

CLASSIC REVISITED: PENAL THEORY IN *PARADISE LOST*

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PARADISE LOST. By *John Milton*. 1674. Reprinted in JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE. Edited by *Meritt Y. Hughes*. New York: MacMillan. 1985. Pp. xix, 1059.

INTRODUCTION

Milton's great poem can be enjoyed as a supernatural adventure story in the epic tradition—indeed almost as a science-fiction fantasy. An incredibly powerful supernatural figure—call him Father—lives on planet Heaven somewhere in outer space, surrounded by lesser supernatural beings, called Angels. Father begets Son asexually, and declares his intent to give him viceregal authority. Infuriated at Son's being promoted over him, the foremost Angel, L leads a third of the Angels in violent rebellion against Father and Son. At first it seems the rebels will best the loyal Angels. But Father sends in Son to defeat the rebels all by himself. He succeeds effortlessly, and packs them (now devils) all off to a dismal region of space, created by Father to be the devils' Devil's Island, called Hell. Father, having lost a third of his angels, and determined to complete L's humiliation, creates a new planet and places on it an (initially) immortal couple that he's created out of the dust on the planet's surface.

Father contrives to allow L to escape from Hell by choosing L's own daughter, Sin, and his incestuously begotten son, Death, to guard the gates of Hell so that L may travel through space to the new planet and there tempt the couple to disobey the one prohibition that Father has laid upon them—that they not eat the fruit of a mysterious tree. L succeeds in tempting them (as Father had, in fact, foreseen, for he is omniscient), and for their disobedience the couple is severely punished: they are deprived of immortality and, together with their posterity and with the entire animal kingdom over which they were to rule, they are condemned to lead a hard life, and then to die. But upon Father's challenge to all the (remaining) Angels to figure out a way to save the new race, Son offers to sacrifice himself to redeem them eventually and so cap L's defeat. Father accepts the offer. We learn that in a few thousand years he will impregnate a descendant of Eve with Son, so that Son can be born a member of the race, and die, as otherwise there would be

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no sacrifice. As a result of his sacrificial death, the worthiest members of the race will eventually become immortal companions of Father and Son (resurrected), like the Angels. The new planet will then be destroyed, Hell sealed forever, and L utterly confounded.

So viewed, the poem is squarely in the epic tradition that, as in Homer, depicts human beings as the playthings of the gods. In form, style, and even certain narrative details, it is greatly indebted to the Homeric epics as well as to later epics such as *Orlando Furioso* and *The Faerie Queene*. It tells the heart-stopping story of a galactic power struggle between a tyrant fearful of rebellion, determined to exact unquestioning obedience at any cost (the great literary critic William Empson compared Father to Joseph Stalin¹), and a formidable rebel against the tyrant; and of the collateral damage that the struggle inflicts on a hapless race.² In the fairy-tale ending (projected beyond the end of the poem), the reader learns that all L's "malice serv'd but to bring forth / Infinite goodness, grace and mercy shown / On man by [L] seduc't."³ Man will live in a "far happier place / Than this of *Eden*, and far happier days" (XII, 464–65).

To tell such a story was not Milton's intention. He thought he was writing a theodicy in the form of a poem, rather than an adventure story, though employing the idiom of epic. His conscious purpose, as he says at the outset of the poem, was to "justify the ways of God to men" (I, 26). "God" is the Christian God as understood by most English Protestants in the seventeenth century. The "ways of God" that concern Milton are the events narrated in the Bible and therefore accepted by him as historically accurate, together with later accretions to the body of Christian beliefs. The key events are the creation, and especially the Fall of man as narrated in *Genesis*, the story of Jesus Christ as narrated in the Gospels, and the last judgment as narrated in the *Revelation of St. John* (the *Apocalypse*). The Fall of man is sketched in *Genesis* with extreme brevity; Milton elaborates it enormously to form the core of *Paradise Lost*.⁴ But what is it exactly that Milton thinks needed to be justified? It is the features of the Christian tradition that would strike a skeptic or other outsider to the tradition as inconsistent with a "modern" conception of God. By "modern," we mean a conception that a person of Milton's intellectual sophistication and moral character would consider plausible. He would have considered neither ancient Greek and Roman

1. WILLIAM EMPSON, MILTON'S GOD 146 (1965).

2. Cf. PHILIP PULLMAN, HIS DARK MATERIALS (2000) (a contemporary trilogy indebted in more than its title to *Paradise Lost*, in which an epic battle rages across several worlds. On one side are God (called "the Authority") and the Church, defending the principle of obedience to dogma; on the other are those taking up the rebellion where Satan and the fallen angels left off, fighting for what they consider to be the superior principles of knowledge and experience).

3. I, 217–19. All citations to *Paradise Lost* are to book and line numbers in the Hughes edition.

4. Milton's choice of the Fall, rather than one of the other key biblical events, as the subject for his epic, may have been due to the unique resonance that the Fall had for seventeenth-century thinking about politics and to the sharpness with which it poses the question of individual freedom versus obedience to authority. See CHRISTOPHER HILL, THE EXPERIENCE OF DEFEAT: MILTON AND SOME CONTEMPORARIES 302 (Bookmarks 1994) (1984).

polytheism nor the vindictive and jealous God of the Old Testament plausible. He would have insisted that God is perfect, meaning omnipotent, omniscient (implying complete foreknowledge), and absolutely good—infinately loving and merciful, but also infinitely just. The task of justification was, therefore, to show how the events of the Christian tradition, to which Milton as a Christian was committed to believing as historical fact, could be squared with the conception of God the perfect.

The theme of justification explains why many readers, including theologians, have found *Paradise Lost* “legalistic.” There are no human laws in the poem, but there is plenty of punishment—of the fallen angels, of Adam and Eve and all their descendants, of the Son (who is going to be executed by the Romans during his incarnation as a human being), of the hapless serpent, and of the other animals (who become predator and prey after the Fall of man, after having been vegetarian in the Garden of Eden). To be justified, punishment must be shown to be the just consequence of a transgression. But that is not to say that it must be the just consequence of a violation of positive law. We have a conception of just punishment by parents for the transgressions of children, though in our society (and in Milton’s too), the punishment is not a sanction having the force of law and the transgression is usually not a violation of law. We can speak of justice within the family and similarly of justice in the cosmic prelegal society depicted in *Paradise Lost*. And since we are lawyers, punishment and justice will be the focus of this essay. Part I explains the difficulty that Milton faced in reconciling a concept of just punishment with the characteristics that he ascribed to God, and how he tried to resolve the difficulty by reference to free will. Part II examines the application of his concept of just punishment to the specific punishments meted out by God, identifying a retributive model for God’s punishment of Satan and the other fallen angels that has a secondary goal of deterring rebellion by the still-loyal angels remaining in Heaven; a rehabilitative and deterrence model for Adam, Eve, and their descendants; a strict liability model for the serpent; but no intelligible rationale for the punishment of the other animals in Eden, who were wholly uninvolved in the Fall.

I. GOD CONSTRAINED

The problem of justification is rendered acute by the difficulty of imagining a deity who is at once omnipotent, omniscient, and absolutely good, yet who at the same time inflicts what appear to be disproportionate, savage, and gratuitous punishments. Any two of the deity’s three traits can be combined without difficulty. If God were omnipotent and omniscient, but not good—rather, sadistic—the existence of excessive and gratuitous suffering in the world that he created would not be puzzling. And likewise if he were omniscient and absolutely good but not omnipotent (not the creator of all things). And if he were omnipotent and absolutely good, but not omniscient, then suffering might occur, even on a grand scale, by mistake. But when, as in *Paradise Lost*, God is assumed to be omnipotent, omniscient, and abso-

lutely good, the extent to which he permits and sometimes inflicts suffering presents a considerable puzzle.

Life on earth, for most people and animals, is full of suffering. This sad truth is presented in the poem, as in orthodox Christian theology, as the punishment for Adam's eating the forbidden fruit in the Garden of Eden. (Had Eve alone eaten it, God would presumably have given Adam a substitute wife, one who—warned by her predecessor's fate—would not have transgressed.) It seems a disproportionate punishment, especially when Satan, in the guise of the serpent, makes so compelling an argument for Eve's eating the fruit and Adam makes so affecting a "case" for standing by Eve and sharing her fate.

Satan explains to Eve that *he* ate the apple with no ill effect—on the contrary, it enabled him, alone of all the animals, to learn to speak (and in as rich a vocabulary as Adam and Eve). So God must have been fooling when he said that to eat the fruit would bring death—and imagine what eating it will do for the intellectual faculties of Eve, who already knows how to speak. At worst, given Satan's plausible arguments, Eve is gullible not to realize that the serpent might be lying to her (but who, in his or her prelapsarian inexperience, would expect an animal to lie or a devil to inhabit an animal?). And at worst, Adam is uxorious in deciding to share Eve's fate by eating the fruit also. For these rather trivial-seeming transgressions the suffering experienced by billions of Adam and Eve's descendants (as Adam puts it, "in mee all / Posterity stands curst" (X, 817–18)), along with countless billions of animals, seems excessive.

Peculiarly gratuitous is the punishment of the serpent, condemned to crawl on its belly. The punishment is fitting in *Genesis* because there the serpent is the tempter. But in Milton's poem the serpent is not the tempter. The creature was sleeping innocently when Satan entered through its mouth and took it over. After tempting Eve, Satan leaves the serpent's body, and presumably the serpent later wakes up and goes about its business oblivious of the malign use to which its body has been put. The serpent is a victim, not a wrongdoer, so why is it punished?

And why does the Son have to suffer being tortured to death on the cross in order to enable some fraction of human beings (no animals) to be resurrected and thus, in a sense, compensated for their sufferings? Empson thought there was an echo of human and animal sacrifice in the mode by which God chose to redeem the human race.⁵ In sacrificial rites the sacrifice is offered to the god in the hope that he will accept it. The Son offers himself as the sacrifice to God, and God accepts the offer.

The punitive events narrated in the poem are particularly disturbing, at least to one not steeped in theology, because of God's foreknowledge, an aspect of his omniscience. He knows that Lucifer will rebel and carry a third of the other angels with him; he knows that Lucifer (as Satan) will tempt Eve, precipitating the Fall of man—in fact, God arranges for Satan to escape from Hell so that he *can* tempt her; he knows that billions of people will

5. EMPSON, *supra* note 1, at 241–47.

suffer horribly as the result of the transgressions of the two human beings whom he created; and he knows that his own Son will be tortured on the cross. He foresees all these things with perfect serenity. It seems odd that being omnipotent and absolutely good (loving, merciful), he did not arrange to avoid these horrible events.

The explanation requires a careful analysis of what it means for God to be absolutely “good,” and an awareness of the supreme value that Milton’s God places on free will. To be good is to be loving and merciful, but also to be just. The New Testament emphasizes the loving and merciful aspect of God’s absolute goodness, the Old Testament emphasizes God’s justice, and Milton’s God combines both aspects. In the retributive theory of justice, justice requires that a crime be requited by punishment. But a crime, in the sense of a deed that justice requires be punished, is normally understood to be a *deliberate* bad act, and an act is deliberate only if it is a product of free choice, at least as Milton understood free choice. (An alternative understanding is that a free choice is simply a choice not constrained by certain particularly powerful inducements, such as threatening to kill a person if he doesn’t hand over his wallet to the threatener.) God could have created man to be incapable of committing bad acts, but man so constrained would not have been sufficiently godlike to be worth creating as a substitute for the fallen angels.

In other words, God faced a dilemma: he could make Eve a type of person incapable of being persuaded by plausible arguments or Adam a type of person who would have abandoned Eve to her fate. He could, in short, have imbued both of them with a robotically inflexible instinct of obedience to Father. But they would have been insipid creatures. As Adam, despite his misgivings, says to Eve when she insists on spending some time by herself: “Go; for thy stay, not free, absents thee more” (IX, 372). And when Adam says, “Idleness had been worse” (X, 1055) than having to work after expulsion from the Eden, is there not a hint that an immortal race of vegetarian nudists would lack a certain savor? Not that Milton would have acknowledged such a heresy, even to himself; but artists do not create with only their conscious mind or fully control their unconscious. Man was created “[s]ufficient to have stood, though free to fall” (III, 99) because without freedom to fall he would have had no will of his own.

We said that the three defining properties of the Christian God (omnipotence, omniscience, perfect goodness) cannot be combined; and what we have just seen is a slight buckling of divine omnipotence. God cannot be at once perfectly just and perfectly merciful, because perfect justice excludes mercy and perfect mercy excludes justice; nor can he create a worthy race that will be perfectly obedient to him; nor can he save them in a way that will preserve their freedom without sacrificing the Son. Adam himself notes that some things are impossible even for God, when he says,

How can he exercise
Wrath without end on Man whom Death must end?
Can he make deathless Death? that were to make
Strange contradiction, which to God himself

Impossible is held [to be], as Argument
Of weakness, not of Power. (X, 796–801)

Could God add two plus two and get five? Could he create a triangle whose interior angles would add up to something different from 180 degrees? The emphasis the poem places on the importance of divine punishment undercuts omnipotence. We punish those whom we do not otherwise control. We *must* punish to exact obedience precisely because those whom we punish are free to disobey. The distinctively “monarchical” punishment (in Michel Foucault’s sense) to which God subjects Satan reflects a typically monarchical anxiety about the ability to maintain order without extravagant displays of power.⁶ No one who actually had absolute power would need to remind his subjects of the fact.

The centrality of free will to just punishment and, therefore, Christian theodicy is brought out in C.S. Lewis’s brilliant exegesis of *Paradise Lost*, where he reminds the reader that in St. Augustine’s theology, as in Lewis’s own, everything that God creates is good by nature.⁷ God cannot (omnipotence buckling again) create something that is bad; that would be inconsistent with his being absolutely good. Bad is simply the absence of good, and the absence is caused by free choices made by creatures, such as Lucifer, Adam, and Eve, that are good by nature. God creates the power of choice, which is good, but that gift of power enables the recipient to decide to be bad; all the blame falls on him or her, none on God.⁸

This analysis leaves a number of loose threads dangling. The punishment of the serpent (and of the other animals) is hard to see as a dictate of justice. The serpent *has* to be punished because *Genesis* said it was punished and Milton is committed to Biblical inerrancy. But at the same time the serpent *has* to be the tool of Satan, to be consistent with the overall structure of the poem, in which Satan is the villain, not some reptile. Since the serpent is the completely unknowing tool of Satan, it is not blameworthy and should not be punished. (And how to explain God’s having hardened the Pharaoh’s heart in *Exodus*, causing Pharaoh to make a disastrous error that results in the death of all the firstborn children in Egypt?)

Also unclear is why Adam and Eve’s descendants should be punished, or why the punishment should include diseases, famine, and other disasters that afflict the innocent (in the sense of people who have not brought disaster on themselves by making bad choices) as well as the guilty. At these points justification runs out, and the faithful have recourse to notions of divine inscrutability, and specifically to the hope that everything that happens, happens according to God’s plan—a good plan, but we cannot know what it is, and we must, therefore, suspend judgment. That is the approach taken by other great works of religious literature, such as *The Brothers Karamazov*,

6. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 130 (Alan Sheridan trans., Vintage Books 1979) (1975).

7. See C.S. LEWIS, *A PREFACE TO PARADISE LOST* 66–67 (1977).

8. *Id.*

works that, unlike *Paradise Lost*, do not seek to justify God, to fit his actions into a “legalistic” framework.

Such a fitting implies notions of proportionality. The punishment must fit the crime. The crimes committed in *Paradise Lost* vary greatly, and likewise, as we now proceed to explain, the punishments.

II. GOD THE PUNITIVE

A. *The Punishment of Satan and the Rebel Angels: Retribution and General Deterrence*

The first event narrated in *Paradise Lost* is a punishment, the punishment of Satan and his followers for trying to overthrow the “Throne and Monarchy of God” (I, 42):

Him the Almighty Power
Hurl'd headlong flaming from th' Ethereal Sky
With hideous ruin and combustion down
To bottomless perdition, there to dwell
In Adamantine Chains and penal Fire
A Dungeon horrible, on all sides round
As one great Furnace flam'd, yet from those flames
No light, but rather darkness visible
Serv'd only to discover sights of woe . . .
. . . torture without end (I, 44–48, 61–64, 67)

Milton ascribes this punishment to “Eternal Justice” (I, 70), but it is more illuminatingly described as a demonstration of unlimited power: a demonstration to Satan, but also to the angels, both good and bad, that the ruler of the universe is unconstrained by any limitations of time or space or physics (“from those Flames / No light, but rather darkness visible”) or biology (God later turns Satan and all the other devils into snakes). Hell is infinitely deep (“bottomless”), eternal (“perdition”), unrelenting (“torture without end”). Not only is it to continue forever; it is to get worse:

[T]he will
And high permission of all-ruling Heaven
Left [Satan] at large to his own dark designs,
That with reiterated crimes he might
Heap on himself damnation, while he sought
Evil to others, and enrag'd might see
How all his malice serv'd but to bring forth
Infinite goodness, grace and mercy shown
On Man by him seduc't, but on himself
Treble confusion, wrath and vengeance pour'd. (I, 211–20)

There is even a hint that God's creating man was intended to shatter Satan's satisfaction in having taken so many angels with him from heaven:

[L]est his heart exalt him in the harm
Already done, to have dispeopl'd Heav'n,

My damage fondly deem'd, I can repair
 That detriment, if such it be to lose
 Self-lost, and in a moment will create
 Another World, out of one man a Race
 Of men innumerable. . . . (VII, 150–55)

Satan has grounds for believing that God created Man from dust, rather than from some more exalted substance, in order to spite Satan: “this new Favorite / Of Heav'n, this Man of Clay, Son of despite, / Whom us the more to spite his Maker rais'd / From dust” (IX, 175–78).

We are in the presence of Foucault's monarchical model of punishment.⁹ It is characterized by extravagantly cruel and protracted public punishments designed to overawe the monarch's subjects by a display of unlimited power over the subject's body. For besides subjecting Satan to the pains of Hell, God has altered Satan's physique. Once the brightest angel in heaven, he is now a hulking monster (“how chang'd / From him, who in the happy Realms of Light / Cloth'd with transcendent brightness didst outshine / Myriads though bright” (I, 84–87)). The “ritual marks of the vengeance” on his body¹⁰ are symbols visible to everyone of that unlimited monarchical power that Hobbes thought the essential guarantor of social peace.¹¹

Interestingly, Satan is surprised by the ferocity of the punishments that God has meted out to him and his followers. He had not realized that God had the power or the inclination to punish him in this manner. In addressing the fallen angels immediately after the Fall, he defends his decision to rebel as rationally based on the information he had regarding God's past behavior and the combined strength of himself and the rebel angels:

[W]hat power of mind
 Foreseeing or presaging, from the Depth
 Of knowledge past or present, could have fear'd
 How such united force of Gods, how such
 As stood like these, could ever know repulse? (I, 626–30)

Satan is complaining not merely about lack of notice of the punishment in store for rebels against God, but, more disturbingly, of having been tricked into rebelling by God's concealment of his power—God who “still his strength conceal'd, / Which tempted our attempt, and wrought our fall” (I, 641–42)—when Satan had plausibly believed that God's authority rested merely on his “old repute, / Consent or custom” (I, 639–40).

Had Satan had the full picture, he might not have rebelled. He would have known that rebellion would fail and hideous punishments ensue. We say “might,” not “would” because there are indications that Satan's resent-

9. See FOUCAULT, *supra* note 6, at 130; Wilma G. Armstrong, *Punishment, Surveillance, and Discipline in Paradise Lost*, 32 *STUD. ENG. LITERATURE* 91, 95 (1992); Jillisa Brittan, *The Economics of Punishment in Milton's Paradise Lost* 1–3 (Feb. 19, 1990) (unpublished paper, Jurisprudence course, University of Chicago Law School, on file with author).

10. FOUCAULT, *supra* note 6, at 130; see also ELAINE SCARRY, *THE BODY IN PAIN* 28 (1985).

11. THOMAS HOBBS, *LEVIATHAN* (C.B. Macpherson ed., Penguin Books 1985) (1651).

ment at God's promoting the Son over him is so profound that nothing could have deterred him from continuing his defiance—" [b]etter to reign in Hell, than serve in Heav'n" (I, 263). Then, too, Satan might not have believed God. Punishment as deterrence presupposes a prior crime that was punished, to serve as an example of what is in store for criminals, as well understood by Vico, who, fifty years after the publication of *Paradise Lost*, grounded his influential concept of punishment in the Greek "paradeigmata" and its Latin translation "exempla."¹² Since Satan was the first criminal, he was the first "example" of punishment. He was right that until then God had ruled by "reputation," "consent," and "custom." God may have welcomed the opportunity to display his power, for Satan's exemplary punishment strengthened God's hand: when the loyal angels saw how Satan was punished, their loyalty to God "though [already] firm, stood more confirm'd" (XI, 71).

But God may have overlooked what criminologists call specific deterrence, which means deterring a particular criminal from repeating his crime.¹³ Severe as Satan's punishment was, it was not incapacitating. And because God had not revealed to Satan how Satan's future crimes would evoke further punishment (" [t]reble confusion, wrath and vengeance" (I, 220)), Satan could, in good faith, as it were, urge the other rebel angels to continue committing crimes against God because they should "fear no second fate" (II, 17). Anything they did to offend God from now on would give them pleasure not offset by fear of incremental punishment for the new offense.

Not that Milton's God overlooks deterrence completely. On one occasion he uses it to deter Satan. Gabriel, dispatched to guard Eden, detects Satan lurking just outside its gate. As the two prepare to fight, Gabriel points to God's scales of justice in the sky:

Th' Eternal to prevent such horrid fray
Hung forth in Heav'n his golden Scales,
. . . in these He put two weights
The sequel each of parting and of fight;
The latter quick up flew, and kickt the beam
The Fiend lookt up and knew
His mounted scale aloft: nor more; but fled
Murmuring. . . (IV, 996–97, 1002–04, 1013–15)

By permitting Satan a glimpse of the movement of God's heavenly scales, God signals the punishment that awaits Satan, and the signal deters. By causing Satan to flinch, God achieves one of his stated objectives, which is to erode Satan's "obdurate pride" (I, 58).

The most difficult questions raised by the initial punishments of Satan and the rebel angels are why God did not inform Satan and his followers of the futility and fell consequences of rebellion, and why the punishments

12. GIAMBATTISTA VICO, *THE NEW SCIENCE OF GIAMBATTISTA VICO* 384 (Thomas Goddard Bergin & Max Harold Fisch trans., unabridged ed., Cornell University Press 1984) (1744).

13. 2 *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* 513 (David Levinson ed., 2002).

took so extravagantly monarchical a form. The answer to the first question ties back to our discussion of free will. Free will is incompatible with complete foreknowledge in the following sense: if you know exactly what will be the consequences of a choice, the choice becomes foreordained, and you make the choice that produces the greatest surplus of benefits over costs (both terms are to be understood here in their broadest sense). If Satan is deterrable, then being given full information about the future will “compel” him to abandon thoughts of rebellion, while if he is undeterrable, giving him full information will have no effect. God wants Satan, as he will later want Adam, to obey not because of a calculation of where his self-interest lies, but as a choice purified of selfish considerations.

The severity of Satan’s punishment involves the following paradox: monarchical punishment demonstrates monarchical omnipotence, and, hence, the utter futility of resistance, but if the monarch is truly omnipotent, there is no need to demonstrate the fact. Cruel public punishment, if instrumental rather than merely sadistic, is rather a sign of weakness, of anxiety, than of strength. (Nietzsche regarded vengeance as a sign of weakness.¹⁴) This returns us to our earlier point that Milton’s God is not really omnipotent. A third of the angels rebelled with Satan; without crushing their free will, God cannot prevent the remaining angels from likewise rebelling—and so he has recourse to a device used by human monarchs, who aspire to and fall short of omnipotence within their domains. But perhaps the demonstration of monarchical power is aimed at *us*, the readers of *Paradise Lost*, to impress us with divine power, so that we will obey.

God uses, by the way, the carrot as well as the stick with the remaining angels when he dispatches several of them to stand guard outside Hell and Eden, even though his powers of surveillance and prevention make guardian angels superfluous. In sending them “upon his high behests / For state, as Sovran King, and to enure / Our prompt obedience” (VIII, 238–40), he assigns them an honorable office that enables them to exercise a modicum of divine power.

The punishment of Satan, though it neither improves nor deters him, has one effect on him: it causes him to switch tactics—with the paradoxical effect of making him more dangerous. As he explains to the other fallen angels,

Henceforth his might we know, and know our own
 So as not either to provoke, or dread
 New War, provok’t; our better part remains
 To Work in close design, by fraud or guile
 What force effected not . . . (I, 643–47)

Foucault remarks upon the shift from a criminality of force to a criminality of fraud, as methods of surveillance improve and forcible crimes become

14. FRIEDRICH NIETZSCHE, *On the Genealogy of Morals*, in *ON THE GENEALOGY OF MORALS AND ECCE HOMO* 13, 1st essay, § 7, at 33 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1989) (1887).

more detectable.¹⁵ Before their rebellion, Satan and his followers were unaware of how closely God monitored their movements. Afterwards they remain imperfectly aware, as otherwise they would realize the futility of further resistance.

B. *The Punishment of Man: Rehabilitation and Deterrence*

God's motivations in punishing humankind differ strikingly from his motivations for punishing Satan. In punishing Adam and Eve, God calibrates punishment to make it both deter further disobedient acts and rehabilitate the offenders so that they and their descendants will become obedient subjects. We are in the presence of Foucault's corrective or utilitarian model of punishment, in which the pain of punishment is set at a level calculated to exceed the expected returns of crime, and thus deter (most) potential offenders from committing the crime, but is not so severe (as the death penalty would be) to preclude rehabilitation, or in religious terms, redemption or salvation.¹⁶

As the consideration (in contract-law terminology) for creating Adam and Eve and giving them sovereignty over Eden, God exacted only two promises: they must tend the trees, plants, and flowers in the garden, and they must not eat any of the fruit of the Tree of Knowledge of Good and Evil. These conditions are the two "laws," one imposing a positive obligation and the other a negative one, that they must obey.¹⁷ The positive obligation is trivial, since Adam and Eve have nothing else to do with their time than garden; the opportunity costs to them of light gardening are essentially zero. The negative obligation is, of course, just a test, indeed a tease, since God does not tell the couple why they shouldn't eat the fruit of that mysteriously named tree and, more specifically, why it is a bad thing to understand good and evil. Nor does he adequately explain to them the consequences of disobedience. He makes clear that the consequences will be bad, but the details (such as painful childbirth and the mortality of their descendants) are withheld.

The failure of notice is conspicuous, and plays into the hands of Satan; it enables him to tell Eve that God must have been kidding when he said that eating the forbidden fruit would be punished by death, for he (Satan in the guise of the serpent) ate it, and he's fine (IX, 568–612). If God through his messenger Raphael had explained the precise consequences of disobedience (death, but not *immediate* death)—even more, if he had catalogued for Adam and Eve the deceptive techniques that Satan might employ against

15. FOUCAULT, *supra* note 6, at 77; Brittan, *supra* note 9, at 8; *see also* Armstrong, *supra* note 9, at 103.

16. FOUCAULT, *supra* note 6, at 92–94, 130–31.

17. Brittan, *supra* note 9, at 14; *see also* JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS 113, 125 (Wilfrid Harrison ed., Basil Blackwell 1960) (1789); VICTORIA KAHN, *WAYWARD CONTRACTS: THE CRISIS OF POLITICAL OBLIGATION IN ENGLAND, 1640–1674*, at 208 (2004).

them—Eve would have been forearmed to resist. Satan further explains that he learned to speak by eating the fruit, showing that knowledge is a good thing to acquire. Of course in Milton's world this is a bad thing; it puts the serpent above himself, as it were, since animals are supposed to be dumb. There is an acute anxiety in the Bible (as in the story of the Tower of Babel) echoed in *Paradise Lost* about challenges to hierarchy; it is this anxiety that leads to exalting blind obedience as the supreme virtue of every living thing except God himself. Though Milton had once been a rebel—or maybe *because* he had once been a rebel: a high official in Oliver Cromwell's regime, who narrowly escaped execution at the Restoration—he exalts obedience and hierarchy to a degree incomprehensible to a modern American.

As with Satan, had God been explicit with Adam and Eve, their choice would have been foregone. Milton's Eve is intelligent. (She is supposed to be less intelligent than Adam, yet she has an inquiring mind, and he does not—it may be an example of Milton's happily incomplete conscious control over his poem.) Satan makes a compelling case for, as it were, the material advantages of her eating the fruit. The case is compelling because it is consistent with what Raphael as God's emissary had told Adam. Concealment of consequences forced Eve to choose between the advantages set out for her by Satan and her duty of obedience to God. God wants it to be a real choice, as it would not be if Eve knew what disobedience would cost her. Raphael is to tell Adam just enough about the gravity of disobeying God's command to "render Man inexcusable" (V, argument, 243–45).

Eve is absent during most of Raphael's discourse with Adam, leading Raphael to tell Adam: "warn / Thy weaker" (VI, 909). Although Eve had overheard Raphael's warning Adam about "such an Enemy we have, who seeks / Our ruin" (IX, 274–75), she had missed the narrative of God's punishment of Satan. The result is that while Adam describes his thirst for knowledge as having been quenched by Raphael's revelation, Eve's thirst has not been—which makes her all the more susceptible to Satan's urging her to eat of the fruit of the Tree of Knowledge of Good and Evil.

It seems that she is left in the dark in this way in order to double the test of her character. For while Adam's only duty (besides gardening) is not to eat the forbidden fruit, Eve has the further duty (though not, it seems, a "law" in the sense that disobedience would be punished by God) of obeying Adam. Perfect obedience would be accepting as an adequate explanation for a command "because I say so." Eve fails that test. She wanders off against Adam's wishes and is promptly "seduced." Even worse from the standpoint of maintaining male authority, she eats the forbidden fruit in the belief that acquiring knowledge will put her on a more equal footing with Adam:

[S]hall I to [Adam] make known
 As yet my change, and give him to partake
 Full happiness with mee, or rather not.
 But keep the odds of Knowledge in my power
 Without Copartner? so to add what wants
 In Female Sex, the more to draw his Love,
 And render me more equal, and perhaps,

A thing not undesirable, sometime
 Superior: for inferior who is free? (IX, 817–25)

If she shares her discovery with Adam and he eats the fruit, it will enable him to reestablish his intellectual superiority, and, as she remarks in the passage we just quoted, “inferior who is free?”

Yet Adam, too, has a secondary duty, which he flunks: to control Eve. He eats the fruit because he cannot bear to live without her. That is weakness. Uxoriousness leads him into sin.¹⁸ The moral is that independent-minded women and uxorious men are the ultimate source of human misery.

Adam and Eve’s willful disobedience of a direct order by God is treason (III, 207). And the punishment for treason is death.¹⁹ As God explains,

Man disobeying,
 Disloyal breaks his fealty, and sins
 Against the high Supremacy of Heav’n,
 Affecting God-head, and so losing all,
 To expiate his Treason hath naught left,
 But to destruction sacred and devote,
 He with his whole posterity must die,
 Die hee or Justice must; unless for him
 Some other able, and as willing, pay
 The rigid satisfaction, death for death. (III, 203–12)

An added humiliation is that when Adam and Eve die, they shall, God explains, return to dust. Adam and Eve degraded themselves by disobeying him, and their punishment degrades them to the base component from which they were created. They will be down in the dust with the serpent.

Why their posterity must also suffer, die, turn to dust, etc., is unclear. Yet it was common in Milton’s time to punish the family of traitors by confiscating their wealth, in order to increase the severity and, hence, deterrent effect of punishment for this (to governments) gravest of all crimes.²⁰ More important, it is one of those undeniable facts in the *Genesis* narrative that Milton as a believing Christian was constrained to accept, whether or not it made a lot of sense to him.

But to have stopped with pronouncing Adam and Eve’s disobedience treason for which the punishment for them and their descendants is death²¹ would have been to deprive man of all hope, as well as to contradict the New Testament. The compromise that Milton—that Christianity—makes

18. LEWIS, *supra* note 7, at 126.

19. 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 476 (London, MacMillan 1883).

20. See LISA STEFFEN, *DEFINING A BRITISH STATE: TREASON AND NATIONAL IDENTITY, 1608–1820*, at 1, 10–17 (2001).

21. STEPHEN, *supra* note 19, at 476; see Janelle R. Greenberg & Martin S. Greenberg, *Crime and Justice in Tudor-Stuart England and the Modern United States: The More Things Change, the More They Stay the Same*, 6 *LAW & HUM. BEHAV.* 261, 268 (1982) (explaining that in seventeenth-century England, judges had no power to commute the sentence of death to a term of imprisonment, but a number of loopholes allowed suspects to go free at earlier stages in the proceedings).

between the duty to punish traitors and the promise of redemption is a sacrifice designed to appease the divine wrath. The Son offers to die for man's sin (Empson thought this an echo of human and animal sacrifice, both found in the Old Testament²²), and God accepts the sacrifice. If the Son is to "redeem" humankind's "mortal crime," he must die a mortal death (III, 214–15).

To justify lenience for man but not for the fallen angels, God explains that the fallen angels

[B]y thir own suggestion fell,
 Self-tempted, self-deprav'd: Man falls deceiv'd
 By th' other first: Man therefore shall find grace,
 The other none: in Mercy and Justice both,
 Through Heav'n and Earth, so shall my glory excel,
 But Mercy first and last shall brightest shine. (III, 129–34)

Calvinist moral theology dictated maximum severity of criminal sanctions, but humaneness in their application to concrete cases.²³ And so we find a distinction drawn in seventeenth-century thinking between punishment for sins of willfulness and punishment for sins of infirmity.²⁴ Though Adam and Eve's were not mere sins of infirmity, God recognizes that—in contrast to the fallen angels, who were "self-tempted" (another clue to Milton's austere conception of free will)—Adam and Eve were "deceived" by a sophisticated and wily adversary. The deception did not rob them of their free will, however. They remain culpable for their disobedience, for they *knew* they were disobeying; the only effect of the deception was to exaggerate the benefits that they could anticipate from disobedience. That is what made the deception an effective test of obedience. Without temptation, virtue does not signify merit.

God's mercy toward Adam and Eve actually replicates an aspect of monarchical punishment. The power to pardon for crimes is a traditional monarchical prerogative.²⁵ To repeal the criminal law on an ad hoc basis, which is what the pardon amounts to, is as effective a demonstration of power as drawing and quartering a traitor. The combination of savage punishment with unexpected remission is an especially powerful symbol of power, and Milton's God, as we know, is preoccupied with demonstrating his power.

Two of the punishments visited on Adam and Eve and their descendants require further consideration: gender inequality and political oppression.²⁶

22. See EMPSON, *supra* note 1, at 241–47.

23. HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 319 (2003).

24. *Id.* at 321.

25. Greenberg & Greenberg, *supra* note 21, at 270.

26. In addition to the punishment of death, God as the Son metes out the following punishments to Adam and Eve, as well as to their descendants: (1) women shall receive pain in childbirth (X, 194–96); (2) men shall rule women (X, 196); (3) human beings shall have to toil for their food (X, 198–202); (4) they shall endure tyrants and enslavement (XII, 90–96). Although he says he will leave it to the Son, God inflicts some additional punishments directly. He adds that (5) spring shall

(They turn out to be connected.) God pronounces Eve's unique sentence thus: "[T]o thy Husband's will / Thine shall submit, hee over thee shall rule" (X, 195–196). Yet it had been made clear before the Fall that Adam and Eve were "not equal" (IV, 296). Adam's physical appearance "declar'd / Absolute rule," while Eve's appearance "impli'd / Subjection"; Adam had been created "for God only, shee [Eve] for God in him [Adam]" (IV, 295–96, 299–301, 307–08). So what did this sentence add?

Before the Fall, God was Adam's law and Adam was Eve's law. As God believed himself to be a benevolent sovereign, he intended Adam to be a benevolent sovereign as well, the human hierarchy replicating the divine one. Eve rejects hierarchy. After the Fall, when Adam reminds her that had she not insisted on going off to do some gardening by herself he would have protected her from temptation, Eve shoots back: "Was I to have never parted from thy side? / As good have grown there still a lifeless Rib" (IX, 1153–54). And to God's description of Adam and Eve's relationship as that of head to body, Eve ripostes: "[W]hy didst not thou the Head / Command me absolutely not to go" (IX, 1155–56). To which Adam replies: "Force upon free Will hath *here* no place" (IX, 1174; emphasis added). In Eden, man cannot force a woman to do anything against her will. But once expelled from Eden, woman's additional punishment is subjection to man's physical force.

Man is similarly punished by subjection to force, only the force of tyrants.²⁷ After exhibiting to Adam such scenes as Cain's murder of Abel and Nimrod's tyrannous reign, the angel Michael explains to Adam the reason for such events:

Since thy original lapse, true Liberty
Is lost, which always with right Reason dwells
Twinn'd, and from her hath no dividual being:
Reason in man obscur'd, or not obey'd,
Immediately inordinate desires
And upstart Passions catch the Government
From Reason, and to servitude reduce
Man till then free. Therefore since hee permits
Within himself unworthy Powers to reign
Over free Reason, God in Judgment just
Subjects him from without to violent Lords;
Who oft as undeservedly enthrall
His outward freedom (XII, 83–95)

no longer be the eternal season; seasons shall now change (X, 678–91); and (6) Adam and Eve must leave Eden (XI, 48–49, 107–08), so that they have no opportunity to eat of the Tree of Life, live forever, and thus foil the sentence of death (XI, 93–95).

27. XII, 93; see MICHAEL WALZER, *THE REVOLUTION OF THE SAINTS: A STUDY IN THE ORIGINS OF RADICAL POLITICS* 31 (1965).

So, for disobeying natural law/“right reason,” God punishes Adam and Eve’s descendants by subjecting them to tyranny by a sovereign improperly exercising his authority.²⁸

Thus Milton explains and justifies both gender subordination and political oppression as the consequence of the Fall’s having deprived man of the ability to conform to natural law. As Eve had explained to Satan, the prohibition against eating the fruit of one tree was “Sole Daughter of [God’s] voice; the rest we live / Law to ourselves, our Reason is our Law” (IX, 653–54). “Reason is our Law” is natural law, understood by one school of Milton’s contemporaries as a moral order that God had stamped into human nature.²⁹ In his prose work, *The Christian Doctrine*, Milton wrote that in Eden “it was the disposition of man to do what was right, as a being naturally good and holy.”³⁰ Made in the image of God, man had “implanted and innate in him . . . the law of nature, which is sufficient of itself to teach whatever is agreeable to right reason, that is to say, whatever is intrinsically good.”³¹ But with the Fall, human beings “lost that right reason which enabled man to discern the chief good.”³² As Calvin put it, the Fall created a “second nature” of man that resists submission and strives to dominate others. Only by finding and obeying the lost “right reason” can the human race be redeemed.

28. This punishment takes on a poignancy in seventeenth-century England at the time Milton was writing *Paradise Lost*. Charles I had been executed in 1649, eighteen years before the publication of *Paradise Lost*. He was considered by many, including Milton, a tyrant who had placed himself above the law and Parliament. See CHRISTOPHER HILL, *MILTON AND THE ENGLISH REVOLUTION* 189 (1977) (noting that Milton was one of the first to appear in print to justify the trial of Charles I). The English Calvinists, and likely Milton as well, viewed England as God’s elect nation, destined to reveal God’s mission to mankind. Calvinists also believed that government by representative leaders of the community was superior to government by a single ruler. Harold J. Berman, *Law and Belief in Three Revolutions*, 18 VAL. U. L. REV. 569, 597–98 (1984). In 1660, the son of Charles I, Charles II, was restored to the throne of England with significant changes in the balance of power between the King and Parliament; absolute monarchy was no more. In the English Calvinists’ view, the people of England, as the elect descendants of Adam and Eve, were obeying their right reason and moving in the path of redemption. See HILL, *supra* note 4, at 310 (explaining the centrality of the Fall to seventeenth-century thinking about politics, and to Milton’s thinking about the question of an individual’s freedom in relation to the authority of the state).

29. RHETORIC AND LAW IN EARLY MODERN EUROPE 7 (Victoria Kahn & Lorna Hutson eds., 2001), citing JOHANN SOMMERVILLE, *POLITICS AND IDEOLOGY IN ENGLAND, 1603–1640*, at 15 (1986). Other writers had a different view of natural law. Hobbes essentially viewed government as an entirely human affair and reduced natural law to the sovereign’s will. See MATTHEW JORDAN, *MILTON AND MODERNITY* 10 (2001); cf. KAHN, *supra* note 17, at 34 (noting the influence on Milton of Grotius’ social-contract view of natural law).

30. JOHN MILTON, *THE CHRISTIAN DOCTRINE* (Charles R. Sumner trans., Cambridge University Press 1825) (n.d.), reprinted in JOHN MILTON: *COMPLETE POEMS AND MAJOR PROSE* 993 (Meritt Y. Hughes ed., 1985).

31. *Id.*

32. JOHN MILTON, *THE CHRISTIAN DOCTRINE* (n.d.), reprinted in 15 *THE WORKS OF JOHN MILTON* 207 (James Holly Hanford & Waldo Hilary Dunn eds. & Charles R. Sumner trans., Columbia University Press 1933).

C. *The Punishment of Animals:*
Strict Liability and Gratuitous Punishment

The logic of punishment in *Paradise Lost* breaks down when it comes to the fate of animals. The reason is Milton's commitment to the historical accuracy of the Bible and his awareness of the brute facts of life.

We should distinguish, however, between the punishment of the serpent (condemned to crawl on its belly) and that of the other animals, especially those who upon expulsion from Eden become prey rather than predators, though of course most predators are the prey of other animals. In the Bible the serpent is properly punished because he is the tempter; he is not a tool of Satan, who barely figures in the Old Testament. In *Paradise Lost*, however, the serpent is the unwitting tool of Satan. Remember that the serpent was innocently asleep when Satan entered his mouth and took control of him (IX, 187–88). Satan chose the serpent because the serpent was the most intelligent animal, and therefore unlikely to arouse Eve's suspicions when he turned out, unlike the other animals, to be able to speak. When the temptation of Eve is complete, Satan abandons the serpent, who presumably awakes eventually with no sense of the use that had been made of him. Why then is he condemned to crawl on his belly? There is no answer except that *Genesis* said that he was punished and Milton cannot, without courting a charge of heresy, flatly contradict a factual claim made in the Bible. He cannot speculate that the Bible story is based on male fears of seduction symbolized by the temptation of Eve by an animal that resembles a phallus. What is true, though unremarked in the poem, is that there are strict liability crimes and, more to the point, that our moral condemnations are not limited to acts motivated by an evil design. The classic case is that of Oedipus, who is depicted as having done terrible wrongs in killing his father and marrying his mother—wrongs that require that he be punished by blinding and exile—even though he neither believed nor had reason to believe that he had committed parricide and incest. And so it is with the unfortunate serpent. Its innocent but deadly role in the Fall of man demanded punishment.

The same cannot be said for the rabbits, deer, mice, and countless other vegetarian animals who upon the Fall of man become prey. They had nothing to do with the Fall. But there is the brute fact that animals eat each other. Milton can no more deny this than he can deny the punishment of the serpent reported in the Bible or the punishments seemingly superfluously added by God to the basic punishment of making man mortal (tyranny, cold winter and hot summer, expulsion from Eden, etc.).³³ But no penal theory expressed or implied in the poem can explain the punishment of those animals who, unlike the serpent, have no causal relation to (let alone moral responsibility for) the Fall.

33. The notion that they have to be expelled because otherwise they would eat of the Tree of Life and thus cancel God's death sentence is unconvincing, since God could simply have destroyed or removed the tree.

This may seem a minor failing, a peripheral inconsistency, as “animal rights” was not a burning issue in Milton’s day. But actually it is central to the poem’s failure—not as a poem, but as a theodicy—to justify the divine punishment that the poem narrates and defends. For it highlights the brutal excess of punishment everywhere evident in the poem. Even the rebellion by Satan and his followers seems punished excessively, for the rebels’ utter impotence in the face of the power of the Father and the Son ensured that the rebellion would have little consequence. Why not just incapacitate Satan and the fallen angels in Hell rather than subject them to “torture without end”? (I, 67). The punishment of Adam and Eve’s descendants—the whole of mankind—seems especially gratuitous given the incentives that the expulsion from Eden created for faith and obedience. Adam and Eve surely learned their lesson; why could they not be trusted to pass it on to their descendants? And the punishment of the animals has not even a concept of hereditary taint to commend it, since the animals, with the very dubious exception of the serpent, committed no wrong. In Milton’s theodicy, God’s divine punishment bears an uncomfortable resemblance to the penal practices of ruthless and insecure secular human monarchs.