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TAKING GUILT SERIOUSLY:
TOWARDS A MATURE RETRIBUTIVISM

Forthcoming in I.Solanke, *On Crime, Society and Responsibility: Essays for Nicola Lacey* (2020)
Oxford, Oxford University Press

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TAKING GUILT SERIOUSLY:
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SEX, LOVE AND GUILT

Some years ago, Nicola Lacey considered how gendered sexual relations underpinned the law of rape, privileged men, and excluded women's experience.² Doing so opened the door to broader issues traversing criminal law. Lacey had suggested we rethink the ethical relations underlying sex and law by use of psychoanalytic argument. This involved 'rethinking ... the philosophical framework of criminal law' in order to reshape 'the law of sexual offences', but also, she suggested, to consider the 'non-sexual offences of violence'.³ Her critique of sexual offences related to the ethical abstraction and seeming neutrality to which general categories of legal responsibility aspire, so that her critique of neutrality was an aspect of the bigger question of how legal forms of responsibility are generally configured. Her argument is accordingly an invitation to consider how a psychoanalytic approach might view the criminal law across the board.

In this essay, I take up the invitation to think about the criminal law in relation to what seems an all too suitable case for treatment, the concept of guilt. The finding of guilt or its absence is a key

¹ This essay was presented at seminars at Leicester Law School and at the Criminal Law and Criminal Justice Theory Forum at the London School of Economics in October and December 2019. Thanks to all those who gave comments on it at these events, from which I benefited immensely. Thanks also to Niki Lacey for many years of intellectual companionship. I would like to take this opportunity to note the convergence in this volume of John Gardner's idea of 'immature' blame and guilt with my account of their 'early' form. Though I cannot match the elegance of John's style, I would like to have been able to acknowledge this late finding of common ground in person.

² Nicola Lacey, *Unspeakable Subjects* (Hart 1998), ch.4.

³ *Ibid*, 122.

moment in any criminal trial, and it is also central to psychoanalytic understanding. But when the two disciplines use the same term, they do not mean the same thing. If they diverge, what could a deeper, psychoanalytic, account of guilt contribute to our understanding of law?⁴ Nothing is straightforward here, for psychoanalysis also speaks with many different voices, some of which are discussed below.

From sex to guilt

In feminist critical legal thinking, the figure of the French poststructuralist psychoanalyst, Jacques Lacan, looms large, in a way that Lacey finds disconcerting. She writes of the 'complex and sometimes unpalatable cocktail of psychoanalysis and deconstruction'⁵ that influences feminist thinking. In Lacan, the subject at the heart of critique 'is marked by its acceptance of the Law of the Father through its entry into ... language'. This means the phallus 'becomes encoded in the role of ... "transcendental signifier" which underpins the construction of meaning',⁶ the nature of language, and the deficient position of those who lack a phallus. Lacey's response is a fairly profound scepticism that this could be the basis on which to reconceive *women's* position in gender relations, and how it might change. Given Lacan's assumptions, one might not be surprised that even the reimagined woman fails to get beyond the existing gendered world. For Lacey, the feminist psychoanalytic critique looks a blind alley.⁷ Perhaps in the area of gender, psychoanalysis will always be at its most vulnerable, but might it be more helpful about the issue of guilt in criminal law?

Love, sex and guilt

We should remember that other forms of psychoanalytic theory are available, so that the invitation to explore law and the idea of guilt should not be cut short by criticism of one approach. The route I

⁴ This essay is part of a larger investigation into the moral psychology underlying law. Such an approach entails linking both moral and psychological elements so that a psychoanalytic approach provides one part of an overall picture.

⁵ Ibid, 206.

⁶ Ibid, 207.

⁷ Lacey, *Unspeakable Subjects*, ch.7.

will take brings together two different approaches which, I shall argue, can form an overall perspective. The first is provided by the German emigré psychoanalyst to the United States, Hans Loewald,⁸ whose work on Freud's later structural theory has been carried forward in brilliant fashion by the Aristotelian philosopher Jonathan Lear.⁹ The second is provided by the British object relations school first developed by Melanie Klein.¹⁰ Both approaches help us understand the nature of guilt as a category in moral psychology, and one that is engaged with the criminal law in a complex way. In that regard, Loewaldian-Freudian and Kleinian forms of psychoanalysis may do for criminal law analysis what Lacanian psychoanalysis sought to do for feminism: to provide a deeper understanding of the embodied and enformed human psyche which helps us grasp the working of the criminal law. In different ways, these approaches understand *love* as a creative and developmental force in the human psyche and link this to an understanding of guilt. This may prove an appropriate starting point for thinking about what criminal law does, and how it may be critically understood.

To see this, let us return to Lacey's argument about what is wrong with the law of rape. Its categories lack an interest in the body and its affectivity, never asking 'what is valuable about sexual experience, sexual expression, lived sexuality'.¹¹ To that question, her answer is that it is ideas of 'self-expression, connection, intimacy, relationship', which 'underpin contemporary understandings of what is valuable about sexuality',¹² and these are missing from the legal analysis of autonomy and responsibility in the sexual offences. Note, however, that what underpins the value of sex is also what is important for human wellbeing generally. Many forms of violation exist alongside sexual violation, which it is the role of criminal law to suppress. To be seriously assaulted, robbed, or otherwise attacked, all impinge on a person's ability to express herself and to have confidence in her ability to relate and connect. Sexual love is one form of human love, and it is love, including love of

⁸ Hans Loewald, *Papers on Psychoanalysis* (Yale University Press 1980).

⁹ Jonathan Lear, *Love and Its Place in Nature* (Yale University Press 1998); *Open Minded* (Harvard University Press 1998); *Freud* (2nd ed, Routledge 2015); *Wisdom Won From Illness* (Harvard University Press 2017).

¹⁰ Melanie Klein, *Envy and Gratitude* (Vintage 1997); *Love, Guilt and Reparation* (Vintage 1998).

¹¹ Nicola Lacey, *Unspeakable Subjects*, 103.

¹² *Ibid*, 106.

self, and as it is appropriately engaged *mutatis mutandis* in different kinds of human relationship, which lies at the core of what we think valuable in human existence.¹³

It makes sense to think about how love comes about, how it lies at the heart of human metapsychology, and how this relates not only to the law controlling sexual relations but more generally in criminal law, where guilt, at least for serious offences involving interpersonal violence, is a central concept.¹⁴ Lacey's argument about what is lacking from the law of sexual relations, extended to human relations more broadly, suggests a general interrogation of the criminal law. Guilt, with its broad range of references both within and beyond the law, is potentially a category with important diagnostic value. The door Lacey opens with regard to metapsychology and sexual relations becomes, in short, an invitation to understand criminal law more generally.

Towards a mature retributivism

I take up this invitation here by investigating the nature of guilt in criminal justice in terms of an underlying relationship between such justice and love, through a metapsychology drawing on Freud, Loewald and Klein. The essay has three main sections. In the first, I identify two forms of guilt in childhood identified by Freud, an 'early' and a 'mature' form. I argue the former is ethically regressive, the latter progressive. In the middle section, I take up Klein's account of infantile guilt in

¹³ Love, as Mario Lanza, and my father, used to sing, is a 'many splendoured thing'. Thus Roy Bhaskar: 'love is consistent with many different forms of action, and can be expressed in an infinity of number of ways. There are various conventional categorisations – which range from erotic, romantic, familial, civic, through to ethical and spiritual modalities' (Roy Bhaskar, *The Philosophy of Metareality* (Routledge 2012) 181). Compare Freud: 'The nucleus of what we mean by love naturally consists (and this is what is commonly called love, and what the poets sing of) in sexual love with sexual union as its aim. But we do not separate from this ... self-love..., love for parents and children, friendship and love for humanity..., and also devotion to concrete objects and to abstract ideas all these tendencies are an expression of the same instinctual impulses....' (Sigmund Freud, 'Group Psychology and the Analysis of the Ego' in *Civilization, Society and Religion* (Penguin 1985), 119.

¹⁴ I accept the case Lindsay Farmer has made with regard to the administrative character of much modern criminal law, so that the distinction between *mala in se* and *mala prohibita* offences reflects real differences in uses to which the criminal law is put. I do not, however, think that an administrative perspective can account for the nature of the criminal law as a whole. Issues of responsibility and guilt remain central to the *mala in se* crimes, and, in the distorted way these are publicly mobilised, to the nature of political discourse. They also have real, first order, relevance to issues of moral responsibility. See Lindsay Farmer, *Making the Modern Criminal Law* (Oxford University Press 2016), discussed in Alan Norrie, 'Criminal Law and Ethics: Beyond Normative Assertion and Its Critique' (2017) 80 MLR 955.

the 'paranoid-schizoid' and 'depressive' positions she identifies. I argue that these can also be characterised as early and mature forms, and that her and Freud's accounts dovetail to offer a coherent metapsychology of guilt at the infant and child stages of human development. Both writers, it should be noted, argue that what is developed in early mental life is relevant to and ongoing in the different setting of adult life. In the final section, I suggest that a critical understanding of criminal justice benefits from seeing how both early and mature guilt are deployed in the modern criminal justice system. At the end, I suggest that the different forms of guilt allow us to identify the basis for a new retributive theory of 'punishment',¹⁵ a *mature* retributivism based on psychoanalytical understanding. This way of recasting retributive theory then brings me back to Lacey, for it is relevant to the work she and Hanna Pickard have done recently, on the idea of 'responsibility without blame'.¹⁶

EARLY AND MATURE GUILT

In this section, I identify two accounts of guilt in Freud, one that is there on its face, the other which can be developed from his later structural theory of the psyche following the line of development begun by Loewald and pursued by Lear. This generates a view of a mature guilt that is developmentally and ethically progressive, alongside an early form that is punitive, persecutory, and ethically regressive.

Two Freuds

¹⁵ The inverted commas indicate that the new theory places the relationship between retributivism and punishment under question.

¹⁶ Nicola Lacey and Hanna Pickard, 'From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm' (2013) 33 *Oxford Journal of Legal Studies* 1-29; Nicola Lacey and Hanna Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35 *Oxford Journal of Legal Studies* 665-96.

Martha Nussbaum has recently written of how she gave up her previous commitment to the psychoanalytic view of guilt. She came to see it as self-centered, self-lacerating and narcissistic, and as echoing a harsh, retributive, Kantian style of ethics.¹⁷ This is a one-sided view of what psychoanalysis can offer, for it misses the progressive ethical view of guilt described below. However, some of Freud's statements on the subject suggest she has a point:

The super-ego – the conscience at work in the ego – may then become harsh, cruel and inexorable against the ego which is in its charge. Kant's Categorical Imperative is thus the direct heir of the Oedipus complex.¹⁸

This is a prominent line in Freud, and is properly subject to Nussbaum's strictures. In *Civilization and Its Discontents*, it can be said to be the dominant approach. However, the case can also be made for the conflicted nature of Freud's thought, and for an alternative approach implicit in his metapsychology, especially as it evolved in his later structural writings. From this approach we find a different way of thinking about guilt, in what I shall call its 'mature' form. Here, guilt is creative, developmental, and ethically progressive, warranting the label 'eudaimonistic' for its future-oriented commitment to human betterment.¹⁹ It is a love-related version of guilt which contrasts with the hate, anger, and fear-related version foregrounded in *Civilization and Its Discontents*. This different account is as consistent with Freud's metapsychology as the other, 'Kantian', account, though it is not well-known, and needs to be developed.²⁰ If we call the first, dominant, persecutory, account

¹⁷ Martha Nussbaum, *Anger and Forgiveness* (Oxford University Press 2016), 127-35. Such a view may be taken of a Kantian ethics of punishment, but it is not the whole picture. See for example Jeffrie Murphy's account of the ambivalences in Kant, discussed below at text to note 57; and Alan Norrie, *Law, Ideology and Punishment* (Kluwer 1991), ch.3.

¹⁸ S.Freud, 'The Economic Problem of Masochism' in *On Metapsychology* (Penguin 1984) 422.

¹⁹ This is the approach developed by Jonathan Lear (above, note 7). Nussbaum also writes of eudaimonic anger (*Anger and Forgiveness*, 16), which could be related to eudaimonic guilt, but she does not develop either such an account of anger or guilt. Guilt, she says, would be the 'wrong motive' while 'positive love and compassion' are the right ones (ibid, 131). I shall argue that there is a mature kind of eudaimonic guilt, and anger, which is necessarily embedded in love and compassion, and is of the 'right' kind.

²⁰ A fuller version of this argument is found in Alan Norrie, 'Animals Who Think and Love: Law, Identification and the Moral Psychology of Guilt' (2019) 13 *Criminal Law and Philosophy* 553. There I identify the immanent account of mature guilt also to be found in *Civilization and Its Discontents*.

Freud's 'Kantian' account of an 'early' form in psychic development, we can call the second his 'mature' account, which I shall argue is creative, reparative, and progressive and may be termed 'Aristotelian', for its eudaimonistic quality.

Early guilt: 'Kantian' and persecutory

'Kantian' persecutory guilt runs through Freud's *Civilization and Its Discontents*. Two quotations from that work will indicate the nature of the argument:

Thus we know of two origins of the sense of guilt: one arising from fear of an authority, and the other, later on, arising from fear of the super-ego. The first insists upon a renunciation of instinctual satisfactions; the second, as well as doing this, presses for punishment, since the continuance of the forbidden wishes cannot be concealed from the super-ego. We have also learned how the severity of the super-ego – the demands of conscience – is to be understood. It is simply a continuation of the severity of the external authority, to which it has succeeded and which it has in part replaced.²¹

The second quote:

The tension between the harsh super-ego and the ego that is subjected to it, is called by us the sense of guilt; it expresses itself as a need for punishment. Civilization, therefore, obtains mastery over the individual's dangerous desire for aggression ... by setting up an agency within him to watch over it, like a garrison in a conquered city.²²

In this account, guilt emerges from fear of the anger of authority figures, and as these are brought back into the psyche, fear of the person's own superego. The latter acts like 'a garrison in a conquered city', while the demands of conscience represent a continuation of the anger of external authority, once it is introjected into the psyche. Overall, the need for the 'civilizational' authority of

²¹ S. Freud, 'Civilization and Its Discontents' in *Civilization, Society and Religion*, 319.

²² Ibid, 316-317.

the superego stems from the forcefulness and the danger of instinctual satisfactions, especially of an aggressive and sexual kind, so that civilization, external authority figures, and the strict superego are all things that keep basic instinctual demands in place.

We can see here why Freud might have compared the superego to the categorical imperative, since both could be said to involve an external command system, which is internally endorsed. We can also see why Nussbaum might have objected to its self-centred narcissism: there is no regard here for the other, it is all about the ego's self-absorption. Freud's model of human conduct, social life, and moral psychology in this account of fear, anger, guilt and the superego is bleak, primitive and persecutory. In this vision, the human condition is one of domination by base instincts and fears, where guilt's facial expression is a snarl. Freud describes man as a wolf in *Civilization and Its Discontents*,²³ and we can see why. There is no development of a consolidated ethical subjectivity in this account, but rather ethical states, or rather psychic states playing the role of ethical censors, emerge to control animal instincts. All that stands between humans and their viciousness is fear and its internal mental representative, the superego: the garrison in the conquered city, the categorical imperative imposed upon animal passions. Small wonder that Nussbaum should distance herself from this 'Kantian' Freud, with his primitive and persecutory account of guilt, but another Freudian view beckons.

Mature guilt: 'Aristotelian' and reparative

While Freud's main argument in *Civilization and Its Discontents* is as we have described it, another view is implicit, but needs developing. Loewald emphasised the importance of love and the life instinct (libido) in the later Freud's structural theory, and Lear has developed this view, linking it to Greek, particularly Aristotelian, philosophy. From this position, it is possible to create another

²³ Ibid, 302.

account of guilt as complex, morally creative, and psychologically developmental, that is, following Lear, as eudaimonistic, and therefore 'Aristotelian', in its nature.

This approach comes from Freud's later, structural, metapsychology of ego and superego development, as the process whereby the human psyche becomes 'enformed'. In the earliest stage of human life, the infant operates in a state of primary narcissism or what can be called 'ideal egoism',²⁴ which is a protean and inchoate state of love for life – an undifferentiated life instinct that Freud called libido or Eros. The process of childhood psychic development is one in which the child interacts with parent figures to differentiate itself as an individual with an identity, by creating an ego and thereby demarcating its self. Later, the ego evolves by creating a further, self-reflective, element or 'precipitate', which Freud called the superego.²⁵ Out of this evolution, we get the development of possibilities for a sense of responsibility, a conscience, the possibility of feelings of guilt, and a desire to repair wrongs. Importantly, all these developments are relational, that is they are emergent from social situations of love and solidarity with other human beings – primarily, but not exclusively, parent figures. The process of individual self-development is always at the same time a relational and a social process. This begins in childhood and remains significant through life.

Elements for an account of mature guilt

Three elements from Loewald's elucidation of Freud's structural theory are important: the sense of responsibility, the sense of guilt, and the desire to repair.²⁶

A sense of responsibility. This basic element of human moral psychology is located in the evolution of the self, as the child develops its sense of its autonomy as an ego and superego out of and away from parental relationships. It identifies through how a parent relates to it, and builds from this a

²⁴ To simplify, 'ideal egoism' refers to the earliest stage of the narcissistic libido, which is distinguished from the later situation where the ego has taken on ego ideals from parent and other figures: Loewald, *Papers on Psychoanalysis*, 46-7, 268-9.

²⁵ S.Freud, 'The Ego and the Id' in *On Metapsychology*, 367-79.

²⁶ For a more developed account, see Alan Norrie, 'Animals Who Think and Love',

sense of how it could be a self (an ego) and have self-agency, culminating in its development of a superego:

Responsibility to oneself, within the context of authoritative norms consciously and unconsciously accepted or assimilated from parental and societal sources, is the essence of superego as internal agency.... It involves appropriating or owning up to one's needs and impulses as one's own, impulses and desires we appear to have been born with or that seem to have taken shape in interaction with parents during infancy.... [So doing] we begin to develop a sense of self-identity [which] means to experience ourselves as agents, notwithstanding the fact that we were born without our informed consent and did not pick our parents.²⁷

If one can feel responsible for what one has done, this implies both an ego that acts and an element in it, a superego, reflecting on those actions, establishing an agent capable of self-reflexivity. This is the basis for a sense of self-responsibility.

The possibility of guilt. Out of this development, there comes the monitoring of potential tensions in the psyche between the things one does and the things one would do if acting according to the best, or ideal, commitments one has developed. Tension between the ego's acts (as ego) and the ego's ideals (as evolved from parental and other social models of conduct, and ultimately as elements collected in a self-reflexive superego) can leave one feeling bad or angry about what one has done. Such a tense, negative, anxious, feeling is guilt, a 'form of tension between ego and superego'.²⁸ For Loewald, we 'have a sense of guilt concerning past or present thoughts, feelings and deeds, but only inasmuch as they represent a nonfulfillment of the inner image of ourselves, of the internal ideal we have not reached'.²⁹ Pace Nussbaum, this is not a question of beating oneself up for the pleasure of

²⁷ Loewald, *Papers on Psychoanalysis*, 392.

²⁸ Ibid, 273.

²⁹ Ibid, 273-274.

it. Nor is it grounded in an unreflective fear of parent figures. Rather it is a concerned self-reflection and criticism that leads a developed subject capable of both in the direction of their ideals in relations with others. Against the 'Kantian' Freud, this is not the screaming anger of the superego keeping one in line; it is the evolving self, seeking to act well according to its achieved sense of its own best lights. Against the primitive, anger, and fear-driven animal that acts in persecutory and self-persecutory ways, guilt is here constructive, related to one's ideals, aimed at addressing how one has acted towards others, with a view to putting things right.

A desire to repair. There are two aspects to this. First, responsibility and guilt are accompanied by a desire to restore or repair wrongs, that is, to act responsibly to lay to rest psychic conflicts arising from negative behaviours. This is the corollary of guilt anxiety, but it is supported by something else: a second, deep-seated, reaction of the superego to the process of its own formation.

The superego emerges out of resolution of the so-called Oedipal struggle,³⁰ with profound consequences for establishing the child's autonomy from its parents and its own coherent agency. The psychological control parents have of the pre-Oedipal child comes because psychologically they dwell inside and are a part of it. The Oedipal struggle is the effort by the child to take control away from them, to become a person with a much greater degree of control over its own psyche. A successful struggle, 'kicking out' or 'killing' the parent inside, generates the possibility of a more coherent and self-reliant superego. Yet this necessary achievement in a child's psychic life leaves it with residual bad feeling - guilt - about what it has done. It absolutely needed to wrest to itself control of its own psyche, but in so doing, it also rejected the internal loving parent that was part of

³⁰ This is commonly understood to relate to issues of sexual identification, but it has a broader implication with regard to super-ego formation, which, like the ego formation that precedes it, 'implies an abandonment of sexual aims, a desexualisation' (S.Freud, 'The Ego and the Id', 369). More broadly, the complex can be generalised to a deeper level than that of sexual identity or family structure, as a 'childhood florescence of ambivalence towards the important people in one's life' (Jonathan Lear, *Freud*, 180), regardless of gender or sexual desire.

it. Normally, of course, a new *modus vivendi* is established, but the rejection of the old emotional order leaves a deep sense that the child has betrayed those it loved, and who loved it, the most.

This is the basis for a deep-set, residual, sense that one has done wrong, and that reparation is required. According to Loewald, the emergent superego develops an inbuilt desire *to atone*:

In an important sense, by evolving our own autonomy, our own superego ..., we are killing our parents. We are usurping their power, their competence, their responsibility for us, and we are abnegating them, rejecting them as libidinal objects. In short we destroy them in regard to some of their qualities hitherto most vital to us.... Without the guilty deed of parricide there is no autonomous self ... no individual self worthy of that name, no advanced internal organisation of psychic life, [so that] guilt and atonement are crucial motivational elements of the self.... Guilt then is not a troublesome affect that we might hope to eliminate in some fashion, but one of the driving forces in the organisation of the self. The self, in its autonomy, is an atonement structure, a structure of reconciliation, and as such a supreme achievement.³¹

‘To atone’ as an active verb means to make good, but in its original sense, it is to find a way once again to be whole, to be ‘at one’.³² This is what makes this mature, superego-based, form of guilt instinctively and residually reparative. The superego has an inbuilt tendency to wish things restored to wholeness, and this works alongside the desire to address tensions around its ego ideals.³³

It should be clear that this eudaimonistic account of a guilt that repairs or restores is very different from the persecutory kind we identified previously. It is different in both its form and its substance.

³¹ Loewald, *Papers on Psychoanalysis*, 390-4.

³² Herbert Morris, *On Guilt and Innocence* (University of California Press 1976), 100.

³³ The wish to restore wholeness has both a backward and a forward aspect. The desire to get back to an early childhood state is present but regressive; the desire to look forwards and to find wholeness in mature relations takes a form of early ideal egoism and puts it to progressive uses. Thanks to Peter Ramsay for raising this point with me.

The 'Kantian' anger-and-guilt model operates with a simplistic account of instincts and their control. While the superego is invoked, it can only be a primitive, early, rudimentary, version of the mature superego that Loewald draws out of superego formation and resolution of the Oedipal complex. The 'Kantian' superego is the voice of angry authority figures, introjected, and with the volume turned up. Anger may also be present in the mature, reparative, model, but it takes the form of a tension within the psyche resulting from unhappiness at failing to live up to one's best ways of dealing with things. The child's mature, eudaimonistic, development establishes moral action as the outcome of a complex, structural, psychic evolution which takes a person from the earliest phase of the basic life drive (primary narcissism) to ego formation, the creation of ego ideals, and the Oedipal struggle to create the 'Aristotelian', self- and other-respecting, superego. All these are complex - individual, social, relational - processes out of which guilt and the desire to repair emerge as ethical possibilities. The resulting human being is able to think and act creatively in relation to wrongs it may have done, or that it observes in the world. Mature guilt and anger are both about ethically valid self-criticism and the desire to repair, and they lead to a sense of responsibility to address personal wrongdoing or wrongs in the world at large – this is precisely the eudaimonistic anger that Nussbaum identifies but does not pursue in her account.³⁴ The reparative model of guilt is complex, evolved, emergent, mature, and creative, contrasting in most ways with an earlier form of guilt in which the person is less complete, and subject to basic instincts and controls. If we turn now to consider Melanie Klein's account of guilt at the earlier infantile stage, we will see a remarkable parallel to the early and mature forms we have identified in Freud.

PERSECUTORY AND REPARATIVE GUILT

³⁴ Nussbaum, *Anger and Forgiveness*, 16.

Klein's work on object relations pioneered a move grounded in Freud's thinking, but pushing it in two directions. The first was to take psychoanalytic thinking to the earliest time in an infant's life, where Klein found, earlier than Freud, the rudiments of ego and superego formation. Where Freud 'discovered the child still dynamic in the adult', Klein 'discovered the infant in the child and the adult'.³⁵ The second was to identify two successive 'positions' in an infant's early development, evolving stages that remained part of the child and the adult throughout a life. An infant developed from the earlier 'paranoid-schizoid' position into the later 'depressive' position, but there could also be regression, and though these positions were most obvious in the behaviour of disturbed children and adults, they represented general forms of human psychology, which could be observed both in individual behaviour and in social practices. These two positions provide parallel accounts of early and mature guilt in Klein to those in Freud, at an earlier stage of development.

Klein's two positions³⁶

A person's development involves a process of psychological integration that deals with basic human anxieties about being loved and having that love secured. In the 'paranoid-schizoid' phase, the infant has no clear sense of itself, or anything else, as whole. Profound emotions of fear, anger, and love jostle as the infant first experiences the world and reacts to an environment on which it depends. The first object it experiences is the breast,³⁷ which can be either giving (the so-called 'good breast') or withholding (the 'bad breast'). While the former is a source of nurture, warmth and security, the latter generates perplexity, anxiety and anger. Perceptions of the good and the bad remain unconnected in the infant mind, which deals only in 'part objects', and this is reflected in a psyche that perceives the world as split into either fearful and angry (bad) or loving and nurturing (good)

³⁵ Hanna Segal, 'Introduction' in Klein, *Love, Guilt and Reparation*, ix.

³⁶ See Craig Reeves, 'What Punishment Expresses' (2019) 28 *Social and Legal Studies* 31 and Craig Reeves, Alan Norrie and Henrique Carvalho, 'Criminal Law: Between Persecution and Reconciliation' in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) for fuller discussion of Klein's work and its implications for punishment and law. I am indebted to Craig Reeves for showing me the way into this work, and Freudian metapsychology more generally.

³⁷ Or an alternative source of nurture.

forms. The world is seen as either all good or all bad: when good, it is very good, and when bad, very bad. Without any overall connection being made between good and bad parts, so that badness might be seen as a temporary experience in an overall good setting, anxiety is overwhelming, and anger when it comes is all-consuming rage and aggression. Herein lies the root of a persecutory anger that responds instinctually in a destructive way to objects that are perceived as all bad. This is Klein's initial, paranoid-schizoid, position.

The 'depressive' position, which supervenes on this first position, also involves anxiety, but of a different kind. Gradually the infant sees that part objects it had perceived as all good or all bad are really one object that sometimes appears as good (for example gratifying) and sometimes bad (for example frustrating). It begins to see a whole object, and to understand, in a sufficiently reassuring environment, that the objects that surround it, the mother's body, the mother, the father, are all capable of acting in ways that gratify – while sometimes they may frustrate. As these objects come to be seen as whole objects, there is a growing sense in the infant that it too could be whole, and could love those who surround it in their own differentiated wholeness.

This position is an advance in developmental terms on the paranoid-schizoid position, but it brings its own emotional difficulties, which leads Klein to call it the 'depressive' position. It involves a new kind of anxiety related to the earlier persecutory forms of anger and rage against part objects. These now jostle in the infant with feelings of love for what it is coming to see as whole objects. Those whom the infant is coming to love as whole objects, and which give it a sense of its own wholeness, are the same objects at which it had directed its anger and rage. In a situation where the rageful wish to destroy is indistinguishable from the imagined outcome, the infant may imagine it has destroyed the whole object it is now coming to love. This generates a troubling anxiety about destroying what one loves, and in turn an anxious desire to repair the harm one thinks one has done. Related to this, developing and then becoming embedded in the infant's psyche, there

emerges an urge to repair that which one loves and imagines to have harmed, and this becomes generalised in the infant's worldly interactions.

As with Freud, these two positions generate a sense of guilt, either of an 'early' or a more 'mature' form. I will now consider these, starting first with mature guilt and working back to its earlier form.

Mature guilt: the wish to repair

From early infantile experiences, there comes an anxious desire to restore loved objects, and this is the basis for a sense of guilt and remorse:

The feeling that the harm done to the loved object is caused by the subject's aggressive impulses I take to be the essence of guilt.... The urge to undo or repair this harm results from the feeling that the subject has caused it, i.e. from guilt. The reparative tendency can, therefore, be considered as a consequence of the sense of guilt.³⁸

Love is developing, but there is also hate from the earlier paranoid-schizoid position, and the anxiety that the hate might have been efficacious against loved objects produces a reparative default position. This becomes a formative experience in the human psyche. Since the early emotional states are retained in later life, this reparative desire becomes an important aspect of the grown adult in social settings. The infant is parent to both the child and the adult as it comes to terms with its loving commitments and its fears for what it may have done. A wish to make things better, because one might have wished them to be worse, stems from the early depressive position, interacting with the paranoid-schizoid position it comes to supersede.

³⁸ Melanie Klein, *Envy and Gratitude*, 36; see also Melanie Klein, *Love, Guilt and Reparation*, 270: 'The ego comes to a realization of its love for a good object, a whole object and in addition a real object. Together with an overwhelming feeling of guilt towards it. Full identification with the [loved] object... goes hand in hand with anxiety for it (of its disintegration), with guilt and remorse, with a sense of responsibility for preserving it intact against persecutors These emotions, whether conscious or unconscious, are in my view among the essential and fundamental elements of the feelings we call love.'

The anxiety operating within this tendency becomes what we know as moral states of guilt and remorse, and lies at the root of the development of a conscience. In the depressive position, the infant's primary aim is to make good the whole object, of which it now understands itself to be a part. While the child feels 'strong conflicts between aggressive impulses and feelings of love', the latter lead to 'feelings of guilt and ... wishes to make good'.³⁹ The depressive position thus lies behind 'the urge to make people happy', a 'strong feeling of responsibility and concern for them' and a 'genuine sympathy with other people ... as they are and as they feel'.⁴⁰ This generates a sense of 'conscience in the true sense of the word' and the means whereby 'a moral and ethical attitude are activated'.⁴¹ It raises the interesting question as to how this early, but developed, instinct towards reparation through the emergence of a sense of conscience fits with Freud and Loewald's arguments in the previous section concerning responsibility, guilt and atonement. We will return to that question below, once we have identified a second, more primitive, account of guilt in Klein.

Early guilt: persecutory anger

If the later, depressive, position is the source of a more developed, rounded, orientation to loved objects, and thence of a mature ethical guilt with its desire to make good, the earlier paranoid-schizoid position, which it seeks to overcome, leaves its trace on guilt through the forms of anger and rage that are its stock in trade. These direct their attention to what are seen as all-bad others, who are split off from any redeeming features, and are therefore only worthy of outright, and potentially ferocious, condemnation. In this position, the primary aim of the immature infantile ego is to defend itself by going on the attack. Through Manichean splitting, it angrily blames and persecutes an all-bad other, while preserving an absolute sense of its own goodness. The persecutory attitude in its hostility holds the all-bad other guilty and subject to recrimination, and this attitude may also be turned back on the infant itself.

³⁹ Melanie Klein, *Love, Guilt and Reparation*, 310.

⁴⁰ *Ibid*, 311.

⁴¹ *Ibid*, 252.

In her clinical work, Klein had noticed how fiercely punitive young children could be in their play, and this attitude was turned on the child itself as a form of stringent guilt. Writing before she had identified the paranoid-schizoid position, Klein described an early feeling of guilt that was engendered by the nascent superego in what she called its 'sadistic' phase. In this phase, a sense of guilt emerges in the infant that stems from the prohibitions of parents and fear of them, but it is augmented many times over by the sadistic imagination of the infant itself. Such infants develop 'fantastic ideas of *what the parent might do to them*: kill them, cook them, castrate them and so on'.⁴² In this way, early sadistic impulses in the infant ensure that a persecutory form of guilt emerges such that 'the Biblical precept "an eye for an eye" is at work' in the infant's psyche.⁴³ Thus an early 'sadistic' instinct, magnified inside the very young infant, becomes the basis for a rudimentary, but very aggressive, superego dishing out a persecutory sense of self- as well as other-guilt.

Effects of persecutory blame in the two positions

This theme of persecutory self- and other-guilt in what Klein initially called the sadistic phase reflects the logic of what she would later call the paranoid-schizoid position. Towards the end of her career, Klein returned to this idea of persecutory guilt, considering the effect of blaming a person who lives with paranoid-schizoid thinking. This is perhaps relevant to thinking about persecutory punishment and its effects in adult social settings today.

Optimally, the later depressive position supercedes the earlier position, but it does not abolish it, so that it may re-emerge, for example in situations of social disruption and heightened anxiety. Blame that is targeted on a mind in the paranoid-schizoid position does not trigger a desire to repair or a sense of responsibility, as in the depressive position, but the perception in the paranoid-schizoid

⁴² Ibid, 179.

⁴³ Ibid, 179. That the superego promotes an 'excessive violence in this early stage would thus be accounted for by the fact that it is an offshoot of very intense destructive instincts, and ... very large quantities of aggressive ones' (Klein, 1998, 250). In this setting the limit form of the *lex talionis* might appear an ethical advance on a more general destruction!

person that they are being further persecuted. This person cannot bear a guilt and blame that is 'premature'⁴⁴ in terms of his psychic state, and which cannot lead to a desire to restore wholeness. Instead, there is further disintegration in one who in the paranoid-schizoid state is essentially marked by its lack. While guilt for the person in whom depressive sentiments are strong represents an opportunity to do better in outward relation to others, for the paranoid-schizoid mind, it can only lead to further internal breakdown. The reason for this disparity in outcomes stems from the different kinds of anxiety in the two positions, and what they focus on. Directed at oneself, persecutory anxiety in the paranoid-schizoid position 'relates predominantly to the annihilation of the ego, while depressive anxiety is predominantly related to the harm done to internal and external loved objects by the subject's destructive impulses'.⁴⁵ Thus persecutory guilt is not only savage and Manichean, it will also be morally counter-productive for many on whom it is imposed. For the person who is already inclined to self-persecution, it leads to further internal disintegration. Angry recrimination against the person who cannot handle it, because that person operates at the level of angry reaction, simply undermines further their ability to develop a whole response to what they have done.

Persecutory guilt is outright, recriminatory, blame directed at an 'all bad' person. If it is destructive for the person who already feels persecuted, how would it affect the person who is able to think reparatively about their guilt? One response might be to shut down the desire to repair in the broadly depressive and reparative mind. If I am inclined to seek to do better in relation to the wrongs I do, but I experience blame as outright condemnation for my unchangeable badness, this is likely to undermine my sense of myself as a person who seeks to repair things in the world. I *thought* I was a person who could respond, as one capable of repairing harm I may have done. If I am addressed as an inherently bad person, for whom persecutory blame is the only valid response, I may come to think that is after all what I am. Alternately, persecutory blame may provoke resistance

⁴⁴ Melanie Klein, *Envy and Gratitude*, 194.

⁴⁵ Melanie Klein, *Envy and Gratitude*, 34.

and indignation at the calumnies directed at me, so that I feel further and wholesale resentment against a world that could only see me in this way, pushing me to become the ‘animal’ ‘they’ always thought I was.⁴⁶

Comparing reparative and persecutory guilt and blame, we can see how these have different ethical consequences and logics, and that they could lead to different reactions and outcomes. I make these points, albeit briefly, because they have implications for how punishment is utilised in society today. Klein’s early and mature forms of guilt are not just infantile manoeuvres, they have effects for individuals throughout their lives, and in adult social settings. They matter when we think about how punishment and blame in the social world might take on a persecutory or a reparative form. For example, is a modern punitive response persecutory, that is, exclusionary, condemnatory, and lacking in a possibility of re-inclusion? Alternatively is it restorative, offering the opportunity for repair or retrieving wholeness in perpetrators and victims? It is all too easy to see the enclosed and overcrowded world of prisons together with the political rhetoric of ‘lock them up and throw away the keys’ as essentially persecutory. This is not to deny that pockets of restorative practice can be present. Perhaps one should see the prison system as persecutory in the major key, restorative in the minor, or that these two strands are contained in a system governed by an overall ‘structure in dominance’ that is persecutory.⁴⁷

Klein and Freud-Loewald compared

⁴⁶ Two great prisoner memoirs that came out of the Special Unit run at Glasgow’s Barlinnie prison (1973-1994) depict life in a prison system that juxtaposed an overall persecutory environment with one pocket of reparative practice (the Unit). The nurturing effect of the Special Unit is remarkable, but so too is the impact of a persecutory environment on men who might be characterised as living on the borderline between Klein’s paranoid-schizoid and depressive positions. See Jimmy Boyle, *A Sense of Freedom* (Ebury 2016) and Hugh Collins, *Autobiography of a Murderer* (MacMillan 1997).

⁴⁷ On the idea of two keys, present in the history of the western penal system, see also Alan Norrie, ‘Beyond Persecutory Impulse and Humanising Trace: on Didier Fassin’s *The Will to Punish*’ (2019) 13 *Criminal Law and Philosophy* 681.

Comparing Klein and Freud on early and mature guilt, I will argue that Klein's infantile forms can be seen as rudimentary forms that are essentially homologous to those found in childhood by Freud-Loewald.

Early persecutory guilt. In writing of early guilt, Klein starts from Freud's view in *Civilization and Its Discontents*. Her account is based on his understanding of an aggression deployed against aggressive instincts.⁴⁸ However, she pushes back the beginnings of this process to the very early period in life, where the aggression is all the infant's. Nonetheless, the idea of a persecutory guilt founded in aggression and anxiety is present in both thinkers.⁴⁹ Klein's paranoid-schizoid position with its account of persecutory anger and rage at all-bad, non-whole, others may be seen as an early fit with Freud's 'Kantian' side. As in Klein, the Freudian subject of introjected anger, dealing with fear of the father's wrath, and deploying this to control basic instinctual desires, is not really a whole person. It is a split subject with uncontrollable instincts, which need external controls to be internalised. In both accounts of early guilt, the subject is submitted to the rule of an anger which starts within, and which it never rises above.

Similarly, love is lacking from both positions. Klein's model of persecutory anger and guilt may be present at the earlier, infantile stage, but both she and Freud retain the sense of a split, anger- and fear-related, guilt superseded by a later, more complex, ethically progressive, holistic, form. Klein's persecutory guilt, based on infantile fantasy, might be seen as the early mapping of what becomes the more complex forms of persecution, incorporating the internalisation of fear of the father, into Freud's harsh superego. Klein deals with the infant in the child, Freud with the child evolving towards adulthood. Both, however, develop an account of early persecutory anger and guilt in contrast to a later, more mature, love-based, form.

⁴⁸ Melanie Klein, *Love, Guilt and Reparation*, 250.

⁴⁹ See for example Melanie Klein, *Envy and Gratitude*, 2.

Mature reparative guilt. Klein develops her own account of the later, mature, reparative, guilt that she identifies in the depressive position. This again comes much earlier than it does in Freud. Is there a parallel between Klein's account of mature and reparative guilt in the depressive position and what we find in the Freud-Loewald interpretation? As we have seen, Loewald's account suggests that the way in which libido or the life instinct (Eros) develops and is enformed leads ultimately to feelings of guilt, responsibility and the desire to atone. The ego develops a sense of its own autonomy and responsibility, incorporates ego ideals, and then, through resolution of the Oedipus complex, evolves a superego with an inbuilt tendency to restore wholeness after rejection of internalised love figures. This is a later phase in the child's life, but we can see a similar pattern evolving. Klein's account of a much earlier, more rudimentary, superego has less space for the enformed structure of id, ego and superego in Freud. Emphasis is placed on the earlier stage at which an infant becomes able to perceive both others and itself as whole objects. Yet, in this infant period, love and anger *are* mediated by early psychic organisation, hence Klein's argument that the foundation of the superego is found in this early stage.⁵⁰ We are talking here of developments that are relevant for the early phases of infancy, and not for a developing child, but it seems these rudimentary forms in Klein may be interpreted to form the basis for later, more sophisticated, yet essentially homologous, developments in Freud's structural theory.

That we might see the Kleinian and Freudian forms of guilt, either in persecutory or in reparative mode, as building on each other is supported by the view that, once experienced, a basic mental structure is seldom discarded. It is rather taken up and find its place in a more advanced form of psychic organisation. Klein thinks that the reparative tendency in the depressive position continues into adult life, while Loewald's argument makes the same claim for the superego as an atonement structure. These look like similar moves at different stages, with the earlier reparatory move being taken up and renewed in the later atonement structure. More broadly, one can see how Klein's

⁵⁰ Melanie Klein, *Envy and Gratitude*, 74.

reparative instinct aligns with Loewald's account of responsibility and atonement; how anxiety around doing harm to loved objects could be reset as anxiety around the conflict between ego action and ego ideals; and how the early Kleinian foundations of the ego and superego as a whole subject facing whole objects could develop into Loewald's account of atonement as a holistic, restorative, 'at-one-ment'.

The upshot is that we might expect to see both persecutory and restorative trends in guilt and blame as a part of the human condition. But this general observation would need to be integrated with a sociological understanding of how such trends play out in particular social formations. I will now proceed to consider, albeit briefly, the relationship of law to these early and mature forms of guilt under modern societal conditions through analysis of the retributive theory of punishment.

TOWARDS MATURE RETRIBUTIVISM

It is permanently fashionable to be sceptical of the claims of Freud and Klein about guilt, to believe that what they had to say depends on imaginative projections that are scientifically ungrounded. Indeed scepticism extends to the entire psychoanalytical enterprise,⁵¹ so it may seem unpromising to consider links between these accounts of guilt and the way that a society thinks about forms of penal practice. Yet, it is plain that modern punishment expresses forms of hostile affect which portray the offender as 'the other', an all-bad, evil, perpetrator who should be shunned and may be treated as a general enemy of humanity. The present Home Secretary in the United Kingdom recently stated that she wanted criminals 'to literally feel terror at the thought of committing offences', a view that is consistent with her past support for capital punishment.⁵² These thoughts of

⁵¹ For a helpful overview and defence against repetitive Freud-bashing, see Jonathan Lear 'Killing Freud (Again)' in Jonathan Lear, *Open Minded* (Harvard University Press 1998) 16.

⁵² See Priti Patel, UK Home Secretary: 'I do actually think when we have a criminal justice system that continuously fails in this country and where we have seen murderers, rapists and people who have committed

terror and of the irredeemable offender might be cast in either Kleinian or Freudian terms, but whichever, it would be the persecutory, early, form of guilt that was reflected. It would be a person who is all-bad, who can only be restrained from base instincts by angry and fearful punishment.

Politicians come and go, and others take a more mature view, emphasising for example the need to support young people to stop them offending, to deal with the conditions of crime, and so on. The overall point is how different social and political views express different affective perspectives. The degree of affect revealed in comments about fear and terror, and their ability to conjure a socially hostile solidarity,⁵³ or the more supportive, holistic, views expressed elsewhere replicate at the political level the two approaches to guilt and punishment described by Klein and Freud. If some politicians, together with the sections of society they seek to represent, get caught up in persecutory fantasies, we have to eventually wonder why these are so compelling, and why they resonate within the human psyche. Every time someone feels *either* anger at, *or* compassion for, an offender, a question is raised about the psychological tripwires that have been engaged. Political ideologies work because they have psychological traction, so the investigation of the grounds of human affect is important, as is how these become integrated into punitive programmes.

Is retributive guilt necessarily 'early'?

The views of politicians inevitably feed into their policies, so early or mature thinking around guilt will shape criminal law and criminal justice. For example, sentencing strategies are an obvious target. There is, however, a deeper question as to the law's internal connection to psychological approaches to guilt. How does law itself reflect these different emotions which are part of the public

the most abhorrent crimes in society, go into prison and then are released from prison to go out into the community to then re-offend and do the types of crime they have committed again and again. I think that's appalling. And actually on that basis alone I would actually support the reintroduction of capital punishment to serve as a deterrent.' <https://www.bbc.co.uk/news/uk-49213743>

⁵³ Henrique Carvalho and Anastasia Chamberlen, 'Why punishment pleases: Punitive feelings in a world of hostile solidarity' (2018) 20 *Punishment and Society* 217

imagination? Is law simply a neutral form which may be more or less coloured by social, political and psychological emotion, or is it more directly implicated in early or mature kinds of affect?

My starting point is to note that law is a social form which proclaims itself ethically neutral, but this is only superficially so. The claim to neutrality derives from the nature of the abstract and universal legal subject, *homo juridicus*, who sits alongside *homo economicus* in modern political discourse.

Legal abstraction or formalism possesses the structural tendency to hide, finesse, or manage substantive, morally and politically contested, issues which lurk behind the form. Abstract legal form endorses substantive ethical positions, though it does so by appearing to say nothing about them. Its substantive commitments are wrapped up in its formal appearance, revealed only in situations of disruption.⁵⁴ From this position, we could ask how abstract legal subjectivity operates in relation to the early, persecutory, and the mature, restorative, accounts of guilt we have examined here. I suggest that when it comes to justifying punishment in ethical terms, the legal form reflects early, persecutory, themes by virtue of its abstract character, but that the same abstract character indicates the possibility of its opening up towards mature, restorative, approaches. The obvious place to examine this issue is the abstract theory of punishment known as retributivism, which grounds much that is done within the criminal justice system.

In thinking through the nature of retributive guilt as early or mature, Jeffrie Murphy is a helpful interlocutor.⁵⁵ Murphy's work from the 1970s onwards has reflected an ambivalence about retributivism as the central ethical rationale for justifying punishment. The defender of a theory of retributive hatred as a justified response to wrongdoing, Murphy has also argued for: the need to

⁵⁴ Alan Norrie, *Crime, Reason and History* (3rd ed Cambridge University Press 2014). The *leitmotif* of this work, which is a sustained critique of legal formalism across the criminal law's general part, is 'substance will out'. See also Alan Norrie, *Punishment Responsibility and Justice* (Oxford University Press 2000), which tracks the way in which abstract legal form informs different versions of orthodox criminal justice theory.

⁵⁵ See also Jean Hampton's probing essays on what she calls resentment-based and indignation-based retributivism in Jeffrie Murphy and Jean Hampton, *Forgiveness and Mercy* (Oxford University Press 1988). The former (see eg pp.144-5) resembles early, the latter (eg 146-7, 151) mature retributivism in my terms, though her emphasis is always on the nature of state responses to wrongdoing, rather than developing the moral psychology of subjects as here.

balance this against compassion for the perpetrator as a fellow human being; that we cannot know the depths of a person's character, and therefore cannot condemn that person as irretrievably bad; and that when we judge another, our own unpleasant resentments may come into play.⁵⁶

If we take the third caution first, Murphy is fond of quoting Nietzsche's aphorism that in condemning others for their monstrosity, there is a danger that we become what we condemn.⁵⁷ There is a slippery psychological slope in condemnation which leads from the judging of a bad act to the judgement that the person is bad, and then to move on to further persecutory condemnation. From a legal finding of guilt, we move easily to persecutory judgements like "you have a vicious character" to "you have a hardened, abandoned, and malignant heart" to "you are evil and rotten to the core" to "you are scum" to "you deserve whatever cruel indignity I choose to inflict on you".⁵⁸ Murphy adds that while this is not 'a logical transition' he fears 'that the transition is psychologically a rather common and in some ways compelling one, one that may tempt us to endorse cruelty and inhumanity'.⁵⁹ This is precisely the kind of persecutory account of blame described by Klein in terms of the guilt of the all-bad person, who is worthy only of hatred and destruction. The question Murphy raises is whether the slide he describes is indeed non-compelling and without an immanent logic in law or legal theory. Is it caused only by unfortunate psychological side-commitments, or is there an intrinsic connection between persecutory punishment and the form retributive theory takes?

An historical and structural logic

⁵⁶ See Jeffrie Murphy, *Punishment and the Moral Emotions* (Oxford University Press 2012), 41. Murphy's work seems to describe a parabola, moving from what I would call a more mature (in the 1970s) to a more early (in the 1980s) account of guilt, and then back to the more mature approach in the new millennium. Compare the essays in the 2012 collection with those in Jeffrie Murphy, *Retribution, Justice, and Therapy* (Reidel 1979) and in Jeffrie Murphy and Jean Hampton, *Forgiveness and Mercy* 1988. If I may so put it, it was an early, mature, essay by Murphy that triggered my first venture into academic writing: Alan Norrie, 'Marxism and the Critique of Criminal Justice' (1982) 6 *Contemporary Crises* 59.

⁵⁷ 'Whoever fights monsters should see to it that in the process he does not become a monster': Friedrich Nietzsche, *Beyond Good and Evil* epigram 146 (Walter Kaufmann, *Basic Writings of Nietzsche* (Random House 2000) 279).

⁵⁸ Murphy, *Punishment and the Moral Emotions*, 88-9.

⁵⁹ *Ibid.*

The missing link in Murphy's thinking is provided by the historical and structural logic that underpins modern legal form, and links it to the play of a persecutory psychological mind set. In an early essay, Murphy pointed to the need to align a Marxist analysis of the social conditions of crime and the philosophical justification of criminal justice.⁶⁰ In a social and economic world premised on class exploitation, violence is structural, and the role of law is, through its abstraction, to present a different image and practice, one premised on individual responsibility at a remove from the social forces which condition it. This works well enough most of the time to legitimate punishment, while calling attention to it presses the need for radical social reform. Without that, the law's abstract individualist conception of justice, expressed through the retributive theory of punishment, aligns with the underlying structural violence, obscures the underlying social explanation of that violence, and constitutes a form of injustice.

This leads to the following question. If the socially causative, structural, conditions of crime have been obscured, what explanation may be given why an individual did something that was very bad? Without the obvious social explanation, the compelling alternative would be that there was something intrinsically bad about *that person* that made her act in that way. Hence the attribution of individual badness may not be connected in formal logic to perpetrating an evil act, but in terms of a causal, functional, explanation, the linking of act to individual character is compelling if a social explanation has been excluded. Where else can one look? To condemn the act is logically *not* the same as condemning the actor, but the retributive attribution of responsibility for bad acts to individuals apart from their social context carries as its corollary the attribution of bad qualities to the actor. Hence, either a split, persecutory, sense of a person as all bad (early guilt in Klein), or a fear-based, punitive, view that violent natural instincts in an individual must be deterred (early guilt in Freud), or both, is invoked by the abstract subject of law as this is reflected in the responsible subject of retributive philosophy. Murphy's slide follows an historical logic under modern social

⁶⁰ Jeffrie Murphy, 'Marxism and Retribution' in Murphy, *Retribution, Justice, and Therapy*.

conditions. Abstract legal form comes to entail an early account of guilt despite its seeming neutrality where a structurally violent setting is excluded. This is not logical in formal terms, but it is logical in a historical context.

Could retributive guilt find maturity?

This then leaves the two other checks on Murphy's support for punishment. The first is that the perpetrator is also a human being, a view that Murphy links with an ethic of Christian love. The second is that we cannot access the deep moral character of any other person, so cannot judge it. This is a view Murphy takes from Kant, where this represents the underside of Kant's otherwise somewhat self-righteous stance on the justification of punishment.⁶¹ The problem with both these objections is that they are reactive to the persecutory, punitive, impulse and do not go far enough. Yes, we are all human beings, and yes, we cannot know the inner workings of another's heart and mind. So these provide a caution against persecutory punishment, but they do not provide an alternative to it. Eventually, Murphy will say that he remains a retributivist, though reluctantly so, but this is having one's cake and eating it.⁶²

Against this reluctant retributivism I would first reiterate the social critique of the structural conditions that generate the form of law, which are obscured by law's abstract individualism. It is also necessary to think about how modern society cultivates persecutory psychic positions which treat as all bad a variety of out groups in terms of race, sexuality, gender, ethnicity, poverty, and, of course, criminality. In this situation, even a reluctant retributivism looks parlous.

More than this, however, another route is missed. Regarding punishable subjects 'with compassion' overlooks the possibility that people who commit violative acts might be self-acting psychic subjects who could contemplate in mature ways the nature of the harms they have done, and how they

⁶¹ Murphy, *Punishment and the Moral Emotions*, 41.

⁶² Murphy disparages his own doubts when he describes them as leading to 'some sentimental orgy of love and self-doubt': Ibid, 42.

might set out to make things right for their victims. Where compassion is paired with punishment, there is no conception yet of the potential for mature guilt as a psychic mechanism in actors who have done bad things. To think in these terms could lead us to a new, different, mature retributivism in which the abstract rebalancing of right and wrong took on a real, human, form. Under classical retributivism, punishment acts as the rational restoration of the moral order that has been undermined by the crime.⁶³ The abstract proportioning of punishment to crime through the *lex talionis*⁶⁴ or the exchange of equivalents⁶⁵ reflects this rebalancing of the moral order. It is carried out by the state, directed at the criminal, and, as the criminal's own act returning to him, it tends to ignore the victim. It easily becomes seen as the vindicated allocation of a just amount of pain on a criminal, without a further progressive outcome either for the criminal, the victim, or society as a whole. It easily becomes seen, in other words, as punitive, persecutory, pain for its own sake.

Starting with mature guilt

Let us assume the position of a perpetrator who has committed a violent and angry act on a victim. What morally should she do about it? From her point of view, working through what she has done, there is a need to process the fact that she has violated another human being who is, in the ways that matter, just like her. As she works through her feelings, she comes to realise that this was a whole person worthy of dignity, and not the all bad, split, object she felt no need to respect. She moves from a persecutory to a depressive position in Klein's terms, and begins to think of what she might do to restore what she violated. Alternatively, she comes to realise that in violating another, she acted against the ego ideals she possesses but which had been submerged when she acted. She realises that in violating another who is a human being just like herself, she placed herself at odds with a sense of the world in which she could herself be whole. She wants to be at one with herself and her world; she wants in Loewald's Freudian terms, to atone.

⁶³ G.Hegel, *Outlines of the Philosophy of Right* (Oxford University Press, 2008), 96-108.

⁶⁴ I.Kant, *Political Writings* (Cambridge University Press, 1991), 155.

⁶⁵ G.Hegel, *Outlines of the Philosophy of Right*, 103-5.

However we describe mature guilt and its working through, we can see how it begins with a subject who has to acknowledge a harm they have done, rather than a state that allocates a punishment. In the social context of punishment, persecutory guilt is ‘top down’ – from the state or blaming body to the perpetrator, while mature guilt is ‘bottom up’ – from within the individual towards the victim. State punishment taking a persecutory punitive form may be the last place to look for activating a process of self-grounded remorse, restoration, and atonement. But the kind of making amends that comes from the mature desire for these things could represent the real foundation for a different kind of retributive theory, one in which past and future action are fully combined through the medium of the mature, guilty, subject. That subject wishes to make amends for those past acts, and to make things better in the future. This would be the basis for a mature retributive response to violating another.

Of course, much more would need to be said about this, but the aim of this essay has been only to identify a new and different starting point for thinking about crime and punishment. From this position, I think we might be able to renew our vocabulary, so that we speak not of crime and punishment at all, but of violation and of making amends, a process in which the state and law may or may not play a part. If they do, it could only be a limited one. And when we use old words like retribution, we give them a new, fuller, meaning, one in which the age old conflation of retribution (a severe, persecutory, punishment) and retributivism (a restorative giving back) is clarified and made untenable. Under a mature retributive theory, the violating actor comes to want to make amends in order to restore a sense of wholeness for himself and his victim, and this rests on a mature, moral, account of guilt. We can find the grounds for such an account in Kleinian and Freudian metapsychology.

I began this essay with a discussion of the possible contribution psychoanalysis could make to an understanding of criminal law through investigating ideas of violation and guilt. I started with Nicola Lacey’s discussion of Lacanian psychoanalysis and suggested that less of a blind alley could be found

in revisiting the accounts of Klein, Freud, Loewald and Lear. Now at the end, I finish with the observation that this different route might be seen as strongly linked to Lacey's recent work with Hanna Pickard on the possibility of a form of responsibility without blame, based on forgiveness, and against what they call affective blaming.⁶⁶ Broadly, it seems to me that the ideas of mature blame, guilt, and retributivism discussed here are in line with this project. Affective blaming looks similar to early, persecutory, blaming in my terms. The kind of responsibility Lacey and Pickard seek, with its close link to forgiveness, is surely connected to the acceptance of wrongdoing, from which forgiveness may flow, and acceptance of wrongdoing is precisely what a mature, guilty, subject pushes towards.

⁶⁶ Nicola Lacey and Hanna Pickard, 'From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm' (2013) 33 *Oxford Journal of Legal Studies* 1-29; Nicola Lacey and Hanna Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35 *Oxford Journal of Legal Studies* 665-96.