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Abstract

This chapter offers a series of reflections on how to pursue new directions in critical criminal justice, by exploring the links between the moral grammar of criminal justice on the one hand, and a serious engagement with moral psychology on the other. In atypical fashion, this handbook chapter starts with an original discussion, leaving a broader engagement with literature and scholarship in criminal justice to its latter half. The first section explores the foundations for a moral psychology of criminal justice, which are further developed in the second and third sections through a dialogue with the work of Melanie Klein, which is then applied to a critical understanding of punishment. The fourth and final section then applies the conceptual framework developed in the paper to the field of criminal justice scholarship and practice. The chapter concludes by considering whether criminal justice can be considered within an emancipatory frame.

Keywords: criminal justice, moral psychology, psychoanalysis, persecution, reconciliation
BETWEEN PERSECUTION AND RECONCILIATION: CRIMINAL JUSTICE,
LEGAL FORM AND HUMAN EMANCIPATION

Craig Reeves, Alan Norrie, Henrique Carvalho

The difficult thing is for each individual to take full responsibility for the destructiveness that is personal, and that inherently belongs to a relationship to an object that is felt to be good; in other words that is related to loving.¹

It is, however, a grave mistake to assume that the law itself and men's attitudes toward it can exist in abstracto…. It is … a fundamental error, for all emotional attitudes—and even respect for law and a sense of responsibility are emotional attitudes—arise in response to concrete impulses…. We have no sense of responsibility as such ….²

INTRODUCTION

Criminal Justice and Emancipation

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In a recent review of critical criminal justice scholarship, two of the three present authors noted the emphasis placed on how law operates as a mode of social control, often in ways that are hidden behind the stated goals and purposes of criminal justice systems. Law is seen as a form of social or political governmentality, and insofar as criminal justice in the liberal view sees itself as representing a sphere of liberties, law’s nature as a means of repression through the forms of freedom is an important critical theme. The review found that authors deployed various ‘hermeneutics of suspicion’ to interrogate critically law’s claims and self-understanding as a virtuous institution reflecting themes of freedom.

Despite the negative critical standpoint, there was also, however, a leitmotif of reflection on an underlying, immanent, relationship between law and emancipation. If the critic could show how law works formally to express freedom, but in practice or substance to repress it, and she could show the mechanisms that produce these relations of form and substance, then the critique had got closer to understanding how repression works, what might be the conditions for its possibility, and therefore what might be the conditions that needed to be removed for repression to stop. Further, in investigating the law, scholars might also find something like a utopian promise, or trace of something better, contained within law that might come into being. Forms of control that operate behind actors’ backs, abstract universalisations of freedom which ignore and repress concrete forms of unfreedom, unacknowledged discriminations grounding violations: all these suggest different possibilities in differently made worlds as to how lives could be lived better. In these settings, the formal symbols of freedom might mark a space where substantive emancipation might emerge. Understandings, for example, of abstract and formal senses of autonomy might expand into deeper, grounded, senses of what it means to act autonomously, with the richer moral and psychological substance thereby invoked. Formal freedom betokens something richer and deeper, the possibility of a fuller flourishing held in check under present arrangements.

This emancipatory promise does not alleviate the tension in modern criminal law and justice; rather, it makes it more acute because the liberal promise of individual freedom and responsibility is directly pitted against the coercion of political authority and the structural inequalities and violence it defends. That violence is real and ongoing, so that it sometimes seems like vanity or narcissism to point to criminal law as a harbinger of emancipation. No doubt, we glimpse the better future to which criminal justice points ‘through a glass, darkly’. Yet, our view is that it is necessary to engage critically with this future. We take our line from Antonio Gramsci, who wrote that ‘the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear’. We see ‘the old’ as a world governed by the broken promises of the liberal Enlightenment and ‘the new’ as one that would be emancipated across a variety of social registers; but the new would still draw upon the values of humanity that modern society renders in a particular, more formal than substantive, way, while generating a variety of morbid symptoms in the dystopic present.

Liberal theorists might view such a characterisation as overly critical of the role and forms of law, while poststructuralists might see it as overly generous and idealistic. Nonetheless, we think that a view of criminal justice as placed in a confused and confusing historical world where law masks and is not always what it seems, where circumstances are bad and may be getting worse, where the need for change is urgent but not easy to achieve, and where emancipation might nonetheless find some guidance through law: such a view may orient us towards redeveloping critique in this field of scholarship. This would, however, raise an immediate question. What would be the precise connection between emancipation and criminal justice, and how can we get from one to the other?

Emancipation involves a freeing of the self, throwing off the things that hold us back. In its original meaning, emancipation involved the freeing of the slave from the master. In

modern times, it is linked to ideas of political self-determination, social freedom for exploited classes, the liberation of women and subjected races and peoples. Always tied in with these different meanings is the way in which people may free themselves not only in terms of their material conditions but also from the mental ties that bind. Emancipation involves the full development of human freedom. The theory of criminal justice is also, ultimately, a theory of human freedom, of how it is given up by criminal actors in return for punishment. However, this involves a sense of freedom that is limited and problematic, one that is very partially linked to ideas of emancipation. It is in between an account of mental and moral freedom in the broad sense of human emancipation and the account of those same things as they are expressed in criminal justice theory that we find a gap that needs to be filled. How, beyond the terms of the problematic of law and liberal theory, might we be free?

**Political Theory and Moral Psychology**

Liberal political theory typically, but incorrectly, fuses two types of question: those around the legitimacy of state punishment, and those concerning a moral psychology appropriate to a setting of violation of another’s lived being (feelings of guilt, forgiveness, blame and reconciliation). It focuses on the first kind of question, and has less to say about the second, not generally seeing it as a question in need of an answer. Critical criminal justice theory, in responding to the liberal model, has made the same mistake, and also primarily addressed the first type of question. It has done so mainly by taking the form of an historical critique based on the social structure that underlies, and the social functions that accordingly shape a criminal justice system. Showing how the

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system reflects particular social interests in a setting of structural violence undermines political legitimations based on contractarian or other abstract rationalist grounds. Showing the historicity of the legal subject challenges the view that legal subjectivity and its responsibility forms is ahistorical and inevitable. Such work is important, but it is not enough.

We can show this quite simply. In the liberal model, an unjust social system cannot sustain the legitimacy of its control processes, so that the right to punish – to find a person guilty – is placed under question. The responsible subject that is hypostatised by extracting it from the criminogenic context is revealed in its decontextualisation. Yet even in an unjust system, a person may feel psychological guilt at her actions and a victim may feel violated. Accordingly, there are questions of moral psychology that are not properly addressed by a model that conflates them with questions of normative political theory. This is the area that both critical criminal justice and liberal theory need to address if they are to get at questions of human freedom and emancipation.

The idea of a moral psychology points in two directions: towards the moral and towards the psychological. This is appropriate in that we are interested in how we understand concepts that are ethically significant for actors, but also at a deeper level, in how these are embedded in the psychological experience of a certain kind of being, the human being. Because we are interested in this as a general phenomenon concerning questions of guilt, forgiveness, blame, etc. we think it important to take these concepts out of the orbit of concepts with similar names that are governed by the gravitational pull of legal and liberal philosophical categories. We want to think about these things separately from political and normative theory, which is concerned with law and legal relations, in order better to understand how the findings of a moral psychology might ultimately relate to law.

In pursuing the idea of a moral psychology, we have drawn on a psychoanalytic understanding of human being to help us understand the moral categories in play around conceptions of violation, blame, guilt, and victimhood. Here our thinking has been informed primarily by psychoanalysis in the object relations tradition, and the emphasis there on the evolution of human identity through love and loving relations, which can, of course, go wrong. This tradition includes psychoanalytic thinkers and practitioners such as Melanie Klein, Hans Loewald, Donald Winnicott, Jessica Benjamin, and Jonathan Lear. This is not to discount the significance or contributions of other psychoanalytic traditions – classical Freudian, Lacanian, or feminist psychoanalysis – but, in our view, the object relations tradition is a rich source of insight that has thus far received virtually no serious attention in critical criminal justice scholarship and promises to reward careful engagement.

Our premise, then, is that one way to address the ethical lacuna in both liberal theory and the social and historical critique of criminal justice is to pursue object relations-based psychoanalytic perspectives on the moral psychology of guilt, violation and wrongdoing, responsibility and judgment, and blame and forgiveness. Moral psychology seeks to account for ethical experience, which here includes the moral emotions, and what we might think of as their cognitive experience and expression, such as their moral duties or obligations possessed or owed to another. Moral psychological inquiry tries to make sense of such phenomena, the moral grammars in which we articulate fundamental feelings or emotions, as they arise from the resources of our psychology.

Of course, what it means to 'account for' or 'make sense of' ethical phenomena in psychological terms needs clarifying, and while this is not the place to give a detailed answer to that question, suffice it to say that two possibilities are ruled out from the start. First, we may well think that what is needed is in some sense a 'naturalistic' account, but that cannot mean that we are reductively to analyse ethical phenomena into organisations of more basic or 'natural' mental states. For one thing, it is not clear that we have any means of knowing in advance what the more 'natural' items to which ethical phenomena should be reduced are, and if we are not simply to beg the question as to what ethical
possibilities are really grounded in our psychological nature, we must remain open-minded. Second, a naturalistic moral psychology is incompatible with a Panglossian moralism that simply writes back into our psychology, and thus affirms, whatever ethical experiences and intuitions we are familiar with as if they were anthropological constants. That is, we will want a genuinely moral psychology rather than 'a moralizing psychology, one that simply assumes the very categories it seeks to vindicate'.

In the Western tradition, moral psychology has tended to fall into one or other of these two reductive traps: a moralizing psychology that takes for granted the moral emotions, intuitions and attitudes of the form of life and seeks to vindicate them simply by writing them back into the fabric of our psychological nature, as perhaps we find in Aristotle’s account of virtues and vices; or a sceptical project that seeks to deflate moral emotions and intuitions in narrow, behavioural science, terms or as the obscure expression of altogether seamier impulses, as we find—at least at times—in both Nietzsche and Freud. The aim, as we see it, would be for a moral psychology of wrongdoing and responses to it that would not blindly seek to rationalise whatever people happen to think and do in a particular historical period. Nor would it blithely dismiss the ethical substance of such phenomena tout court as reducible fluff, but would rather be able to offer real grounds for distinctions among putative ethical experiences.

Commented [c d1]: Its Making Sense of Humanity, p. 68, but I think it muddies the waters so better to just leave it out! He’s not against naturalism per se, he’s just objecting to the idea that we know what naturalism actually means, ie it has a tendency to be taken in a reductive scientific or physicalist way, etc. The question at issue is what our nature involves, so talking about naturalism doesn’t really address the question.

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9 Both Williams and Jonathan Lear think that Nietzsche and Freud provide genuine cases of moral but neither moralizing nor reductive psychology. But both seem to us to tread at times very close to, if not over, the line of reductionism. Freud, we think, is appropriately read in reductionist terms on the face of his ethical texts, but opens the door to better, non-reductionist, readings which ground ethical experience in his later structural approach to psychic development. Though we draw on Klein’s metapsychology in this essay to identify persecutory and reconciliative forms of guilt, we think a parallel route to conflicting forms can be developed by contrasting Freud’s account of guilt as repressive, fear and anger-based with an alternative view implicit in his later structural theory that sees guilt as based on love and the desire to atone to, to be ‘at one’ with, another: A. Norrie (2018) ‘Animals Who Think and Love: Law, Identification and the Moral Psychology of Guilt’ *Criminal Law and Philosophy* DOI 10.1007/s11572-018-9483-8. Here, we draw upon J. Lear (1990) *Love and Its Place in Nature: A Philosophical Interpretation of Freudian Psychoanalysis* (New Haven: Yale University Press); (1998) *Open Minded* (Cambridge: Harvard University Press); (2015) *Freud* (2nd ed) (Abingdon: Routledge); and on Hans Loewald (1980) *Papers on Psychoanalysis* (New Haven: Yale University Press).
The basic suggestion is that an adequate moral psychology might allow us to distinguish non-arbitrarily between *supposedly* ethical experiences that are really expressions of psychological distortions or fabulations, and those ethical possibilities that are more securely grounded in valuable psychological potentials, even if such potentials are at present only sporadically realised. Moral psychology could then come of age and pull its normative weight in the division of labour within ethical and legal theory, leading to a better understanding of what it would mean for human beings to be free, emancipated, and to have real autonomy. On this basis, it would also be possible, more particularly, to think about what it means to blame, to feel guilt, to be responsible. Such an approach would take us through and beyond a mere ‘hermeneutics of suspicion’, to an investigation of the real ethical possibilities grounded in human psychological powers which conduce to emancipation.

**Moral Psychology and Blaming Practices**

In what follows we seek to build a moral psychology of criminal justice, on the basis of a dialogue between two perspectives. The first perspective takes up the key positions, the ‘paranoid-schizoid’ and the ‘depressive’, identified by Melanie Klein in her account of the pre-Oedipal phase of infant development. The second considers Jessica Benjamin’s relational psychoanalytic account of recognition and domination. We think Klein can shed significant light on modern punitive practices, in the following three ways:

1. **A Critique of Retributive Blaming.** The first draws upon Klein’s identification of the paranoid-schizoid position in infant development in which a phantasy of omnipotence prevails, and in which the world is split in Manichean terms into all good and all bad objects. This is a world that lacks proper bearing in relation to the reality of others, where appreciation of the mixture of good and bad qualities, and the interconnection between the self and the other (I am what I am because you are what you are) is not grasped. This is also Benjamin’s world of the doer
and the done to, where ‘only one can live’.\textsuperscript{10} It is possible to see this phantasy as lying at the heart of forms of retributive punishment which seek to banish or permanently ‘hurt’ the offender, as is often reflected in law and order politics. There is a sense here of the intrinsic pleasure in punishment, but it is based on a negative phantasy. In this view, guilt and punishment are essentially persecutory in their form.

2. \textit{Guilt and Reparation}. A second route follows Klein’s view of the so-called depressive position, which suggests a feeling of guilt and a desire to repair in relation to a loved one that one fears one has damaged in phantasy through one’s anger. This can be put together with Benjamin’s argument that intersubjective mutual recognition, based on love, struggles with interpersonal relations of domination and submission. Linking these, it can be argued that guilt is the unhappy state of one whose act towards another is one of domination, but who has sufficient upbringing in relations of mutual recognition to experience a conflict between what she does and who she is. Here, guilt and its outcomes are essentially reconciliatory in form. We will seek to interpret current criminal justice problems in light of the interplay between these two psychological positions.

3. \textit{Holding Responsible and Taking Responsibility}. A third view comes from the difference between the two accounts of responsibility drawn from the above. The first involves an actualist, momentary and individualistic account of responsibility, which is associated with law, which identifies a voluntary act and accompanying cognitive state, and holds an actor responsible for that act. We think this compatible with Klein’s schizoid and persecutory position in the critique of retributive blaming. The second is a holistic account of agency which relates acts to the underlying psychological conditions and surrounding contextual setting of action, including the understandings, distortions and phantasies under which it occurs. It is consistent with Klein’s depressive and reconciliatory position. Taking responsibility is being committed to understanding and

\textsuperscript{10} J. Benjamin (2017) \textit{Beyond Doer and Done To: Recognition Theory, Intersubjectivity and the Third} (Oxon: Routledge), 232.
addressing the unconscious mental processes and the social contexts that mesh with conscious agency to produce action.

In the next section of the essay, we develop Klein’s account of the two psychic positions just sketched and in the following section we relate them to practices of guilt and blame. Finally, in the last substantive section, we relate these findings about the nature of guilt to the way in which legal practices relate to issues of guilt and blame in modern social settings. This involves:

4. The Moral, the Legal and the Broken Third. This draws upon Benjamin’s recent work on the moral third, which is the form that the relationship of mutual recognition at the core of identity formation takes as it moves out from infants and parents, and beyond the analyst-patient relation and into broader social relations. It takes wrongdoing and its repair out of the split position of the ‘doer’ and the ‘done to’ and offers the possibility of the repair of violation in legal settings. The moral third is in line with Klein’s depressive, reconciliatory position. It is a relationship that embodies mutual recognition, and which serves in settings of violation to permit witnessing and acknowledgement of what has happened. It raises questions, however, as to how the moral third could link to law – does law for example reflect aspects of the moral third as a legal third? Here we note that modern law is located on sites of structural violence, and this undercuts its ability to reflect positions of moral thirdness: law may be seen accordingly as a site of the broken third. More broadly, structural violence is the basis for law’s relationship to persecutory trends in the human psyche and in social practices. Accordingly, here we see criminal justice practices as sitting between the persecutory and the reconciliatory, and we see the abstract nature of legal form as the means whereby law can be utilised both regressively to persecute and, to a certain extent, progressively, to reconcile. Here we move back from the sphere of moral psychology to that of political theory.
MELANIE KLEIN’S MORAL PSYCHOLOGY

In this section, we provide a brief outline of the two positions developed by Melanie Klein in her understanding of infantile development in the pre-Oedipal phase. In respect of the deep ethical issues with which criminal justice attempts to deal – those of wrongdoing and violation, responsibility and judgment, blame and guilt – one avenue that seems most promising is that established by her development and transformation of Freud's psychoanalytic research programme. Freud's account of guilt is certainly less one-sided than it has sometimes been thought to be. The stock interpretation is that guilt is the feeling of anxiety about retaliation or punishment from the internalised father figure in respect of the infant's possessive desires toward the mother figure. The infant internalises the father figure and thus takes inside itself an imagined vengeful or punishing authority who is also omnipotent (as the parents are imagined to be), such that violations of the father figure's dictats will provoke dreadful retaliation.

Such a story might be thought to offer a more developmentally grounded and less speculative fleshing out of Nietzsche's genealogy of guilt in On the Genealogy of Morality, though both might be thought to reduce unacceptably the ethical dimensions of guilt to base narcissism and resentment. Yet already in Civilization and Its Discontents the internalised figure is not only hated and feared, but also loved, and Freud's seemingly reductive account seems to eat its own tail. There, Freud indulges his own Nietzschean impulse for a speculative historical anthropology. The guilt associated with the infant's hateful, destructive wishes toward his frustrating father is traced to the original patricidal act of the primal band of brothers, but he then makes a startling U-turn. Since the band of brothers story is supposed to explain the taboo on patricide, it must not presuppose it. It is supposed to precede the development of the internalisation of the

father as an internal punishing figure, and since they have actually killed him, they cannot have grounds to actually fear his retaliation. Yet, apparently, they feel guilty and set up the taboo on patricide, and in turn on incest, as a response. The question then arises: why did they feel guilty about killing the father in the first place? Freud's answer: because they not only hated and feared him but loved him and felt remorse at having destroyed one they loved.14

The psychological account of guilt that Melanie Klein eventually developed can fruitfully be seen as a systematic exposition and clarification of the insights Freud touched upon but was unable to articulate otherwise than aporetically. The irony that Freud had, in attempting to trace guilt back to narcissistic impulses, eventually led himself back to the genealogical ground state of a basic, irreducibly ethical impulse of care for a loved other and remorse at having harmed them, is what Klein, by reversing the developmental order, turned into a paradigm shift. This was not a systematic undertaking on Klein’s part, but was nevertheless one of her key achievements. One of the crucial innovations flowing from her pioneering work with child psychoanalysis15 was the development of an account of pre-Oedipal phantasy structures (and an increased understanding of the blurriness and gradualness of the Oedipal/pre-Oedipal distinction itself). She claimed to identify two distinct developmental phases or 'positions', both of which in essence preceded Freud's triangular Oedipal position. In their different ways, both address the questions of love and hate that remained unresolved in Freud’s account.

The first phase is the originary psychic situation for the infant, one could say the diachronic starting-point of its conditions of experience. The basic feature conceptually speaking is that the infant as yet lacks the capacity to experience whole objects outside itself that persist through time and may have different and conflicting qualities

14 See also Norrie, ‘Animals Who Think and Love: Law, Identification and the Moral Psychology of Guilt’

15 Not all of which, of course, exactly showered her in ethical glory. She famously analysed her own 5-year-old boy, publishing the case study as the analysis of 'a friend's son', a practice which – particularly in light of her experimental methods – is hardly a model of best practice today (or even then).
manifested at different times. In metaphysical terms (not Klein's), it lacks the category of substance.\textsuperscript{16} The consequence is that the world, and the figures in it – at this point, primarily, the 'mother', i.e. primary care-giver – do not appear as complex persisting wholes. Rather, the infant's experience is organised around fleeting, transient experiences of figures that possess one or another quality, depending on how it feels towards them. Basically, the figures that populate its world are one-sided, are experienced as either very good or very bad. The frustrating mother is one, bad, figure, the satisfying mother, a different, unrelated, very good figure. Hence, Klein described this early organisational form of experience as 'schizoid', or pervasively split. But because momentary frustration is bound to be more common than instant gratification, this world is also predominated by bad figures.\textsuperscript{17} At this point one of the most controversial aspects of Klein's theory arises: she hypothesises first that the infant's rage at being frustrated is projected onto the bad, frustrating figures, transmogrifying them into horrific persecutors; and second, that the infant expresses anger and frustration by phantasising vicious attacks – of an oral, biting and chewing nature – on those persecutors in retaliation for their hostility. And the consequence of these biting and chewing phantasies is that the persecutors are phantasised to be taken inside the infant as part of its psychic formation.

This early experiential world is what we might call an age of extremes: the infant's experience (Klein speculates) oscillates between engulfment in the loveliness and perfection of the idealised loved object/mother, enraptured in what Richard Wollheim calls 'archaic bliss',\textsuperscript{18} and suffocation by the terror and dread of a world populated by a multitude of entirely bad persecutors who are not just outside, but have been taken in by, the infant. We should not forget the importance in this phase of idealised love, but, since frustration is bound to predominate over gratification, Klein emphasises the latter – calling this position the 'Paranoid-Schizoid Position'. We will refer to it more simply as the persecutory, its main features being fear and rage.

\textsuperscript{18} Ibid.
Developmentally, this position gives way to a second, 'depressive position', within the first year. The crucial advance here is that the infant begins to acquire the intellectual and emotional capacity to experience whole, complex objects, and thus to begin to put together the good and bad figures – which now come to be seen, retrospectively, as merely part-objects – into the wholes of which they were merely momentary glimpses. The major step now – ideally, at least – is that the infant becomes able to recognise that the loved and hated, treasured and attacked, objects are actually not separate objects but aspects of the same, complex, ambiguous loved whole person. The frustrating mother and the comforting mother are one and the same person, at different moments. Klein calls this the depressive position because this realisation that the loved person and the hated person are simply aspects of the one whole person ushers in a period of despair, which Klein interprets as a basic, irreducible, though developmentally-diachronically secondary, ethical experience: remorse or real guilt arising out of love and concern for the other and out of the realisation of the true nature of one's own destructive impulses, wishes and (phantasised) actions regarding them. This depressive realisation presents to the infant the most crucial developmental challenge they will encounter.

There are two basic possibilities at this juncture. First, the infant may turn away in hopelessness from the realisation, reverting to the splitting of the persecutory position as a defence against it. In that case, the parts are kept apart and the confrontation with despair is avoided but at the cost of substituting for it the dreadful anxiety of the persecutory world. The second is that the infant begins to work through the depressive position instead of fleeing from it altogether. Now this depends essentially on the infant's capacity for hope – both in the loved object's (the real parent's) capacity to withstand and

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20 At this point, the infant has not acquired the distinction between real world actions and phantasised ones; indeed, they are only still negotiating the distinction between 'inside' and 'outside' at all. See D. Winnicott, (1960/1965) 'Ego Distortion in Terms of True and False Self', in *The Maturational Process and the Facilitating Environment* (London: Hogarth)
survive the infant's attacks, and in the infant's own capacity for love and care, and the hope that it can, not undo the harm done, but repair it and make amends. The depressive phase is in its essence reconciliatory. The drive for reparation is crucial at this juncture and is tied to creative capacities to rebuild, to repair, cure, mend, to make anew and whole again. Of course, as Klein was aware, but as Winnicott\textsuperscript{21} emphasised more forcefully, hope depends in part on the input of the care-giver, both to reassure the infant that their attacks haven't in fact destroyed the loved parent, and in providing opportunities for and recognition of – and thus confirmation of – the infant's attempts at reparative activity. Whereas the turn back to persecutory splitting marks an inability to tolerate the self's own ambivalence, the working through of the depressive position marks the growth of the capacity to do so, and to develop the infant’s own psychic reality. The consequence is a growth in the capacity to experience the world as it is rather than defensively fragmenting and dissimulating it.

Now, crucially, these positions are not by any means merely developmental stages, but are rather claimed to be persistent \textit{unconscious phantasy structures of experience}. We may think of them as competing categorial and hermeneutic \textit{a priori} emotional frames of reference. They organise actual experience, providing the categories, roles and narratives into which we must interpellate the experienced world, which indeed arrange that world and so both make possible and constrain (in various ways) our experience. The two basic frameworks sit alongside one another, as if vying for prominence. Ordinary psychic life, beyond the early developmental phases in which they arise, is structured by the negotiation of the tension and oscillation between these two great emotional paradigms, under the constantly changing pressures of real life. The fluctuation between these positions, as Klein is thinking of it, might be thought of along the lines of a paradigm or \textit{gestalt} shift, whereby a whole framework for understanding experience can be suddenly displaced by, or is in competition with, another. Klein's claim is that at least one very important aspect of how adult life is organised is in terms of such a paradigm struggle, with the possibilities of fluctuation and shift.

Klein's revolutionary distinction between the two distinct phantasy positions – the competing, oscillating, emotional a priori categorically organising experience – makes possible a moral psychology that is neither reductive nor moralizing. For it suggests a way of accounting for, or making sense of, our putative ethical experience, not in an undifferentiated way which opts either for rationalisation or elimination, but in one which offers to explain the whole range of the phenomena involved in that experience. And this distinction is in no way question-beggingly reliant on prior ethical judgments of what is or is not preferable. It is not rooted in moral intuitions but in morally uncontentious psychological distinctions, that is, in distinctions not grounded in moral claims, but in real psychological states - that then represent the source of emergent moral attitudes. The depressive position may then be preferred morally, to be sure, but this is on the basis that realistic apprehension of the world and of the self, as against distortion and delusion, represents a preferable mindset. Essentially, the persecutory phantasy world organises experience into falsely split off, one-sided objects, and prevents the apprehension of whole substances, while the depressive position generates an agential and interactional space in which, through hope, psychic reality can be realistically tolerated and outer reality can be realistically apprehended. These are positive and preferable mental positions not because a moral theory says they are, but because mental realism is preferable to paranoia at the level of psychological well-being.22

DIFFERENT SIDES OF PUNISHMENT: ANGER, GUILT AND RESPONSIBILITY

What might all this imply for a realistic psychology of wrongdoing and violation, blame and guilt, responsibility, judgment and justice? There are, we think, initially three fruitful directions in which this analysis leads us. The first and second concern two competing accounts of guilt as a case of persecutory anxiety, or a form of concern related to

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22 This argument chimes with Lear’s account of psychoanalytic truthfulness as a foundational virtue for ethics, aligning the possibility of human flourishing with a self-understanding that is both psychoanalytic and Socratic: ‘Psychoanalysis is not directly a training in familiar ethical virtues, but it is a training in the truthfulness that such virtues require’ (Lear, Freud, p.18).
reconciliatory efforts to regain wholeness through making good a harm done. A third aspect concerns our understanding of what modern responsibility practices involve and how ethical potentials are mediated by them.

**Retributive Blame and Persecutory Anxiety**

First, Klein furnishes us with the resources to make critical sense of retributive blaming emotions in a way that avoids simple reduction (to something else, such as Nietzschean *ressentiment*), but which at the same time offers an explanatory-critical challenge to those emotions rather than simply accepting them. It is sometimes said in the criminological literature that psychoanalytic explanations of punitive attitudes cannot possibly have normative implications since non-punitive attitudes must also have psychoanalytic explanations, but that is to assume that psychoanalytic moral psychology must be reductive in just the bad sense that we have rejected. A Kleinian moral psychology makes it possible to offer explanatory interpretations of retributive blaming that avoids such pitfalls. For Klein's is not simply a 'hermeneutics of suspicion', it is a hermeneutic rooted in a realistic moral psychology. In brief, while on the Nietzschean-Freudian view retributive attitudes and emotions are to be denounced as based on narcissistic or dominatory drives *just like everything else in ethical experience*, a Kleinian view makes possible a differentiated interpretation of them as primarily arising from defensive regressions to persecutory ways of experiencing the world.

Such a line of inquiry might begin from the observation that retributive blame presupposes, or at least often involves, a partial view of the person being blamed as a formally free wrongdoer abstracted from an experience of their concrete wholeness as a real person. The categorial framework of criminal law and the philosophical justification of retributive punishment are agreed in excluding from view the concrete reality of the person. In the persecutory mindset, aggressive, punitive, retaliatory, destructive or even

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23 Nietzsche, op cit.

annihilating impulses make emotional sense, insofar as the other person is being conceived not as a whole person but merely as a bad, persecuting fragment, a part-object, that contains no goodness anyway. The abstract individualist conceptualisation of the criminal in both legal theory and retributive philosophy is at least open to being read as an intrinsically bad, dangerous person, since that person has (a) performed a harmful act and (b) been evacuated of any pre-existing moral contextualisation linked to the person’s actual social and psychological formation. The way is open through legal-philosophical abstraction to persecutory condemnation on the basis of paranoid-schizoid thinking.

Moreover, the forms of punishment as they have evolved in the modern period might be susceptible to an interpretation in terms of persecutory anxieties: they centre, after all, on, first, violence, then exclusion, then containment and control – characteristic phantasies of the persecutory period. And the much-explored new popular punitiveness seems fairly undeniably to marry together wider anxieties of a narcissistic, self-directed, nature, linked to feelings of subjective and ontological insecurity, to phantasies about possible or actual persecutors and imagined threats that are at least out of proportion to reality. The two key elements – splitting and paranoia – of the persecutory position seem to be in evidence in the punitive complex. Since persecutory experience is characterised by distortion rather than realistic apprehension, these suggestions should give us pause for thought. For it would suggest, on moral psychological grounds, that retributive blaming is corrupted by paranoid-schizoid, persecutory, thinking.

Such a judgment would not depend on the sui generis value judgment that there is something wrong with retributive blaming, but would flow from the normative implications of the naturalistic moral psychology that Klein presents, and which suggests


that persecutory mentation is 'bad' in the precise sense that it is unrealistic, based on motivated cognitive distortion. This is not to suggest that guilt and blame have no proper place within human responses to harmful behaviour. Rather, it is to suggest that the blaming emotions may be, and often are, embedded within a black-and-white simplistic categorial frame of experience in which good and bad are kept separate. This is not a world of beings who compose a basic, flawed and vulnerable humanity, but a world in which there is a split between a ‘doer’ and a ‘done to’, as Benjamin has recently put it.28 This may be quite independent of the fact that we know rationally that this is not the case. Indeed, one of the striking features of the philosophical discourse of criminal justice is that the persecutory view of the offender as a free rational person electing to do wrong and the rational understanding of offending as socially conditioned are kept rigorously apart. To ‘understand less and blame more’, as British voters were once advised, is a classical splitting along persecutory lines.29

The question that Klein’s moral psychology raises ultimately is whether there might be possible forms of anger that are not split off from love in a doer/done to formation, but are rather integrated with love. As we will now suggest, Klein’s work also provides the basis for a moral psychology that can ground judgments of this kind, and work in this direction is one promising avenue we think should be explored.

**Guilt, Remorse and Reparation: Reconciliatory Desire**

A second avenue for exploration is the inquiry into the role of guilt as remorse in contexts of violation and wrongdoing. Klein’s account can be interpreted as differentiating two distinct species of guilt, or anyway two distinct emotional kinds that are commonly

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28 Benjamin, *Beyond Doer and Done To*.

29 A. Norrie, *Punishment, Responsibility and Justice*, pp.219-20. It should be said that the alternative counter-slogan in the same campaign, ‘tough on crime, tough on the causes of crime’, by creating an analytical separation between the two forms of toughness, was equally aimed to maintain persecutory splitting at the level of penal policy.
collapsed together under the concept of guilt.\textsuperscript{30} The advance that Klein makes possible is to both hold in view the possibility of a narcissistic, ressentiment-fuelled form of guilt such as that which Nietzsche and Freud had identified – persecutory guilt rooted in anxiety for the self – while insisting that this is not all there is to guilt by discriminating a deeper form of depressive guilt, real remorse for the harming of the loved object that is independent of self-regarding anxiety. This is the irreducibly naturalistic, ethical, form of guilt that gets lost on a Nietzschean view, and to which Freud eventually appealed when he spoke of love in the band of brothers story. Klein's distinction between persecutory and depressive guilt opens up several directions for promising future research.

Moral retributivists have often appealed to guilt in their arguments. Michael Moore,\textsuperscript{31} for example, builds an argument for the truth of retributivism along Nietzschean lines upon the supposed results of thought-experiments concerning how we would feel, and what we would want to do or undergo, were we to commit a horrific crime. His answer is that we would feel guilty, and the desire that would flow from this is that we would want to be punished. Now quite aside from the obscurities involved in the set-up of this putatively maximally intuition-pumping thought-experiment, Moore seems to be appealing to one kind of guilt at the expense of another. It has been shown in empirical test situations where subjects are invited to undertake thought-experiments concerning how they would feel if they did something that hurt a valued other, that while there are those who feel 'guilt' and desire to be punished, many feel 'guilt' but desire to undertake reparative actions to try to mend or heal the harm done.\textsuperscript{32}

\textsuperscript{30} Klein herself later decides to call only depressive guilt 'guilt', and to treat persecutory guilt simply as 'anxiety' distinct from guilt. (M. Klein (1948/1975) 'On the Theory of Anxiety and Guilt', in Envy and Gratitude, and other works 1946-1963 (London: Hogarth Press)). This could make sense as an attempt to privilege depressive guilt as a more fully realised form of guilt, but little is gained by insisting that the privative persecutory case is not guilt at all. We should rather say simply that it is guilt, but a privative case of it.


Such findings can be made ready sense of by Klein's moral psychology: we are encountering two different kinds of guilt. One kind of guilt brings in its train the desire to punish or be punished, but this is the persecutory kind. For the subject of persecutory guilt, punishment may be desired because it is imagined that it will provide relief. They feel internally threatened by vengeful persecutors, and the desire for actual punishment might be both a form of acting out, in which the subject's desires are governed by the impulse to arrange the real world to conform with their phantasy, and the actual punishment might provide relief by exacting in a determinate external way the internal retaliation that otherwise would seem interminable. This is often how things seem phenomenologically: people talk of the feeling that they would be eaten up by guilt unless they are punished. Punishment may also provide a sadomasochistic satisfaction. Nietzsche may have exaggerated the centrality of sadism in human nature, but sadistic pleasure is clearly a possibility for us, and insofar as the person identifies with the punishing figure, and draws through this identification pleasure from the punishing that is exacted on themselves, they may find gratification in their own punishment. But what of those who do not share Moore's intuition, those who respond to the thought-experiment with guilt that leads them to the desire not to be punished but to make reparation?

This is precisely what Klein claims is the content and motivational direction of depressive, or reconciliatory, guilt. Whereas persecutory guilt is preoccupied with the anticipated retaliatory attacks on the self, depressive guilt is preoccupied with the harm done to the other. This is why persecutory guilt leads to the desire to be punished – a self-
directed and passive desire, while depressive, reconciliatory, guilt leads to the desire for reparation – an other-directed and active desire. Once this distinction is drawn, a critical response to the retributivist appeal to guilt can be developed: appeals to guilt only support retributive punishment insofar as we limit our attention to persecutory guilt and exclude reconciliatory guilt from consideration. Once we think of guilt in terms of reconciliation with a harmed other, the retributive urge turns into something else.

A second role for guilt in retributivism has long been defended by those who see punishment as a moral endeavour the aim of which should be to inspire guilt in the offender. Anthony Duff, for example, has defended the view of criminal punishment as a moral dialogue, in which the offender's part is that of secular penance, and where the aim of the whole enterprise is to provoke guilt in the offender so that they come to see the wrongfulness of what they have done and resolve to act differently in the future. Unlike Moore, Duff recognises that there is a distinction between the 'unhealthy, unproductive kind of guilt' and the healthy, constructive kind, but he says nothing more about what this distinction might amount to, nor whether criminal justice is well-equipped to bring out the one rather than the other. Klein's moral psychology suggests a realistic, grounded way to elaborate this distinction.

When the fullness of this distinction is in view, we may well be able to make more sense of Duff's intuition and to delineate what the potentials are for unhealthy, unproductive, persecutory guilt and healthy, productive, depressive guilt. Depressive, reconciliatory, guilt is, for Klein, bound up with the capacity to tolerate psychic reality, and that is dependent on the capacity for hope – both in oneself, and in the world and the objects one has harmed. While hope that one possesses enough goodness to persevere can come through reparative activities, such reparative activity must be recognised by the other to

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have emotional reality. This is, at least what we learn from the work of Winnicott.\(^\text{36}\) And for the self to have any hope in themselves and their capacity to do good in the world, and in turn to be accepted, welcomed, in the community rather than simply rejected, both the individual's capacity for remorse and the community's capacity to facilitate that remorse will be essential.

Recently, Lacey and Pickard have gone further in arguing for the cultivation of reconciliatory guilt and acknowledge that such guilt is not furthered by advancing a condemnatory narrative; a more hopeful, 'redemption script' is crucial for offenders who change.\(^\text{37}\) Their account implicitly recognises the distinction between a persecutory, destructive, 'condemnatory' kind of guilt and a distinct kind of guilt that is reparative, creative and reconciliatory. Yet they note that such reconciliatory guilt is linked to a contextual self-appraisal on the offender's side that is incompatible with the decontextualised attributions of culpability and responsibility at the core of criminal law. This raises the question of the extent to which criminal law's formal morality can accommodate and nurture reconciliatory guilt, but this is a question Lacey and Pickard sidestep. Accepting the nature of criminal law's judgment, they recommend that we resign ourselves to the fact that offenders in the criminal process will, insofar as they are to experience productive, reconciliatory guilt, not acknowledge 'the entirety of their culpability,'\(^\text{38}\) a conclusion that seems anathema to the spirit of ethical truthfulness and self-knowledge that informs reconciliatory guilt.

The initial impression, then, is that Kleinian 'depressive guilt' lies at the heart of recent attempts to re-theorise criminal law as a rational and dialogic moral practice, but that the form of that practice as those same theorists defend it rules out the nurturing of that sort of guilt. If that is indeed the case, further work is needed both to develop in more detail


\(^{38}\) Lacey and Pickard, p. 690
an account of the kind of real guilt that is inherent in violation and a possibility within our ethical form of life, but that may well be blocked off by criminal law's categories. But the underlying question lingers: if there is a potentially progressive core to guilt through restorative and reconciliative forms, can it be that the state, through its convictions and punishments, can represent a mechanism to deliver reconciliative guilt? While law’s abstraction may leave it open to move in the direction of reconciliation, its operation in the medium of the punitive, class-based, state and its penal system must radically circumscribe, without doing away with, reconciliative possibilities.39

In the light of Klein’s identification of two forms of guilt, the persecutory and the reconciliatory, we suggest two hypotheses for consideration. The first is that modern criminal justice systems operate on a persecutory model in which social anxieties are focused on ‘getting’ wrongdoers and making them suffer. Within that system it is possible for agents to inflect and temper practice with reconciliatory intentions and actions, but these are inevitably caught up in the broader persecutory framework. The second is that philosophies of punishment based on retributive grounds can take up either a persecutory or a reconciliatory approach. The persecutory approach fills out the abstract rationality of the philosophical subject with a negative emotional reaction that portrays the perpetrator of a wrongdoing as different from normal humanity and subject to retaliation for their badness. The reconciliatory approach takes the same abstract rationality and seeks to supplement it with emotionally restorative and reintegrative purposes. In the former,

39 Here, we point to the range of reconciliative projects that operate in the margin and the shadow of the prison and the penal system, and the possibility that individuals within that system will find moral assistance, come to regret acts of violation, and change their moral outlook. See for example some of the dialogues between victims and perpetrators found in M. Cantacuzino (2015) The Forgiveness Project (Jessica Kingsley: London and Philadelphia), and this recent book by a former prisoner: E.James (2016) Redeemable: A Memoir of Darkness and Hope (Bloomsbury: London). On the ethics brought out by the Forgiveness Project, see A. Norrie (2018) ‘Love Actually: Law and the Moral Psychology of Forgiveness’ Journal of Critical Realism doi.org/10.1080/14771701.2018.1472409. It has to be said that the young Hegel was already onto moral reconciliation two centuries ago, in his early theological writings, though his mature work is more law-minded and points to the persecutory, albeit within a framework that is formally reconciliative: A.Norrie (2018) ‘Love in Law’s Shadow: Political Theory, Moral Psychology and Young Hegel’s Critique of Punishment’ Social and Legal Studies doi.org/10.1177/0964663917758512.
retributive punishment is the rigorous application of a persecutory psychological mindset given philosophical expression. In the latter, such punishment is at most a way of gaining the attention of a person who has done wrongful acts, so that they may embark on restorative work for themselves and their victim. But the question that remains unanswered in this latter situation is whether the institution of punishment as it is structurally positioned can play the role of trigger for reconciliation when it is at its core part and parcel of a persecutory system.

**Holding Responsible and Taking Responsibility**

A third avenue drawing on reconciliatory guilt concerns the possibility for radically rethinking the conceptual structure of our responsibility practices. Criminal theorists often say that the point of holding someone responsible is to get them to take responsibility, but what the latter might actually involve is left unexplored. It seems usually to be assumed that taking responsibility is simply holding oneself responsible, but that seems to be too hasty. The moral psychology of responsibility suggests a different conclusion. The language of holding responsible and taking responsibility may thus be seen to be further apart than we normally suppose, with the former related to Klein’s persecutory complex, the latter to her depressive standpoint. While holding responsible might be thought to be bound up with persecutory phantasies, vindicating Nietzschean scepticism about retributivism, the reconciliatory phantasy world of the depressive may imply a fundamentally different sort of responsibility practice.

Criminal justice theorists often suggest we are faced with two irreconcilable alternatives, where one is plainly unacceptable. These are based on free will and determinism, so that we must accept free will in one form or another, because the practical and logical outcome of accepting determinism, that humans are only capable of behaviour modification and therapy, is morally and phenomenologically unacceptable. However, the responsibility practice that stems from taking responsibility would neither conspire with the asceticism of existing retributive norms and the failed aspirations of the so-called 'justice model', nor lurch toward a reifying treatment model that apprehends offenders as
mere things or animals and fails to allot them respect as persons. The moral grammar of taking responsibility, we suggest, is what is implicit in the psychological structures of the depressive position, and it is very different from the practice of holding someone responsible as a free agent in a punitive, blaming way. It corresponds to depressive, that is, whole-object-oriented, forms of anger and guilt. These offer the starting-point for concrete utopian exercises in thinking about what radically different, alternative, responsibility practices might be. Such practices as the grammar of taking responsibility presages would, far from being morally unserious, be much more morally serious about human possibilities than our existing ones.

The practice of holding responsible, tied to notions of free will and other retributive thoughts, embodies a distancing of the person and an abstract, de-contextualised sense of personal autonomy leading to the attribution of blameworthiness. Asking someone to take responsibility per contra may actively acknowledge unfreedom and heteronomy in the person and their past actions, while still resisting simply ignoring the reality of the wrongs they have done. The latter approach is processual rather than static, inviting an active engagement in an undertaking that takes time and involves real change. It is also dialogical in a genuine sense, opening itself up to the impetus of the conversation in which the agency or community which asks the offender to take responsibility must at the same time also be prepared to take appropriate responsibility itself for its part in the situation. Kleinian moral psychology thus offers guidance as to radical alternatives to our existing responsibility practices which would be rooted in, and answerable to, the ethical potentials and needs in our real human nature, and such lines of inquiry are an important third avenue for critical criminal justice research to explore.

**LOCATING LAW BETWEEN THE PERSECUTORY AND THE RECONCILIATORY**


The ideas of responsibility used in law and legal theory have often been criticised as thin and impoverished. The semiotician Roland Barthes spoke of law’s universal language lending ‘a new strength to the psychology of the masters’ by dealing only in adjectives and epithets, ‘ignorant of everything about the actions themselves, save the guilty category into which they are forced to fit’.\textsuperscript{42} The philosopher Bernard Williams described legal responsibility as ‘governed by a certain political theory of freedom in the modern state, not by a moral refinement of the very conception of responsibility’.\textsuperscript{43} Norrie characterised legal morality as a ‘morality of form’, one that is abstract and universal, and removed from the real experiences of what it means to be responsible and human while living in a structurally divided and violent world.\textsuperscript{44} These views either discount or, at least, leave unanswered the question of law’s ultimate relationship to underlying moral issues, despite its particular forms.

How should the moral experiences of what it means to be responsible be understood? What equally would ‘a moral refinement of the very conception of responsibility’ look like? At the end of \textit{Shame and Necessity}, tucked away in an appendix, Williams wrote in psychoanalytic terms of ‘the ‘primitive basis [of guilt] in an internalised figure [of] a victim or an enforcer… [an] internalised figure [of] anger’ that is ‘progressively more structured by social, ethical, or moral notions’.\textsuperscript{45} This is not much more than a gesture in the direction of psychoanalysis as the ground on which moral theory should be built, in a way that would take it away from political encipherment and towards a fuller appraisal of the human ethical condition. Williams’s description of the psychological basis of guilt is unclear. It looks pretty much like Freud’s account in \textit{Civilization and Its Discontents}, though it could be related to Klein’s account of the paranoid-schizoid position and persecutory guilt. In this chapter, we have sought to give a fuller account of the psychological elements that may underpin an understanding of guilt, and to show how

\textsuperscript{42} R. Barthes (1973) \textit{Mythologies} (St Albans: Paladin), 45.
\textsuperscript{44} Norrie, \textit{Punishment, Responsibility, and Justice}.
\textsuperscript{45} Williams, op cit., 219.
these may be more complex than Williams’s sketch might suggest. In particular, we have outlined two accounts of guilt that go in different directions, one persecutory, the other restorative and reconciliatory. We think both are not only eminently identifiable in modern moral experience, but also can be related to the workings of the criminal justice system, in line with the two hypotheses that we outlined above.

In this final section, we wish to consider how we might develop an account of how persecutory and reconciliatory trends bear on criminal justice practice. We want to be clear that our intention in identifying these two broad moral psychological thrusts within practice is not reductive. We do not wish, for example, to replace an historical understanding of the emergence of modern criminal justice with a psychoanalytic understanding. Rather, we think an understanding of the moral psychology of persecution and reconciliation as positions within the criminal justice system must be related to social, historical, political and economic dimensions over time. The persecutory and the reconciliatory are embedded in structural developments in a complex way and are pushed one way and another as the criminal justice system develops in line with other major developments in society.

In line with this, we equally do not wish to align law with either persecution or reconciliation. We mentioned above the criticism of legal form as abstract and thin, and in its abstraction and thinness as usable for a purpose beyond the form itself. Thus Barthes’s suggestion that law’s universal language becomes an aid to the psychology of mastery in modern society. This seems to us an important way to approach legal abstraction in relation to persecutory or reconciliatory trends in the human psyche and in modern society as a whole. As we have noted, law’s abstract form lends itself to persecutory application, since an abstract person who has done a bad thing may quite easily be interpreted as a bad person. Equally, however, a free legal subject able to act autonomously in a rational compact with other citizens might become in substance one who finds real agreement with other human beings and acts accordingly. The formal requital of harm in the retributive exchange of equivalents might become a concrete making amends leading to genuine emotional change.
The question then would be, if law in its abstraction can move regressively towards the persecutory or progressively toward the reconciliatory, how do we see this happening in criminal justice practice? In this section, we consider these two directions of legal travel in relation to, first, how law might assist in moral and emotional healing. Here, we consider Jessica Benjamin and the place of law in relation to the possibility of social transition. Then, second, we consider how law is generally situated in connection with structural violence and how its effects generally establish a persecutory shadow over criminal justice practice.

Towards Reconciliation: Benjamin’s Moral Third

Jessica Benjamin’s work is an excellent opportunity for engagement between law and psychoanalysis both because of its sustained long-term treatment of critical themes in political theory from a psychoanalytic perspective and, in its most recent form, because it deals with issues that are in effect in the law’s domain. It is on the latter that we focus here.46

At the beginning of Beyond Doer and Done To, Benjamin talks about the importance of the lawful world as a central category of human experience. By this she means a world in which ‘the other’s behaviour is not simply always predictable but more importantly confirms when the unexpected or painful wrongness occurs as well as the need to put things right’.47 She adds that the idea of the lawful world ‘refers not to juridical law, but to a belief in the value and possibility of intelligible, responsive and respectful behaviour as a condition of mental sanity and interpersonal bonds’.48 Many lawyers and legal theorists in the liberal tradition would say that the values Benjamin associates with the


48 Ibid.
lawful world are precisely those that they associate with the juridical world. We agree with Benjamin that there is a distinction to be made between what law does and the idea of lawfulness, and her work is helpful in developing it. What is the nature of legal (especially criminal) justice, and to what extent can it be compared with the process of what she calls ‘moral thirding’ that make the world a lawful place in Benjamin’s terms?

Benjamin’s interest is to move from considering the dynamics of child development and therapy to the role that such an understanding can perform at the level of society, politics and law, in particular in situations of traumatisation and transitional justice. The lawful world is a way of speaking about the moral third, an overall setting of assumptions and practices that can hold together the relationship between a ‘first’ and a ‘second’, and render their relationship appropriately respectful and loving. In the parent/child dyad, or in the analyst/patient setting, thirdness is a negotiated set of asymmetrical relations which holds the parties together. This starts with a sense of bodily co-understanding in the parent/child setting (the ‘rhythmic third’ – the ‘One in the Third’), and progresses to moral or lawful thirdness (the ‘Third in the One’) as a relationship progresses. Allowing for obvious differences, the psychotherapeutic relationship reflects what evolves in the parent/child relation. The parenting process of recognising, sharing and emotional holding, when applied mutatis mutandis in the therapeutic context provides a moral setting in which a patient can articulate her concerns, learn from her actions, and identify new ways to proceed.

**The Moral Third as Broken in Modern Socio-Political Settings**

Moving from these existing settings of moral thirdness to the social and political settings of traumatisation and transitional justice, moral thirdness takes on its own forms: such thirdness may be, as in the other settings, ‘embodied’, as in processes of shared empathic feeling in truth processes; but it may also be ‘public’, and here a political and legal process acts to publicise, but also to state authoritatively that some things did happen, and in that sense to stand for a generalised statement of truthfulness. And it may be universal in the sense of affirming the value of all lives: ‘the principle that we are all human, that
vulnerability and suffering must be honoured’. Law is linked to much of this. Hence we can extend the idea of moral thirdness to include co-related ideas of the ‘public’, the ‘legal’ and the ‘universal’ third. This extension of thirdness to the socio-political, the public, and the legal levels must however be treated with caution: where public witnessing fails, for example, thirdness cannot happen, and we are in the place of what Benjamin calls the ‘failed’ or the ‘dead’ third. More broadly, we live in a social and political world in which nationalism and imperialism prevail, and this inculcates the phantasy that opposes moral thirdness at all levels, the phantastic split between the doer and the done to, the claim that ‘only one can live’. This is paranoid-schizoid, persecutory, territory, emerging out of modern social and political contexts, and it too must be a significant element in public settings. If so, how will it affect claims of public, legal and universal thirdness?

An interesting interlocutor here might be Robert Meister’s *After Evil*, in which the author adopts the critical view that the human rights and transitional justice movement in the post-1989 unipolar world is a way of providing victims with the appearance of resolution to their traumatic suffering. However, what is really happening is that a merely symbolic recognition of victims is provided as a means of ensuring that the beneficiaries of violation retain their status and wealth in the transitioning community. Relating this to Benjamin’s terms, we might speak here of a superficial or perhaps a ‘hollow third’. Against this, it would be a mistake to think that ‘moral thirding’ does not remain a central element in what is happening, even if its potentialities are significantly limited by social, political and economic considerations in the emerging, transitional, polity. To examine critically the limits of the processes we see occurring in countries such as Chile, South Africa, Colombia, and Northern Ireland cannot be to deny the hard emotional and moral

49 Ibid, 240.
51 Benjamin, ibid, 232.
work involved in addressing past traumatisation. That work is real and invested with a true spirit of moral thirdness. It should be honoured. But equally, to fail to acknowledge the systematic limitations and the structural violence operating against the possibility of the public third, often with bitter outcomes for those involved, would be to be untrue to the situation. Note, however, that the moral untruth that has to be charted would lie in the failure to represent the fate of the human drive to moral thirdness in a political world structured against it. Acknowledging the real limits of transitional processes in practice thus occurs in the name of the moral third.53

One possible way of exploring the gap between the theory and the practice of moral thirdness in the legal and political arena would be to speak of it as establishing a position of partial, or broken thirdness. In a recent book, Justice and the Slaughter Bench, Norrie refers to the ‘broken dialectic’ that is present in legal justice to indicate something of the same phenomenon.54 There, the idea is that legal justice must be valued at the same time as we understand its social and historical limits under modern political and economic conditions. The book’s title refers to Hegel’s description of history as a ‘slaughter bench’: if this is the terrain on which law operates, then law and violence must be connected and co-related. If that is so, then the projected dialectical resolution of conflicts that Hegel foresees will not occur, and the dialectic will be shown to be unresolved and broken under modern conditions. From this perspective, it is possible to think of Benjamin’s account of moral thirdness in the ‘nationalist and imperialist’ world we inhabit as entailing, equally, a third that is both valid and broken.

**Criminal justice and structural violence**

53 A good illustration here is the enduring search of family members for the bodies of their loved ones decades after their murder in countries like Chile. Patricio Guzman’s film Nostalgia for the Light (2010) is a moving depiction of the relentless commitment to moral thirdness in private and public settings, as well as its limits and vulnerabilities, in that country post-Pinochet.

This brings us to the issue of structural violence in modern societies. In a social reality where state institutions actively work to preserve a social order marred by pervasive structural inequality and violence, the normative framework underpinning the juridical world should be understood as shaped not only by what it expresses and defines in terms of lawful and unlawful conditions and behaviours, but equally also by the aspects of social experience that it does not concretely address, and thus inherently conceals or represses. At its heart, the notion of a broken third suggests that the moral claims advanced by the law can be seen as inherently paradoxical: the law makes promises and furnishes aspirations that, upon closer scrutiny, not only remain perennially unfulfilled, but also ultimately turn out to be in direct opposition to much of what the law promotes and accomplishes in practice. Awareness of this contradictory nature of the workings of the law evidences that there is something in the juridical world that is kept hidden from view, but which is nevertheless intrinsic to it.

In criminal justice, evidence of this phenomenon abounds. Scholarship has pointed to a paradox in the very notion of individual liberty, one of the cornerstones of liberal law, in that the very exercise of political and juridical power that is supposed to protect and promote freedom ends up posing a threat to it.55 One of the primary expressions of this paradox lies in the framework of punishment, where its practice seems to betray every one of its normative56 and political justifications;57 that is, while punishment is often justified as a modern institution geared at respecting the wellbeing and rational agency of individuals, in reality the state’s penal power is experienced primarily as a hostile and exclusionary instrument of social control. Another manifestation of this paradox can be


found in the notion of criminal responsibility, where the proposition that individuals should be respected as responsible agents leads the criminal law to regulate an ever-increasing proportion of individuals’ social agency. The criminal law has been shown to both limit and embody authoritarianism, its subject to be at the same time responsible and dangerous, and punishment to express fear and aggression as much as it does respect for individual freedom.

To fully explore the morality of criminal justice, in a manner that takes its normative claims seriously, it is fundamental to critically engage with the tensions and contradictions which permeate its institutional structure and practice. Here, the lessons taken from critical, socio-legal criminal justice scholarship are many and invaluable. However, while many of these contributions expertly reveal and examine the broken character of the juridical world of criminal justice, it is much less common to find comprehensive attempts to examine how such engagement can move beyond exposing or acknowledging the existence of this broken character, towards an effort to directly face it and work through it.

**Under the Shadow of Liberal Law**

Directly and critically engaging with the paradoxical character of criminal justice has the potential not only to shed light into its darker side, but also to reveal that these two poles of the juridical world—light and dark, the expression and the repression of human freedom—are two sides of the same coin, and as such, they are inextricably related. Understandably, the temptation to focus predominantly on the authoritarian, exclusionary and violent aspects of the law—to see it ‘through a glass, darkly’—is an inherent aspect

58 Farmer, *Making the Modern Criminal Law.*
59 Norrie, *Justice and the Slaughter Bench.*
60 Carvalho, *The Preventive Turn in Criminal Law.*
62 Cf. Carvalho and Norrie, ‘In This Interregnum’.
of critical criminal justice scholarship, since this is the side that is neglected and concealed from most mainstream scholarship. However, this tendency also runs the risk of presenting a similarly polarised, and thus ultimately skewed, picture of criminal justice practices. Instead, the focus on relationality invoked by the notion of thirdness suggests that there must be considerable attention dedicated to the dynamics and the interaction between liberal law and its dark shadow.

This image of a shadow is very useful for understanding the relation between the two contradictory poles of criminal justice, especially when this relation is scrutinised from a psychoanalytical perspective. The psychoanalytic shadow has been conceptualised as the part of an individual’s self that exists mostly in the unconscious, away from the individual’s self-consciousness and self-perception. However, the shadow nevertheless has a significant role in shaping that individual’s personality, the more so since the individual is unaware of the shadow’s influence. Indeed, besides being neglected, the influence of the shadow over the self’s personality is inherently uncomfortable, since it undermines the strongly held ideas around the autonomy and self-control of the conscious self. In addition, the shadow is often taken to represent those aspects of personality that are considered inferior, that are feared or despised. As a result, instead of being actively recognised and assimilated into the individual’s conscious self, the shadow is almost always repressed, and its most active traits are often projected externally, so that the conscious self sees them as reflections of other subjects and objects instead of its own personality, and comes to interpret them as a result of the outside world—therefore justifying its own limitations.63 The negative aspects of criminal justice can be seen to operate within the framework of the juridical world much in the same way the shadow works within the self, as an obfuscated dimension of the law that is nevertheless intrinsic to its constitution, and which significantly influences its role and practice.

The juridical world appears to deal with its own shadow much in the same way as the unreflexive self. The paradoxes within law and justice point to the existence of a ‘social

shadow’, at the core of which lies the problem of structural violence. In this sense, the broken third constituted by the juridical world is largely characterised not only by the existence and the effects of structural inequality, social marginalisation and exclusion, but also by an active (if unconscious) effort to repress this darker side of the law, to project it externally onto others—in the case of criminal justice, others who are deemed to be dangerous, and whose dangerousness is deemed to be the source of law’s problems and limitations. This reluctance and resistance to deal with this shadow is perhaps one of the main reasons why it is so difficult to engage with the problems in criminal justice, and why the persecutory position grounding the need for punishment as a form of justice appears to be so socially alluring and difficult to overcome.

The recognition of liberal law’s inability to come to terms with its own complicity in the preservation and promotion of structural violence can add another level of depth to the critique of criminal justice, by turning our attention to the processes through which the two terms in the various paradoxes contained within the law shape and condition each other. This approach can potentially enable us, for instance, to explore the ideological and authoritarian elements within criminal responsibility and punishment, without completely dismissing or losing sight of the real moral demands that are embedded within such concepts and institutions—even while recognising that these demands are posed in an abstract, often significantly distorted manner, which ultimately prevents them from being concretely realisable. In other words, the paradoxical nature of the law, when taken seriously, can suggest and sometimes reveal something deeper about human relations and desires, which needs to be a part of any critical analysis of the law.

**Moving beyond the broken third**


How, then, can an engagement with the relation between the law and structural violence help us to move beyond the broken third of the juridical world? At its core, the idea of moral thirdness implies the pursuit of a social condition which enables mutual recognition. This is an assumption that is often identified with the higher aspirations of liberal law.\(^{68}\) However, the very existence of structural violence in liberal societies, together with law’s role in maintaining the conditions for such violence, betrays such aspirations.\(^{69}\) This paradoxical state within the law inevitably generates a tension, which the law attempts to resolve through repression. But in repressing its shadow, and projecting it so that the responsible agency of law-abiding citizens is protected by being distinguished from the dangerousness of criminals, criminal justice replaces its ideal of mutual recognition with a condition of domination, in which only the subjectivity of some is fully recognised.

In her earlier work, Jessica Benjamin has suggested that, at the heart of human relations, there is an inherent tension between self-assertion and recognition—between the need to be recognised, and the need to recognise, to acknowledge our dependence upon others.\(^{70}\) We seem to be constantly tempted to try and resolve this tension, either by dominating one another, and thus being fully recognised without recognising, or by submitting to the other, recognising without being properly recognised in return. Both approaches are inadequate, however, as they both only lead to the satisfaction of one need at the sacrifice of the other, and therefore to an unequal and partial relationship.\(^{71}\) Instead, Benjamin suggests, we need to acknowledge, accept and maintain this tension between self-assertion and recognition, and to work through it. Doing so requires us to acknowledge the value and importance of relationships, as something that is not only constituted by

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68 E.g. cf. Duff, op cit.
69 Cf. Carvalho, op cit.
those taking part in it, but which also constitutes them and goes beyond them, in the shape of a moral third.

Regarding criminal justice, this perspective is rather damning. This is so because the very kind of moral judgment that is embedded within punishment seems to imply an intrinsic (persecutory) aggressiveness that forecloses communication, which fails to reach out to those against whom such judgments are made. Instead, to preserve the tension, it is perhaps necessary to resist the ‘righteous law-mindedness’ that is inherent to retributive justice, and to see justice in these cases as an ongoing and inextricably inter-relational process.

CONCLUSION: VIEWING CRIMINAL JUSTICE IN AN EMANCIPATORY FRAME

This paper has explored a potential avenue for present and future scholarship in criminal justice theory, grounded on a concrete engagement with issues of moral psychology. It started by deploying an analysis of Melanie Klein’s work as a basis for a serious and critical account of the moral categories underpinning criminal justice, such as guilt, blame and responsibility. This analysis explored the problems and limitations inherent in retributive justice, and the need to move from a ‘persecutory’ to a ‘reconciliatory’ framework which can ground the conditions for emancipation. Then, the chapter shifted its attention to a discussion of Jessica Benjamin’s work, framing the ambivalent character of the normative framework of law and criminal justice within its institutional and socio-political context. Here, criminal justice is exposed as inherently paradoxical, and consequently espousing a broken ethical condition.

The question this analysis leaves would be: how do we, as legal scholars, strive to move beyond the broken third in the social, political and legal settings that exist today? An answer to this question might have at least three elements. One would be to relate the

failures of moral thirding as legal/public thirding in the socio-political world to the forms of structural (economic, ideological, institutional) violence and the systematic limitations in public practices that these generate—and to expose and explore these relationships through critical legal scholarship. Here, attention to the persecutory dimensions of an abstract moral psychology embedded within legal categories is particularly important.

Second would be to strive to recognise instances of justice practice where there is more, or less, scope for more concrete, reconciliatory, forms of moral thirding. For instance, if we examine transitional justice settings as diverse as Chile, South Africa, Colombia and Northern Ireland, it is possible to distinguish transitions according to how they are related differentially to structural violence and systematic limitation in different contexts, and thus how they relate differently to each other. Here, it is also fundamental to acknowledge how similar concerns can take substantially differentiated expressions and generate unique concerns in particular contexts; it cannot be a question of one size fits all.

This process of identifying the differently conditioned processes of legal and public thirding, in their limited and broken forms, involves examining moral thirding in particular social totalities. It is a step that is committed to the claims of moral thirdness in concrete terms, and that thus seeks a socio-historical understanding of how, when, why, and to what extent emancipation could be made possible. This totalising viewpoint might be regarded as an additional move that respects the importance of moral thirding and thinks about how it is undermined, and how it might be supported in practice.

Finally, a third point would involve insisting on the underlying psychoanalytic significance of that which moral thirding is directed against: the persecutory splitting of doer and done to, the assumption that ‘only one can live’. Benjamin’s recent work identifies the underlying existence of a powerful conflictive alternative to moral thirdness in psychoanalytic understanding. She draws on Melanie Klein’s identification of the paranoid-schizoid position as a basis for hostile splitting. From a legal point of view, we would propose that law’s push in the direction of reconciliation and public reparation

73 Cf. Benjamin, Beyond Doer and Done To, 5.

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clashes with a world in which persecutory and paranoid-schizoid forms are also present, if not predominant. Law inevitably reflects and embodies both sides: think for example of the turn to authoritarian forms of criminal justice in the US and the UK. Accordingly, an overall view of the co-constitution of law is necessary, involving claims to moral thirding and alternative, hostile, paranoid-schizoid reflexes under modern social-historical conditions. Law’s abstract universality is open to both persecutory and reconciliative moves, both of which are embedded as potentials in the nature of the human psyche. The progressive, reconciliatory, drive can ground the possibility of human emancipation, but to get to it, it would be necessary to address the regressive, persecutory element in human psychology, especially as it is given encouragement by modern social, economic and political conditions.