

TWO KINDS OF JUSTICE: HUMAN AND DIVINE, RANDOM THOUGHTS À PROPOS MILTON'S PARADISE LOST¹

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It is an honour to be asked to give the Denning Lecture and I must confess from the outset that I can never do justice to such a great man and jurist. I say that not out of modesty, being conscious of his great legacy, but also because I was fortunate enough to meet him, talk to him in extenso on several occasions, and even had the privilege of holding a chair that once bore his name. I shall return to him briefly at the end of this short talk but first I must explain here why I chose tonight's subject.

Having spent the last three years or so working on my latest volume on the German law of Obligations written for an Anglo-Saxon legal audience in mind the temptation was to take something out of that unending research project and turn it into tonight's lecture.² But Sir Martin Nourse, to whom I owe tonight's honour and to whose judgment I have always deferred, asked for a wider theme that could appeal to an audience not only of lawyers. What better way to achieve this than by connecting some random thoughts on law and literature? Given my chosen theme, Milton's Paradise Lost seemed an obvious choice allowing one to compare not only substance but also style in law and literature.

¹ Even non specialists – and I include myself in this group – know that the literature on Milton is enormous. They also know that in Paradise Lost his account derogates from Genesis as well as containing seeds, developed more fully in other works of his, of religious deviation from established doctrine. To reflect all this accurately as well as his political views in a lecture of this kind would produce a text unsuitable for the text of the Denning Lecture addressed to an educated but not specialist audience. It was delivered at the Old Hall of Lincoln's Inn on November 22nd, 2006 at the invitation of the Chairman of the Denning Society, Sir Martin Nourse PC.

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² The first volume entitled *The German Law of Torts: a Comparative Treatise* is now in its fourth edition (2003); the second *The German Law of Contract: a Comparative Treatise* is now in its second edition (2005). These last editions were co-authored with three favourite pupils – the first with Professor Hannes Unberath, the second with professor Hannes Unberath and Dr Angus Johnston – who I hope will maintain these works of love in the years to come.

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I. THE TREATMENT OF THE VILLAIN IN ART

(i) *Predetermined Summary Punishment*

Art often follows the (contradictory) biblical texts, which tend to impose a predetermined punishment in a summary way. To any contemporary jurist this is harsh; and it becomes totally repugnant when one considers with little short of amazement the severity of penalties envisaged by texts such as Leviticus³ and Deuteronomy.⁴ These, it must be remembered, are not ordinary laws but laws given to man by his God. This is an aspect of the problem that these great works of art raise but few if any seem to have addressed them in any great detail. To the extent that I am aware of, this is, indeed, true even of the huge literature generated about *Paradise Lost*, even after the re-orientation this discussion received following the appearance of the seminal monograph *Surprised by Sin* first published in 1967 by Professor Stanley Fish, now of Duke University in the USA.

The expulsion from Eden offers an example. Genesis suggests that a kind of legal procedure was followed before the expulsion took place.⁵ No lawyer could fault what is there stated. For Adam and Eve are 'summoned' to a hearing, told what they stand accused of, and given a chance to explain their behaviour. Fortescue J used this example in *Dr Bentley's case*⁶ as an illustration of the antiquity of the *audi alteram partem* rule, incidentally, underscoring the link between law and (religious) literature. But complaints, naturally by lawyers, have also been voiced why the same was not done in the case of the serpent since, at the time, he was empowered with miraculous powers of speech.⁷ The objection, as much as the explanation offered for the omission – that God being omniscient knew that the Serpent had transgressed willfully – is too 'religious' in its logic to warrant further legal discussion. That religious texts are often subject to hermeneutical rules of their own cannot be doubted; and possibly lawyers should be slow to extend their own reasoning to these texts. Still, if the objection about the different treatment accorded to the serpent is of any interest, it is because it suggests that different 'accused' were treated differently.

³ 21.13: death for homosexuality; 21.15: death to those who rape animals.

⁴ 22.22-4: death for a woman guilty of adultery; 21.18-21: death by stoning for a son denounced by his father as "stubborn and rebellious".

⁵ 3.9-24.

⁶ (1723) 1 Stra 557.

⁷ R P Croom-Johnson and G F L Bridgman (eds) *Judge Pitt Taylor's A Treatise on the Law of Evidence* (London: Sweet and Maxwell, 12th edn, 1931), 2nd vol, note p 1095.

The standing of the *audi alteram partem* rule in divine justice is dealt a more serious blow by other biblical texts; and they convey a different picture. For in Saint Matthew's account of the Last Judgment, Christ suggests that punishment and salvation come before those who are judged can say anything;⁸ and in Daniel V we are told that the moving finger, which wrote on the wall the damnation of Belshazzar, the soon-after deposed King, was given "no summons, information of the nature of the complaint, or opportunity to answer."⁹ The religious texts thus remain ambiguous as to what extent the notions of divine procedure would satisfy the tenets of its earthly counterpart.

That the violation of God's command had a predetermined, fixed consequence (whatever its severity) is also an indication that discretionary justice does not hold much attraction to those who administer justice in Heaven. Asking Adam to explain why he ate the forbidden fruit, could thus not, and indeed did not, have any effect on his sentence. Genesis makes this clear in 2.17.¹⁰ The significance of observing the *audi* rule is thus diminished. One explanation given for even asking Adam to explain himself was that; but in asking Adam to defend himself God was merely intending to elicit from him the statement that it was the snake who had "beguiled him," thus laying the foundations for a promise of redemption. But if God is omniscient, surely he knew this, too. In legal terms one could just about stretch this promise of future redemption to make it sound something like a future pardon; but again, it destroys the aesthetic and religious content of these texts to read them in legal ways so, suffice it merely to stress that they suggest some basic differences between divine and human justice.

Much of this rigidity is echoed in the later literature of the Fall of Man. In Milton's *Paradise Lost*, God, himself, makes the above points abundantly – "sternly" is Milton's word – clear to Adam when he tells him:¹¹

"The day thou eat'st thereof, my sole command
Transgressed, inevitably thou shalt die."

The penalty is thus clear; it is unique; and it is very severe. Mitigation pleas are not allowed; nor does the judge/God seem to care about the summary way in which it is imposed, for it is all part of what He has foreseen having endowed man with a free will and what He has predetermined.¹² The

⁸ Matt 25, 31 ff.

⁹ R F V Heuston *Essays in Constitutional Law* (London: Stevens & Sons Ltd, 2nd edn, 1964) p 185.

¹⁰ "But if the tree of the knowledge of good and evil, thou shalt not eat of it; for in the day that thou eatest thereof thou shalt surely die".

¹¹ VIII 329-330 (my italics).

¹² It is all set out clearly in Book IV.

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opinion of the Supreme Judge is thus pronounced *ex tempore*, for He needs no time to reflect on the convincing nature of the defence: He has made His mind up long ago on what will happen, having Himself foreseen the events leading to the Fall and set the penalty in clear terms.

Yet in the Miltonian version of these dramatic events a 'defence' of sorts is offered to the culprits. It could be seen as an artistic 'twist'; better, part of the effort to "justify the ways of God to man." In this sense it is, to put it bluntly, part and parcel of the effort to improve further the image of the 'Son' since this 'mediation' is in derogation to what is said in Genesis as the latter is silent on this point. Indeed, towards the end of the poem, where God, after Man's Fall, delegates his judicial powers to the Son, he says:

"But whom send I to judge them? Whom but the
Vicegerant Son, to thee I have transferr'd
All Judgment, whether in Heav'n, or Earth, or Hell.
Easie it may be seen that I intend
Mercie colleague with Justice, sending thee
Mans Friend, his Mediator, his design'd
Both Ransom and redeemer voluntarie,
And destin'd Man himself to judge Man fall'n."¹³

But that is the "image," not the reality (at any rate at the time of Adam's trial). For at that stage at least, there is little sign of 'mercy'; and the 'defence' the Son offers on behalf of the 'Fallen,' is not only brief – twenty-three lines – but also expressly limited to mitigating the sentence, not avoiding it or reversing it.¹⁴ But, in keeping with the inflexibility and previously decided nature of the sentence, God's reply to the request that Adam *not* be expelled from Paradise is curt:

"But longer in that Paradise to dwell
The law I gave to nature him forbids."¹⁵

Of course all this may be explained by reference to what is said in Book Three: for God, making man free and also foreseeing that he will be seduced by the devil, ordained a long series of sufferings which will not be ended until someone else comes forward to offer himself as sacrifice to expiate the

¹³ X 55-62.

¹⁴ "Let him [Adam] live
Before Thee reconciled at least his days
Numbered, though sad, till death his doom (which I
To mitigate thus plead, not to reverse). [XI, 38]

¹⁵ XI 48.

primordial sin. It is, indeed, at this stage that we get a glimpse of God's plan, his giving man free will, his (God's) relationship with the Son, and the latter's selfless character as he offers to sacrifice himself to save man. Indeed, the way this is uttered (in quiet, firm, and most effective monosyllables)¹⁶ represents, in my view, one of the few examples of 'deity' being represented in this poem as attractive. Yet, once again, the language used still makes one wonder about Milton's feelings as an artist. For, as Mr Balachandra Rajan put it many years ago:

"(...) (T)he spare precision of the language Milton gives him [the Son] is lit only seldom by the ardour which should inform it. Clothed in the language of Ezekiel's vision his [the Son's] triumph over Satan must have its moments of majesty, but it remains a moral rather than poetic victory."¹⁷

So how the Son will, in the postlapsarian world, combine justice with mercy remains to be seen.

(ii) The Punishment is Severe if not Excessive

The punishment is severe. The Fall from Heaven is caused by disobedience of one single command. How can the violation of one rule have such catastrophic consequences? Lawyers would find this difficult to comprehend and even more difficult to justify. But religious hermeneutics operate in a world of their own, incomprehensible to the un-initiated or disbelievers! Milton thus sees in the violation of this prime command "distrust in divine veracity," "proportionate credulity in the assurances of Satan," "unbelief," "ingratitude," "insensibility to the fate of offspring" of our first parent, "patricide," "theft," "sacrilege," and "deceit." The list is still longer.¹⁸

Not only is the punishment excessively severe; it is also the same for all offenders. The accessory (Eve) will get the same treatment as the principal offender (the snake) as will Adam, at one removed again from the main culprit. It is noteworthy that this point, inevitably raised by lawyers, has also crossed Milton's mind when, in the "Foresake me not thus, Adam" speech,¹⁹ he makes Eve develop the idea of 'graded' sin, hers being heavier than Adam's:

¹⁶ III 144 ff.

¹⁷ *Paradise Lost and the Seventeenth-Century Reader* (London: Chatto and Windus, 1947, reprinted by Ann Arbor: University of Michigan Press, 1967) p 107.

¹⁸ *The Works of John Milton*, xv, 181-3.

¹⁹ X 913 ff.

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“Both have sin’ed, but though
Against God only, I against Good and thee,
And to the place of judgment will return,
There with my cries importune Heaven, that all
The sentence from thy head remov’d may light
On me, sole cause to thee of all this woe
Mee mee onely just object of his ire.”²⁰

Eve addresses this plea to Adam, though we must assume that God, being omniscient, is aware of its content. If He is, it seems to make no difference. So, could someone else raise it as a defence? As already mentioned, in the Milton poem only the Son seems inclined to plead the case of the Fallen; but he fails to raise this point altogether. Notwithstanding the moving lines of Eve’s soliloquy, her plea, once again, falls upon deaf ears.

Nor is there is any clue as to how old Adam and Eve were when they disobeyed the divine ordinance; but neither is there any indication that youth (or, come to that, any other mitigating circumstance) could soften the pre-ordained sanction. I need hardly add that such rigidity of religious justice is not one that commends itself easily to contemporary lawyers.

The punishment also seems to be oblivious of any need for proportionality. The old Mosaic law “an eye for an eye and a tooth for a tooth” could, one might argue, be seen as embodying some idea of proportionality; but it is not only barbaric; it is also a rule that encourages the wronged victim to take the law into his hands. To be sure, one can oppose to this argument that such conduct was tolerated two or more thousand years ago. But this does not mean that such rules have any appeal in today’s civilised systems.

In the biblical texts punishment thus often degenerates into a form of vengeance. Allusion has already been made to an extract from the Ten Commandments where the sins of the fathers are visited on the children and the children’s children. This, too, would not pass muster in the world of law; nor would its vengeful language, emphasized by the Lord stressing that He is “a jealous God.” Likewise, when the world is found to live in sin it is flooded, all but one man and his pairs of animals having been decreed to drown. The attempt to separate the sinners from those who were not (or less) guilty was, clearly, not even considered, reminding one of the action of the Papal Delegate who ordered that the cathedral at Bézier be torched, killing all inside and trusting that God would then find (and reward) his own among the burnt bodies.²¹

²⁰ X 927.

²¹ Caesarius de Heisterbach, quoted in extract in Coulton C G (ed) *Life in the Middle Ages* (Cambridge: Cambridge University Press, 1967) pp 67-68. True to Christian tradition, the Abbot of Cîteaux who gave the orders of the massacre was,

Once again, the Supreme Judge is portrayed as the Rex Tremendus of the Requiem. To a lawyer, he also appears to allow Himself to exercise His powers to excess. The same power is also awarded to those doing justice on His part. Solomon's famous decision to allocate the disputed baby²² is preceded by his decision to have the baby 'divided in two' – that is, effectively, killed. Whether he would have carried out this threat, had not the 'good' contender acted the way she did, we will never know for sure. That the threat could be made is, however, a fact if we are to treat the sources as describing a real event. To modern eyes, this is hardly a way of 'doing justice,' even if it amounts to a gable that, in the end, paid off. But it provides us not only with an example of divine justice being harsh justice; it also shows that what, at the time, was seen as proof that God had truly endowed Salomon with wisdom can nowadays be seen as an example of 'male chauvinist' behaviour. One thus does not have to share modern feminist sentiments to see in this famous incident – probably the first major recorded history of a legal trial – another illustration of the point made repeatedly in this essay viz. that what may appear as just and brilliant to one age may be seen as biased and improper by another.²³

To sum up, the incidents of 'divine' or 'divinely inspired' justice do not lend themselves easily to a contemporary legal analysis and, possibly less so, to approval. Probably, this is in part due to the fact that they do not provide lawyers with all the facts they need to exercise their professional judgment.²⁴ Possibly, they also echo values and ideas which hold out less appeal to our generation than they did to others. Thus, in many cases, the only way a lawyer can be restrained from applying his principles to condemn such decisions is by being asked/ordered 'to believe but not probe' on how divine justice works. No true lawyer can do this easily; yet this is what the Christian religion asks its followers to do: not to raise questions.

subsequently, promoted to Archbishop of Narbonne while Pope Innocent III, known often as the Great, rejoiced that, through this incident, God had "enabled as many as possible of the faithful to earn by their extermination a well-merited reward." Today's lawyers might have been tempted to think in terms of crimes against humanity! Whose attitude is better? That is not the point. More to the point is that a particular conception of justice and behaviour, lauded eight centuries (or more) ago, would be condemnable by all today.

²² 1 Kings 3:16.

²³ For a feminist interpretation of this famous incident, see Professor Ann Althouse "The Lying Woman, The Devious Prostitute, and Other Stories from the Evidence Casebook" (1994) 88 *Northwestern University Law Review* 914.

²⁴ To my knowledge the most balanced (and intriguing) legal interpretation of this instance of Solomonian justice can be found in Professor L H LaRue "Solomon's judgment: a short essay on proof" (2004) 3 *Law, Probability and Risk* 13.

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(iii) The Passage of Time and its Effect on the Interpretation of the Law

The religious texts are replete with examples of severe punishment imposed for a wide variety of offences.²⁵ But though these texts were 'handed down' or written over a long period of time, their self-confident wording suggests no awareness of the need to adapt either their wording or their interpretation. Rabbinic interpretation may flesh out details; but much of the original rigour seems to stay alive.

Not only are the religious texts timeless; we are made (indoctrinated?) to think that so, too, are the underlying moral values. Clearly, there must be some merit in the idea that values, at their core, cannot be changed or, at least, changed rapidly and in a capricious manner. But change there must be, for everything, or so it seems to me, is subject to this inevitable law of nature. Those, especially on the religious/conservative side, must surely dislike this idea of flexibility or change or relativism, in which I, for one, find some appeal. But then let us not forget that 'adultery,' figuring prominently in the Ten Commandments, was, traditionally, understood to include unmarried sex and even excessively passionate relations between married persons. Though some, Leo Nikolayevich Tolstoy for instance, tried to retain this wider meaning as late as the 19th century Russia²⁶ (while himself shamelessly violating this same Commandment) the meaning of the word (and, I assume, the biblical Commandment) has now moved closer to the legal meaning of the word. Is this not an evolution brought about by time? And if it is possible here, is it not also possible to accept the need to weaken some extremely harsh pronouncements on homosexuality found in, for instance, Leviticus?²⁷ I am, of course, conscious of the fact that many, more highly trained in the art of interpreting religious texts, can come up with a host of objections, convincing or not. Equally, it should not be taken as granted that the author feels any personal sympathy for this predilection. But the point that has to be made is that personal neutrality or even antipathy should not be translated into moral condemnation, let alone into illegality.

²⁵ For instance Exodus, 21.

²⁶ In his *Kreutzer Sonata*, published in 1889.

²⁷ Leviticus 21:13. It is, for me, particularly interesting to see that this 'move' towards a 'different' approach to the problem can be found as early as in Dante's Hell – Canto 15 and 16 – where, though homosexuality is condemned by the very Christian poet, it nonetheless receives a compressed and nuanced treatment that does not tally with earlier religious understandings. After all, Dante is guided to his redemption by Virgil; and it is in his second Eclogue that we find the shepherd Corydon yearning for the lovely Alexis. I see this treatment of homosexuality by Dante as providing early signs of the 'spring' of humanism or, to put it slightly differently, the beginning of the return to classical antiquity.

Law adapts; and modern courts have often stressed the need to retain such flexibility. These religious texts do not. More importantly, they have no justification, where they are still found to apply horrible mutilations and harsh forms of execution. And let us not forget that some of the harsh punishments found, for instance, in Deuteronomy²⁸ are also imposed in our times in Islamic countries by Sharia courts. So one is not here talking just of Old Testament notions of justice (mitigated or not by Christianity or Rabbinic interpretation); one is talking about the usual inherent rigidity found in religious systems and their rules, of whatever faith.

To adapt and change is difficult; the older the person (or civilisation or legal system), the greater the difficulty. To make a change, one must not only be realistic; one must also know how to forget and re-learn. The point I wish to make was well encapsulated in a short sentence by the Nobel Prize laureate Boris Leonidovich Pasternak when he wrote that sometimes in life

“It is more important (...) to loose than to acquire. Unless the seed dies it bears no fruit. One must live tirelessly, looking to the future, and drawing upon those reserves of life which are created not only by remembrance but also by forgetting.”²⁹

I have italicised the words which I find interesting (indeed intriguing), for this, I think, is what is needed. That is to learn to ‘forget’ precepts instilled in one in early life and to learn how to re-phrase them and re-evaluate them – *always within measure and with conscious self-restraint* – in the face of a changing society. Certainly, this happens in the law all the time, though as stated repeatedly, such a task is – and should be – undertaken by society only incrementally and with due deliberation. So, changing times must lead to new understandings of old texts, crimes, and punishments.³⁰ Changes in prevailing

²⁸ 22:22-24; in Nigeria and other Muslim countries women have thus been stoned to death for adultery.

²⁹ “An Essay in Autobiography” reprinted in *Poems 1955-1959 and An Essay in Autobiography* (London: Harvill Press 1990) p 39.

³⁰ In the context of imposing the sentence of life imprisonment the German Constitutional Court put the point beautifully when it said in BVerfGE 45, 187 at 229: “With all this, one must not lose sight of the following: Human dignity is something that cannot be disposed of without more. Insight into what is required by the obligation to respect it cannot be separated from historical development. The history of the practice of criminal law shows clearly that most cruel methods of punishment were replaced by milder penalties. Progress leading from crude to more human, from simpler to more differentiated forms of punishment has continued, with the distance yet to be covered becoming clearly recognisable. Any judgement on what [which treatment] accords with human dignity can therefore rely only on the present state of knowledge and insight, and cannot rightly demand to be considered valid timelessly”.

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morality must thus, in the end, be reflected in the law for otherwise those who apply the law – be they juries³¹ or judges – will find ways not to apply the law. Even religious writers of a conservative ilk are prepared to accept this. Thus, Professor C S Lewis expressed this in the following terms:

“The law must rise to our standards when we improve, and sink to them when we decay. It is a lesser evil that the laws should sink than that all judicial procedure should become a travesty.”³²

This is particularly true when interpreting ‘constitutional’ documents – and I use the word here widely and not technically – which, as Lord Bingham so convincingly told us in a marvelous dissenting judgment on the death sentence, should not be interpreted as if they were charter-parties.³³ And this, widely accepted, view is crucial for the constitutional soil all other laws draw their nourishment. The importance of taking change into account here is doubly crucial. Crucial, first, in the sense of agonising over the issue which is causing nowadays so much pain to American judges, namely, whether they can, themselves, attempt to give effect to such a change or whether they must leave it solely to the elected representatives. But the agonizing is also crucial because often the basis of these legal changes depends upon ‘accepting’ changes in underlying moral issues. The death sentence issue is such a problem; and in one sense takes us back to the issue whether ‘humanity’ can and should challenge the idea of retribution and ‘just deserts.’³⁴ But other phenomena, such as suicide, abortion, homosexuality, or adultery are issues which have strong moral roots which may no longer be able to support particular legal outgrowths. It seems to me that in all these instances, the currently accepted legal solutions have moved away from original moral precepts on which, however, sections of the Christian Church have shown a lesser ability to adapt.

³¹ See, for instance, the jury verdict in the Pontyn case the details of which can be found in the following BBC file:
http://news.bbc.co.uk/onthisday/hi/dates/stories/february/16/newsid_2545000/2545907.stm

³² “Sex in Literature” published in the Sunday Telegraph, No 87 (30 September 1962) and reprinted in Lesley Walmsley (ed) *C S Lewis Essay Collection: Literature, Philosophy and Short Stories* (London: HarperCollins, 2002) p 71.

³³ *Charles Matthew v The State* [2004] 2004 WL 1372517 at p 8.

³⁴ In a famous “death sentence” case the South African Constitutional Court, which decided against the legality of its imposition, referred to the idea of a forgiving society as a factor to be taken into account when deciding the issue before it. Thus see *The State v Makwanyane and Mchunu* (Case No. CCT/3/94 of 6 June 1995).

(iv) *The Lack of Appeal, Even in Theory, Against the divine Sentence*

Once imposed, the divine sanction is final. This, too, cannot commend itself to the legal mind. No doubt, the sole explanation for this must be that the chances of the Supreme Judge making an error are nonexistent. But what of the tendency already mentioned to over-react and make others, besides the prime culprit, suffer?

In the end, none of this counts and the ‘fall’ from Heaven is complete and irreversible. In the very distant future, and thanks to the Son’s (subsequent to the events described here) self-sacrifice, the condemned will be summoned by the sound of a trumpet to present themselves in order to be re-judged. But that will take a very long time. That is as close as one ever gets to an appeal in the system of Divine justice. In the meantime, and if the scriptures are to be relied upon, we seem to have only one human being who has ever made it to Heaven, and he is a most unlikely person: the robber who was crucified with Christ at Golgotha.³⁵

The system clearly does not believe in ‘carrots and sticks’ but only sticks. To me this is obvious in the stern expression of the old man depicted on the ceiling of the Sistine Chapel as he famously stretches his hand out and ‘transmits energy’ – life – into the lethargic, still lifeless, body of the beautiful young man.³⁶ But then ‘stern’ may be the wrong adjective, though ‘joyful’ is not the word one would use either. Austere might, in the end, be the better term to describe God’s expression, reflecting the intensity (and concentration) of ‘creation.’³⁷ Yet, is this not, again, an instance of a man – Michelangelo – ‘divinely’ interpreting the text of Genesis? For all that the latter says is that when God reached the end of his busy week he stood back and felt satisfied with what he had accomplished. Once again, therefore, it is the artist who has created (and tried to improve) the enduring image, not the revealed text.

³⁵ Luke 23.43. Interestingly enough Matthew totally ignores the incident, whereas the remaining two Evangelists, Mark and John, merely mention that the robbers joined the crowd in hurling abuse at Christ.

³⁶ The late E H Gombrich, in *The Story of Art* (London: Phaidon, 11th edn, 1966, reprinted 1967) at p 227, talks of life entering the “beautiful body of vigorous youth.” The lawyer’s mind, duller than that of the art historian, needs proof to be convinced, and I see none in either the depiction of the creation or in the story of life in Eden to suggest ‘vigour’.

³⁷ Dr Northrop Frye, analysing the Miltonian texts, comes close to the same ideas when he states that these texts “suggest that we ought to revise our conception of creation: it is not so much imposing form on chaos as incorporating energy into form” See *The Return of Eden: Five Essays on Milton’s Epics* (London: Routledge, 1966) p 52.

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II. THE TREATMENT OF THE VILLAIN IN LAW

(a) Better Treatment for the Accused

However base, nasty, uninspiring or downright evil they may be, the law will treat its villains better than Divine justice does its own. The striving for fairness is not only real; it must also be seen to be made to look fair and efficacious, avoiding at all cost any idea of a 'fixed trial' or, as theologians might put it, 'predestination.' The punishment of the villain will thus come after a properly regulated and publicly held trial. The sinner's degree of fault will be taken into account and his punishment made commensurate with the crime. The death sentence is now prohibited in the vast majority of nations even in the case of treason, which must be the closest equivalent to Adam's crime.

(b) Taking into Account his Personal Characteristics

The offender's personal characteristics (and those of the class to which he belongs) will be looked at in order to mitigate his sentence. In *Roper v Simmons*,³⁸ America's most recent and important death sentence case, the age of the murderer at the time of his truly heinous murder constitutes a major reason for not imposing the death sentence. Delivering the judgment of the Court, this is how Justice Kennedy put it:³⁹

“Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” (...) It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behaviour.” (...) In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. (...) The second area of difference is that juveniles are more vulnerable or susceptible to

³⁸ 125 S Ct 1183 (2005).

³⁹ *Ibid*, at 1195.

negative influences and outside pressures, including peer pressure.⁴⁰ This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.⁴¹ The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. (...) These differences render suspect any conclusion that a juvenile falls among the worst offenders.”

This brief extract represents, in my view, the essence of the majority’s objections to the imposition of the death penalty even though some of the dissenting judges expressed severe doubts as to whether this expert evidence was convincing and even though it was the Court’s invocation of foreign law that attracted the most venom from those opposed to the actual result.⁴² Likewise, in the earlier case of *Atkins v Virginia*⁴³ the Court decided (on similar but also different⁴⁴ arguments) that the death sentence should be deemed a cruel and unusual punishment given the “evolving standards of decency.”

(c) Remission of the Sentence

This is possible in most systems after it has been imposed and partially served. For legal systems find much value in the idea that one should take into account subsequent repentance and good behaviour, and this for many reasons. To be sure, some incidents of early release have attracted, in Britain and elsewhere, considerable outcry, especially where the (prematurely) released offenders re-offended again. Yet this should not be blamed on the notion of remission as such but on the way it was exercised by those given the statutory power to order such releases.

⁴⁰ “[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” See *Eddings v Oklahoma*, 455 US 104, 115 102 S Ct 869 (1982).

⁴¹ “[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.” See Steinberg & Scott “Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty” (2003) 58 *American Psychologist* 1009 at 1014.

⁴² For instance Justice Scalia, above n 38, 1126.

⁴³ 536 US 304 (2002).

⁴⁴ A crucial difference between *Atkins* and *Roper* was the change of mind evidenced by State legislators on the issue at hand. Many more State legislators had abolished the death sentence for mentally retarded persons than for juveniles. Justice O’Connor and Justice Scalia for the dissent were both keen to point out this difference between the two cases.

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By contrast, and as stated, the Divine sanction can not be altered for good behaviour. Rigidity once again is valued more than flexibility. God – certainly the one of the Old Testament – does not forgive or bend; and artists (such as Mozart) who consign the hero to the flames of hell from which there is no return are, as we suggested earlier on, compelled by the conventions of their times to do so. As already stated, this need was felt so strongly and was accompanied by such pressure to convey this final message clearly, that the concluding (admittedly rather lame) sextet written for Don Giovanni was not, for a long time, performed, and even nowadays tends to be omitted from contemporary productions. The final damnation must thus be the last image imprinted in the audiences' minds.

Exceptions, however, do exist in literature; and, perhaps, it is not surprising that it is Goethe, so anxious in his life and work to reconcile Christian and pagan, Western and Eastern thought,⁴⁵ who makes Margareta forgive Faust and thus assist his final salvation. For he, too, has committed murder, yet somehow its clear that it is not murder in the first degree since Mephistopheles 'paralysed' Valentin's hand at the critical moment of the duel. But in divine justice forgiveness seems to be ruled out by definition; though millennia later, God's Son incarnate will advise His own disciple Peter that man must learn to forgive seventy times seven.⁴⁶

(d) Continued Concern for the Wrongdoer's Rights

The legal process goes on caring about the wrongdoer's rights – some would in fact say too much, and at the expense of those of the victim. The molester's interests are invoked to give him a 'human' aspect and bring about his protection against wrathful vigilantes. Even after he has come out of prison the law continues to be concerned about the preservation of his anonymity in order to prevent vengeful (or concerned?) citizens taking the law into their hands and seeking to impose their own punishment on the molester. It is only because he is seen as remaining a real threat that, in the end, the disclosure of his identity is allowed to certain persons. This very laudable attempt to weigh the competing interests takes much courage from our judges who end up not being praised but pilloried by the tabloid press.

⁴⁵ This desire is seen in many of his poems but, mainly, in his *Der West-Östliche Divan*, a collection of exuberant poems inspired by the reading in his later life of the work of a medieval Persian Poet, Hafiz, which led him to the idea of trying to build bridges across the cultures of the East and the West.

⁴⁶ Matt 18 22.

(e) *The Balancing Process of Legal Reasoning*

This could, for present purposes, be the last difference between Divine and human justice, and in law it takes two forms. The first is that a court of law is often asked to balance competing values before declaring a bad act condemnable. Secondly, it differentiates carefully and subtly between offenders.

The first goal is shown clearly in the case of *Kaye v Robertson*.⁴⁷ We may not like the idea of privacy being sacrificed to free expression; and we could sensibly propose a better way of balancing these competing interests. But the attempt is, at least, made; and if it does not always produce the best results this is not because the aim is not worth the effort but only because the line was drawn, as lines often are, in the wrong way.

The balancing process is seen even more clearly in the *Bulger* case notwithstanding the repeatedly stressed heinous nature of his murder. For this to happen, resort is had to national and international texts, evidence is weighed carefully, and legal principles such as that of proportionality are closely scrutinized before the scales of justice are finally tipped in favour of granting eternal anonymity to the murderers. Frankly, this balancing process can, especially in Common law judgments, take up more space than I, for one, believe is necessary. Yet this detail also reveals the care taken as well as the merits offered by *ad hoc* weighing of the arguments, including the need to re-integrate into the fold the human being who has left society.⁴⁸ The Common law judgments, longer and more explicit than their civilian counterparts, may also help reveal the attention given to every aspect of the case by judge and counsel alike.

Once again, Christian or artistic justice has few such counterparts. One has to go back to the ancient Greek tragedy and find, again, the Pagan God's ability to appear at the critical moment and tip the scales in *favour* of the accused. This invention of the device of *deus ex machina* is thus not only a brilliant theatrical invention of Aeschylus which enables him to bring a tangled plot to its conclusion in his *Orestia*; it is one which involves the god –

⁴⁷ *Kaye v Robertson* [1991] FSR 62.

⁴⁸ That this value is, once again, appreciated by the ancient Greeks can be seen from the Odysseus myth. For though the resourceful (polytropos) hero is given by Calypso the chance – indeed the rarely awarded honour – to become a God and to live in Oxygia in eternal sensual and luxurious immortality, he chooses, instead, to return to the role of husband and father and king of a small kingdom. In his *Inferno*, Canto XXVI, 90 ff, Dante attributes this to Odysseus's restless urge to travel and explore the world. But though Odysseus is a restless person – how many great achievers are not? – he cannot, I think, be accused of 'travel lust' for if there is one constant and transparently expressed theme in the *Odyssey* it is his desire to return home.

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in the instant case the goddess Athena – not only to intervene in favour of clemency but, through bargaining,⁴⁹ transform the Erinyai, relentlessly pursuing Orestes, into the Eumenides. This result, which leaves everyone as happy as can possibly be, is brought about by the same pragmatic goddess who so favoured that archetypal Greek hero – Odysseus – because he was so intelligent and so human, warts and all.

The second point worth making here is even more obvious in law, both criminal and civil – yet, again, divine justice seems to ignore it and lump all offenders together. Thus, in the book of Revelations we are told that:

“But the fearful, and unbelieving, and the abominable, and murderers, and whoremongers, and sorcerers, and idolaters, and all liars, shall have their part in the lake which burneth with fire and brimstone: which is the second death.”⁵⁰

How much more human and also more convincing is Dante who, while placing all of the above in Hell, makes them inhabit different circles in a manner more suitable to the gravity of their offence. But it took the Middle Ages to invent, despite their deep spirituality, the idea of *iustum contrapassum*.

CONCLUDING THOUGHTS

I would like to end not by summarizing the two approaches of human and divine justice by looking at them in juxtaposition for, in a sense, I have done that already. I would, instead, like to bring out the human element in litigation and thus end, as I began, by paying tribute to one aspect of Lord Denning's legacy: putting literary style to the service of humanity which survives – in his judgments at least – even in the dry, cerebral, and adversarial environment of a real trial.

My point is simple: literary texts invariably outdo in beauty and expressive power the legal counterparts. Exceptions are rare. In the USA Justice Cardozo springs to mind; in this country Lord Denning must hold a special position. But there is more in his language than beauty. For the way we describe his character can tell us or conceal much about how the author saw him. Milton's attitude towards Satan has been famously controversial; and I belong to the Shelley, Blake and Byron club who think he comes out of this epic poem rather well. But language can tell us more about how the writer feels

⁴⁹ This bargaining which takes place between ancient Greek gods – an early version of alternative dispute resolution? – is often based on flattering the opposing god. That is how Zeus finally settles the fate of Aeneas with his wife Hera.

⁵⁰ 21.8.

about the people he is dealing with. It can also conceal the substantive arguments that lead the author/writer/judge to save him or damn him. In *Beswick v Beswick*,⁵¹ a famous Denning judgment, we see this most clearly.

For the sake of non-specialists in the audience may I say that the case concerned a sale of a business owned by Mr. Beswick to his nephew in exchange for the later paying a small amount of money per week to Mr. Beswick and a lesser amount to his widow if she survived him (which she did by about one year after the contract was concluded). After Mr. Beswick's death, the nephew refused to honour his promise and the action by the widow (acting as administratrix of her husband's estate) failed at first instance. On appeal, Lord Denning began his judgment as follows:

“Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales and weights. He used to take the lorry to the yard of the National Coal Board, where he bagged coal and took it round to his customers in the neighbourhood. His nephew, John Joseph Beswick, helped him in the business. In March, 1962, old Peter Beswick and his wife were both over 70. He had had his leg amputated and was not in good health. The nephew was anxious to get hold of the business before the old man died.”⁵²

The simplicity of the language lulls you into missing its legal subtlety; but it is almost certainly part of a deliberate rhetorical strategy designed to win the audience over to the Denning view. For most of its appeal is emotional, not intellectual.

“Thus, Peter Beswick is routinely called “old Peter Beswick”. Which makes us both visualise him and pity him for his age... When “old” is used to describe him in a context that suggests the nephew's point of view, the epithet takes on a pejorative colouring: we tend to dislike the person who would view Peter as “old” in that way. John Joseph Beswick (note the formality of the tripartite name) becomes the “the nephew” – depersonalised, unlike Peter; he is rendered unrelated to Peter by the use of the definite article instead of the pronoun (“his”) which we might expect; he wanted to “get hold of” the business. Peter is made more personal and familiar to us by the evocation of his life and circumstances: “he had no business premises”; “all he had...”; he bagged the coal (himself, using his “scales and weights”); he “took it

⁵¹ [1966] Ch 538.

⁵² *Beswick v Beswick* (1966) Ch 538, [1968] AC 58.

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round” (not “delivered it”); his customers were “in the neighbourhood”. And, finally, he had his leg amputated.”⁵³

Could anyone hearing these opening words read out in court have any doubt where Lord Denning was going? And was he not siding, as he invariably did during his long judicial career, with the weak, the needy, or the oppressed?⁵⁴ Only if our imagined observer was a lawyer would he need to wait to hear more to discover the ingenious way the former Master of the Rolls found in order to achieve this ‘just’ result. And there is no doubt that, for him at least, this was not just the fair result but also the inevitable result. For, as he tells us a few lines further down, “If the decision of the Vice Chancellor truly represents the law of England, it would be deplorable.”⁵⁵

Though good argument has been known to change a judge’s views, I would be willing to take a bet that Lord Denning had made his mind up at a very early stage of this hearing; and this was in accord with the philosophy he manifested in all his judgments! The form of words he chose to use in his judgment supports, I think, my hunch.

Denning thus reminds us that form communicates. Persuasion is often involved with stylistic choice. Denning, like Milton, often pursued an agenda; and Denning like Milton knew how to paint the characters he admired to come out as also being likable. And he strove for justice which, by being so human may also have been preferable to the divine. Though Milton’s real aims in *Paradise Lost* remain hugely controversial, I belong to those who believe that the richness and ambivalence of his text, capable of supporting differing interpretations, is one of its greatest sources of strength.

So what a rich and fortunate life! Am I referring to Lord Denning’s? Of course. But to a much lesser extent, I am also grateful of my lot. For I was fortunate enough to meet him; to be enriched by his ideas, to be helped by his generous patronage; and now, thanks to the kindness of my friend Sir Martin Nourse, to be given the chance to express an inadequate but posthumous “thank you”. Lucky but also foolish (or perhaps courageous) to do it in a manner which, at first blush appears to be unorthodox; for it is anything but usual to argue that human justice may, at times, be better than divine justice. Yet Lord Denning’s mistrust for orthodoxy might, I suspect, have tolerated this indiscretion. For it praises modern justice for having become more sensitised to weaknesses, more tolerant of human differences, more eager to respect human rights. We are wrong to criticise judges at the drop of a hat for

⁵³ Dennis R Klinck ““Criticising the Judges” Some Preliminary Reflections on Style” (1986) 31 *Revue de Droit de McGill* 655 at 680.

⁵⁴ For which he was often criticised by academics obsessed by doctrine and often unable to match the judge’s sensitivity to changing times.

⁵⁵ [1996] Ch 538 at 550.

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doing that. We are wrong to criticise lawyers for being legalistic or rapacious while ignoring the service they render to society. We are wrong to argue that the justice system is now “the most remote part of the administration from the ordinary citizen”. We are wrong to undermine on a daily basis all our institutions. As the person who works more on foreign law and in foreign systems than anyone else in this room tonight, I can tell you how much of what we criticise so readily here is deeply admired abroad. But that is a matter for another lecture.