandra are a non-arbitary signal for distinguishing levels of civil jurisdiction in the criminal law. Our situation in the physical world, and the concomitant limitation on our abilities to discern and appreciate truth, support the use of results as such a jurisdictional marker. So the cases of Alexander and Alexandra raise a matter of "jurisdictional," not "moral," "luck."[89]

That the luck involved is jurisdictional and not moral goes some distance to explain the justice of treating Alexander differently from Alexandra in the courts of civil justice. The Christian understanding knows God as ultimate guarantor of perfect justice.[90] The desert of a criminal, whatever its extent, may be described as pay now or pay later; the payment will be made regardless.[91] If Alexander and Alexandra merit the

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89. *See* JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, AND RISK 227-29 (1986) (characterizing as "just luck" that one but not the other of her two murderous shooters in fact killed his target). At least one commentator, however, has argued that to characterize the distinction like that between Alexander and Alexandra as one of luck may beg the question. *See* Note, *The Luck of the Law: Allusions to Fortuity in Legal Discourse*, 102 HARV. L. REV. 1862, 1862-63 (1989) (arguing that the law often uses the concept of luck to pass off disguised policy choices as simply a principle of avoiding the effects of chance).

90. *See Galatians* 6:7 (stating "[b]e not deceived; God is not mocked: for whatsoever a man soweth, that shall he also reap").

91. *See* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1724 (1994).

> Of special interest in this connection is Hale's statement of a presumption of innocence and his justification of it in religious terms: that although God requires the judge to convict the guilty and acquit the innocent, where the evidence of guilt is not conclusive the judge should acquit, even though he thereby risks acquitting the guilty, since God himself is the final judge and, moreover, the guilty person who has mistakenly been acquitted may repent and reform.

Id.; *see also* L.E. GOODMAN, ON JUSTICE: AN ESSAY IN JEWISH PHILOSOPHY 69 (1991) (explaining that the deserved social response to actions is only a part of God's ultimate

same or similar punishment, eventually they shall receive it.

Nonetheless, that so important a jurisdictional matter, one affecting profoundly the response of civil government to a crime, should rest upon the wind still gives pause. It appears that nothing the defendants themselves did would be responsible for producing the "jurisdictional facts." Though the standard for jurisdiction be not arbitrary, the presence of the facts that meet the standard in a given case may seem arbitrary. In other words, even if results matter, that there are results seems to flow from factors that do not matter.

This aspect of civil justice in the cases of Alexander and Alexandra needs light from the second doctrine we found adumbrated in the Sermon on the Mount, the doctrine of Divine Providence. Though "[t]he wind bloweth where it listeth,"[92] the wind also is subject to the providence of God.[93] The Christian faith that sees God as the author of justice and civil officials as His ministers also sees the wind as obeying God's command. It understands that God's hand ultimately determined that Alexander's case implicates a greater measure of punitive civil authority than does Alexandra's.[94]

Divine Providence is a fundamental doctrine of the Christian faith and a theme of the Bible.[95] Three instances from biblical narratives should help illustrate the doctrine. The first could lend the doctrine its name. The Akedah, or Sacrifice of Isaac, tells of God's testing Abraham, calling upon him to offer Isaac, the promised son through whom the covenant blessings of Abraham were to be transmitted. When on the way to the place of sacrifice Isaac asks his father, "Behold the fire and the wood: but

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working of justice).

92. *John* 3:8.

93. *Cf. Mark* 4:39 ("And he arose, and rebuked the wind, and said unto the sea, Peace, be still. And the wind ceased, and there was a great calm.").

94. Perhaps this understanding is a corollary of the still-popular belief as to Alexander's victim: that though Alexander is responsible for the death, there is a sense in which his victim's "time was up," and that the divinely appointed length of his life was fulfilled. Likewise, one might say that in the case of Alexandra and Carol: "Providence charitably averts the intended result." Burkhardt, *supra* note 7, at 561.

95. *See generally* 1 CALVIN: INSTITUTES OF THE CHRISTIAN RELIGION 197-210, 210-28 (John T. McNeill ed., Ford Lewis Battles trans., Westminster Press 1960) (1559) (comprising two chapters, "God by His Power Nourishes and Maintains the World Created by Him, and Rules Its Several Parts by His Providence" and "How We May Apply This Doctrine to Our Greatest Benefit"); CATECHISM OF THE CATHOLIC CHURCH 89-93 (¶¶ 302-14) (United States Catholic Conference 1994) (1994) (portion on Divine Providence); JOHN FLAVEL, THE MYSTERY OF PROVIDENCE (First Banner of Truth 1976) (1678) (classic Puritan treatment); 3 THE ILLUSTRATED BIBLE DICTIONARY 1292-93 (1980) (biblical theology of Providence); J. RODMAN WILLIAMS, RENEWAL THEOLOGY 117-26 (1988) (definition and aspects of Providence).

where *is* the lamb for a burnt offering?" Abraham tells Isaac, "My son, God will provide himself a lamb for a burnt offering. . . ."[96] The angel of the Lord stops Abraham at the point of killing Isaac:

> And Abraham lifted up his eyes, and looked, and behold behind *him* a ram caught in a thicket by his horns: and Abraham went and took the ram, and offered him up for a burnt offering in the stead of his son. And Abraham called the name of that place Je-ho'vah-ji'reh: as it is said *to* this day, In the mount of the LORD it shall be seen.[97]

"[I]t shall be seen"; that is, the Lord "shall provide."[98] God's providence provided—foresaw the need for and supplied to fill that need—the substitute ram to die in Isaac's place and to typify the Lamb who would die in the place of mankind.

The Bible portrays God's Providence as reaching all things,[99] including the actions of human beings. Two other famous instances of Divine Providence from biblical narratives are the captivity of Joseph and the betrayal of Judas. In the first, Joseph's jealous brothers sell him to Midi-

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96. *Genesis* 22:7-8.

97. *Id.* 22:13-14.

98. From *providēre*, Latin for "to foresee." *See* D.P. SIMPSON, CASSELL'S LATIN DICTIONARY 484 (1968).

99. *See Romans* 8:28 ("And we know that all things work together for good to them that love God, to them who are the called according to *his* purpose."); *see also* JEREMIAH BURROUGHS, THE RARE JEWEL OF CHRISTIAN CONTENTMENT 111-12 (Banner of Truth Trust 1964) (1648). Burroughs teaches that

> God by his providence rules the world, and governs all things in general, . . . it reaches to every detail; not only to order the great affairs of kingdoms, but it reaches to every man's family; . . . it reaches to every condition; yea, to every happening, to everything that falls out concerning you in every particular: not one hair falls from your head, not a sparrow to the ground, without the providence of God. Nothing befalls you, good or evil, but there is a providence of the infinite eternal [Just] Being in that thing; and therein is God's infiniteness, that it reaches to the least things, to the least worm that is under your feet.

Id.; 1 CALVIN, *supra* note 95, at 208. Calvin states that

> however *all things* may be ordained by God's purpose and sure distribution, for us they are fortuitous. . . . [S]ince the order, reason, end, and necessity of those things which happen for the most part lie hidden in God's purpose, and are not apprehended by human opinion, those things, which it is certain take place by God's will, are in a sense fortuitous.

Id. (emphasis added); *see also* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 95, at 89 (¶¶ 302-08) (teaching that "there is a solidarity among all creatures [because] . . . all have the same Creator and are all ordered to his glory" (emphasis removed)); THE ILLUSTRATED BIBLE DICTIONARY, *supra* note 95, at 1292 ("God rules all natural forces (Ps. 147:8f.), all wild animals (Jb. 38-41), and all happenings in the world, great and small, from thunderstorms (Jb. 37; Ps. 29) and plagues (Ex. 7:3-11:10; 12:29ff.; Joel 2:25) to the death of a sparrow (Mt. 10:29) or the fall of a lot (Pr. 16:33)."); WILLIAMS, *supra* note 95, at 123 ("God in His providence directs His creation. He guides and governs all things.").

anites, who sells him to Potiphar, the captain of Pharaoh's guard.[100] As Providence would have it, Joseph ends up Pharaoh's vizier and the official whose wisdom, advice, and administrative skill save the Egyptians and his own family from starvation.[101] After Jacob, father to Joseph and his brothers, dies, Joseph's brothers become uncertain of the forgiveness Joseph had offered them and ask him to confirm that forgiveness:

> [A]nd now, we pray thee, forgive the trespass of the servants of the God of thy father. And Joseph wept when they spake unto him. And his brethren also went and fell down before his face; and they said, Behold, we *be* thy servants. And Joseph said unto them, Fear not: for *am* I in the place of God? But as for you, ye thought evil against me; *but* God meant it unto good, to bring to pass, as *it is* this day, to save much people alive.[102]

God's providence, working through the actions of Joseph's brothers and of others, used his captivity to avert starvation.

In the betrayal of Judas, God similarly works through human acts to bring about His will. At the Last Supper, Christ remarks, "But, behold, the hand of him that betrayeth me *is* with me on the table. And truly the Son of man goeth, as it was determined: but woe unto that man by whom he is betrayed!"[103]

In both of these instances of Divine Providence, God acts as the One who ultimately shapes human events, even when acting through humans who themselves remain responsible for their acts.[104] Joseph's brothers do

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100. *See Genesis* 39:1.

101. *See id.* at 41:1-57.

102. *Id.* at 50:17-20.

103. *Luke* 22:21-22; *see also Acts* 2:23 ("Him, being delivered by the determinate counsel and foreknowledge of God, ye have taken, and by wicked hands have crucified and slain . . . ."); *cf. Habakkuk* (prophesizing God's raising up of the Chaldeans to wreak by violence His vengeance and also His punishing of the Chaldeans for the very same violence).

104. *See* ST. AUGUSTINE, THE ENCHIRIDION ON FAITH, HOPE AND LOVE 117-19 (Henry Paolucci ed., Regnery Gateway Co. 1961) (421) (comprising chapter entitled "The Will of God, Which is Always Good, Is Sometimes Fulfilled Through the Evil Will of Man"); 1 CALVIN, *supra* note 95, at 216-19 (comprising section entitled "God's providence does not exculpate our wickedness"). Calvin continues by explaining:

> Suppose a disease should carry off anyone whom he treated negligently, although it was his duty to take care of him. Even though he knows that this person had come to an impassable boundary, he will not on this account deem his misdeed less serious; rather, because he did not faithfully discharge his duty toward him, he will take it that through the fault of his negligence the latter had perished. Where fraud or premeditated malice enters into the committing of either murder or theft, he will even less excuse such a crime on the pretext of divine providence; but in this same evil deed he will clearly contemplate God's righteousness and

ask and receive forgiveness, Judas does receive condemnation. But God Himself, consistent with human responsibility, shapes our destinies. That, at least, is the orthodox Christian understanding.[105]

The operation of Divine Providence obviates "jurisdictional luck." It is not meaningless, blind chance that leads to the distinction between the

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man's wickedness, as each clearly shows itself.

Id. at 222; *see also* J.I. PACKER, EVANGELISM AND THE SOVEREIGNTY OF GOD 18-36 (1961) (comprising chapter entitled "Divine Sovereignty and Human Responsibility"); THE ILLUSTRATED BIBLE DICTIONARY, *supra* note 95, at 1293 ("God's control is absolute in the sense that men do only that which he has ordained that they should do; yet they are truly free agents, in the sense that their decisions are their own, and they are morally responsible for them (*cf.* Dt. 30:15 ff.)."); WILLIAMS, *supra* note 95, at 124-25 ("God providentially directs the history of people and nations. This denies neither the freedom of their actions nor the evil of their intentions. God fulfills His purpose through all. Both God's predetermining will in every detail and their own totally free exercise of action are underscored.").

An antinomy akin to that of Divine Providence and human responsibility received possibly its most famous philosophical treatment in Kant's *Critique of Pure Reason.* The "Third [Conflict] of the Transcendental [Ideas]" poses the thesis, "Causality according to the laws of nature, is not the only causality operating to originate the phenomena of the world. A causality of freedom is also necessary to account fully for these phenomena." Against this, it poses the antithesis, "There is no such thing as freedom, but everything in the world happens solely according to the laws of nature." IMMANUEL KANT, CRITIQUE OF PURE REASON 270 (J.M.D. Meiklejohn trans., J.M. Dent & Sons Ltd. 1979) (2d ed. 1787). Kant purports to demonstrate "[t]hat this antinomy is based on a mere illusion, and that nature and freedom are at least *not opposed.*" *Id.* at 329-30.

Of particular interest for our question is a passage from Calvin discussing Augustine. The passage links the doctrines of providence and human responsibility to God's judgment of humans according to the goodness of their wills.

> And for modest minds this answer of Augustine will always be enough: "Since the Father delivered up the Son, and Christ, his body, and Judas, his Lord, why in this delivering up is God just and man guilty, unless because in the one thing they have done, the cause of their doing it is not one?" But if some people find difficulty in what we are now saying—namely, that there is no agreement between God and man, where man does by God's just impulsion what he ought not to do—let them recall what the same Augustine points out in another passage: "Who does not tremble at these judgments, where God works even in evil men's hearts whatever he wills, yet renders to them according to their deserts?" And surely in Judas' betrayal it will be no more right, because God himself both willed that his Son be delivered up and delivered him up to death, to ascribe the guilt of the crime to God than to transfer the credit for redemption to Judas. Therefore the same writer correctly points out, elsewhere, that in this examination God does not inquire into what men have been able to do, or what they have done, but what they have willed to do, so that purpose and will may be taken into account.

1 CALVIN, *supra* note 95, at 237 (footnotes omitted).

105. The Book of Esther, which makes no mention of God, is one of the greatest biblical accounts of Divine Providence. The salvation God works for the Jews there is so remarkable a story of apparent coincidence and happenstance that the Book has no need of mentioning Divine Providence. *See generally Esther.* The point would not be lost on those familiar with the earlier books of the Bible.

cases of Alexander and Alexandra.[106] Providence is at work.[107] Jurisdictional providence, not moral luck, leads to the distinction. Just as the warrant for greater civil authority in the presence of results is not arbitrary, so the presence of results in a given case is not arbitrary. Both are ordained by the God of perfect justice and goodness.

This interworking of Divine Providence and "jurisdictional facts" is presupposed in biblical law. Recall the rule that requires two or three witnesses to establish incriminating facts in court.[108] Offenses that lacked these witnesses were to escape punishment at the hands of human beings. The number of witnesses to an offense had nothing to do with its wickedness. Lack of witnesses might have something to do with the capacity of humans to do justice—much as the case with results. By this limitation, God alone remains the guarantor of eventual perfect justice. Nonetheless, the biblical understanding of God's Providence underlies the justice of applying the rule in human courts in any given case.[109] Two equally culpable offenders may receive opposite judgments as a conse-

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106. *See* 3 THE ENCYCLOPEDIA OF RELIGION 195-96 (Mircea Eliade ed., 1987). This work interrelates chance and the Divine Providence:

> Chance events, beyond human ratiocination and calculations, disclose the radical uncertainty that (at least from the human perspective) is present at the heart of reality. The interpretation of what chance is depends on whether one's worldview is religious or nonreligious. The fundamental unknowability of events—their mystery—can inspire awe. The religious mind has perceived in chance something sacred or a manifestation of the divine will. Some have placed chance within the governance of divine providence. Others reject it in deference to the same divine providence, arguing that what happens has already been determined by the transcendent scheme.

Id.; *see also* 3 ENCYCLOPAEDIA OF RELIGION AND ETHICS 355-56 (James Hastings ed., 1925) (emphasizing in the discussion of "chance" its dependence upon the limitations of human knowledge and not upon some lack of causation).

107. And all the more surely when a human death is the result. *See Exodus* 21:12-13 ("He that smiteth a man, so that he die, shall be surely put to death. And if a man lie not in wait, but God deliver *him* into his hand; then I will appoint thee a place whither he shall flee."). God Himself determines our days. Note, of course, that this fact does not render God, instead of Alexander, responsible for Carl's death. *See supra* notes 96-100 and accompanying text.

108. *See supra* text accompanying note 57.

109. The belief in Divine Providence was a basic presupposition of English jurisprudence, at least in the seventeenth century. *See* Berman, *supra* note 91, at 1722. One reason Justice Hale would "rather through ignorance of the truth of the fact or the unevidence of it acquit ten guilty persons than condemn one innocent" was that "the hand of divine justice in the way of His providence may reach in after time a guilty person." *Id.* at 1706 n.147. A similar Jewish understanding sees God's providence at work in punishment and reward. *See, e.g.*, 8 SALO WITTMAYER BARON, A SOCIAL AND RELIGIOUS HISTORY OF THE JEWS 101-04 (2d ed. 1958) (discussing the thought of medieval Jewish philosophers); 13 ENCYCLOPAEDIA JUDAICA 1279-86 (1972) (discussing providence generally, but noting its pronounced retributive aspect).

quence of Divine Providence.[110]

Divine Providence, or something very like it, is presupposed in matters some have described as instances of moral luck. Our ability and inclination to hold ourselves and others accountable, though affected by happenstance, is not just a matter of resigning ourselves to this state of affairs as an unavoidable puzzle in holding humans to be accountable moral agents.[111] Instead, it is just for the actor to be judged, in part be-

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110. Ironically, the most explicit connection between providence and civil punishment in cases like Alexander's and Alexandra's comes from a pagan:

> The statute of wounding, then, shall run thus. If anyone intend and purpose the death of a person with whom he is on friendly terms, such person not being one against whom the law arms his hand, and fail to kill, but inflict a wound, he who wounds with such intent deserves no mercy, and shall be made to stand his trial for homicide with as little scruple as though he had killed. But the law will show its reverence for his not too wholly unpropitious fortune and the tutelary power which has, in mercy to both wounder and wounded, preserved the one from a fatal hurt and the other from incurring a curse and a disaster; it will show its gratitude and submission to that power by sparing the criminal's life and dooming him to lifelong banishment to the nearest state, where he shall enjoy his revenues in full. He must make payment of whatever damage he have caused to the wounded, the amount being fixed by the court before which the case is tried, and this court shall be composed of the same persons as would have tried the homicide had death followed as a consequence of the wounds inflicted.

PLATO, *Laws*, *in*, THE COLLECTED DIALOGUES OF PLATO 1435-36 (876e-877b) (Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1961) (A.E. Taylor trans. 1934).

111. Michael S. Moore has demonstrated that a consistent application of the doctrine that moral luck is to be eliminated from moral judgments would remove all human responsibility. One's character, one's health, one's opportunity to act, one's ability to choose, all depend, at least in part, upon luck. "The blunt fact is that we have no more control over all the factors necessary in order to choose to kill than we do over all the factors necessary for us to kill." Moore, *supra* note 71, at 277. Moore uses this argument as a *reductio ad absurdum* in support of his argument that penal retribution for harm is proper. *See id.* But for our purposes, the argument highlights the pervasiveness of Providence in affecting criminal liability. *See* Margaret Urban Walker, *Moral Luck and the Virtues of Impure Agency*, *in* MORAL LUCK, *supra* note 11, at 241 (demonstrating that "moral luck" is "a fact of our moral situation and our human kind of agency").

This pervasiveness has led Lloyd L. Weinreb to suggest that positing a normative natural order, an order that shapes the circumstances of our actions according to our desert, might provide one way to render coherent our law of criminal responsibility. *See* Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, LAW & CONTEMP. PROBS., Summer 1986, at 47. He mentions the Christian Doctrine of Providence as including such an order. *See id.* at 75. Providence is one way to escape a devastating contradiction:

> Desert . . . seems to require that a person's acts be *both* free *and* determinate. Unless they are free, the person [sic] cannot be said to be morally responsible, and desert is out of the question. By the same token, a person is not responsible for circumstances beyond his control—circumstances, that is, that are not the product of his freedom. But then, unless the conditions in which a person acts are fully determined according to his desert, they are arbitrary from a moral point of view; furthermore, unless such deserved conditions fully determine his

cause the stage, setting, and props are designed by the critic. Perhaps this notion is easiest to grasp in cases where God's Providence offers no Act of God, but rather holds things on even keel. That too is truly God's Providence.[112] The uniformity of nature we take for granted in moral and

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> action, an attribution of desert according to how he exercises his freedom also is morally arbitrary. If freedom requires desert, it seems to require that the exercise of freedom itself be determinate. But if desert requires freedom, that is a contradiction. Desert cannot depend on freedom and at the same time freedom depend on desert.

Id. at 74. Weinreb claims that Providence ties freedom to desert, as if to suggest that human freedom is of no fundamental concern to the doctrine. *See id.* at 75-77; *see also* THOMAS NAGEL, MORTAL QUESTIONS 38 (1979). Nagel states that

> [t]he inclusion of consequences in the conception of what we have done is an acknowledgement that we are parts of the world, but the paradoxical character of moral luck which emerges from this acknowledgment shows that we are unable to operate with such a view, for it leaves us with no one to be. The same thing is revealed in the appearance that determinism obliterates responsibility.

Id.

Two aspects of the Doctrine of Providence discussed in this Article bear emphasis regarding these matters. First, the orthodox Doctrine of Providence is not in derogation of responsible human freedom. In a mystery, both coexist. *See supra* notes 96-100 and accompanying text. Second, the Providence that governs the jurisdictional facts of the sort that distinguishes the cases of Alexandra and Alexander need not array circumstances according to the actors' deserts. Other good and just reasons may lead God to affect harmful results one way or another. Because the results are jurisdictional and not "moral," they need not themselves be driven by desert. God has other means at His disposal to assure justice is done; this truth makes possible the jurisdictional approach in the first place. Similarly, the providential governance of harmful results need not be driven by the desert of the victim, or after a fashion humans would ordinarily relate to desert. *See, e.g.*, 1 *Kings* 14:12-13. Sometimes early death is a good reward:

> Arise thou therefore, get thee to thine own house: *and* when thy feet enter into the city, the child shall die. And all Israel shall mourn for him, and bury him: for he only of Jeroboam shall come to the grave, because in him there is found *some* good thing toward the Lord God of Israel in the house of Jeroboam.

Id.

112. *See Colossians* 1:17 ("And [Jesus Christ] is before all things, and by him all things consist."); *see also* 1 CALVIN, *supra* note 95, at 199. Calvin asserted that God's providence is seen in exceptions that prove the rule:

> [W]hen we read that at Joshua's prayers the sun stood still in one degree for two days [Josh. 10:13], and that its shadow went back ten degrees for the sake of King Hezekiah [II Kings 20:11 or Isa. 38:8], God has witnessed by those few miracles that the sun does not daily rise and set by blind instinct of nature but that he himself, to renew our remembrance of his fatherly favor toward us, governs its course. Nothing is more natural than for spring to follow winter; summer, spring; and fall, summer—each in turn. Yet in this series one sees such great and uneven diversity that it readily appears each year, month, and day is governed by a new, a special, providence of God.

Id.; *see also* 3 THE ILLUSTRATED BIBLE DICTIONARY, *supra* note 95, at 1292 ("[T]he regularity of the natural order is thought of as depending directly upon the divine will (cf. Gn. 8:22) . . . . God's providential government of the created order proclaims his wisdom, power, glory and goodness (Pss. 8:1; RV; 19:1-6; Acts 14:17; Rom. 1:19f.)"). In his theo-

legal judgments is just that—granted.

VII. THE VIEW FROM THE TOP

The cases of Alexander and Alexandra—Alex and Lexie by now, to be sure—present an odd prospect. From one vantage point, we are sure that both are equally guilty, and that the wind could not make a difference in their desert: they both performed the same act with the same intent. From another vantage point, we are sure that they are by no means equally guilty, and that the wind has made all the difference: Alexander is a murderer, Alexandra is not. How does one reconcile these seemingly irreconcilable conclusions?

This Article has suggested that both conclusions may be true, properly understood. While in absolute moral terms, both actors may share equal guilt, in the moral region assigned to civil government for enforcement, each bears different guilt. This harmony is not due to a different concept of justice, to the invasion of tort into criminal law, or to some other distinction between the substance of justice before God and before civil government. What is at work is a jurisdictional principle. Civil government administers God's justice, but only in part. The two vantage points view the cases from these respective jurisdictions.

The wind provides the distinction in the case of Alexander and Alexandra. But the wind is no blind force driven by chance. It is impelled by the hand of God. It is the same hand that maintains physical reality, that keeps both actors alive, that determines the span of Carl's life. The Supreme Judge[113] is also the Supreme Assignment Clerk.

The explanation tendered in this Article may strike many as based on fantasy. It is that fantasy, however, that by and large undergirds Western morals and legal systems. The Christian appreciation of the cases of Alexander and Alexandra does explain our reactions and our treatment of the cases they exemplify. Fantasy or not, the Christian view must prove helpful for understanding a culture based largely upon the Bible.

On the other hand, many may hold that the Christian faith is true. For

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logical treatise, J. Rodman Williams states the following:

> God in His providence preserves His creation. He preserves, sustains, upholds. This relates particularly to the *being* of what He has made. . . . Structures and laws are but continuing sequences that would break down immediately without a power that restrains them. The revolution of the earth around the sun, the earth's turning on its axis, the oxygen level in the atmosphere—whatever exists by God's creative act—would break apart, dissolve, go back into chaos if God did not sustain and preserve.

WILLIAMS, *supra* note 95, at 118-19.

113. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

them, this Article might present not just a model but also a guide to the truth regarding cases like Alexander's and Alexandra's. And here they may be led to agree with G.K. Chesterton: "Thoroughly worldly people never understand even the world . . . ."[114]

114. GILBERT K. CHESTERTON, ORTHODOXY 22 (1943).