University of Maryland Law Journal of Race, Religion, Gender and Class

Volume 1 | Issue 2 Article 5

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Recommended Citation

Trisha Olson, *Of Claiming the Law: The Distress of the Wanderer*, 1 U. Md. L.J. Race Relig. Gender & Class 451 (2001).
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OF CLAIMING THE LAW: THE DISTRESS OF THE WANDERER

TRISHA OLSON*

I. INTRODUCTION

I was pleased to be asked to join Margins' symposium today. My task is to provide an historical context that, hopefully, will highlight the novelty of the question we address today: to what degree, if any, is it permissible for moral or (more narrowly) religious beliefs to provide the justification for, or content of, our laws? I want to suggest that this question would have been unintelligible for most of the period that we call the western legal tradition. After making this argument, I want to turn to the medieval conception of criminal sanctions as a specific example of how a union between law and morality found expression.[1]

Let me begin by clarifying terms. By "the West," I mean the developing culture of the peoples of Western Europe since the fall of the Roman Empire and who from the late eleventh to the early sixteenth century shared a common allegiance to the Roman Catholic faith.[2] By "legal" I mean more than positivist law. Rather, I mean to refer to Roman-canonical law, royal law, feudal law, and Germanic folk law as far back as the fourth century.[3] By "tradition" I mean our sense of continuity between past and future—our sense of historical continuity.[4] Finally, by "criminal law," I mean to reference those wrongs such as murder, arson, rape, and larceny that by the twelfth century comprised our common law felonies.

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1. I prefer the word sanction, for punishment holds a particular definition of sanctioning as the infliction of a suffering (*i.e.* penalty) upon a wrongdoer. When the meaning is intended, the word "punishment" will suffice.

2. Within the tradition of legal scholarship, "Western" is separate from Arab and Byzantine. *See* HAROLD BERMAN, LAW AND REVOLUTION 2 (1983).

3. *See* ALAN WATSON, THE MAKING OF THE CIVIL LAW 1 (1981).

4. *See* Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1496 (1996). ("[I]t is also clear that without some common ground, not only law, but language too would fail. Legal discussions, then, would not be pointless, but simply impossible. As long as there is something to say, there must be some shared meaning, however thin or superficial.").

I begin by suggesting that the question of the relationship between law and morality presupposes a positivist framework. By asking what the relationship between law and morality should be, we assume a distinction between the two. This assumption of a distinction between law and morality rests with the idea that what makes an imperative "law" is that it has been posited by a legally constituted sovereign who holds the power to sanction people within a specific territorial space.[5] Under this vision, "law" can exist without reference to its content, or without asking whether it is wrong or right (by whatever measure).[6] What I wish to share with you is an older understanding of law that did not accept or entertain this gap between law and norms that today's question implicitly adopts.

Note, however, that the reader should not leap to the conclusion that some form of natural law, or moral realism, is about to be discussed. This warning seems necessary given the tendency of the modern jurisprudential literature today to conceive of legal theory as a tussle between reason and power.[7] Thus, those who are not medieval historians tend to view disagreements about the nature of law as reducible to a conflict between a universal ideal of natural law, or enlightenment reason and an historically contingent idea of law that amounts to the power of given groups at given periods in history. In the latter case, what makes a given rule a law is the fact that it has been enacted in a legally identifiable way. In contrast to either theory, what I wish to share with you today is a conception of law as custom

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5. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 18, 20 (1st ed. 1834) ("[E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory." It "would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things within its territories."); 2 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 1.6, at 6, § 4.12, at 46. (1935).

6. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 157 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

7. *See* Linda Ross Meyer, *Between Reason and Power: Experiencing Legal Truth*, 67 U. CIN. L. REV. 727, 731-32 (1999) (providing an elegant attempt to resolve the perceived tension between rhetorical argument and philosophical enquiry). Despite attempts to locate something between reason and power, the battle lines continue to be drawn in a traditional manner. *See* DANIEL A. FARBER AND SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 33 (1997) ("The Enlightenment's goal of an objective and reasoned basis for knowledge, merit, truth, justice, and the like is an impossibility: "objectivity," in the sense of standards of judgment that transcend individual perspectives, does not exist. Reason is just another code word for the views of the privileged. The Enlightenment itself merely replaced one socially constructed view of reality with another, mistaking power for knowledge. There is naught but power.").

and inherited tradition.[8] The period I wish to speak of is roughly from the seventh to the twelfth century.

A view of law as the *volksrecht* or *volksgeist* of a people is little studied by legal historians today.[9] In jurisprudence, such talk is not in vogue. Though schools of thought, such as the law and society movement for example, focus attention upon cultural context and social immersion when discussing the nature of law, a gap between "law" and "society" is still presupposed. The questions in this literature are often not about the nature of law, but about what *causes* it.[10] In other areas of jurisprudence, the discussion about "what is law" (particularly in the law school classroom) usually centers upon such concepts as H.L.A. Hart's "rule of recognition,"[11] some form of human rights theory, or ideas of moral realism which posit an objective moral order that places normative constraints on our daily conduct.[12] And as indicated above, in the case of medieval law, legal scholars, (as opposed to medieval historians), usually find it sufficient to employ the phrase "natural law" to capture the juridical posture of the middle

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8. The name frequently given to this understanding is historicism. *See* BRUCE ACKERMAN, WE THE PEOPLE 22-23 (1991) (discussing historicism in American jurisprudence); Harold J. Berman, *Towards an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 789 (1988) (Savigny's relation to American and English jurisprudence). While in legal scholarship it is commonly associated with such thinkers as Edmund Burke or Karl Savigny, its ancestry may be traced back to time immemorial.

9. Patrick Wormald rightly observes that the phrase "heroic code" of a Germanic peoples, for example, is little used by legal historians today for in the later twentieth century: "Wagnerian images have acquired unhappy connotations." Patrick Wormald, *Anglo Saxon Society and its Literature* in THE CAMBRIDGE COMPANION TO OLD ENGLISH LITERATURE 11 (M. Godden & M. Lapidge eds., 1998). Similar skepticism has been envinced in regard to English common law. The idea of a peculiar "spirit" or Volkgeist at work as the answer to why English law differed from the continent has been called the kind of appeal that attracted "nineteenth century romantic scholars" but which is no more than to speak of "souls, channels, springs, wells, and other deep tides" but is not the doing of good history. *See* R.C. VAN CAENEGEM, BIRTH OF THE ENGLISH COMMON LAW 86, 99 (1973).

10. *See* Naomi Mezey *Out of the Ordinary: Law, Power, Culture and the Commonplace,* 26 LAW & SOC. INQUIRY 145 (2001) (review of THE COMMON PLACE OF LAW) (excellent discussion of tensions in law and society movement between social sciences and those who find methods of social science as unstable as law itself). *But see* Jane B. Baron, *Language Matters,* 34 J. MARSHALL L. REV. 163 (2000) (noting that law may itself *be* the doing of daily life and hence the assumed gap between law and life a mistaken construct).

11. For Hart, "law" proper and the rule of recognition given by secondary rules is thought to cure the defects of non-legal regimes where custom remains uncertain, static, and instable. *See* H.L.A. HART, THE CONCEPT OF LAW 92-95 (2d ed. 1994).

12. *See* Jean Porter, *From Natural Law to Human Rights: Or Why Rights Talk Matters,* 14 J.L. & RELIGION 77 (2000) (for interesting discussion on whether natural law is a necessary condition of a natural rights theory).

ages in its entirety.[13] Steadily overlooked, however, is a conception of law as unwritten custom and practice where "[t]ruth was not isolable but fill[ed] the interstices of things."[14] This omission is odd given that this understanding of law dominated from the fifth century well into the sixteenth century. In the specific context of those who write on theories of punishment, the oversight is stranger still for folded into the medieval knowledge of law as custom and usage was a clear and undisputed understanding of wrongdoing as a moral offense, and of the redemptive nature of sanction. These ideas have much to teach those concerned with alternatives to the retributive or utilitarian model of punishment.

In Part One I will sketch, the idea and salient attributes of law as custom. In Part Two, the discussion turns to the question of "religious values" and the necessity of recasting that question when one turns to middle ages. Hopefully having set a backdrop, Part Three will take up the narrower topic of the relationship between medieval conceptions of sanctioning and penance prior to the twelfth century. Some comparison will be made with contemporary theories of punishment in order to highlight those ancient beliefs and aspirations that remain with us as traces in the air, and those from which we, albeit at times unconsciously, recoil.

II. PERSONALITY OF LAW AND POSITIVISM

Often the best place to begin is with the familiar. Thus, I start with a quick thumbnail outline of what most of us understand by the word "law." Next, we turn to the medieval discussion of law as custom and to the ways such an understanding of law may continue, however faintly to resonate.

A. Territoriality and Sovereigns

Many of us are comfortable, or at least familiar, with an understanding of law that is tied to territoriality, legality, and sovereignty. The principle of sovereignty is typically ascribed to Jean Bodin's work *Les Six Livres de la Republique* in 1576 where he wrote

13. *Id.* at 82.

14. ROBERT FRASER, THE DARK AGES AND THE AGE OF GOLD 234 (1973).

that sovereignty was the supreme power over the citizens.[15] This power was subject to no limitations and could neither be delegated nor divided. The sovereign alone "makes law for the subject, abrogates law already made, and amends obsolete law."[16] Law, then, was the product of a willing sovereign who was, himself, not constrained by law. In the nineteenth century, John Austin and Jeremy Bentham added to Bodin's theory. John Austin declared that law amounts to those rules a sovereign wills and, most importantly, can enforce against any individual who may be within his reach (*i.e.* territory).[17] There is, said Austin, an interdependence between "obligations," "coercion," "command," and "sanction."[18] What distinguished authoritative commands as law was that legal commands are both accompanied by a sanction and directed toward a general public group.[19] Central to this understanding of law is that "the authenticity of a law is a question exterior to, and independent of, that of its content."[20] H.L.A. Hart expanded upon this thesis, arguing, that secondary rules—rules of promulgation—enabled a citizenry to recognize a posited rule as a legally valid norm.[21] Accordingly, under legal positivism, the question arises about whether law's content should ever be morally grounded and, if so, whose morality should dominate. The criminal law is not excepted from this debate. Notwithstanding, that in the area of traditional crimes our intuitive judgment is that crimes are morally culpable acts,[22] well respected scholars argue in the tradition of western liberalism that the purpose of criminal law should be about preventing identifiable harm and not about assigning moral culpability.[23]

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15. JEAN BODIN, LES SIX LIVRES DE LA REPUBLIQUE 10 (1576); JEAN BODIN, ON SOVEREIGNTY 23, 46 (Julian H. Franklin ed. & trans., 1992) (1583 ed.).

16. On the importance of Bodin, particularly for theories of conflicts of laws, see Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 18 (1966).

17. Austin explained, "[a] command is distinguished from other significations ... by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded." AUSTIN, *supra* note 6, at 5.

18. *Id.* at 25.

19. *See* Anthony Sebok *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2065 (1995) (arguing against perceived tie between legal formalism and positivism).

20. GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 313 (quoting Bentham Manuscripts in the University College, London Library) (1986).

21. *See* HART, *supra* note 11, at 97-107 (defining rules of recognition).

22. *See, e.g.* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

23. *See* Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (presenting a theory of crime in terms of an intentional bypass of an available

The positivist's assumption of a conceptual distinction between law and morality is routine for most academics in one form or the other. Still, we in the legal community remain (albeit at times unreflectively) uncomfortable with positivism as a true understanding of law. We find it unworkable, for example, in the area of conflicts of law where the idea of the unconstrained sovereign, if taken to the extreme, would render the burdens, privileges, commitments, and obligations of citizens liable to constant uncertainty and instability whenever they traveled across a state line. Think of the simple problem of enforcing a contract. Comity, the limiting principle in choice of law, has operated, albeit not explicitly in modern literature, as a moral barrier to the extreme implications of classic positivism.[24] So too, much is not needed to persuade the law student that there is something more to the lawfulness of law than the fact of its enactment. Take the example of a rule where all people who enter a church must uncover their heads. Those who do not uncover their head will suffer a severe penalty. Tell a student that a woman with her head fully covered enters the church and then ask if the rule should apply to her. In other words, did she violate the law? The answer is, yes. Then tell the student that the woman had brain surgery and if she unwrapped her head, her brains would fall out. Suddenly the student questions the applicability of the rule. Always, the student usually will reach for some idea, such as equity, mitigation, or mercy to say the law is not a law for people in the woman's condition. Again, what is being intuited is that there is something else to law than its mere legality.[25] With this, I want to turn to the idea of law not as legally enacted rules, but as custom and practice.

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voluntary market); Claire Finkelstein, *Positivism and the Notion of an Offense* 88 CALIF. L. REV. 335, 342 (2000) (proposing constitutional limits on what can be made a crime should focus on actus reus and harm rather than on mental states and mens rea).

24. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 35 (1st ed. 1834) ("The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return."); Louise Weinberg, *Against Comity*, 80 GEO. L. J. 53, 70 (1991) ("'Reciprocity' is simply not as safe an item as 'motherhood' or 'apple pie.' Reciprocal comity is a kind of Kantian imperative, a golden rule, and thus addresses itself more emphatically to all courts than other normative models.").

25. This hypothetical is obviously a take off on Lon Fuller's now famous debate with H.L.A. Hart. Lon Fuller, *Positivism and Fidelity to Law--A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958).

B. Custom and Personality of Law

Sharp division among what we would call religious, ethical, or legal norms was nonexistent in the central Middle Ages.[26] "Law was rooted in the soil of ancient custom, *riht*, and practices."[27] Unwritten, law resided in the collective memory of law-worthy or faithful ones who, as elders of their various communities, recalled and declared the law whenever disputes arose and in conjunction with proof by ordeal.[28] As Manlio Bellomo writes, "the [written] laws of the barbarian peoples ... were like an archipelago of tiny islands in the vast sea of custom."[29]

There was no legal profession with lawyers or professional judges, and this world did not know legal literature.[30] There could be no jurists where there was no notion of law as an autonomous science. "The law, in fact, was seen as identical with the art of reasoning and expression, and on the other hand with ethical standards."[31] And notwithstanding attempts in the Carolingian era to bring about a conception of law as the sovereign's will in a pale reflection of the Roman concept of *imperium,* the idea that law denoted the non-legislated normative practices of one's people did not begin to lose sway until the twelfth century; and then only slowly.[32] I want to highlight several features of this custom-based knowledge of law that will clarify why the question of the relationship of law and morality would appear incomprehensible to both the learned and lay persons of the age.

First, from the time of the barbarian invasions until the dawn of the early modern period, the notion that men created law—legislated—

26. SUSAN REYNOLDS, KINGDOMS AND COMMUNITIES 900-1300, 16-17 (Oxford 1984)(arguing that before the twelfth century conditions, did not exist that would allow for the conceptual distinctions between law, right, and custom).

27. Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial,* 50 SYRACUSE L. REV. 109, 138 (2000). The word *rhit* translates to "justice" or "right" with the reference most often being to custom. *See* LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I at Indexes (A.J. Robertson ed., and trans. 1925).

28. *See* Reynolds, *supra* note 26, at 52-55 (noting that where Roman law was felt, collective judgment eroded. Susan Reynolds observes, however, that throughout Europe some form of collective law-remembering remains).

29. MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE 42 (1995).

30. *Id.* at 44-45.

31. *Id.* at 46.

32. *See* BERMAN, *supra* note 2, at 145.

would be unthinkable. True, we have Anglo-Saxon dooms going back to the sixth century and the capitularies of the Frankish empire. But these written documents were not pieces of legislation; they were rather declarative statements of custom.[33] The fact of the writing gave these laws no added authority.[34] Not until the rediscovery of the laws of Justinian and the emergence of the learned jurist in the twelfth century, did a commitment to written law begin to develop. And even so, print did not displace oral tradition as a repository of the law until the latter sixteenth century.[35]

Second, for us to conclude that these medieval people substituted a Divine Being as the lawgiver, and, hence, well understood the idea of legislation, is far too simplistic. Law was not conceived of as a list of rights or prohibitions, but rather as a "right order," a "peace" between one and his fellows.[36] And the content of this "right order" was not accessible by reference to abstract propositions, divine or otherwise. Rather, rules of conduct unveiled themselves slowly and over time. Their unveiling required the medieval's participation in interpreting signs in the world and in exercising particularized and contextual judgment to any given question.[37] Custom was not absolute, but supple, not immutable, but adaptable.[38] One felt his way toward the right situation by situation.

Third, the medieval mind did not conceive of "law" as obligatory by virtue of the existence of a legal imperative backed by a threat in case of breach. Indeed, well into the eleventh century in both England and France (though for very different reasons), the enforcement of law remained a private affair between a wrongdoer and an accuser.[39] As a corollary, our medieval ancestor would not have

33. *See* BELLOMO, *supra* note 29, at 43.

34. Medieval charters and privately produced lawbooks were "surrounded by and subordinate to the living legal sense of the community, or the law transmitted by word of mouth, ... never more than a fragment of the whole law which lives exclusively in the breast or conscience of the community." FRITZ KERN, KINGSHIP AND LAW IN THE MIDDLE AGES, 158 (S.B. Chrimes ed. Westport, Conn., 1985).

35. *See* Richard Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640,* 10 YALE J.L. & HUMAN. 229, 234 (1998).

36. *See* GEOFFREY KOZIOL, BEGGING PARDON AND FAVOR 218 (1992).

37. *See, e.g., id.* at 217 (describing Ivo of Chartres understanding of justice as tied not to the rigors of law but to the moral demands of mercy that thereby led to particularized judgment in every case).

38. *Id.*; Ross, *supra* note 35, at 305.

39. On the idea of criminal wrong as private see FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I II 450-51

imagined that custom (that is law) and morality were distinct concepts. The force of custom was precisely its normative force.[40] One was obligated to follow a particular custom because it told one the right way to proceed, not because it was backed by a sanction. Put differently, medieval customary law is not to be confused with convention. Customary law did not reference what everybody did as a matter of social description. Rather, it referenced the right thing to do. Consistent with this approach, the thirteenth century jurist Bracton had no timidity about going back to the "older and better rule" if he found the current one unjust.[41]

Fourth, this identity between law, custom, and morality was not thought of as effecting a constraint. Law did not limit a person, but granted her an identity by giving definition to a myriad of relationships that defined her.[42] For example, one was free to be a mother because she knew the duties, privileges, and subtle variations that denoted the act of mothering. And this knowledge was passed generation to generation. Similarly, a corollary point is that in this period, unlike today, identity was understood relationally rather than individualistically. One was a member of a vill, a congregation, a kinship group, a manor.[43] The idea of a being primordially existing independent of her various relations was unintelligible. I add that there is something right-headed in this idea as the communitarian literature of the last 25 years or so has stressed.[44] When we attempt to sit and conceive of ourselves, stripped of all relation to place, time, and historical contingencies, we strain to feel anything there that

(2 vols 1968); Stanley Rubin, *Bot Compensation in Anglo- Saxon Law: A Reassessment*, JOURNAL OF LEGAL HISTORY 17 (1996).

40. *See* BELLOMO, *supra* note 29, at 46-47. As A.W.B. Simpson writes of a little later period: "In the common law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution." A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN LEGAL THEORY 79 (Tony Honore ed., 2d Ser., 1973).

41. T.F.T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE 58 (1958).

42. *See See* Simeon L. Guterman, *The Principle of Personality of Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas*, 21 UNIV. MIAMI L. REV. 259, 261 (1966) (asserting that law was part of "the common consciousness of a people").

43. *See, e.g.*, JACQUES LE GOFF, *The Symbolic Ritual of Vassalage*, *in* TIME, WORK, & CULTURE IN THE MIDDLE AGES 251-52 (Goldhammer trans., 1980) (detailing the spiritual dimension of seeing oneself as dependent upon another in vassalage).

44. *See, e.g.*, Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445, 456 (1987); ROBERT H. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

bespeaks the rich complexity we call a human being.

Finally, given that law was identity bearing, it was also, unlike today, personal. Under this older notion, the customs of one's people were carried wherever she went as a birthright.[45] One's national birth signified to what people one belonged and, irrespective of what territory one may journey, this law covered one wherever she may go. Accordingly, in the ninth century, the answer to the question of whose law should govern a situation was evident: one's own law.[46] And that law was the law of one's people, understood as a community glued together by tradition, manners, folklore, language, and local religious practices. Thus, for example, in a land dispute between Saxons, Saxon law governed whether they lived in Britain or Gaul.[47] In the case of a dispute between people of different nations, some common ground was found between them. In England we find the mixed jury, whereby a special jury comprised of both citizens and aliens that was used to reconcile the law of the community with the law of the alien in the case of a dispute.[48]

C. Why Should We Care?

An easy response to the above sketch is that while it may be interesting, it is irrelevant to contemporary discussions about the relation between law and morality, even if we accept that positivism may not truly capture all that law is. We no longer live in small communities where all adhere to shared norms and beliefs.[49] Moreover, recognition of the primacy of the community (and hence of the rootedness of our obligation in customs, practices, and norms) is not recognition of "metaphysical," "transhistorical," or "transcultural legitimacy."[50] Rather, we are confronted with the knowledge that normative knowledge (ideology, to use a current term) is a function of power.[51] In light of the currency of this idea, scholars offer various

45. *See* Guterman, *supra* note 42, at 261; Hessel E. Yntema, *The Historic Bases of Private International Law*, 21 AM. J. COMP. L. 297 (1952).

46. *See* Guterman, *supra* note 42, at 261.

47. *Id.*

48. *See* MARIANNE CONSTABLE, THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE (1994).

49. *See* John R Wallach, *Liberals, Communitarians, and the Tasks of Political Theory*, 15 POL. THEORY 581, 594-600 (1987).

50. Daniel R. Ortiz, *Categorical Community*, 51 STAN. L. REV. 769, 771 (1999).

51. *Id.* at 778. *See also* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative*

approaches designed to distribute the power between communities more fairly.[52] On the other side, the importance of state neutrality, of not promoting any concept of the good life has continued to be emphasized in the context of the criminal law.[53] In either case, the gap between law and morality is assumed and the medieval knowledge of law seems distant and foreign.

Nevertheless, we, in and out of the legal community, seem still to gravitate toward a way of thinking about law that is in keeping with that of our medieval ancestors. At the outset, the Austian notion of law frequently prompts some form of the question: "apart from your power to coerce me, who are you, sovereign, to tell me I can or cannot do X?" This question is couched in other terms of course. For example, in a law school class, the discussion may be about issues of federalism,[54] communities, or individual rights. Now, frequently the one who cries out for protection of states' rights is thought to be the intellectual or political foe of the other who cries out for protection of her individual right. Yet, at bottom, the two share, albeit not always self-consciously, a common belief: each claims some way of life as his "law," or his order, that the ruler (be it a federal or state legislature) cannot disregard *even though* its jurisdiction extends to the territory in

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Action in Legal Academia, 1990 DUKE L.J. 705, 733.

52. Professor J.M. Balkin discussed the technique of deconstruction in the following terms:

> Described in its simplest form, the deconstructionist project involves the identification of hierarchical oppositions, followed by a temporary reversal of the hierarchy. Thus, to use Derrida's favorite example, if the history of Western civilization has been marked by a bias in favor of speech over writing we should investigate what it would be like if writing were more important than speech.... In so doing, we reverse the privileged position of speech over writing, and temporarily substitute a new priority.

J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 746 (1987). *See* DUNCAN KENNEDY, LEGAL EDUCATION AS TRAINING FOR HIERARCHY, IN THE POLITICS OF LAW (D. Kairys ed., 1982); Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 6 (1984) (law "is a mechanism for creating and legitimating configurations of economic and political power").

53. Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 132-134 (1999)("The fact is that, over time, a consensus emerged that the liberal harm principle prevailed in the legal philosophic debate over the enforcement of morality.").

54. *See* Kraig James Powell, *The Other Double Standard: Communitarianism, Federalism, and American Constitutional Law*, 7 SETON HALL CONST. L.J. 69, 76 n.32 (1996) (arguing that current American political practice discourages the development of "meaningful communities").

which the person is located.[55] Similarly, traces of an understanding of law as personal and rooted in one's given community persist in such diverse areas as cultural defense for criminal defendants,[56] the rationale for refusing an ignorance of the law defense in malum in se crimes,[57] the acknowledged place of the law merchant in the framing and interpretation of the uniform commercial code,[58] and the recognition of Tribal sovereignty.[59] In the criminal law, the language of liability is richly normative with phrases such as "reasonable provocation," "depraved heart," and "malice," inviting not a descriptive but an ethical evaluation by a jury.[60] Such evaluation presupposes, in turn, the existence of some moral bank accessible to the jury.

Irrespective of our worry about *whose* normative custom will become law and thus legally binding upon us (and in the end this seems to be what the worry about the relation between morality and law is about), we still may retain an understanding of law as personal and reflective of our ethos.

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55. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 137-38 (1991) ("The myriad associations that generate social norms are the invisible supports of, and the sine qua non for, a regime in which individuals have rights."); Linda Ross Meyer, *Unruly Rights*, 22 CARDOZO L. REV. 1, 12 (2000) (conceiving of right assertions as moral claims).

56. *See* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1094-99 (1996).

57. *See* Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998) (notwithstanding erosion of the maxim, noting its continued acceptance, when mal in se crimes are concerned, on the ground that knowledge of moral blameworthiness is known).

58. *See* Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 646-56 (1989). The drafters of the UCC clarify that the Code is "in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries." U.C.C. § 1-105 cmt. 3 (1995).

59. *See* Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 964 n. 17 (1991).

60. *See* Alan C. Michaels *"Rationales" of Criminal Law Then and Now: For a Judgmental Descriptivism*, 100 COLUM. L. REV. 54, 66-71 (2000); Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 128 (1997).

III. THE ARGUMENT FROM MEANING

In asking about the relationship between law and morality today, a collateral question has been raised in the symposium about the appropriate relationship between law and religious values. Again, I want to suggest that in the central Middle Ages, this question, as phrased, would not have made much sense. If we are willing to recast the question, however, something worthwhile can be said about medieval law and the way in which it was suffused by what may be loosely called a religious sentiment.

A. The Problem With the Religious Values Question

The medieval period has traditionally been called "the age of faith," in contradistinction to the eighteenth century "age of reason." Still, to speak of the place of "religious values" in the central Middle Ages borders on the anachronistic. First, in terms of the word "religious," there was not in the Middle Ages a notion of "secular," as opposed to "religious," modes of reasoning. Indeed we are wrongheaded to speak of a divide between the spiritual and secular realm insofar as that divide is meant to imply a distinct frame of reference or governing epistemology. Not until the late eleventh and twelfth centuries was the Church's:

> priesthood ... called for the first time "spirituals" (spirituales, in German Geistliche), and the newly unified Western ecclesiastical hierarchy, under the papacy, was said to wield the "spiritual sword," as contrasted with the tribal and feudal and urban laity, including emperor and kings, who wielded the "secular sword."[61]

Second, the way in which we use the word "values" is of particularly modern origin. The word "value" is at bottom a word of law and economics. It connotes contriving equivalences, setting prices, and exchanging.[62] So too, the word "values" assumes that

61. *See, e.g.*, BERMAN, *supra* note 2, at 66.

62. *See* Philippe Nonet, *What is Positive Law?*, 100 YALE L. J. 667, 670-671 (1990).

man[63] is "himself as the essence [Wesen] that measures values, evaluates and measures as the 'estimating [abschatzende] animal as such.... When we criticize our laws, our legal system, or our lawmakers, we do so by way of evaluating them, by measuring them up to the values we have set for ourselves, and thus in the light of an assumed power to legislate.'"[64] In contrast, medieval man understood himself as thrown into a world of meaning which he did not control and from which he did not seek escape. He did not hold values, but engaged in practices that both defined him and opened up possibilities.[65]

Moreover, a question exists about whether we ourselves know what we mean when employing the phrase "religious values." For example, the Ninth Circuit Court of Appeals has suggested that "'[r]eligious beliefs' ... are those that stem from a person's 'moral, ethical, or religious beliefs about what is right and wrong' and are 'held with the strength of traditional religious convictions.'"[66] Under this definition the word "religious" adds nothing to the way we typically speak of the word "values" today.[67] To hold certain acts as right or wrong would mean one had a religious belief. And insofar as law, say criminal law, embodies norms,[68] it would (under the Ninth Circuit definition) embody *religious values*. Certainly medieval

63. I purposefully use the word "man"; and, indeed, the archetype here is decidedly masculine in the context of Nietzsche's work referenced.

64. Nonet, *supra* note 62, at 670-671.

65. *See, e.g.*, BEOWULF 22:1534 (Joseph. F. Tuso ed., E. Talbot Donaldson trans., 1975) ("So shall a man when he aims to earn lasting praise in battle—he does not worry about his death."). The deeply rooted and long life of the heroic ideal for England is apt to be overlooked if one sees in that age an ethic of "hopeless courage." As Kenneth Sisam observes, never does Beowulf brood on death and always does the poet show him as fearless. Kenneth Sisam, *The Structure of Beowulf*, *in* BEOWULF, *supra* at 116-17. Similarly, in a little later period one sees the same heroic confronting of fate and determination to act well in face of it in the songs of deeds. *See generally* DOROTHY L. SAYERS, THE SONG OF ROLAND 57, at line 2355-63 (1957). These epics were particularly popular during the late eleventh century and recited along the pilgrim routes that dotted western Europe retelling a history that assumed the audience's knowledge. *Id.* at 9-10.

66. United States v. Ward, 989 F.2d 1015, 1018 (9th Cir. 1992) (quoting Welsh v. United States, 398 U.S. 333, 340 (1970)).

67. *See, e.g.*, John Witte, Jr., *A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective*, 42 WM. & MARY L. REV. 707, 756 (2001) ("A creed defines the accepted cadre of beliefs and *values* concerning the ultimate origin, meaning, and purpose of life.") (emphasis added).

68. *See* Dan M. Kahan & Martha C. Nussbaum, *supra* note 22, at 351; George P. Fletcher, The Fall and Rise of Criminal Theory, 1 BUFF. CRIM. L. REV. 275, 287 (1998) ("The utilitarians and Kantians have in fact had much to say about the rationale for punishment. Virtue theorists have recently offered us a more subtle account of culpability.").

criminal law was about right and wrongful conduct. And today, at least in the context of malum in se crimes, this remains true. But the added word "religious" adds or subtracts nothing from this realization.

By "religious value," we may mean to say that if the *exponent* of a particular norm was a theologian or canonist, then *a fortiori,* the norm expressed becomes a "religious value." As historians who work with the Roman-canonical law well know, this argument would then sweep a vast number of our legal principles under the label of religious argument. For example, modern commercial law and contract law are rooted in medieval canon laws.[69] Civil and criminal procedural rules such as the requirement of written procedures or hearsay rules, or the privilege against self-incrimination have similar roots.[70] That modern theorists mean to include all the above when debating the place of religious norms in law is doubtful.

Moreover, the corpus of canon law bequeathed to us resulted methodologically from the very sort of modes of reasoning that modern theorists are inclined to call rational, in contradistinction from religious. As Charles Reid and Professor John Witte observe, "[i]t was in [the] vibrant intellectual context of the twelfth century ... in accord with the dialectical method then being worked out in the schools of philosophy by the likes of Peter Abelard," that the Concordance of Discordant Canons (conventionally known as Decretum) (ca. 1141 or 1142) was compiled by Gratian.[71] The dialectical rigor of the scholastic logicians certainly does not fall under, for example, Professor Michael Perry's definition of what constitutes a "religious argument":

> By a "religious" argument, I mean ... an argument that presupposes the truth of a religious belief and includes that belief as one of its essential premises. A

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69. *See* JOHN W. BALDWIN, MEDIEVAL THEORIES OF THE JUST PRICE (1959).

70. *See, e.g.*, RICHARD H. HELMHOLZ et al., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT (1997); Richard H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613 (1983); Richard H. Helmholz, *Origins of the Privilege Against Self- Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962 (1990); Frank R. Herrmann, *The Establishment of a Rule Against Hearsay in Romano-Canonical Procedure*, 36 VA. J. INT'L L. 1 (1995); Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481 (1994). *See generally* Charles J. Reid, Jr. & John Witte, Jr., *In the Steps of Gratian: Writing the History of Canon Law in the 1990s*, 48 EMORY L.J. 647 (1999).

71. Charles J. Reid, Jr. & John Witte, Jr., *supra* note 70, at 661.

> "religious" belief is, for present purposes, either the belief that God exists—"God" in the sense of a transcendent reality that is the source, the ground, and the end of everything— or a belief about the nature, the activity, or the will of God.[72]

As a corollary, we speak of religious values today from an analytical framework that assumes we can disengage one mode of thinking from another. But among the texts woven into the classical canon law are the Bible, the Corpus *iuris civilis* of Emperor Justinian (527-565), the early Christian canons of various councils, as well as collections of juridical writings. One cannot simply pull out one source, as Professor Perry's definition implies is possible, and discard it, for what the canon law achieved was synthesis of an entire cultural mentality webbed together in such a way that each strand connected and strengthened another.

Finally, by "religious value," we may simply mean to refer to any meta-theory that purports to provide a blueprint for ethical conduct independent of any historical contingency. But if this is the case, it is we in the legal academy of the twenty-first century who are the champions of such meta-theories. In all varieties of law and economics, critical legal studies, law and feminism, and critical race theory one finds such schemes of measurement.[73] Insofar as we think that to bring a religious view to bear upon the law is to evaluate one's community by some standard existing outside of it, we who are caught up in the law and movements, perhaps, should claim the religious label.[74]

In contrast, the idea that medieval law was rooted in part in a belief that scripture provided guidance about what was proper either as matter of substance or procedure tells us very little, if anything at all, about the tie between law and "religious arguments" in the period. There was, until the twelfth century, little thought of interpreting scripture in such a way that it yielded abstracted rules to be imposed

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72. Michael Perry, *The Religious Voice in the Public Square: Religious Arguments in Public Political Debate*, 29 LOY. L.A. L. REV. 1421, 1423 (1996).

73. *See* ANTHONY T, KRONMAN, THE LOST LAWYER 166-68 (1994).

74. *See* Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 129 (1998) (making a like contrast between external and internal theories of judicial judgment).

upon a pre-existing community.[75] The legal argumentation of the learned was mediated and adapted through layers of tradition with strict and respectful adherence to those who taught and wrote before.[76] It was our ancestors, living in an age of faith, who most carefully kept their attention focused upon the context of a dispute, the concrete details involved, and the equities required.[77] For example, in the case of blasphemy, while Scripture provided the example of the Old Testament story of King Nebuchadnezzar's decree requiring the punishment of blasphemers with death, the canonists did not seek to draw a literal lesson from the example. "The problem, they said, was that if blasphemy were punished as it should have been, too few men would be left."[78]

My intention here is to only highlight the difficulty of speaking of "religious values" in the context of today's discussion and in the context of medieval law. One insight, however, can be drawn from comparing the past with today. On one hand, we can live in repudiation of all that is typically associated with religious belief and nonetheless argue for a jurisprudential understanding of law that shares much affinity in its form with what we would call religious. On the other hand, the fact of belonging to a people with a rich spiritual life and a commitment to the deep ethical import of law does not necessarily lead to a belief in law as abstract categorical declarations that can provide a source of normative practices for people requiring no interpretative mediation.

Still, if we recast the religious values question, it is possible to say something meaningful about the nexus between medieval man's religiosity and his way of conceiving of law, wrongdoing, and criminal sanction.

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75. *See* R.H. Helmholz, *The Bible in the Service of Canon Law*, 70 CHICAGO-KENT L. REV. 1557, 1569-70 (1995) (discussing canonists view of Scriptures as yielding principles rather than posited legal enactments.).

76. *See* T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 40 (1955).

77. *See* RICHARD FIRTH GREEN, A CRISIS OF TRUTH 83-85 (1999) (tracing modes of dispute resolution in tenth and eleventh centuries).

78. *See* Helmholz, *supra* note 75, at 1570.

B. Are We Really Talking About Sense and Significance?

Consider that the subject is not about referencing a source from which one may deduce a set of ethical mandates, but rather that the link between religion and medieval law was about a certain temperament—an understanding of the sense and significance of the universe.[79] As a caveat, note that insofar as the question about the relationship between religion and law was for the medieval mind a question about the relationship between the meanings of his universe and the way those meanings should be expressed in law. In this sense, we are again closer to our ancestors than we may at first think.

Granted, in the last twenty years, more and more frequently the law (and its scholars) seems to softly scream at us, "we exist in a universe of sound and fury signifying nothing." As Professor Linda Meyer writes, "[t]he tendency of law to dispense with obligations, and to talk instead in terms of regulation and incentives, shows us to ourselves as the effects of causes."[80]

> Instead of defining due care in tort law as reasonableness, we define it as economic efficiency—as what sanctions are necessary in order to control behavior and organize energy effectively. Contracts is no longer about honor or promises, but about regulating or deregulating behavior to produce economically efficient distributions of capital.[81]

In criminal law we seek to induce wrongdoers to refrain from further crime by means of deterrence and behavior modification. Syndrome defenses abound, and the traditional knowledge of "heat of passion" is transformed by the Model Penal Code into the defense of "externally

79. The possibility that to think "religiously" might not be about the direction to choose specific outcomes, but about how one goes about thinking and evaluating a given problem has been nicely addressed by Scott Idleman. *See* Scott Idleman, *The Limits of Religious Values in Judicial Decisionmaking,* 81 MARQ. L. REV. 537, 543 n.20 (1998) (faith commitments may affect a judge's disposition or perspective on authority, a judge's reasoning or rhetorical style). *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 27-53 (1988) (approaches to constitutional interpretation may be considered "Protestant" or "Catholic" in nature by virtue of their relative emphasis on text, tradition, and so forth).

80. Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647, 670-71 (1998) [hereinafter *Is Practical Reason Mindless?*].

81. *Id.* at 668.

influenced emotional disturbance." Yet, "[t]he irony is, of course, that if everything we do is due to something else, there is no one to direct all the regulation and management.... No one is left to be responsible for all the managing and regulation; no one is left to choose among purposes. We are all transformed into the objects of prediction and control."[82] On this account, what remains in the world is only power. Hence Nietzsche's cry, that this world is nothing but a sea of forces, "a play of forces and waves of forces, at the same time one and many ... flowing and rushing together ... without goal."[83] "*This world is the will to power—and nothing besides!*"[84]

Yet we resist completely succumbing. We still attempt to make sense, to locate meaning, to (dare I say) seek truth no matter how contingent, hazy, contradictory, and constantly in movement, it may be. We do not quite give up belief in our freedom to think, witness, and understand. And for some scholars this faith and search is distinctly medieval. As if they hear distant whispers from a long ago past, these scholars keep attention upon human finitude, and hence they modestly refrain from seeking the unconditional truth of any matter.[85] Yet, on the other hand, they share the medieval faith that the world we inhabit illuminates some portion of this elusive thing called truth. Hence, in the literature, scholars reach toward rhetoric[86] or Aristotle's teaching on practical reason to discern the rhyme and reason of judicial decision.[87] Others peer into the dusty hidden corners of ancient legal history, into heavy dense manuscripts of canonical exposition and endless glosses or capitularies and epistles to painstakingly piece together the story and the messages left to us.[88] And in so doing, we prove our bloodline with the religious medieval

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82. *Id.* at 672.

83. FRIEDRICH NIETZSCHE, THE WILL TO POWER §1067, at 550 (W. Kaufmann trans. 1968).

84. *Id.* (emphasis in original).

85. This attribute separates these scholars from either those who insist on objective rationality (for we are already *in* truth, or those who posit radical subjectivity. The latter works with the same distinctions as the former.

86. *See* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985).

87. *Is Practical Reason Mindless?*, *supra* note 80, at 652. (exploring the unrootedness of practical reason as a gracious openness to the world); Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law,* 107 HARV. L. REV. 714, 742 (1994).

88. *See, e.g.*, John S. Beckerman, *Procedural Innovation and Institutional Change in Medieval English Manorial Courts,* 10 LAW & HIST. REV. 197, 201 (1992) (exploring action for injury to honor in what we now call tort law); Richard H. Helmoholz, *Magna Carta and the Ius Commune*, 66 U.CHI. L. REV. 297 (1999).

man who "never forgot that everything would be absurd if it exhausted its meaning in its immediate function and form of manifestation."[89] He knew, as do we, that all things extend beyond their appearance. This knowledge allows us to connect isolated moments and render sensible a world of constant change and movement. Put differently, in that we too think nothing empty or meaningless exists, we share in what Johan Huizinga called the "religious emotion" of medieval man.[90]

C. *The Symbolic Nature of the Medieval World*

For the medieval, the salient feature of his pietistic affection was his belief in the fundamental inter-connectedness of all ideas, beings, and things. He located meaning in the idea of synthesis, in the concept of unity. Divinity itself was understood as neither solitary nor singular. His very existence as three in one was an existence in communion.[91] As contemplated by the Cappadocian Fathers (Basil the Great d. 379, Gregory of Nyssa d. 395 and Gregory of Nazianzus d. 390), the Divine's inner nature was relational—a state of "reciprocal delight" where one could "not conceive of either [Father or Son] apart from their relationship with each other."[92] The Holy Spirit, in turn, came forth as the emanating "breath" of that perfected union.[93] This understanding of the meaningful as always denoting the whole rather than the part gave rise to a discourse of symbology and rite which so permeated social beliefs as to shape thinking about notions of community, law, and wrongdoing.

Moreover, the practices that comprised the doing of law were as much acts of devotion as they were acts of legal signification. One might say that no practice or act lacked an element of the moral or the

89. JOHAN HUIZINGA, THE AUTUMN OF THE MIDDLE AGES 235 (R.J. Payton trans., 1996).

90. *Id.* at 234.

91. The Cappadocian Fathers articulated trinitarian theology The Theological Orations of Gregory of Nazianzus in which he defends the divinity of the Son and Holy Spirit is perhaps most important in influence for both the Eastern and Western Church. *See* EDMUND J. FORTMAN, THE TRIUNE GOD: A HISTORICAL STUDY OF THE DOCTRINE OF THE TRINITY 76 (1901); T.A. Noble, *Paradox in Gregory of Nazianzen's Doctrine of the Trinity,* XXVII STUDIA PATRISTICA 94 (1993).

92. GERALD O'COLLINS, THE TRIPERSONAL GOD, UNDERSTANDING AND INTERPRETING THE TRINITY 132 (1999).

93. Fortman, *supra* note 91, at 79. Basil stressed that the Holy Spirit was the breath of Divinity and thus not below it whereas Gregory of Nazianzus spoke of the Spirit as "procession" (*ekporeusis*). *Id.* at 80.

ethical. Yet, the words as modernity calls upon them says too little, are too thin, to capture the meaning of the idea that lawful action, at its core, comprised a prayer. Suffice to say that the idea of unity provided the reason, the ground, and the aim of all expressions of law. And those expressions were meaningful in themselves, for the hallmark of this age was its belief in the immanent presence of the Deity.[94]

Rather than existing transcendently apart and exterior to the world, this ultimate Perfection was born of an irradiance, "a downward spilling burst of luminosity" that united all beings and "irrigat[ed] the entire world establishing order and coherence within it."[95] Thus, in this world intangible interlaced with the perceivable and, until the end of the twelfth century when scholasticism revived logical speculation, "[i]n the eyes of all who were capable of reflection the material world was scarcely more than a sort of mask" behind which sat the worthy and true.[96] "Even at its most dreadful, nature" the world was an "alphabet through which God spoke to man ... the world was [His] discourse" to us.[97]

This idea of the significance of the endlessly changing and chaotic world resting in Perfected Union and of the human world's participation in its manifestation colored and provided the surrounding context for how the medieval age conceived of criminal sanctions.

IV. THE GIFT OF SANCTION

In the language of today's symposium, nowhere is the inextricable nature of "law and morality" in the medieval period more arresting than in its practices of what we call punishment. I begin with the idea of community. Next the discussion will turn to the medieval conception of wrongdoing. The stage will then be set to consider the law of sanctions.

94. *See* Olson, *supra* note 27, at 133-36.

95. GEORGES DUBY, THE AGE OF THE CATHEDRALS 100 (1981).

96. MARC BLOCH, FEUDAL SOCIETY 83-84 (L.A. Manyon trans., 1961).

97. UMBERTO ECO, ART AND BEAUTY IN THE MIDDLE AGES 54 (Hugh Bredin trans., 1986); KAREN JOLLY, POPULAR RELIGION IN LATE SAXON ENGLAND 72-73 (1996).

A. Community

In this universe, where the worldly always signified a partially hidden meaning and an open pathway existed between heaven and earth, concord between men was appropriate not only because it honored the ideal of the Holy Accord: It literally embodied it. In daily life, each act of enhancing—and transfiguring a deed, word, or oath contained a liturgical element for perfecting—rendered the divine possibility concrete.[98] In turn, perfecting required the harnessing of polarities. Reconciliation of that which stood in potential opposition was for the medieval mind a core attribute of the Divine. To speak in Hegel's terms, to live in harmony and fellowship through law gave flesh to the idea of union, thereby actualizing what was before a mere universal of possibility.[99] There was in the idea of friendly and peaceful relations a trace of the holy.

Although words such as "holy," "sacred," or "embodiment" are not common ways to speak of the ideal of community today, contemporary scholars reach for something akin to the medieval way. They speak of lawfulness as reflecting and giving life to an intangible, meaningful, and primordial bond—a right (*recht*) order between men and women,[100] understanding of the world, given to us by a common past. Yet, a yellow light of caution should begin to flicker here. Although there is much that seems worthy, even noble, in the contemporary discussion about the way wrong and sanction is wrapped within, albeit often unspoken, understandings of communal union, I respectfully tender the thought that the contemporary discussion about what comprises a community remains thin when

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98. *See* HUIZINGA, *supra* note 89, at 44, 58, 292-293.

99. *See* G.W.F. HEGEL, PHILOSOPHY OF RIGHT § 5 (T.M. Knox trans., 1st ed. 1952). *See* Philippe Nonet, *Sanction*, 25 CUMB. L. REV. 489, 491 (1995) ("But sanction, as we shall see, is precisely the overcoming of and return from estrangement. In this return, the native tongue has the power to say. The word Hegel employs is die Aufopferug (e.g., GPR § 100), in English 'the offering.' An offering is a sacrifice, and in Latin sacrificare says the same as sancire. To offer is in turn always also to suffer the pain of renouncing.").

100. *See* Linda Ross Meyer, *Forgiveness and Public Trust*, 27 FORDHAM URB. L.J. 1515, 1519 (2000) ("The way we make sense of each others' actions lies deep in our language and understanding of the world, given to us by a common past. The post-modern discovery that we are "socially constructed" beings is now commonplace, usually asserted to underscore cultural differences and distinctions, but it also entails that we have a deep connection to each other—we already share language, ways of thinking, ways of feeling, and ways of going on that we were born into and that shape our human world. We may vary in our expressions of respect, in the details of our expectations and our norms, but we still share some bedrock.").

viewed in light of the medieval example.

In a recent article on the place of forgiveness in punishment, Professor Meyer notes that arguably we live in many communities. By way of example, she proffers that Catholics, skinheads, African Americans, gays, survivalists and intellectuals all form various communities.[101] She then goes on to argue, however, that our "common linguistic heritage means that we share many basic concepts" such as "understandings of meaningful human action and basic norms of respect"[102] that cut across these group lines. In other words, we share basic knowledge of right and wrong conduct as expressed in the criminal law. She continues that it is critical to realize that we proceed to live with each other in trust of that belief.[103] And when we meet a stranger, Professor Meyer argues, we assume that stranger will make sense.[104] Hence, the horror of wrong. "The more deeply a crime breaches basic public trust, the more 'strange, 'inhuman' and 'senseless' it seems."[105]

Now, the first problem is obvious; and Professor Meyer recognizes it herself. Seemingly, the examples offered of community are not communities at all, but interest-groups.[106] To share ethos, however, is not necessarily to share interests, nor does the rich idea of ethos, of the spirit of a people, have anything to do with interests. Rather, the idea of community reaches deeper and is more narrow than Professor Meyer allows. Indeed, in terms of the latter point, it is precisely the "stranger" who is distrusted by a community.[107] In part, what made a medieval jury's moral evaluations of an accused's conduct possible was its narrowly confined view of what kind of deeds demonstrated character or its lack. The making of this judgment presupposed the jury's ability to take note of whether an accused was known to be a "good son," a "lawful man," or was but a stranger.[108]

As to the first point, shared norms in the context of the criminal law outstretch far deeper into a people's heritage than, for examples,

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101. *Id.* at 1519.

102. *Id.*

103. *Id.* at 1520.

104. *Id.*

105. *Id.* at 1521.

106. *Id.* at 1519.

107. For example, trial by oath required a swearing as to an accused's or accuser's reputation. If one was a stranger, it would be impossible to acquire sufficient oath-swearers. *See* Olson, *supra* note 27, at 118-120, 183.

108. *Id.*

rules of the road. The law of murder suffices to make the point. The Medieval person's shared concrete practical knowledge about the ugliness of killing by stealth, and the possible justification for, or at least acceptability of, killing in open, particularly in the heat of blood. What sort of weapon was used, the details of the brawl, the standing of the wrongdoer in the ville or the county all went into the jury's judgment that morally evaluated the accused's conduct. As Professor Tom Green has detailed, out of this complex community knowledge of what constituted a culpable and partially justified killing, manslaughter law slowly evolved.[109] What made (say the thirteenth century) jury's judgment possible was a rich, complicated, moral life that rolled and stretched back to an ancient heroic code recorded in literature, referenced in homilies, refined and folded into a shared religion, expressed in architectural motifs, and heralded in ballads.

This is not our world. Certainly Professor Meyer must be right that we proceed in basic public trust with each other when we drive on a highway or buy a cup of coffee at McDonalds. But do we share basic notions of right and wrong when it comes to the nitty gritty of the daily grinding of the criminal law? Can we doubt that, for example, the local gang member from South Central in Los Angeles, California standing accused of, and guilty of, a low level charge of distribution of cocaine may claim very distinct law from those who live in the small wealthy community of Pasadena, California? Basic laws about what constitutes respect, what sort of "boundaries" should exist between persons of "equal" respect (all terms of educated middle-class America), or what is an appropriate response to shows of disrespect may differ dramatically. For one man, a killing of another who has grievously dishonored him is a noble, justified, and proper response whereas for others it constitutes murder.[110]

The point here is not to advocate some sort of contrived return to a deeper, more substantial, more dramatic understanding of community. It cannot be. We cannot decide to make, create, legislate, or artificially construct community. In recognizing the world we live in now, in confronting the divide between diverse community norms and generalized legal prohibitions head on, in the area of our discourse about community, wrong and sanction, we may also need to come to

109. THOMAS GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL 1200-1800 22-35 (1985).

110. *See* Elijah Anderson, *The Code of the Streets*, ATLANTIC MONTHLY, May 1994, at 80.

grips with the import of what we theorists do. Potentially we are engaged in a kind of intellectual play that is close to asking how many angels can fit on a pinhead.[111]

Still, though we should be cautious about too quickly locating community within our time, as the previous discussion of personality of law implied, some idea of community continues to reverberate with us even if faintly. And insofar as it does, we too retain (albeit vaguely) a knowledge of wrong that also echoes the medieval.

B. Wrong As The Betrayal of Trust

Professor Meyer has offered an answer to the question: what is wrong about wrong? As she rightly observes, typically we think of wrong in terms of harms done to individuals.[112] We think the harm must be undone either to restore value to the injured party, or to nullify the problem of free-riders.[113] In the latter case, what's wrong with wrong is that an outlaw takes advantage of the sacrifices of others. Thus sanction rights the unfair distribution of liberty.[114] There is something, she says, obviously wrongheaded about both constructs. For one, wrong under this definition would not include those acts that caused no harm but which we all would find morally bankrupt, such as the taking of candy from a baby or the defrauding of a person who experienced no sense of injury due to a particular quirk in her character.[115] Moreover, Professor Meyers submits that if we truly believed that our theories of wrongdoing were founded upon an ideal of equal distributions and restraints of our liberty, the only citizens with standing to insist on punishment would be those with an inclination to lawlessness.[116] Rather, she argues, wrongdoing is not about harms (though I would suggest that we use the fact of a harm as one signal that a wrong may have occurred), but about a person's decision to breach the trust of his relation with his fellow community

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111. Note that Professor Meyer seems to agree, for as she concedes, punishment between strangers makes no sense. There is no breach in a union to repair. *See* Meyer, *supra* note 100, at 1525.

112. *Id.* at 1516; Finkelstein, *supra* note 23, at 342 (providing an account of wrong has harm and focused on actus reus rather than mens rea and moral culpability).

113. *See* Meyer, *supra* note 100, at 1516.

114. *Id.*

115. *Id.* at 1517.

116. *Id.*

members.[117]

What Professor Meyer has traced is an understanding of wrong close to the medieval's understanding. For medieval man, wrongdoing was conceived of as a breaking of faith, *fidelitas*.[118] As late as Malory's Tristan, King Mark is portrayed as a "*fals traitou*" to his vassal Sir Tristran.[119] And well into the fourteenth century, the English remained wedded to the idea that each, including a King, was defined and constrained by his trothplight to others.[120] Wrong was, at its essence, the breaking of one's bond. The outlaw engaged in a corruption in that he damaged the peace of another and dishonored him. By his deed, he also corrupted himself by breaching those bonds that granted him identity[121] and damaged his relation to his god. In eleventh century England, it was the right and duty of every man to pursue a fleeing man, to hunt him as prey for he was *caput gerat lupinum*—a friendless man—a wolf.[122] The rigor of this stance bespoke the deadly seriousness of breaking bond. Those wrongs of a particularly wicked nature became our felonies. Yet, again the locating of commonality should not wash away difference.

The medieval also saw what we often refuse to see today. The breach of trust at the core of wrongdoing not only corrupts—stains—the wrongdoer, it stains the person wronged. We lie to victims when we say that their "true ... dignity is never touched by criminal actions."[123] For the medieval this basic truth rang loud. In contrast to modern accounts of the nature of wrong, the medieval person experienced wrong as a sullying of another's honor and dignity. It

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117. *Id.* at 1520-22.

118. Olson, *supra* note 27, at 194-95.

119. CAXTON'S MALORY, A NEW EDITION OF SIR THOMAS MALORY'S LE MORTE D'ARTHUR 1:562 (2 vols. J. Spisak & W. Mmatthews eds. 1983).

120. Hence, treason remained well into the fourteenth century essentially a betrayal of trust. R. GREEN, *supra* note 77, at 231.

121. This is a point noted recently by Stephen P. Garvey. *See* Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999) (though he does not note the way in which one may breach relations with his Deity through a breach with fellows, Professor Garvey reads Anselm as speaking of an unmediated relationship with the Divine).

122. *See* HENRY BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 362 (S. Thorne trans. & ed. 1968) ("An outlaw also forfeits everything connected with the peace, for from the time he is outlawed he bears the wolf's head, so that he may be slain by anyone with impunity, especially if he resists or takes flight so that his arrest is difficult.").

123. Meyer, *supra* note 100, at 1527. *But see* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 14, 25 (1988) ("Intentional wrongdoing insults us and attempts (sometimes successfully) to degrade us—and thus it involves a kind of injury that is not merely tangible and sensible.").

could be no other way. In a world where identity is not individualistic, but tied to, and dependent upon, our various relationships with others then a rupturing and blackening of a relationship is a blackening of both the wrongdoer and the one wronged. The idea of the psychology of the individual came at the end of the twelfth century. Until that time, the world was a place of deeds and those deeds took place *between* persons shaping, elevating, or degrading the appearance of each. Hence, the feud commanded respect. It said that one was not "timid" and would take action to restore his reputation (*fama* being the touchstone of whether one dwelled in a state of honor or shame).[124]

Those scholars who insist that criminal law and wrongdoing pertain to moral culpability, in distinction from those who argue for a harm-based notion of culpability, still fail to acknowledge the above. Arguably, the reason is twofold. First, we are very uncomfortable today with the idea of that a wrong can sully a victim, for we think mistakenly that such a judgment is about a person's moral worth.[125] Yet, we need to tread carefully when trying to discern the meaning of this sullying. We need to not be afraid of the idea that one can become less of a man, or less of a woman because of a wrong done them, and yet realize that this *fact is not a moral evaluation of their worth.*[126] Wrong can indeed demean, humiliate, defile or desecrate another being insofar as he stands in relation to a wrongdoer and to those who see him as humiliated, lowered, or impotent. And in that a wrong accomplishes these things, the victim stands dirtied, much as an altar where sacrilege has occurred is tarnished.

The second problem for scholars in confronting the stain on the victim from wrongdoing is that they suspect recognition will lead to a theory of retributive justice where somehow the belief exists that the victim's devaluing will be set right by a like devaluing of the wrongdoer.[127] They rightly see this for what it is—the endless cycle of

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124. *See* Julian Pitt-River, *Honour and Social Status, in* HONOUR AND SHAME 27-28 (J.G. Peristiany ed., 1966).

125. *See* Meyer, *supra* note 100, at 1527.

126. *See* Garvey, *supra* note 121, at 1821 (confusing question of degrading with moral worth of victim, and denying that latter can be touched).

127. *See* Paul Campos, *The Paradox of Punishment*, 1992 WIS. L. REV. 1931, 1933 (1992); Jean Hampton, *An Expressive Theory of Retribution, in* RETRIBUTIVISM AND ITS CRITICS 1, 13 (Wesley Cragg ed., 1992) ("The retributive punisher uses the infliction of suffering to symbolize the subjugation of the subjugator, the domination of the one who dominated the victim.").

wrong upon wrong in the name of vengeance.[128] But a theory of retribution does not necessarily follow from an understanding of wrongdoing as sullying both the wrongdoer and the victim.

C. Punishment as Penitential Atonement

Granting variation across the centuries, common threads concerning the meaning of sanction prevailed up until the twelfth century. Loosely, we may say that woven together these threads formed an understanding of sanction neither as retribution nor as an instrument of crime prevention, but as penitential atonement. The stuff and matter of this understanding was shaped by the nexus between law and morality that so marks the medieval period. Lawfulness denoted right action and breaking of the law, wrong. Sanction too was tied to ethical conduct in that the medieval saw it as an obligation upon the doing of a wrong.[129] The question this begs, of course, is what were the moral details of sanction? What, if not the mere infliction of suffering upon the wrongdoer, did sanction consist of in this period? And what about sanction rendered it a good and noble act?

At its conceptual core, medieval sanction denoted reunion between a wrongdoer and those he had affronted by his wrong. Thus sanction held the possibility of both healing the wrongdoer and of wiping away the stain of dishonor that imprinted itself upon the wronged. Casting this idea slightly differently, the moral content of sanction pertained not to its recognition of the injured right of the person wronged. Instead, sanction was a moral good in that it sought to reunite those who had been divided. Recall that in the idea of concord—of union with others—the divine possibility became concrete.[130] Accordingly, in all disputes, criminal or otherwise, the medieval sensibility aimed at concord.[131] Concords—agreements to

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128. *See* Meyer, *supra* note 100, at 1525-27.

129. Insofar as the medieval conceived of sanction as an obligation that followed from wrongdoing, it shares with retribution. *See* George P. Fletcher, *Criminal Theory in The Twentieth Century*, 2 THEORETICAL INQUIRIES L. 265, 268 (2001).

130. *See supra* n.91-93 & accompanying text.

131. The term *finslis concordia* does not appear in legal documents from England until soon after the Norman Conquest, the Anglo-Saxon agreements were akin in substance and spirit. *See* Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuium in Anglo Saxon England and Today,* 11 OHIO ST. J. DISP. RESOL. 1, 32 (1996). In LEGES HENRIC PRIMI 164, 176 (L.J. Dower trans., 1972), one finds the statement, disputants

remain friends for perpetuity—were not an aberration from the norm of litigation. Instead, they were an integral part of the wider medieval legal system, and were able to occur seconds before the judgment of ordeal was to take place.[132]

This idea of punishment, as a step in reuniting the wrongdoer and his community, has gained notice in the literature as of late. Those in the "restorative justice movement,"[133] criminal law scholars writing on atonement as a proper paradigm for understanding punishment,[134] and scholars interested in the ties between Anglo-Saxon dispute resolution and the current Alternative Dispute Resolution model[135] all carry traces of the medieval conception of sanction. Yet, at this point of the discussion, we may find ourselves the most distant from our ancestors.

Typically discussions about punishment's relation to penance begin with Saint Anselm of Canterbury.[136] In the eleventh century, Saint Anselm asked how is God's infinite justice to be reconciled with his infinite mercy.[137] To put the question a bit differently, how can a judge ensure that the debt of wrong is paid, thereby restoring balance, and at the same time extend mercy by forgiving the requirement of punishment? This question of course remains with us today in that the legal academy struggles to discern whether mercy has any place in criminal sentencing.[138] In his effort to solve the theological paradox, Anselm observed that God could not justly forgive man's wrongs for then He seems to violate the order of the universe that He must uphold to remain consonant with Himself.[139] On the other hand, He was infinite grace.[140] Anselm then found, in the idea of satisfaction, a way

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are "brought together by love or separated by judgment." In the time of Henry II, we find the statement in Glanvill that "it is generally true that agreement prevail over law." G.D.G. HALL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 129 (G.D.G. Hall trans. & ed. 1993).

132. *See* Edward Powell, *Settlement of Disputes by Arbitration in Fifteenth Century England*, 2 LAW & HIST. REV. 21, 29 (1984) (discussing rituals that had long use in practice, though a little later period than we are discussing).

133. *See, e.g.*, John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian*, 46 UCLA L. REV. 1727, 1738 (1999).

134. *See* Meyer, *supra* note 100, at 1525; Garvey, *supra* note 121, at 1801.

135. *See* Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo Saxon England and Today*, 11 OHIO ST. J. DISP. RESOL. 1, 32 (1996).

136. *See* BERMAN, *supra* note 2, at 175-81.

137. ANSELM, *Cur Deus Homo*, *in* BASIC WRITINGS (Deane trans., 1990).

138. *See, e.g.*, MURPHY & HAMPTON, *supra* note 123, at 1- 34; 162-86.

139. ANSELM, *supra* note 137, at 204.

140. *Id.*

to transverse the chasm between grace and justice.

In modern parlance, we think of satisfaction as payment. We "satisfy" a debt, a requirement. This idea of a debt justifies our most traditional notions of retribution. The wrongdoer having robbed another of his "value" now owes a restoration of that value by his own devaluing.[141] Anselm recognized, in a theological context, what many of us intuit in our everyday lives. Insofar as wrong constitutes a breaking of bond with another—a betraying of trust which sullies another's dignity by treating her as "less than," the moral harm is limitless: It cannot be priced.[142] Common sense confirms the idea. As any woman who has endured beatings by her husband knows, no amount of suffering inflicted upon her husband will restore the right order between them, or recover her sense of delight in her womanhood, in the way a payment cancels out a debt. Something very different needs to occur between her and her husband for sanction—a reunion—to be kindled.

Anselm conceived of satisfaction not as a payment, but as an offering.[143] Whereas punishment is a thing "exacted," satisfaction is a thing "freely given" which restores a man's relationship to the one wronged, much as a remorseful beloved bringing flowers to his offended lover reaffirms the beloved's pledge.[144] The reason an offering restores, Anselm said, is that pricelessness inheres only in gifts: what is unconditioned. Given that wrong too is priceless—unpayable, it is only a gift that can begin to wipe one clean.[145] Anselm provided the dogma of penance consisting of the four interwoven steps of contrition of heart, confession of mouth, satisfaction of deeds, and the infusion of grace.

While the laity was both uneducated and illiterate, the spirit which opened this discourse to Anselm predominated medieval life. For example, the complicated system of *bot*, "betterment," among the Germanic peoples, which designated compensations to be paid for various wrongs as a substitute for resolve by blood feud was tied to the penitential system.[146] Overlap existed between the penitential manuals

141. *See* MURPHY & HAMPTON, *supra* note 123, at 122-47.

142. ANSELM, *supra* note 137, at 208-16.

143. *Id.* at 209.

144. *Id.*

145. *Id.* at 216, 241.

146. *See, e.g.*, Thomas P. Oakley, *English Penitential Discipline and Anglo Saxon Law in Their Joint Influence*, *in* STUDIES IN HISTORY ECONOMIC AND DUBUL LAW 136-151 (1923).

and, for example, the Anglo-Saxon law codes, whereby the latter often mandated the former. Both the penitential and "legal" literature of the Anglo Saxons spoke of expiation rather than punishment. At trial by ordeal, the hagiography and chronicles tell us that a wrongdoer's contrition often led to his acquittal.[147] In a little later period, we find evidence suggestive of the medieval jury's inclination to forgive in the high acquittal rate.[148] The bench accepted verdicts of self-defense though that coroner indictments show that a number of cases were sudden arguments that resulted in death. Again, if we rely on the narratives of the period to put flesh on bare statistics, a picture emerges in the tenth and eleventh century of a culture saturated through and through by complex penitential rituals whereby the wrongdoer's redemption hovered as a promise in light of his demonstration of contrition or sacrificial acts.

As indicated above, many contemporary theorists call on the language of punishment as atonement. And in so doing, they seem to call on a clear understanding of criminal law as morally grounded, and on an understanding of sanction as repair of the moral injury. This literature would seem to echo the medieval mentality. In considering whether this is so, I want to pause on Professor Stephen Garvey's work, *Punishment as Atonement.*[149] Tracing Anselm's work, Professor Garvey considers how punishment as atonement would look if we substitute the community for a Deity.[150] Professor Garvey also fiddles with the traditional scheme of penance. In place of the four interwoven steps of contrition of heart, confession of mouth, satisfaction of deeds, and the infusion of grace, Professor Garvey instead says that atonement consists of the two acts of expiation and reconciliation.[151] The first involves repentance, apology, reparation and penance by the offender; the second, forgiveness by the victim.[152] Though the language sounds medieval, what we have is two very different, and indeed antithetical understandings of punishment.

First, for Professor Garvey and others who write of restorative

147. *See* Olson, *supra* note 27, at 152-154.

148. Both pulpit and Crown grumbled that "compassion" rendered justice void with the juries acquitting far too many wrongdoers. Bernard W. McLane, *Juror Attitudes Towards Local Disorder: The Evidence of the 1328 Trailbaston Proceeding, in* TWELVE MEN GOOD AND TRUE 36 (J.S. Cockburn & T. Green eds., 1988).

149. Garvey, *supra* note 121, at 1801.

150. *Id.* at 1803.

151. *Id.* at 1804.

152. *Id.* at 1804-05.

justice, a central feature of sanction proper is reparation or restitution.[153] What scholars unwittingly do is transform satisfaction from an offering into the exacting of a debt.[154] The language resounds in tort law which aims to make the injured person whole again, to undo the harm.[155] And though theorists speak of wrong as signifying a breach in the communal bond, the focus—in the end—remains upon wrongdoing as reflecting the harm done to the victim. This insistence on criminal sanction being tied up with the repair of harm shares little with medieval punishment.

Granted, the Anglo-Saxon had a complicated system of monetary payments whereby a wrongdoer was to offer amends to his adversary. But here an aspect of the folk law must be mentioned. It is an aspect consistently overlooked by those who call on the medieval example of compensation as support for reparation in the criminal law. A passage from the eleventh century *Leges Henrici Primi* states "that if anyone makes amends to another for his misdeed or makes good the injury caused" and "offers an oath of reconciliation, it is commendable of him to whom the offer is made if he gives back the whole thing."[156] More than an empty maxim, the practices involved in making concord, even after a judgment at an ordeal, aimed to ensure that no one left a dispute empty handed and irrespective of whether the accuser had made his case successfully against a wrongdoer.[157] Similarly, one finds in the Anglo-Saxon period a duty of *forgyf*, (forgiveness), when a wrongdoer hands himself over to a wronged kin group member in unabashed surrender.[158] No doubt, the idea of either a civil plaintiff or a victim to a crime returning what a wrongdoer offers seems absurd to

153. *Id.* at 1816-17.

154. This is a point Professor Meyer catches as she firmly tells us "no reparation, is no reparation." Meyer, *supra* note 100, at 1527. Reparation would mean—if genuine—the inflicting of what was given which would mean in its essence the demeaning and debasing of the wrongdoer. This is, of course, another wrong which would require under a just desserts theory, a demeaning of the one who now stands as the desecrator. The endless cycle of vengeance begins...

155. *See* Frederick W. Gay, *Restorative Justice and the Prosecutor,* 27 FORDHAM URB. L.J. 1651, 1652 (2000) ("This approach ... is more focused on reparation, restitution and accountability with less emphasis on punishment alone. Restorative justice is much more concerned about remedying harms than exacting punishment.").

156. LEGES HENRICI PRIMI, *supra* note 131, at ch.36.2, at 143.

157. *See* Green, *supra* note 77, at 84-85 (providing a detailed discussion of the pressure to award the wrongdoer his offering back as well as a gift in twelfth and thirteenth century England).

158. William Ian Miller, *Choosing the Avenger: Some Aspects of the Blood Feud in Medieval Iceland and England,* 1 LAW & HIST. REV. 159, 202 (1983).

us. Yet, before pausing upon the sense of that act to medieval sanction, I want to suggest that the modern literature's insistence upon reparation raises a suspicion that while a few scholars certainly wish to rethink criminal sanction, much that is being thought is retribution dressed up in new clothes.

This suspicion becomes keener when we turn to Professor Garvey's condition that a wrongdoer undergo what he calls penance.[159] Professor Meyer also implies the necessity of what amounts to a penalty (though she does not say why it is necessary). What is not being said, but hovers in between the lines of these reflections, is that suffering must be inflicted upon the wrongdoer. Professor Meyer is careful to speak in terms of "humane punishment," though she does not detail what it looks like.[160] We might imagine here that humane punishment means a community inflicting a little less suffering upon a wrongdoer than it could. We do not rape the rapist. We incarcerate him. Professor Garvey similarly turns to a modified form of retribution that allows an account to be taken of a wrongdoer's remorse.[161] He sees in the infliction of a penalty—suffering—a message to the victim that annuls the false message the wrongdoer "implicitly conveys through his wrongdoing, and of vindicating the moral value and standing of his victim."[162] Accomplishment, in part depends upon the wrongdoer being *made* to feel "small" and "diminished."[163]

At the outset, the inflicting of suffering upon a wrongdoer has nothing to do with restoring honor to the one wronged. Ironically, what scholars miss is the distorting, deeply wrenching, nature of wrongdoing despite their attention on wrong's true character as a rupturing of civic, and at times, personal trust. Insofar as a wrong concretely degrades another, that stain cannot be washed away except by two acts. One, the wrongdoer can actively show the victim—through his honorable treatment of her over a course of time—her honor. This, of course, can only be done in situations where the wrongdoer and the one wronged have a personal relationship. Two, in situations of impersonal wrong, the one wronged must rely on the concrete acts of those around him. What is critical is not messages to

159. *See* Garvey, *supra* note 121, at 1819.
160. *See* Meyer, *supra* note 100, at 1527.
161. *See* Garvey, *supra* note 121, at 1825-26.
162. *Id.* at 1821.
163. *Id.* at 1822.

the wrongdoer, but *our deeds* toward the *one wronged.* To return to the example of the woman whose husband has beat her without mercy over a course of time, her aplomb, sass, and sense of womanhood will not return through like diminishing being exacted from the wrongdoer! Her restoration takes more—the constant, affirming, concrete acts of those around her which say she appears as, and thus is, one of dignity and account.[164]

Moreover, a need to inflict suffering upon a wrongdoer is precisely what the penitential teaching of the middle ages sought to invert! The suffering that *constituted* punishment, or penance as Professor Garvey calls it, was not externally inflicted upon a wrongdoer. Instead, punishment denoted the distress that overcame a penitent at having ripped himself from his union with another (and from his god).[165] Insofar as others were concerned, to provide the wrongdoer a way to expiate his anguish through practices such as fasting or self-mortification was to offer a gift.[166] But atonement is what it says—at-one-ment. For this to be, the injured person was to forgive, and forego. In current literature, theorists insist upon a distinction between forgiveness and mercy, equating the former to an internal change in the way one feels toward a wrongdoer and the latter as an affirmative act of mitigation of an otherwise required suffering.[167] This distinction was not lost on the Middle Ages. Nevertheless, until the twelfth century the penitential coloring of sanction yielded an understanding of the import of affirmative grace.[168] Not only was grace, as graciousness, important, it was a necessary condition of sanction. Given that the wrongdoer's suffering merely signified a gift, only by the grace of the injured would reconciliation would take place.

Professor Garvey does not tussle with Anselm's musing on the paradox of justice and grace. Professor Meyer does. She argues that mercy is wrapped up in traditional punishment for we do not give the wrongdoer his desserts. She notes that we do not torture the torturer,

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164. Though beyond the scope of this essay, the above signals the problem with pity. *See* Meyer, *supra* note 100, at 1534.

165. *See* Garvey, *supra* note 121, at 1819.

166. Professor Garvey acknowledges that the "best" penance is self-imposed, but he fails to consider that there is not such quality as forced or inflicted penance. Garvey, *supra* note 121, at 1819.

167. *See* Meyer, *supra* note 100 at 1522-23 (discussing general modern debate).

168. *See* KOZIOL, *supra* note 36, at 217-219 (discussing import of concrete acts of mercy and vengeance as making up the odd union of justice in eleventh century).

beat up the bully, nor rape the rapist.[169] In a word, we do not seek to demean the integrity of the wrongdoer in a way that matches the moral harm done to the dignity of injured.[170] I am not sure this is right. I suspect, the literature's nearly blasé acceptance that penalties must be inflicted upon a wrongdoer bespeaks our unwillingness to quite let go of our thirst for a bit of vengeance. And though cruel and unusual punishment is prohibited under the Eighth Amendment, for anyone familiar with, for example, the spiritual brutality of solitary confinement in the new super maximum-security prisons, an argument that we do not employ demeaning and assaultive means of punishment (justified by a rational goal) becomes impossible to make.[171]

What the contemporary discussion on punishment misses is that a penitential understanding of sanction is not wrapped up with the goals of punishment.[172] Punishment *is* atonement: this is what the medieval understood. Punishment is an act of the *mutual* suffering into accord between two torn apart, be the one wronged a person or a community. In the language of today's symposium, the moral and obligatory character of punishment in the medieval period inhered in that of which the act consisted: the struggle toward unity, and thus toward the meaningful.

Insofar as the wrongdoer is concerned, his suffering bespeaks his inner contrition and anguish. More than a feeling of guilt, this anguish bespeaks the pain and misery of standing in a state of broken trust with one's fellows.[173] For the medieval this state of corruption meant too that one stood in breach with the Divine itself insofar as divinity denoted Union *par excellance.* Practice followed teaching. Unlike theories of "atonement" put forth today, often contrition sufficed to repair a breach between a wrongdoer and his adversary or

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169. *See* Meyer, *supra* note 100, at 1527, 1530-31.

170. *Id.* at 1527.

171. *See, e.g.*, Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection From Psychological Consequences*, 49 DEPAUL L. REV. 567 (1999).

172. *See* Garvey, *supra* note 121, at 1806 ("Such theories combine, or fuse, teleological and deontological insights inasmuch as they identify an end for punishment beyond punishment itself but portray punishment as an "intrinsically appropriate (not just contingently effective) means of pursuing that goal.").

173. *See* Michael E. Smith, *Punishment in the Divine Comedy*, 25 CUMB. L. REV. 533, 556 (1995) (explaining the idea in the context of Dante's work thusly: "[t]he damned also enjoy a somewhat more substantial good. They have a persistent natural desire for the vision of God, the true primal good. The thwarting of this desire is the main source of their pain. But as in Paradise so even in Hell, God is present wherever he is desired. The damned have an inkling of him.").

community. The tears of the penitent cleansed and washed away the stain upon his own dignity and through his humbling in prostration before the person wronged removed the stain to his dignity.[174] To put the idea slightly differently, for a wrongdoer to turn toward home in his suffering as he stood, by his act, now homeless *was* punishment proper. The wrongdoer's actions alone, however, did not comprise punishment completed.

The completing of punishment necessitated the injured man's, and in a little later period, the community's grace. Sanction proper, that is penance, could not take place unless reunion occurred. Hence, the medieval well understood that the injured man must give up his need for redress! He must abandon his hope of inflicting suffering upon the wrongdoer. Indeed, in direct contrast to Professor Stephen Garvey who suggests that the injured person may rightly wait to extend his forgiveness,[175] in the medieval world each moment of failing to yield to the wrongdoer was a moment of punishment's lack. Thus as late as Pope Innocent IV, church fathers taught of the importance of not accusing one's brother and of tolerating those wrongs done to us.[176] Professor Koizol gives us the vivid picture of a knight wronged by a miscreant, chasing him to his place of refuge, and then laying prostrate before Saint Ursmari's relics gnawing and gnashing his teeth as he writhed in pain at being asked by the saint to give up his claim to redress.[177] In that the wronged person felt and renounced his wrath, and hence his thirst to see the wrongdoer suffer, he too experienced pain. The wronged man offered his wrath to the wrongdoer.

None of the above is to say that satisfaction—amends—was not important to the medieval period, but it was weighty only insofar as it signified a manslayer's or thief's contrition. And that contrition, can neither be compelled, as Maryland now does in requiring youthful miscreants to apologize on hands and knees to their victims,[178] nor can it be induced as one trains a dog.

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174. *See* KOZIOL, *supra* note 36, at 182, 185-186.

175. *See* Garvey, *supra* note 121, at 1828.

176. *See* Richard M. Fraher, *Preventing Crime in the High Middle Ages: The Medireview Lawyers' Search for Deterrence, in* POPES, TEACHERS, AND CANON LAW IN THE MIDDLE AGES 215 (James Sweeney & Stanley Chodorow eds., 1989).

177. Geoffrey Koziol, *Monks, Feuds, And The Making of Peace in Eleventh Century Flanders, in* THE PEACE OF GOD 251 (Thomas Head & Richard Landes eds., 1992).

178. *See* Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631-34 (1996).

The medieval way may seem strange to us indeed. In this mysterious world, a wronged man was encouraged in his loud and wrathful assertion of what lay in store for his assailant and then urged him to forego compensation. And the wrongdoer's penalty never represented punishment but only the promise of a sacrificial offering: punishment depended on a wrongdoer's heart alone. What allowed this conciliatory system of sanctioning was its embeddedness within a culture that knew criminal law as a manifestation of the myriad of ethical ties that bound each—firmly—to another. But that knowledge was itself rooted in centuries of belief that the meaningful, all that bespoke the good or true, rested in an immanent unity. Hence, insofar as one stretched toward the right, one did not reach for personal vindication, but toward reunion. In a world where one saw the human condition as a never-ending journey toward home, sanction could exist not as an infliction of suffering upon a wrongdoer that may be mitigated by mercy, but as a promise to not abandon—out of grace—those who anguished in distress for want of the home they lost by their wrongdoing.[179] Of course, behind all this stood the fusion of law and morality.

V. CONCLUSION

I am not sure about all that our ancestors may have to say to us, for we as a culture no longer believe that each law abiding action we take toward each other ignites a spark of divinity by actualizing a Holy Accord. Indeed, whether statesmen, stateswomen or judges may appropriately rely on even a partial religious understanding in making

179. *See* Nonet, *supra* note 99, at 521. "Spirit takes the deed back in itself" (PG at 492; Eng. trans. at 407), redeems it, by removing it from the element of existence and returning it to the element of thought proper. Thus kept safe in thought, the past opens new and higher possibilities for the self-revelation of spirit in existence (PG at 591; Eng. trans. at 492). *Die Er-innerung*, the re-interiorization of the past in the truth of thought completes the absolution of the self from its bondage to alien existence, in the restoration of its harmony with its inner essence. As the fulfillment of this return, *die Erinnerung* is the at-one-ment of the self with itself, in German *die Versohnung*, the return of the son to his filial belonging with the father, that is, mortal man's unity with the godhead. In this return, the self rises again in its *Auferstehung*, its resurrection to its proper identity with itself in the spirituality of selfhood. Hence it is that the transformation of revenge into punishment accomplishes "the atonement of the law with itself," as well as that "of the offender with himself," by which "the law is restored," and "first known by the offender as his own," so that he "finds in it the peace of justice" (GPR § 220).

or defending positions and judgments has become an issue.[180] But it seems there is something noble and beautiful in the thought that law signifies our ethos, and that that ethos binds us to each other in a heartfelt and meaningful way tying us both to our dead and to our unborn in a way that lends intangible but nevertheless real sense and significance to our lives.

And insofar as we wish a more humane kind of sentencing scheme, one that takes account of contrition, or welcomes a wrongdoer back in a meaningful way after punishment, the ethical and moral content of the law is a necessary condition to those ends. We all understand the idea of a homecoming. But home is not home simply because we are biologically attached to certain people who live in a house neutrally decorated in a no-one's kind of character. Rather, home signifies certain smells, attitudes, customs and manners that we embrace—it is the fact of our embracing these things that make us yearn for home. This "me"-ness we sense in the law is nothing but our common practices embodied into legal enactments much as we pour hot liquid metal into a mold.

On the other hand, if breaking the criminal law only amounts to a violation of a posited rule, which in turn is thought of as a neutral and instrumental protection of unfettered personhood existing outside culture—outside time and place—there is nothing profound about disavowing that rule. The prohibition carries no weight by its very claim to emptiness. Punishment, in turn, becomes only an exercise in behavior modification much the way we train animals. Contrition becomes unintelligible; and the notion of coming home, becomes slightly grotesque.

180. Davison M. Douglas, *Religion in the Public Square*, 42 WM. & MARY L. REV. 647 (2001) (introductory remarks to symposium).