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**How the Principle of Guilt Purified Criminal Law from Sacrificial  
Remnants. A Girardian Interpretation**

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## Law and Desacralisation

### How the Principle of Guilt Purified Criminal Law from Sacrificial Remnants. A Girardian Interpretation

#### Introduction

The French philosopher René Girard (\*1923) has devised a global theory of religion that is grossly structured as a diptych: primitive religion was based upon scapegoat mechanisms, but managed to hide the bloody reality of human violence under the so-called veil of the sacred; Christianity on the other hand unveiled the scapegoat mechanism and desacralised human violence. One of the major differences Girard sees between the archaic and the modern world is the way conflicts are resolved and/or prevented. Whereas the former was dependent on the ritual re-enactment of scapegoat mechanisms through sacrifice, the latter has developed legal institutions. Sacrifice does not revolve around punishing culprits, but rather makes use of surrogate victims, whereas legal systems swear by the principle of guilt.

This paper aims to contribute to a better understanding of how sacrifice and law became mutually exclusive by developing a Girardian philosophy of a very specific institution that was recently uncovered by the legal historian Harald Maihold, namely the doctrine of *Strafe für fremde Schuld*.<sup>1</sup> This doctrine allowed for innocent surrogates to be legally punished for the crimes of others, but it was gradually expelled from the body of criminal law as the principle of guilt was consolidated. We will investigate whether there are similarities between surrogate punishment and sacrifice. If these would be traceable we might have entered a zone where law and the primitive sacred are still intertwined. The question therefore will arise whether the demise of this peculiar institution and its rejection from the legal system should not be read as a process of desacralisation of law. Before we can take on these challenges found at the crossroads of legal theory and philosophy of religion, we must of course briefly present both Girard's as Maihold's theory.

#### 1 A brief overview of Girard's theory

##### 1.1 Violence and mimesis

According to Girard, the key element to decipher human behaviour is *mimesis*, or our innate disposition for imitating others. Girard identifies mimesis as the underlying cause of human rivalry and conflict. This claim becomes intelligible in the light of his metaphysics of desire, envisaging the object of our yearning as being mediated by the models we have chosen to imitate. This so-called *mimetic desire* harbours an obvious pitfall: once we covet the same object as a model that is spatially, temporally, spiritually or symbolically not sufficiently remote to avoid a confrontation, rivalry has arisen and the model transforms into a model-obstacle.<sup>2</sup> Essential is Girard's observation that opponents are unconsciously but permanently mirroring each other. In the ever more rapid exchange of arguments, insults and blows, violent reciprocity is objectively fading out the differences to which the adversaries

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<sup>1</sup> H. MAI HOLD, *Strafe für fremde Schuld. Die Systematisierung des Strafbegriffs in der Spanischen Spätscholastik und Naturrechtslehre*, Köln-Weimar-Wien, 2005.

<sup>2</sup> Girard's theory on mimetic desire has been deduced from literature. Cf. R. GIRARD, *Mensonge romantique et vérité romanesque*, Paris, 1961, especially pp. 1-52. See also: C. FLEMING, *René Girard. Violence and Mimesis*, Cambridge-Malden, 2004, pp. 9-40.

subjectively profess in their asserting to be fundamentally other. The hidden but nonetheless manifest core of conflict and crisis is thus pinpointed by Girard as *undifferentiation*.

## 1.2 Violence and the sacred

Since humans are the most mimetic of all species, as Aristotle says, and conflict therefore lures behind every corner, it was paramount for primitive culture to organise itself as a system of differentiation that would prevent desires from converging on common objects by redirecting them outwards.<sup>3</sup> Following Durkheim's intuition that in primitive society the religious and the social were identical<sup>4</sup> and that "religion, in fact, stands as society's primary expression of order"<sup>5</sup>, Girard claims that the whole corpus of archaic religion has no other aim than the prevention of conflict. This central and predominant preoccupation of primitive man didn't plummet from the sky, but must have been a rational response to a continuous threat, which, according to Girard, can be no other than the dissolution of cultural differentiation or, in other words, a collapse of culture itself. Once one grasps that nothing is more contagious than violence, this doom scenario becomes strikingly realistic. Without an institutional framework providing prevention or remedies, violence is bound to spread like an epidemic. "La violence a des effets mimétiques extraordinaires"<sup>6</sup>, says Girard. This is why one murderous crime can unleash a vengeful blood feud potentially resulting in a *bellum omnium contra omnes* that dissolves all the symbolical differences constitutive for culture.

"La violence maléfique se conçoit comme une force qui agit sur les plans les plus divers, physique, familial, social, et qui, partout où elle s'implante, se propage de la même façon; elle fait tache d'huile, elle gagne *de proche en proche*"<sup>7</sup>, writes Girard. He adds that the notion of impurity predominant in religious thought was no doubt interconnected with the highly contagious nature of violence:<sup>8</sup> "[L]'impureté, c'est-à-dire le contact avec la violence, la contagion de cette violence".<sup>9</sup> Where the modern concept of contagion has been narrowed down to the biomedical domain, its archaic significance seems to have been much wider, indicating the lethal threat posed both by disease as by violence alike. This *merging of social and biomedical categories*, the amalgamation of "social and material causation"<sup>10</sup> is an illustration of the interaction that exists between both spheres: a plague or an earthquake is likely to have as undifferentiating repercussion as rampant violence.<sup>11</sup> If religion's core objective is the preservation of harmonious order, it comes as no surprise that violence is the protagonist in the religious drama that has moulded more than any other force, it seems, the course of history. After all, violent cataclysms are religion's primordial point of reference. The sacred has therefore absorbed all perils menacing humankind:

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<sup>3</sup> As, for instance, the sexual appetites of family members are centrifugally deflected by the incest taboo, we see exogamic systems arising on the level of the tribe.

<sup>4</sup> R. GIRARD, *Des choses cachées depuis la fondation du monde. Recherches avec Jean-Michel Oughourlian et Guy Lefort*, Paris, 1978, p. 90.

<sup>5</sup> FLEMING, *René Girard*, p. 67.

<sup>6</sup> R. GIRARD, *La violence et le sacré*, Paris, 1972, p. 51 (original italics deleted).

<sup>7</sup> Idem, *op. cit.*, p. 90 (original italics).

<sup>8</sup> For instance the impurity of warriors returning from the battlefield or of ambassadors sent by cities where a massacre took place. Idem, *op. cit.*, p. 67.

<sup>9</sup> Idem, *op. cit.*, p. 47.

<sup>10</sup> FLEMING, *René Girard*, p. 105.

<sup>11</sup> Resulting in a meltdown of social cohesion and the disturbance of peace. GIRARD, *La violence et le sacré*, p. 46-55.

“Nous avons vu que le sacré inclut toutes les forces qui risquent de nuire à l’homme et qui menacent sa tranquillité, les forces naturelles et les maladies ne sont jamais distinguées de la confusion violente au sein de la communauté. Bien que la violence proprement humaine domine secrètement le jeu du sacré, bien qu’elle ne soit jamais complètement absente des descriptions qu’on en donne, elle tend toujours à passer au second plan, du fait même qu’elle est posée hors de l’homme; on dirait qu’elle cherche à se cacher, comme derrière un écran, derrière des forces réellement extérieures à l’humanité.”<sup>12</sup>

Now we understand how violent mimesis hangs as Damocles’ sword over humanity’s head, we must ask how cultural systems managed to survive and how religion, according to Girard, not merely has emerged out of collective traumas of tribes staring in a deadly and seemingly endless abyss of vengeance, but also offers us crucial indications as to the existence of those social near death experiences.

Girard thinks that only a *scapegoat mechanism* or *surrogate victimage* can save cultures from collapse by providing “l’unité d’une communauté [...] au paroxysme de la division, au moment où la communauté se prétend déchirée par la discorde mimétique, vouée à la circularité interminable des représailles vengeresses.”<sup>13</sup> Violence can be appeased by being unleashed not on its object of preference, but on surrogate ones. Only when a scapegoat becomes a viable *substitute* for the enmity all the group members felt for their personal antagonists, he absorbs all hostility and the peace has been restored. Still imitating each other’s hate, but now polarized on a common victim, mimesis appears here as a uniting force. Girard’s hypothesis of the scapegoat mechanism is so powerful since it can provide a coherent explanation of primitive religion and its institutions.<sup>14</sup> Therefore our philosopher thinks he has identified the hidden and bloody foundation of human culture. This claim will seem less farfetched once we grasp that the *sacrificial crisis* overcome by surrogate victimage forms the backbone of taboo, ritual and myth.

The primitive world was structured by *taboo*, the *genus* of which all prohibitions are *species*. Often found are taboos on twins, mirrors, representation or imitative behavior. Since they all deal with preventing a lack of differentiation.<sup>15</sup> Their common denominator could be described as anti-mimetical. Therefore Girard argues they are connected to a crucial primitive insight in the nature of violence. Where moderns always stress the result of a conflict, namely defeat or victory, or in other words the restored difference between antagonists, primitive societies have stressed reciprocity, mimesis and identity between them. Taboos aim at the prevention of conflict and its typical undifferentiation. By transgressing incest taboos, for instance, the distinction between sexual and asexual tribe members has vanished, just as the difference between two persons fades once they give in to violent reciprocity. Twins or mirror images could very well symbolize this kind of undifferentiation and are therefore deemed to be just as dangerous.<sup>16</sup> Taboos can be said to function as “cultural codifications [...] of the fear of the emergence of doubles, the erasure of

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<sup>12</sup> Idem, *op. cit.*, p. 91.

<sup>13</sup> Idem, *Des choses cachées depuis la fondation du monde*, p. 33.

<sup>14</sup> Although Girard has proposed explanations of institutions as different as hunt, domestication, funeral rites, or sacred kingship, to name a few, we will restrict ourselves mainly to ritual.

<sup>15</sup> Whether that be between twins, between a person and his image, or between a model and his imitator.

<sup>16</sup> On the Tobriand isles, for instance, simple consanguinean or physical resemblance is considered to be highly suspect and mentioning it is taboo. “La proche parenté n’a aucune spécificité, en fin de compte, puisqu’elle symbolise la dissolution de la différence familiale; autrement dit, elle désymbolise”. Cf. Idem, *La violence et le sacré*, pp. 92-94, 97.

differences or the transgressions of culturally inscribed hierarchies”,<sup>17</sup> as Fleming summarizes it. In short: “les interdits cherchaient à écarter la crise en prohibant les conduits qui la suscitent.”<sup>18</sup>

The second pillar of primitive religion is *ritual*, in essence a diptych where a phase of belligerency is followed by a sacrifice – whether this last be human, animal or symbolical. Girard sees rituals as reenactments of the sacrificial crisis: “Si les interdits sont anti-mimétiques, toute mise en scène de la crise mimétique va nécessairement consister à violer les interdits”.<sup>19</sup> Girard mentions an exceptionally clear rite of the Dinka tribe, where the reciprocal hostilities gradually metamorphose into unilateral and collective violence against a cow.<sup>20</sup> Girard thinks that, when a crisis is threatening to reappear, “les rites s’efforcent de la canaliser dans la bonne direction et de l’amener à la résolution, c’est-à-dire à la réconciliation de la communauté aux dépens d’une victime”.<sup>21</sup> But ritual may also be simply carried out at fixed moments in order to reinvigorate the cultural order of prohibitions that emerged out of the sacrificial crisis. Although rites also are the valve out of which societal tensions escape, its primordial function still lies in preventing rather than satisfying violence. And how ever much they might have in common with what they reenact, they aren’t identical to it:

“La violence originale est unique et spontanée. Les sacrifices rituels, au contraire, [...] on les répète à satiété. Tout ce qui échappe aux hommes dans la violence fondatrice, le lieu et l’heure de l’immolation, le choix de la victime, les hommes les déterminent eux-mêmes dans les sacrifices. L’entreprise rituelle vise à régler ce qui échappe a toute règle; elle cherche réellement à tirer de la violence fondatrice une espèce de *technique* de l’apaisement cathartique.”<sup>22</sup>

Whereas the choice of the victim in the sacrificial crisis is arbitrary, only guided by some general rules of thumb that could explain the angry looks of the crowd, as we shall see further on, those selected to be ritually sacrificed stem from specific social strata. Girard mentions prisoners of war, slaves, children and unmarried adolescents, kings, the handicapped and other ‘scum’ of society. These are all marginal figures who are not fully integrated.<sup>23</sup> The difference between the community and the sacrificial victims is that these last ones are, as social *Fremdkörper* -to some extent-, unlikely to be avenged by their family or their immediate environment.<sup>24</sup> Sacrifice is thus supposed to be a kind of violence that ends violent reciprocity, rather than sparking new animosity –just as the unanimous violence of all against one taking place in a scapegoat mechanism. Furthermore, “[le sacrifice] détourne la violence de certains êtres qu’on cherche à protéger, vers d’autres êtres dont la mort n’importe moins ou importe rien du tout.”<sup>25</sup> To properly understand the social function

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<sup>17</sup> FLEMING, *René Girard*, p. 66.

<sup>18</sup> GIRARD, *Des choses cachées depuis la fondation du monde*, p. 34.

<sup>19</sup> Therefore we see rituals with mock fighting and warlike clamor staged in beautiful choreographies demonstrating the interchangeability of the antagonistic positions and mirror effects, we notice men violently disputing forbidden objects or ritually committing incest. Idem, *op. cit.*, p. 29.

<sup>20</sup> Idem, *La violence et le sacré*, pp. 147-148.

<sup>21</sup> Idem, *Des choses cachées depuis la fondation du monde*, p. 34.

<sup>22</sup> Idem, *La violence et le sacré*, p. 154 (original italics).

<sup>23</sup> Idem, *op. cit.*, p. 24.

<sup>24</sup> Some rituals elucidate the preoccupation of vengeance very clearly when for instance even the ‘family clan’ of the sheep one is about to slaughter is being requested not to avenge the sacrifice. Cf. Idem, *op. cit.*, p. 26.

<sup>25</sup> Idem, *op. cit.*, p. 11.

sacrificial rituals play, we must analyze how surrogation is central to it in a multi-layered way. In the first place the sacrificial victim is representing and substituting the scapegoat that was collectively killed during the original crisis, of which the sacrifice is a controlled *mise-en-scène*. Only while the scapegoat served as a substitute for all, the one sacrificed can, as its substitute, serve as a substitute for all in an indirect way. In contrast to Joseph de Maistre, Girard stresses that the relationship between the potential victims -from whom the violence is deflected through sacrifice- and the actual ones -the sacrificial categories- cannot be thought in terms of a non guilty party substituting for a guilty one. The sacrificial mechanism at play is much more indifferent. It is just looking to appease slumbering or awakening violence by unleashing it on a sacrificial object, also when no obvious crime needs to be atoned for. This however seems to be somehow contradicted by statements as “le primitif paraît se détourner du coupable”<sup>26</sup> or “[c]ette élément d’expiation est une ressemblance avec le sacrifice”.<sup>27</sup> His precise thoughts on the subject seem to be very subtle and deserve careful analysis:

“Jamais, en effet, une immolation proprement rituelle, n’est *directement et ouvertement* liée à une première effusion de sang, de caractère irrégulier. Jamais elle n’apparaît comme la rançon d’un acte déterminé. C’est bien parce qu’un tel lien n’apparaît jamais que la signification du sacrifice nous a toujours échappé.”<sup>28</sup>

This seems to mean not that there never is a link between a culprit and a sacrificial victim, but that this is never made explicit. Since all should be able to project their personal opponent, their personal culprit so to speak, into the one going under the knife, the sacrifice helps the community to get rid of their hostile feelings. The sacrifice doesn’t represent a specific member of society, because it should be able to represent whomever. And when nevertheless a sacrifice does unambiguously represent a specific individual, Girard says we are dealing with “[une] évolution [...] tardive, contraire à l’esprit de l’insitution.”<sup>29</sup> The only relationship that does exist between a potential and an actual victim is one of *resemblance*.<sup>30</sup> The requirement of resemblance in sacrifice is the negative of the anti-mimetical stance in taboo.

Worth mentioning is also Girard’s remark that war is another kind of violence that, just as sacrifice, and even in a more or less ritualized way, deflects the menace of internal dissension on external objects.<sup>31</sup>

Girard elaborates on the similarities and differences that exist between sacrificial and judicial institutions. The civilized world differs radically from its primitive predecessor by the absence of blood feuds. This is made possible only by well functioning judicial institutions, which limit vengeance to a single act of retaliation executed by a sovereign authority accepted by all. The state, once it has obtained the monopoly on vengeance, administrates justice “*toujours comme le dernier mot de la vengeance.*”<sup>32</sup> Girard distinguishes the following historical evolution: “le point focal du système se déplace de la prévention religieuse vers les

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<sup>26</sup> Idem, *op. cit.*, p. 38.

<sup>27</sup> Idem, *op. cit.*, p. 42.

<sup>28</sup> Idem, *op. cit.*, p. 43 (my italics).

<sup>29</sup> Idem, *op. cit.*, p. 153.

<sup>30</sup> For instance, among the Nuer or the Dinka, there truly exists a bovine society, paralleling the human one and being just as complex. Every man has a cow functioning as his double. Although this resemblance between man and animal is felt to be very strong among those tribes, the difference remains since one never sacrifices the first but always the second. Idem, *op. cit.*, pp. 12-13, 22, 24.

<sup>31</sup> Idem, *op. cit.*, p. 35.

<sup>32</sup> Idem, *op. cit.*, p. 29 (original italics deleted).

mécanismes de la rétribution judiciaire”.<sup>33</sup> In cultures where a judicial system is consolidated, the sacrificial institutions corrode into a formal inanity *sans raison d’être*<sup>34</sup> before disappearing altogether. But for societies deprived of justice, sacrifice must have been essential.<sup>35</sup> The primordial distinction between a sacrificial and a modern judicial system is that the first seems to turn a blind eye on the culprit, whereas the second is organized around the principle of guilt. Sacrifice is preoccupied above anything else with the danger that springs from a non avenged victim and provides for a structured deflection of the violence on secondary targets. In deviating violence it hopes to break the vengeful violent reciprocity that is so dreaded. “Si le primitif paraît se détourner du coupable [...] c’est parce qu’il redoute de nourrir la vengeance.”<sup>36</sup> The judicial system on the other hand remains faithful in a strict sense to the principle of vengeance, which it has rationalized by reciprocation of violence exclusively on the violator.<sup>37</sup> Girard thinks that vengeance, sacrifice and criminal punishment are nevertheless identical on a deeper level. His argument is that if sacrifice goes wrong,<sup>38</sup> or if authority crumbles to such an extent that state justice is no longer accepted as the final word, institutionalized violence will spark undifferentiating violence in exactly the same way as vengeance would.<sup>39</sup> The sacred aura that sacrifice always enjoyed as violence that purifies society by relieving its tensions was passed on to the legal system for exactly the same reason. Both sacrifice and justice refer to a theology legitimating their acts, differentiating sacred -or pure- and legitimate violence from its impure and illegal counterparts. Although the theology behind justice might have disappeared in our days, its transcendence remains –meaning that the label ‘legitimate’ prevents its acts from being contested and reciprocated.<sup>40</sup>

Among the tribe of the Chuchki, described by Lowie, Girard has found a curious practice, which he holds as something in between sacrifice and justice. In the wake of a violent crime, the Chuchki avoid a cycle of violence by offering a member of the family of the perpetrator to the ones brooding on revenge. Providing an unguilty victim as atonement, their attempt to deflect straightforward ‘perfect’ reciprocity reeks of sacrifice. Girard says: “C’est en tant que coupable [...] que le coupable est épargné”<sup>41</sup>, because “[f]aire violence au violent, c’est se laisser contaminer par sa violence.”<sup>42</sup> But because the Chuchki obviously state their act to be a retaliation of a crime, a first step towards the administration of justice is taken. Neither sacrifice nor justice, this custom comes in to play “à défaut ou en plus du vrai responsable ou encore dans l’indifférence totale à toute responsabilité individuelle.”<sup>43</sup> This Chuchki tradition is in other words a telling tale hybrid on the long journey from sacrifice to justice.

Before we can describe the world of the primitive gods as presented to us in myth, we must return to *the birth of the sacred* which has taken place in the process of the scapegoat mechanism.

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<sup>33</sup> Idem, *op. cit.*, p. 38.

<sup>34</sup> As in Greece and Rome.

<sup>35</sup> Idem, *op. cit.*, p. 33.

<sup>36</sup> Idem, *op. cit.*, p. 38.

<sup>37</sup> Idem, *op. cit.*, p. 39.

<sup>38</sup> Idem, *op. cit.*, pp. 64-66.

<sup>39</sup> Idem, *op. cit.*, p. 42.

<sup>40</sup> Idem, *op. cit.*, pp. 41-42.

<sup>41</sup> Idem, *op. cit.*, p. 43.

<sup>42</sup> Idem, *op. cit.*, p. 45.

<sup>43</sup> Idem, *op. cit.*, p. 43.

Before unanimous mob violence descends upon an unlucky poor victim, *communis opinio*, formed by “accusatory mimesis”,<sup>44</sup> has it that this person is the cause of the social implosion. When peace has magically returned after his death, people are all the more convinced of this.<sup>45</sup> As the scapegoat’s life had brought death and his death has provoked an influx of life, he will be considered an entity with supernatural powers over the community. As the bringer of evil, the scapegoat can be demonized. As the bringer of life he might gain the properties of a savior deity. The so called *ambivalence du sacré* is hereby explained. In his soteric shape the divinized scapegoat becomes the guarantor of peace. As such he also comes to govern over the taboos and laws that have emerged out of his death in order to avoid future mayhem. The divinized victim is thus thought to legitimate and “becomes the signifier of all prohibitions”.<sup>46</sup> His bloodthirsty demonic side is however highlighted in sacrificial theology, representing “the sacrificial victim [...] as appeaser of the gods, rather than [...] the victim/god as the appeaser of the mob.”<sup>47</sup>

The lack of understanding in the mimetic process as a whole, as alpha and omega of the crisis, is what underlies a process of transcendentalization of the surrogate victim. Not the mimetic violence is identified as Derrida’s *pharmakon*, being disease and cure at the same time, causing the crisis and its resolution, but instead responsibility, culpability and power are transferred from the mob to the scapegoat. Since the mimetic process is being projected on the scapegoat, who is therefore considered a god, it is actually the social dynamics of violence that is being transcendentalized. Girard has by this means brilliantly elaborated Durkheim’s notion of social transcendence.<sup>48</sup> The sacred consists out of clustered obfuscations and distortions of social phenomena. The anger of the crowd is nothing else than the wrath of god.

Girard has observed that the most common theme of all *mythology* is collective violence. He explains this collective violence as a partially revealing and partially concealing representation of the scapegoat mechanism. Myth therefore is not the realm of fantasy, but finds its origin in historical events. This daring hypothesis coherently binds together the recurrence of a number of themes almost omnipresent in mythology: 1) a state of undifferentiation or social crisis;<sup>49</sup> 2) an individual guilty of a transgression that had caused the crisis. It are always crimes of the same type that pop up: “ces crimes [...] s’attaquent aux fondements mêmes de l’ordre culturel, aux différences familiales et hiérarchiques sans lesquelles in n’y aurait pas d’ordre social.”<sup>50</sup> First we have crimes of violence against those who symbolize authority, like the king or the father, or those who are the weakest and need protection. Secondly we have sexual misconduct like incest or bestiality. Thirdly we have religious violations against the firmest of taboos. These wrongdoings are feared to spread and to corrode social cohesion, they are considered to be “crimes contagieusement indifférenciateurs.”<sup>51</sup> Important to note is that, although the selection of a scapegoat is in reality arbitrary, he is portrayed in myth as being incontestably guilty of these crimes; 3) the presence of what Girard calls ‘victimary signs’. These are bodily defects or signs of social marginality. They provoke the rejection, angry looks or violence of people, and make

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<sup>44</sup> FLEMING, *René Girard*, p. 48.

<sup>45</sup> *Idem*, *op. cit.*, p. 61.

<sup>46</sup> *Idem*, *op. cit.*, p. 65.

<sup>47</sup> *Idem*, *op. cit.*, p. 62.

<sup>48</sup> R. GIRARD, *I See Satan Fall Like Lightning*, New York, 2001, p. 100.

<sup>49</sup> As common examples Girard mentions the lack of difference between night and day, gods and men, men and women, or natural catastrophes like floods or plagues.

<sup>50</sup> R. GIRARD, *Le bouc émissaire*, Paris, 1982, p. 27.

<sup>51</sup> *Ibidem*.



someone a suitable scapegoat; 4) the killing or the expulsion of the culprit;<sup>52</sup> 5) the return of order, symbolized or incarnated by the one who disturbed it, namely the culprit.<sup>53</sup>

Above anything else it is the striking comparison of myth with medieval *texts of persecution* that corroborates Girard's hypothesis that real violence is hidden behind the veil of the sacred presented to us in myth. Texts of persecution attest to the social crisis, the accusation of undifferentiating crimes, and the victimary signs.<sup>54</sup> Girard thinks that when these three stereotypes of persecution are present in a text, we can conclude that the violence it informs us about is historical. If this goes for medieval texts, it could also serve as a criterion to radically reinterpret mythology by rooting it in social reality. Girard writes:

“Standing before the myths, we remain the dupes of transformations that are no longer capable of fooling us in the case of the witch-hunt. [...] Mythology is a more powerful version of the transformational process whose functioning we demystify easily in the witch hunt because the process doesn't work any longer in our world, except in very weakened form, one incapable of producing myths.”<sup>55</sup>

In other words, “la violence qui constitue le coeur véritable et l'âme secret du sacré”<sup>56</sup> just as the victims that fell prey to it are no longer -sufficiently- sacralised in texts of persecution. The engine of the sacred, which is the scapegoat mechanism, seems to be sputtering. To understand how this came to be, we must turn to the biblical revolution in religion.

### 1.3 The biblical disruption of the sacred

The theologian Schwager asserts that violence is the most repeated theme in the Bible. Biblical violence truly is of biblical proportions, even in comparison with pagan myths.<sup>57</sup> “[I]n its preponderance, its scale and its very explicitness [...] we witness necessary preconditions for the gradual realization of its meaning.”<sup>58</sup> In the Bible collective violence is a common theme<sup>59</sup>, just as in mythology, but with the crucial difference that the victim appears as a scapegoat. In myth the victim was a culprit, in texts of persecution the scapegoat is already recognizable, in the gospel, Golsan says, the “text, in effect, interprets itself, and it is no longer up to the reader to disengage the scapegoat from the textual distortions that disguise him.”<sup>60</sup> Girard says: “The reversal of the relation of innocence and guilt between victims and executioners is the keystone of biblical inspiration.”<sup>61</sup> The Bible is therefore a critique of

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<sup>52</sup> The collective violence can however be subject to censorship. Girard thinks that in some mythological traditions, the believers have rewritten their myths in order to have a less repulsive pantheon. The violence of a group was reduced to the violence of one of them in particular, or subsequently erased altogether. Cf. Idem, *op. cit.*, pp. 97-111.

<sup>53</sup> Let us briefly illustrate this five-fold scheme by Girard's favorite example, the myth of Oedipus: A plague is ravaging Thebes (1). Oedipus, a limping stranger that rose to be king (3), is considered to be responsible for it, since he slept with his mother and killed his father, the king of thebes (2). An oracle decrees that to end the epidemic (5) the criminal needs to be expelled (4). Cf. Idem, *op. cit.*, pp. 38-39.

<sup>54</sup> Idem, *op. cit.*, pp. 23-34.

<sup>55</sup> Idem, *I See Satan Fall Like Lightning*, p. 73.

<sup>56</sup> Idem, *La violence et le sacré*, p. 51.

<sup>57</sup> R. SCHWAGER, *Must there be scapegoats? Violence and redemption in the Bible*, San Fransisco, 1987, pp. 47-67.

<sup>58</sup> A. MCKENNA, *Violence and Difference: Girard, Derrida and Deconstruction*, Urbana, 1991, pp. 201-221.

<sup>59</sup> E.g.: Job, the prophets, Yahweh's servant, Joseph, the Psalms, etc...

<sup>60</sup> R. GOLSAN, *René Girard and Myth*, New York, 1993, p. 100.

<sup>61</sup> GIRARD, *I See Satan Fall Like Lightning*, p. 118.

mythology. An innocent victim cannot be demonized as being the cause of all misery. Therefore, the real demon now finally appears from behind the curtain of the sacred, namely mob violence. The book of Job attests to the mechanism of social transcendence in describing a single God as an army of archers attacking their victim from all sides.<sup>62</sup> While Job's 'friends' are representing the calamities descending upon him, just as the insults he has to endure from his people, as part of an absolute Justice, they attest to the crowd as the vehicle of divine vengeance.<sup>63</sup> But Job rejects this interpretation. He "wrests the deity out of the process of persecution to envision him as the God of victims, not of persecutors."<sup>64</sup> The book as a whole attests to the fact that his misfortunes are of human origin. Job isn't caught in the web of divine wrath, he is the victim of his people, says Girard. Although the Old Testament definitely attests to the growing divide between victims and the divine, or between the collectivity and God, the old vestiges of the sacred are not yet erased. Yahweh remains an ambivalent God and his divine retribution still echoes mob violence. The definite breakthrough comes in the New Testament.

The gospel doesn't only clarify that violence is a purely human affair, but also delineates the process of mimetical contagion that precedes Christ's passion<sup>65</sup> and cries out his innocence. Since the scapegoat mechanism only functions as long as those involved have not identified it as such and, unaware of what they are doing, vehemently express how justified their anger is, the gospel has, in unveiling the injustice of what has been moulding culture 'depuis la fondation du monde', delivered a fatal blow to the effectiveness of surrogate victimage. "L'essentiel de la révélation sous le rapport anthropologique, c'est la crise de toute représentation persécutrice qu'elle provoque."<sup>66</sup> Golsan rephrases by claiming myth to be the "casualty of Judeo-Christian revelation and so too are the sacrificial practices which originally founded social and cultural order."<sup>67</sup> Whereas persecutors always think what they are doing is right and just, and for the common good,<sup>68</sup> Jesus clearly states "*They hated me without cause*"<sup>69</sup> to highlight the arbitrariness of the victimage. Mobs don't need rational grounds, but rather act for no reason, or for illegitimate ones: "The least pretext is enough. No one really cares about the guilt or the innocence of the victim."<sup>70</sup> The high priest Caiaphas formulates the sacrificial logic underlying the crucifixion in the clearest possible terms: "*better that one man die for the people than that the whole nation perish*"<sup>71</sup>. In contrast to medieval theology, the New Testament does not convict any of the agencies involved in Jesus' horrendous end - whether they be Caiaphas, Pilate, the Jews or the Romans-, but "illustrate[s] the chaotic movement and immense force of mob dynamics."<sup>72</sup> Only Jesus stands above the mimetic violence, and voluntarily undergoes it to unmask the scapegoat mechanism. The sacrificial catharsis after the crucifixion mentioned by Luke - "*Herod and Pilate became friends with each other that very day, for before this they had been at enmity with each other*"<sup>73</sup> - is described as a purely human phenomenon, rather than a divine. "The facts and patterns on

<sup>62</sup> R. GIRARD, *Job. The Victim of His People*, Stanford, 1987, pp. 22, 130.

<sup>63</sup> Idem, *op. cit.*, pp. 25-27.

<sup>64</sup> Idem, *I See Satan Fall Like Lightning*, p. 117.

<sup>65</sup> The passion exhibits for instance how the apostles get carried away by mimetic contagion, somehow turning their back on Jesus and contributing to the unanimity of all against one.

<sup>66</sup> Idem, *Le bouc émissaire*, p. 166.

<sup>67</sup> GOLSAN, *René Girard and Myth*, p. 88.

<sup>68</sup> GIRARD, *I See Satan Fall Like Lightning*, p. 126.

<sup>69</sup> John 15:25; cf. Ps. 35:19. Cf. GIRARD, *op. cit.*, p. 127.

<sup>70</sup> GIRARD, *I See Satan Fall Like Lightning*, p. 128.

<sup>71</sup> John, 11: 50; cf. GIRARD, *Le bouc émissaire*, p. 163.

<sup>72</sup> FLEMING, *René Girard*, p. 132.

<sup>73</sup> Luke, 23:12; cf. GIRARD, *I See Satan Fall Like Lightning*, p. 132.

which mythic deifications are based are all present in the Passion stories, but they are not misunderstood, nor do they go unrecognized as they would in a myth. Rather they are understood, demystified, neutralized.<sup>74</sup> Christianity is therefore not a religion in the age-old sense, but rather a horse of Troy that destroys the sacred from within.<sup>75</sup> In deconstructing the scapegoat mechanism, “it leaves sacrificial structures in place while exposing them for what they are and thereby enabling us to withdraw credibility and allegiance from them.”<sup>76</sup> Through the Heideggerian notion of *Wahrheit als Unverborgenheit (a-lètheia)*<sup>77</sup> we can understand why also Girard could be seen to interpret Christianity as “la religion de la sortie de la religion”<sup>78</sup>, since religion’s hidden foundation is revealed and therefore sabotaged. Our proclivity to persecute is condemned and maimed. The desacralisation of all institutions, religious and political ones, which have evolved out of the original murder and took part in its logic by being invested with sacred power, or its remnants, is what Girard calls the triumph of the cross over Satan.<sup>79</sup> Satan is described in the gospel as ‘tempter’, ‘accuser’, ‘*princeps huius mundi*’ or ‘the murderer from the beginning’, he is the incarnation of “all the symptoms of desire and its sickness”.<sup>80</sup> Satan is therefore the signifier of the mimetical process as a whole that has claimed so much innocent blood since the beginning of time. Satan is as such intimately connected with what could be a new reading of the original sin. “Under Girard’s interpretation, there is a twofold sense of original sin: 1) human beings are born with the propensity to imitate each other and, eventually, be led to violence; 2) human culture was laid upon the foundations of violence”, says Andrade.<sup>81</sup> Satan stands, as the accuser or the public prosecutor<sup>82</sup> against the Holy Gost or the *parakleitos*, a word originally denoting ‘the lawyer for the defense’, ‘defender of the accused’. “Le paraclet, c’est l’avocat universel, le préposé à la défense de toutes les victimes innocentes, *le destructeur de toute représentation persécutrice*. Il est donc bien l’esprit de vérité, celui qui dissipe les brumes de toute mythologie.”<sup>83</sup> Satan is, as mimetical contagion himself, the lord of the mythical illusions. The gospel on the other hand is written in the spirit of the paraclete.

#### 1.4 Historical Christianity and the modern world

Out of Christ’s death a new order has arisen, a new religious culture that has again generated its own scapegoats, the Jews for instance, who were blamed for the passion. The whole revelation seems to have been sucked back into the black hole it uncovered. Although nowhere in the gospel the crucifixion is identified with a sacrifice -it is after all a spontaneous happening and not a ritual-, the sacrificial interpretation has become legio. Medieval theology has focused itself on Paul’s letter to the Hebrews, which proposes a

<sup>74</sup> Idem, *op. cit.*, p. 133.

<sup>75</sup> P. ANTONELLO, in the foreword of R. GIRARD, G. VATTIMO, *Christianisme et modernité. Entretiens menés par Pierpaolo Antonello*, Paris, 2009, p. 10.

<sup>76</sup> R. G. HAMMERTON-KELLY, *Sacred Violence. Paul’s Hermeneutic of the Cross*, Minneapolis, 1992, p. 60.

<sup>77</sup> M. HEIDEGGER, *Vom Wesen der Wahrheit. Zu Platons Höhlengleichnis und Theätet*, Gesamtausgabe Band 34, Frankfurt am Main, 1997, p. 124.

<sup>78</sup> This is a description of Gauchet. Cf. M. GAUCHET, *Le désenchantement du monde. Une histoire politique de la religion*, Paris, 1985, p. 11.

<sup>79</sup> Coll. 2, 14-15; cf. GIRARD, *I See Satan Fall Like Lightning*, p. 137-138; Idem, *Des choses cachées depuis la fondation du monde*, pp. 214-217.

<sup>80</sup> Idem, *I See Satan Fall Like Lightning*, p. 182.

<sup>81</sup> G. ANDRADE, art. ‘René Girard (1923-)’ in *The Internet Encyclopedia of Philosophy*, 2012, cf. <http://www.iep.utm.edu/girard/#SH5d>.

<sup>82</sup> GIRARD, *I See Satan Fall Like Lightning*, p. 138.

<sup>83</sup> Idem, *Le bouc émissaire*, pp. 289-290 (original italics).

sacrificial pact between Father and Son. Hereby the responsibility for the crucifixion is again projected on the sacred. This is however in contradiction to the spirit of the gospel, where no violence whatsoever is attributed to God. The idea that God does not avenge any wrongdoings, and expects the same from humanity, is found in Matthew.<sup>84</sup> It seems that, since Christianity has used the mythic elements it is deconstructing, its message was highly vulnerable to be recuperated by the very sacrificial structures it laid bare. Fleming has even claimed that “historical Christianity became one of the principal mechanisms for hiding its own revelation.”<sup>85</sup> Anselm’s doctrine of atonement maybe forms the zenith of medieval sacrificial theology in the west. In *Cur deus homo* he explains that no human being was capable of enough suffering to provide God compensation for humanity’s misconduct. Therefore Jesus needed to save us from divine wrath.<sup>86</sup> Only the resacralisation of Christianity, Girard thinks, can explain its swift success among Romans and barbarians alike, whose conceptual schemes were still imbued with the primitive sacred. Only through the protective envelop of the sacrificial reading, the revelation of human violence was able to spread unto the end of the world.<sup>87</sup>

Although “in history, we are always between the gospel and myth”,<sup>88</sup> Christ’s message has bared remarkable and tangible fruits. Although it is a very slow process, Girard says that “[w]herever Christianity spreads, the mythical systems decay and sacrificial rites disappear”<sup>89</sup>. It is what Paul calls the knowledge of the cross, which enables us to recognize “situations of oppression and persecution that earlier societies did not detect or took to be inevitable.”<sup>90</sup> In the long run, more and more victims appear as victims, which means their victimage was unsuccessful.<sup>91</sup> As is the case with any kind of historical progress, there is no absolute linearity about it and many relapses into sacrificial mentality are to be deplored, but nevertheless there is a general tendency towards an ever greater concern for victims notable in western history. Not that we have overcome our scapegoating tendencies, but it embarrasses us when we are caught doing it, and they no longer generate the sacred. “Nous restons capables, en somme, de haïr nos victimes; nous ne sommes plus capables de les adorer.”<sup>92</sup> Our massive belief in the guilt of those we persecute is crumbling, and our victims are more often than not no longer harmed physically, but rather exposed to a form of psychological violence,<sup>93</sup> or economical or social exclusion. Our awareness of surrogate victimage has reached such a level that the common notion of ‘scapegoat’ includes all kinds of substitutive victims, as one might be tempted to beat up his wife instead of kicking his boss. Girard writes that:

“Since the High Middle Ages all the great human institutions have evolved in the same direction, more humane private and public law, penal legislation, judicial practice, rights of the

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<sup>84</sup> “But I tell you to love your enemies and pray for anyone who mistreats you. Then you will be acting like your Father in heaven. He makes the sun rise on both good and bad people. And he sends rain for the ones who do right and for the ones who do wrong.” Cf. Mat. 5: 44-45; GIRARD, *Des choses cachées depuis la fondation du monde*, p. 206.

<sup>85</sup> FLEMING, *René Girard*, p. 144 (original italics deleted).

<sup>86</sup> ANSELMUS CANTUARIENSIS, *Cur deus homo*, in *Opera omnia*, edited by F.S. Schmitt, Stuttgart-Bad Cannstatt, 1968, lib. 1, cap. 20-23, pp. 86-91.

<sup>87</sup> GIRARD, *Des choses cachées depuis la fondation du monde*, pp. 273-277.

<sup>88</sup> R. GIRARD, *Generative Scapegoating. Discussion*, art. in *Violent Origins. Walter Burkert, René Girard and Johnathan Smith on Ritual Killing and Cultural Formation*, Stanford, 1987, p. 145.

<sup>89</sup> Idem, *I See Satan Fall Like Lightning*, p. 154.

<sup>90</sup> Ibidem.

<sup>91</sup> FLEMING, *René Girard*, p. 145.

<sup>92</sup> GIRARD, *Des choses cachées depuis la fondation du monde*, p. 45.

<sup>93</sup> Idem, *I See Satan Fall Like Lightning*, pp. 156-157.

individuals. [...] When viewed in terms of the large picture, this social and cultural evolution goes always in the same direction, towards the mitigation of punishment, greater protection for potential victims. [...] In each generation legislators questioned more radically an historical heritage that they felt was their duty to transform. Where their ancestors saw nothing to be reformed, they discovered oppression and injustice."<sup>94</sup>

In fact the growing concern for victims is the fundamental and untouchable value of our time.

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<sup>94</sup> *Idem, op. cit.*, pp. 166-167.

## 2 A brief overview of Harald Maihold's *Strafe für fremde Schuld*

To the contemporary ear the postulate that punishment presupposes guilt seems inviolable and evident. Punishment however has evolved from an objective compensation to restore order, possibly carried out by others than the culprit, to a purely subjective measurement. Maihold has traced the discussions among scholars (12<sup>th</sup>-17<sup>th</sup> century) on the so called *Strafe für fremde Schuld* or surrogate punishment, indicating that innocents undergo punishment for crimes committed by others. Originally punishment was used in a very broad sense, incorporating all kinds of 'injustice', not only surrogate punishment, but also handicaps or a dying flock. Gradually this inflated concept was narrowed down to its contemporary meaning, namely a penalty for proper guilt. It could therefore be argued that Maihold unravelled what Voegelin coined as an evolution from symbolical compactness to differentiation.<sup>95</sup>

### 2.1 Punishment and the principle of guilt. A history of a troubled marriage

The divine retribution that awaits us in the afterlife is thought to be in accordance with our merits. It is therefore to theology that we owe the principle of guilt, expressed in eternal and spiritual punishment by God. In an attempt to imitate its divine counterpart, earthly justice has introduced it as well, first in penitential jurisprudence and subsequently, under influence of Aquinas and the canonist tradition, secular penal law has followed.<sup>96</sup> In the heavens as well as on earth, the principle of guilt functions to protect us from arbitrariness.<sup>97</sup> We can only fully appreciate this, once we have gained some understanding into the doctrine of surrogate punishment.<sup>98</sup>

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<sup>95</sup> On the Egyptian word *ma'at* for instance Voegelin comments: "The symbol is too compact to be translated by a single word in a modern language". E. VOEGELIN, *Order and History. Volume 1. Israel and Revelation*, Missouri, 2001, p. 79. See also Idem, op.cit., p. 3; R. N. BELLAH, *Religion in Human Evolution. From the Palaeolithic to the Axial Age*, Cambridge (Mas.)- London, 2011, 271.

<sup>96</sup> MAIHOLD, *Strafe für fremde Schuld*, pp. 350-351.

<sup>97</sup> Idem, *op. cit.*, p. 358.

<sup>98</sup> We cannot however portray this doctrine in all its historical complexity. A primordially thematic rather than a strict chronological presentation was chosen. The subtle differences in how canon, secular law or theology dealt with the doctrine of surrogate punishment, and the ways they influenced each other, will for instance be largely lost. A clear and most of all succinct presentation of *Strafe für fremde Schuld* has the disadvantage of blurring chronology and cannot do justice to the internal dynamics of the doctrine, but is largely able to avoid repetition. Since many of the themes are dealt with by a large amount of authors, belonging to different schools and centuries, we have preferred to group them.

For interested readers who do not have a background in legal history, we provide some additional historical information on authors or legal collections in the footnotes.

We moreover present a (working) translation for the Latin quotes and terminology. With one exception, the translations are my own.

## 2.1.1 The doctrine of surrogate punishment

### 2.1.1.1 Divine and human punishment

In the Old Testament God often punishes innocents, which gave rise to the idea among earlier canonists (12<sup>th</sup>-15<sup>th</sup> century) that divine punishment is not restricted to guilt, but that some other cause may do.<sup>99</sup> This so called *causa*-punishment is however limited to temporal matters. The *poena aeterna*<sup>100</sup> is the exclusive consequence of guilt, just as the *poena spiritualis excommunicationis*<sup>101</sup>.

The obvious question was how divine justice that gives everyone his due in the afterlife was to be combined with His surrogate punishments on earth. Augustine holds that God's judgement is always just and true, but that human reason is insufficient to penetrate its causality.<sup>102</sup> It was Augustine's deep distrust in the here and now that prevented canonists to fully imitate divine judgement on earth. Men ought therefore not to imitate God when His judgement is noxious (*poena nocens*)<sup>103</sup>, unless it is useful and corrective (*poena conferens ad salutem*).<sup>104</sup> Bottom line is that, although Roman law did traditionally not permit surrogation<sup>105</sup>, human punishment by secular law came to incorporate surrogate punishment

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<sup>99</sup> The *Liber Sextus* renders this in the following rule: "*Sine culpa, nisi subsit causa, non est aliquis puniendus*". Translation: "Nobody should be punished without guilt, unless a reason for punishment exists." (Cf. CORPUS IURIS CANONICI *emendatum et notis illustratum. Gregorii XIII. pont. max. iussu editum*. Romae, 1582, VI 5, 13, 23 (Cf. <http://digital.library.ucla.edu/canonlaw/>)). The *Liber Sextus*, promulgated in 1298 by Boniface VIII, is one of the books out of which the *Corpus iuris canonici*, the backbone of the classical canon law, consisted. In the twelfth century, the history of canon law enters its classical era, since it then became a comprehensive, organised, systematic, consistent, pan-european and independent body of law, which had a tremendous influence on Western legal culture. In 1140 the first pillar of the *Corpus iuris canonici* saw the light, namely the *Decretum Gratiani*. The *Decretum* collected and organised a mass of authorities, such as decrees of councils -*canones*-, papal decisions -*decretales*-, scriptural fragments, passages in the church fathers and some Roman law. Because canon law was conceived as work in progress, popes as well as councils continued to issue adaptations, affirmations or amplifications of the rules found in the *Decretum*. These adjustments were subsequently gathered in collections, which formed the next building blocks of the *Corpus iuris canonici*. Under Gregory IX the *Liber extra* appeared in 1234 and in 1298, as was said above, the *Liber sextus*. (Cf. R.H. HELMHOLZ, *The Spirit of Classical Canon Law*, Athens (Georgia), 1996, pp. 2-15; for the notion of progress inherent in the system of canon law cf. H.J. BERMAN, *Law and Revolution. The Formation of the Western Legal Tradition*, Cambridge (Mass.)-London, 1983, pp. 202-203.)

We shall from now on use the conventional way to refer to the *Corpus iuris canonici*, which means, for instance that VI stands for '*Liber sextus*' and C for a '*causa*' of the second part of the *Decretum Gratiani*, X for the '*Liber extra*'. These references are traditionally given without mentioning the Corpus itself. We will do the same for the *Corpus iuris civilis*.

<sup>100</sup> Translation: eternal punishment.

<sup>101</sup> Translation: the spiritual punishment of excommunication. Cf. S. RAYMUNDUS de PENIAFORTE, *Summa de poenitentia*, edited by X. Ochao and A. Diez, Roma, 1976, lib. 3, tit. 32, num. 6, p. 732. Raymundus de Peniaforte lived from circa 1180-85-1275 and was the compiler of the *Liber extra* (cf. footnote 99). Cf. J.A. BRUNDAGE, *Medieval Canon Law*, London-New York, 1995, p. 222.

<sup>102</sup> Augustine, quoted in C. 23, q. 4, c. 23. Aquinas follows Augustine's train of thought: THOMAS de AQUINO, *Summa theologiae*, Matriti, 1978, 2-2, q. 108, a. 4, solutio ad 2, p. 673. See also MAIHOLD, *Strafe für fremde Schuld*, pp. 131, 162-163.

<sup>103</sup> Translation: "harmful punishment".

<sup>104</sup> Translation: "punishment conducive to salvation". Maihold does not provide us with a more specific reference than Augustine's "Erklärung zu Josua 7". Unfortunately, we haven't found the mentioned passus in Augustine. Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 133.

<sup>105</sup> This is rendered in the formula: "*alteri stipulari nemo potest*". Translation: "Nobody can stipulate for another". This means that Roman law did not allow obligations for third parties to be created in a contract. Cf. R. ZIMMERMAN, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford-New York, 1996, pp. 34-35.

Cf. D. 45, 1, 38, 17: <http://webu2.upmf-grenoble.fr/DroitRomain/Corpus/d-45.htm#1>.

under the influence of the canonistic tradition.<sup>106</sup> The infliction of this type of punishment by humans was however much more restricted than its divine counterpart, as we shall see further on.

### 2.1.1.2 Who is being punished?

The victims of surrogate punishment are mostly connected to the culprit, since it are his sons, wives, family members, servants,<sup>107</sup> animals,<sup>108</sup> or reificated subjects.<sup>109</sup> There is communal responsibility, when the group is punished for the fault of their leader, and ruler punishment for the depravities of the group.<sup>110</sup> The ruler's wife can take the hit for her husband as well.<sup>111</sup> Furthermore we encounter lunatics<sup>112</sup> and inanimate objects, like cities which are destroyed,<sup>113</sup> the offspring of priests and other illegitimates,<sup>114</sup> coming generations even.<sup>115</sup>

A faithful son of a heretic should however not be punished,<sup>116</sup> nor fathers for their sons.<sup>117</sup> Sons that were adopted<sup>118</sup>, emancipated before the crime of heresy was committed<sup>119</sup> or who turned their father in<sup>120</sup> are also exempted. Daughters do not get punished, or only slightly.<sup>121</sup>

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<sup>106</sup> MAIHOLD, *Strafe für fremde Schuld*, p. 139.

<sup>107</sup> "anathematizetur pro patris peccato filius; aut pro mariti, uxor aut pro domini, servus; aut quisquam etiam in domo nondum natus", cf. C. 24, q. 3, c. 1. Translation: "let a son be put under the ban for the sin of his father, or a wife for that of her husband, or a slave for that of his master; or even any person which has not yet been born in the family." Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 128.

<sup>108</sup> Covarrubias is referring to a passage of Augustine in which he treats Lev. 20. 15-16, where the death penalty is ordered both for whom commits sexual acts with an animal as for the innocent animal involved in the act. Cf. D. de COVARRUBIAS Y LEYVA, *Variarum ex iure pontifico, regio et caeareo resolutionum libri III*, in *Opera omnia*, Augustae Taurinorum, 1594, lib.2, cap. 8. num. 1, p. 265. See also: MAIHOLD, *Strafe für fremde Schuld*, p. 216.

Diego de Covarrubias y Leyva (1512-1577) was the most famous canonist of his time in Salamanca. He combined his academic activities with forensic practice and was able to successfully integrate the traditions of civil law, canon law and moral theology. (Cf. DECOCK, *Theologians and Contract Law. The Moral Transformation of the Ius Commune (ca. 1500-1650)*, Leiden-Boston, 2013, pp. 41-42; MAIHOLD, *Strafe für fremde Schuld*, p. 69).

Also Gratian, the author of the *Decretum Gratiani* of whom virtually nothing is known, writes: "*animalia et insensibilia quae morte perduntur, vel anathematizantur*". Translation: "animals and lifeless objects which are killed or put under the ban", cf. C. 1, q. 4, c. 11, pars 3, § 7. MAIHOLD, *Strafe für fremde Schuld*, p. 123.

<sup>109</sup> Such as children, servants and animals, who count as the *res*, the possession of the *pater familias*. Cf. THOMAS, *Summa theologiae*, 1-2, q. 87, a. 8, co, p. 569-570; 2-2, q. 108, a. 4, solutio ad 3, p. 673; MAIHOLD, *Strafe für fremde Schuld*, pp. 165-166.

<sup>110</sup> MAIHOLD, *Strafe für fremde Schuld*, p. 128.

<sup>111</sup> A. GANDINUS, *Tractatus de Malificiis*, tit. De poenis reorum, num. 7, p. 149, in P. H. LILIUS (ed.), *Tractatus diversi super malificiis, neme D. Alberti de Gandino, D. Bonifacii de Vitalianis, D. Pauli Grillandi, D. Baldi de Periglis, D. Jacobi de Arena*, Venetiis, 1560, pp. 3-294.

Albertus Gandinus (1245-1310) was as a judge "der auch als Praktiker bedeutendste Kriminalist des Mittelalters" Cf. E. KANTOROWICZ, *Albertus Gandinus und das Strafrecht der Scholastik. Erster Band. Die Praxis. Ausgewählter Strafprozessakten des dreizehnten Jahrhunderts nebst diplomatischer Einleitung*, Berlin, 1907, p. VI.

<sup>112</sup> MAIHOLD, *Strafe für fremde Schuld*, p. 176.

<sup>113</sup> T. DECIANI, *Tractatus criminalis*, Venetiis, 1614, lib. 5, cap. 50, num. 1, p. 446. Deciani (1509-1582) is deemed to be one of the most important authors on criminal law of his time. Cf. MAIHOLD, *Strafe für fremde Schuld*, pp. 74, 79, 346.

<sup>114</sup> A. GANDINUS, *Tractatus de Malificiis*, tit. De poenis reorum, num. 7, p. 149, pp. 3-294.

<sup>115</sup> Ex 20, 5. Cf. MAIHOLD, *Strafe für fremde Schuld*, pp. 277-285.

<sup>116</sup> B. de VITALINIS, *Tractatus de malificiis, cum additionibus et apostillis D. Hieronymi Chuchalon Hispani, rub. De crimine haeresis*, num. 10, p. 364, in P. H. LILIUS (ed.), *Tractatus diversi super malificiis, neme D. Alberti de*



A special case is the collective punishment. Roman history abounds in cities being punished as a whole, a sanction justified as restoring the *pax deorum*, or as counteracting contamination by the crime.<sup>122</sup> In this tradition secular law takes up the theme. Bartolus<sup>123</sup> says the legal personality of a group is a *fictio iuris*.<sup>124</sup> Precisely because of that it can perpetrate, for instance in an improper sense by the actions of its members: one murderer can imply the guilt of all. Bartolus argues that in cases of heresy and lese-majesty, criminal penalties can be imposed on a community.<sup>125</sup> Gandinus says a group can have a common will (*ex animo proveniens*)<sup>126</sup> when they all commit a crime or issue a common decision leading to it.<sup>127</sup>

Under debate is whether spiritual punishments, like excommunication, can be imposed on groups. Augustine says excommunication can't. He would never excommunicate a group<sup>128</sup>

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Gandino, D. *Bonifacii de Vitalianis*, D. Pauli Grillandi, D. Baldi de Perigliis, D. Iacobi de Arena, Venetiis, 1560, pp. 295-378. Bonifacius de Vitalinis (died in 1390) is known for the aforementioned treatise on criminal law. Cf. MAIHOLD, *Strafe für fremde Schuld*, pp.136, 142.

<sup>117</sup> The reason for this is that sons are considered to be infected by their father's blood, but not the other way around. Cf. ARETINUS (ANGELUS de GAMBILIONIBUS), *Tractatus de malificiis*, cum additionibus A. Bonfrancisci e.a., apud viduam H. Falchenburg, Coloniae Agrippinae, 1599, tit. Et hai tradito, num. 13, p. 282. Aretinus was a 14<sup>th</sup> century professor of philosophy at Bologna. (Cf. [http://www-app.uni-regensburg.de/Fakultaeten/PKGG/Philosophie/Gesch\\_Phil/alcuin/philosopher.php?id=194](http://www-app.uni-regensburg.de/Fakultaeten/PKGG/Philosophie/Gesch_Phil/alcuin/philosopher.php?id=194).)

<sup>118</sup> T. DECIANI, *Tractatus criminalis*, Venetiis, 1614, lib. 7, cap. 41, num. 11, p. 250.

<sup>119</sup> Idem, *op. cit.*, lib. 7, cap. 41, num. 4, pp. 249-250.

<sup>120</sup> A. de CASTRO, *De iusta haereticorum punitione libri tres*, Antverpiae, 1586, lib. 2, cap. 26, pp. 281-287, 290-292 (non vidi), cf. MAIHOLD, *Strafe für fremde Schuld*, pp. 295 (for the reference to Castro) and 289-295 (in general). Alfonso de Castro (1495-1558) was a theologian of the Franciscan order, who dedicated himself to criminal law. Since he tried to provide foundations for punitive violence he should be considered as a philosopher of criminal law. Apart from being professor in Salamanca, he advised the Spanish kings on the question of heresy and was active in the struggle against the Lutherans in the Netherlands. Although he is considered by many as the founder of criminal law or the science of criminal law, others have deemed this an exaggeration. Cf. MAIHOLD, *Strafe für fremde Schuld*, pp. 66-67; F. TOMÁS Y VALIENTE, *El derecho penal de la Monarquía absoluta (Siglos XVI-XVII-XVIII)*, Madrid, 1969, pp. 90-91.

<sup>121</sup> DECIANI, *Tractatus criminalis*, lib. 7, cap. 41, num. 12, pp. 250-251.

<sup>122</sup> Livius writes: "*bona eorum, ne quid ex contagione noxae remaneret penes nos, Romam portavimus*". Translation: "We brought their possessions to Rome, so that the offence wouldn't contaminate us at all." T. LIVIUS, *Ab urbe condita*, edited by B.O. Foster, Loeb Classical Library, Cambridge (Mas)-London, 1982, lib. 9, cap. 1, num. 6, p. 162. The translation in the Loeb edition runs "Their possessions -that no guilt might remain with us from touching them- we carried to Rome".

<sup>123</sup> Bartolus de Saxoferato (1313/14-1357) was a professor of Roman civil law at Perugia who integrated argumentations drawn from Aristotelian-Thomistic philosophy, theology and canon law into civil law. Cf. W. DECOCK, *Theologians and Contract Law*, p. 37; Encyclopaedia Britannica: <http://www.britannica.com/EBchecked/topic/54429/Bartolus-of-Saxoferrato>.

<sup>124</sup> Translation: legal fiction. See BARTOLUS de SAXOFERRATO, *In secundam noui partem*, cum adnotationibus A.B. Parisij, e.a., Venetijs, 1570, Comm. ad Dig. 48, 19, 16, 10, num 2 (De poenis, 1. Aut facta, § nonumquam) p. 200; ([http://www.historia.unimi.it/digLibrary/slideshow3.asp?n=399&dir=2\\_46937&ww=5#pagina](http://www.historia.unimi.it/digLibrary/slideshow3.asp?n=399&dir=2_46937&ww=5#pagina)). For more information on legal fictions, see Y. THOMAS, *Fictio legis. L'empire de la fiction romaine et ses limites médiévales*, art. in *Droits*, 21, 1995, pp. 17-63.

<sup>125</sup> Idem, *op. cit.* ad Dig. 48, 19, 16, 10, num 5 (De poenis, 1. Aut facta, § nonumquam) p. 200; ([http://www.historia.unimi.it/digLibrary/slideshow3.asp?n=400&dir=2\\_46937&ww=3#pagina](http://www.historia.unimi.it/digLibrary/slideshow3.asp?n=400&dir=2_46937&ww=3#pagina)). MAIHOLD, *Strafe für fremde Schuld*, pp. 145-149.

<sup>126</sup> Translation: "originating out of its will".

<sup>127</sup> GANDINUS, *Tractatus de Malificiis*, tit. De homicidariis et eorum pena, num. 14, p. 295 (Maihold refers to num. 13, which, at least in the edition consulted by us, did not contain the quotation).

<sup>128</sup> As a bishop Augustine also was a judge.

“*nisi gravissime commoveret*”<sup>129</sup>. Raymundus relates this commotion to external social pressure: “*innuit ibi Augustinus non quid fieri debet, sed quid de facto aliquando fit, cum homines sunt turbati.*”<sup>130</sup> Following Augustine’s intuition, canonists require a sinful soul as precondition for excommunication, which groups can’t have.<sup>131</sup> By this condition excommunication was bound to the principle of guilt. Since it was the first punishment proclaimed by human judges to be thus confined, excommunication was the anchor point of the principle of guilt on earth.<sup>132</sup>

Also the killing of innocents in war and the passion of Christ is treated as surrogate punishment (cf. infra).

### 2.1.1.3 What kind of punishments?

Divine surrogate punishment can be capital, corporal (implying defects and abnormalities) and economical.<sup>133</sup> Since humans can’t understand God’s corporal punishments and shouldn’t imitate his *poenae nocentes*<sup>134</sup> human surrogate punishment is mostly economical.<sup>135</sup> It can also imply the loss of honour (*infamia*)<sup>136</sup> or the interdict,<sup>137</sup> which is a milder version of excommunication. In canon law *irregularitas* is a sanction excluding someone from taking up church offices ‘on grounds of the blood’<sup>138</sup>, meaning congenital abnormalities or being the sprout of illegal relationships.<sup>139</sup>

### 2.1.1.4 Strategies of legitimation

One strategy to deal with surrogate punishment is the doctrine of original sin. By claiming we all have sinned in Adam, the divine punishments connected to our fallen nature -like mortality

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<sup>129</sup> Augustine’s letter that deals with this theme is quoted in total in the *Decretum Gratiani*: C. 23, q. 5, c.2. Translation: „unless it would be heavily disturbing.” Some versions read “*commoverer*”, which would then be “unless I would be heavily disturbed”.

<sup>130</sup> RAYMUNDUS, *Summa de poenitentia*, lib. 3, tit. 32, § 6, p. 732; MAIHOLD, *Strafe für fremde Schuld*, p.113. Translation: “Augustine meant in that matter not what should happen, but what *de facto* happens when people are disturbed.”

<sup>131</sup> C. 24, q. 3, c.1; SINIBALDUS FLISCUS (INNOCENTIUS IV), *Commentaria super libros quinque decretalium*, Francofurti ad Moenum, 1570, tit. 39, c. 52, num. 1, p. 559. Pope Innocence IV or Sinibaldo dei Fieschi (died in 1254) was a canon lawyer who after a period of teaching at Bologna made career in the Vatican under Gregory IX and became pope in 1243. He is famous for excommunicating Emperor Frederick II and invested a lot of energy in crusading projects. Cf. BRUNDAGE, *Medieval Canon Law*, p. 226.

<sup>132</sup> The interdict however, a spiritual punishment also known as the small excommunication -excluding the sinner not from the community of faith as such, but from for instance church service-, was pronounced on groups and struck innocents and culprits alike. MAIHOLD, *Strafe für fremde Schuld*, pp. 112-117.

<sup>133</sup> Examples: Iosua 6 and 7; I Samuel 4 and 15; II Samuel 24; Genesis 19; Exodus 12... Cf. RAYMUNDUS, *Summa de poenitentia*, lib. 3, tit. 32, § 6, pp. 731-733; MAIHOLD, *Strafe für fremde Schuld*, p. 120.

<sup>134</sup> Cf. supra.

<sup>135</sup> MAIHOLD, *Strafe für fremde Schuld*, pp. 121, 143-144, 217-218, 236.

<sup>136</sup> Infamia implied the loss of assets, inheritance and eligibility for military service or a public office. Cf. Arcadius et Honorius, Cod. 9, 8, 5. Cf. <http://webu2.upmf-grenoble.fr/DroitRomain/Corpus/CJ9.htm#8>.

<sup>137</sup> Cf. footnote 132.

<sup>138</sup> “*ex iusta sanguinis sententia*”, cf. CASTRO, *De potestate legis poenalis*, Salamanticae, 1550, lib. 1, cap. 3, p. 18. Translation: “based upon a justified blood sentence”.

<sup>139</sup> MAIHOLD, *Strafe für fremde Schuld*, pp. 312-313.

and body-defects- can be explained as biological inheritance<sup>140</sup> of guilt and would therefore cease to be surrogative.

The reasons for *causa*-punishment are diverse. Augustine says it fortifies discipline (“*disciplina sancitur*”)<sup>141</sup> and provides unity. Thomas renders this Augustinian stance as: “*ad commendandum unitatem humanae societatis*”<sup>142</sup>. Sometimes the grounds given are no more than hatred, poverty, provoking scandals because of defects as leprosy or simply the crime of others.<sup>143</sup>

The fear for imitation of the crime (especially of the father) is systematically advanced as legitimation for the surrogate punishment, now appearing as a preventive doctrine<sup>144</sup> clearly deviating from the retaliation inherent in the principle of guilt. Thomas argues innocents are

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<sup>140</sup> A. AUGUSTINUS, *De civitate dei*, edited by P. Levine, Loeb Classical Library, Cambridge (Mas)-London, 1988, lib. XIII, cap. 14, p. 180.

<sup>141</sup> A. AUGUSTINUS, *Quaestionum in Heptateuchum*, in *Quaestionum in Heptateuchum libri VII. Locutionum in Heptateuchum libri VII. De octo questionibus ex veteri testamento*, Turnholti, 1958, lib. 6, q. 8, pp. 315-316. A more extensive quote is: “*apud eos qui talia [i.e. surrogate punishments] metuunt disciplina sancitur ut non se solum quisque curet in populo, sed invicem sibi adhibeant diligentiam, et tanquam unius corporis et unius hominis alia pro aliis sint membra sollicita [...]. Simul etiam ostenditur quantam connexa sibi populi societate ipsa universitas, ut non in seipsis singuli, sed et tanquam partes in toto existimentur.*” Translation: “among those who fear those things [i.e. surrogate punishment] discipline is fortified, so that every member of the community doesn’t just take care of himself, but they mutually care for each other and some members are in distress for the sake of the others as if they were one body of one man [...]. And it also becomes manifest to what extent the group itself is held together in a community of the people, so that the individuals are not considered in themselves as such, but rather as parts of a whole.” Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 122.

<sup>142</sup> THOMAS, *Summa Theologiae*, 2-2, q. 108, a. 4, solutio ad 1, p. 673. A more extensive quote is: “*ad commendandum unitatem humanae societatis ex qua unus debet pro alio sollicitus esse, ne peccet: et ad detestationem peccati, dum poena unius redundat in omnes, quasi omnes essent unum corpus*”. Translation: “to procure unity of the human society, wherein one should be filled with apprehension that the other wouldn’t sin; and to renounce sin, while the punishment of one flows over into all the rest, as if all would be one body”. Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 167.

<sup>143</sup> “*paupertas, odium, [...] vitium, scelus*”, see RAYMUNDUS, *Summa de poenitentia*, lib. 3, tit. 32, § 8, p. 735. Translation: “poverty, hate, defect, crime”; “*defectum, scandala*” see J. von ERFURT, *Summa confessorum*, edited by N. Brieskorn, Frankfurt am Main, 1980, lib. 2, pars 5, tit. 3, pp. 1172-1174. Translation: “defect, scandals”. Johannes von Erfurt was both theologian and jurist. He lived from +- 1250-1320. Cf. H. KÜHNE, art. *Johannes von Erfurt (um 1250- nach 1320)*, in *Handwörterbuch zur deutsche Rechtsgeschichte*: [http://www.hrgdigital.de/download/pdf/johannes\\_von\\_erfurt\\_um\\_1250\\_nach\\_1320.pdf](http://www.hrgdigital.de/download/pdf/johannes_von_erfurt_um_1250_nach_1320.pdf) ); Regarding leprosy, see X, 3, 6, 4; J. von ERFURT, *Summa confessorum*, lib. 2, pars 5, tit. 3, p. 1173.

<sup>144</sup> Baldus writes for instance on the collective punishment of a family: “*est contra omne ius divinum et humanum, posset tamen tollerari, quoniam licet non sine culpa, tamen subest causa, quo magis a delicto absteineat.*” BALDUS de UBALDIS, *Super octavo Codicis lust. Lib. Commentaria*, Lugduni, 1532, Comm. ad cod. 8, 47, 22, p. 447 (non vidi), cf. MAIHOLD, *Strafe für fremde Schuld*, p. 141. Translation: “it is against all divine and human law since it is not allowed [to punish] without guilt, but it can nevertheless be tolerated however, when a reason exists, in order to better abstain from crime.”

Baldus de Ubaldis (ca. 1327-1400) studied civil and canon law and became an influential professor who taught at no less than six universities. Among his students was the later pope Gregory XI. Cf. BRUNDAGE, *Medieval Canon Law*, p. 207.

Another example of prevention as the goal of surrogate punishment can be found in COVARRUBIAS, *Variarum resolutionum*, lib.2, cap. 8. num.4, sub: tertio, p. 267.

Also Innocence IV writes: “*et ideo ex iusta causa punitur unus pro alio, ne eum in vitio imitetur*”. Cf. SINIBALDUS, *Commentaria super libros quinque decretalium*, tit. 39, c. 52, num. 3, p. 559. Translation: “and therefore someone can be punished for someone else for a just reason, namely to prevent him from imitating the crime”. Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 127,141, 216.

punished “*propter imitationem culpa*”<sup>145</sup>, or because “*peccatum unius derivatur in alterum per imitationem*”<sup>146</sup>. Imitation is explained as contamination of the blood. The punishment is supposed to counter foul hereditary inclinations. Only Castro keenly observes that imitation is a primarily social phenomenon rather than a biological one.<sup>147</sup>

Although secular law in general respects the principle of guilt,<sup>148</sup> there are *delicta atrocissima* “*in quibus unus tenetur pro delicto alterius, utputa in crimine laesae maiestatis divinae & humanae*”<sup>149</sup>, as Farinacci writes.<sup>150</sup> The sons of traitors and heretics can therefore expect an extra-ordinary reaction from society.<sup>151</sup>

Often we encounter a utilitarian logic as justification to punish innocents. Thomas uses the metaphor of a doctor sacrificing a dispensable organ to save a vital one.<sup>152</sup> But he draws a very clear line: the *bonum commune* can never justify killing an innocent.<sup>153</sup> In Vitoria we read: “*sicut si opus esset abscindere ab eis digitum ne pereat brachium.*”<sup>154</sup>

Outside the context of surrogate punishment Vitoria transfers this type of reasoning to defend the death penalty,<sup>155</sup> which he calls *supplicium* or sacrifice to preserve the state.<sup>156</sup> Non-

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<sup>145</sup> THOMAS, *Summa Theologiae*, 1-2, q. 87, a. 8, solutio ad 1, p. 570. Translation: “because of imitation of the fault”. Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 166.

<sup>146</sup> THOMAS, *Summa Theologiae*, 2-2, q. 108, a. 4, solutio ad 1, p. 673. Translation: “the sin of one spreads mimetically to the other”. Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 235.

<sup>147</sup> Idem, *op. cit.*, p. 297.

<sup>148</sup> “*quod alius pro alio non puniatur*”, cf. Glosse *metus* zu Cod. 9, 47, 22, in Law School Rare Corpus Juris Civilis. Harvard Law School Library: CORPUS IURIS CIVILIS, *commentariis Accursii, scholiis Contii, paratitlis Cuiacii ... novae accesserunt ad ipsum Accursium Dionysii Gothofredi, I. C. notae, ...*, Lugduni, 1604. (<http://pds.lib.harvard.edu/pds/view/14856910?n=4366&imagesize=1200&jp2Res=.25&printThumbnails=no>).

Translation: “That someone can not be punished for another.” Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 137.

<sup>149</sup> P. FARINACCI, *Praxis et theoriae criminalis libri duo*, Francofurti ad Moenum, 1622, lib. 1, tit. 3, q. 24, num. 120, p. 340. Translation: the most horrendous crimes “for which one is convicted for the crime of another, as for instance lesion of divine and human majesty.”

<sup>150</sup> Prospero Farinacci (1544-1618) wrote an important and very extensive treatise on criminal law named ‘*Praxis et theoriae criminalis*’. Cf. MAIHOLD, *Strafe für fremde Schuld*, pp. 74, 76.

<sup>151</sup> COVARRUBIAS, *Variarum resolutionum*, lib.2, cap. 8. num. 2, sub. tertio, 266 (Maihold is -according to the edition we have consulted- wrong in ascribing this content to num. 1).

<sup>152</sup> “[*M*]edicina [...] quandoque [...] infert nocumentum in minoribus, ut melioribus auxilium praestet”. THOMAS, *Summa theologiae*, 2-2, q. 108, a. 4, co, p. 672. Translation: “medicine sometimes [...] inflicts harm on lesser things in order to offer a remedy for better things”. Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 161.

<sup>153</sup> E.g. “*nullo modo licet occidere innocentem*”. Translation: “in no way it is allowed to kill an innocent person”. Cf. THOMAS, *Summa theologiae*, 2-2, q. 64, a. 6, co, p. 417. Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 167.

<sup>154</sup> F. de VITORIA, *Commentarias a la Secunda secundae de Santo Tomas*, edited by P.V. Beltrán de Heridia, Salamanca, 1932-1952, tom. IV, ad 2-2, q. 79, a. 3, num. 2, p. 244 (non vidi), cf. MAIHOLD, *Strafe für fremde Schuld* p. 176. Translation: “like if it were necessary to have their finger cut off in order not to lose an arm”.

Francisco de Vitoria (1486-1546) is considered to have been the first important theologian of the Spanish late scholastics. He is credited to have laid the foundations of the famous school of Salamanca. Particularly influential was his commentary on Thomas’ *Summa*. Recent investigations have however questioned if Vitoria was responsible -as is often claimed- for importing the Thomas-renaissance that flourished in Paris into Spanish territory. Cf. DECOCK, *Theologians and Contract Law*, pp. 51-52; MAIHOLD, *Strafe für fremde Schuld*, p. 94.

<sup>155</sup> “[*S*]icut licitum est abscindere membrum corruptum et nocivum toti corpori, ita est licitum in iure divino et naturali hominem perniciosum et boni communis corruptorem interficere”, cf. F. de VITORIA, *Relectio de homicidio*, 1530, I, num. 18, p. 474, in *Vorlesungen I-II. Völkerrecht, Politik, Kirche*, edited by U. Horst e.a., Stuttgart, 1995-1997 (non vidi), cf. MAIHOLD, *Strafe für fremde Schuld*, pp. 177-178. Translation: “like it is allowed to cut off a corrupt member that harms the whole body, so it is allowed by divine and natural law to kill a pernicious man who corrupts the common good”.

<sup>156</sup> MAIHOLD, *Strafe für fremde Schuld*, p. 178.

surrogate punishment is furthermore grounded in the reconfirmation of the legal order (*ratio legis*).<sup>157</sup>

Although punishing innocents is not in accordance with the *ius naturale*, Covarrubias argues that since the fall has corrupted humanity, the *ius positivum* can impose harsher sanctions than the *ius naturale*, whenever a consensus among the people can be found.<sup>158</sup>

### 2.1.2 Interludium: Thomas' theory of punishment

The multi-headed dragon that punishment was -involving culprits, innocents and objects-, was already systematized by Thomas. He distinguishes three kinds of punishment:

-Real punishment is an involuntary suffering that compensates for a voluntary act in disarray with the moral world-order, namely a sin.<sup>159</sup> Real punishment can never be surrogative "*quia actus peccati aliquid personale est.*"<sup>160</sup>

-The *poena satisfactoria*<sup>161</sup> is a punishment voluntarily taken on you in order to compensate a sin of the past but likewise in order to prevent a future involuntary punishment from being imposed. This punishment allows third parties to voluntarily substitute for culprits, as was the case in Christ's passion.<sup>162</sup>

-The *poena medicinalis*<sup>163</sup> can have three objectives: it may heal a sin of the past, prevent a future one or have beneficial effects.<sup>164</sup> This type of punishment does allow for surrogation: "*nihil prohibet talibus poenis aliquem puniri pro peccato alterius, vel a Deo, vel ab homine.*"<sup>165</sup>

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<sup>157</sup> VITORIA, *Commentarias a la Secunda secundae de Santo Tomas*, tom. V, ad 2.2, q. 108, a. 1, num. 3, p. 232 (non vidi), cf. MAIHOLD, *Strafe für fremde Schuld*, p. 177.

<sup>158</sup> MAIHOLD, *Strafe für fremde Schuld*, p. 221.

<sup>159</sup> THOMAS, *Summa theologiae*, 2-2, q. 108, a. 4, co, p. 672: "per poenam reparatur aequalitas iustitiae, in quantum ille qui peccando nimis secutus est suam voluntatem, aliquid contra suam voluntatem patitur." Translation: "by means of punishment the equality of justice is restored, in so far as the one who has too much followed his will, suffers something against his will." The Thomistic idea of equality of justice lives on in modern legal concepts as retaliation, based upon reciprocity. For an approach with attention to legal anthropology, see for instance: G. SCHLEE, B. TURNER (eds.), *Eine interdisziplinäre Betrachtung der Rechtfertigung und Regulation von Gewalt*, Frankfurt-New York, 2008.

<sup>160</sup> THOMAS, *Summa Theologiae*, 1-2, q. 87, a. 8, co, p. 569. Translation: "Because to sin is something personal". Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 154.

<sup>161</sup> Translation: satisfactory punishment.

<sup>162</sup> THOMAS de AQUINO, *In quattuor libros sententiarum*, lib. 4, dist. 15, q. 1, a. 1c co, p. 502, in *Opera omnia*, Stuttgart-Bad Cannstatt, 1980; MAIHOLD, *Strafe für fremde Schuld*, pp. 158-160.

<sup>163</sup> Translation: "medicinal punishment".

<sup>164</sup> "[A]lio modo potest considerari poena, in quantum est medicina non solum sanativa peccati praeteriti, sed etiam praeservativa a peccato futuro, vel etiam promotiva in aliquod bonum." THOMAS, *Summa theologiae*, 2-2, q. 108, a. 4, co, p. 672. Translation: "punishment can be considered in another way, in as far as it is a medicine that heals not only a sin of the past, but also prevents from future sin, or even produces some good". MAIHOLD, *Strafe für fremde Schuld*, p. 160.

<sup>165</sup> THOMAS, *Summa theologiae*, 1-2, q. 87, a. 8, co, p. 569. Translation: "nothing forbids that with such punishments someone is punished for the sin of another, either by God or by man". Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 161.

Suffering surrogate castigation is considered to be a medicine because it contributes to the salvation of the soul of the one who undergoes it and will deter him as well as others from sinning in the future. It is in reference to the *poena medicinalis* that Thomas proposed utilitarian logic. By stating this guilt-free punishment could be considered as a consequence of the original sin, he reconnects it with real punishment.

In Aquinas we clearly recognize the process of conceptual differentiation. He is the hinge-joint between the older doctrines and the theological concept of punishment exclusively connected to guilt that will arise out of his 'real punishment' during the Thomas-renaissance in the 16<sup>th</sup> century.<sup>166</sup>

### 2.1.3 The genesis of the principle of guilt

Whereas Vitoria follows Thomas in distinguishing a real *poena vindicativa* or *retributiva*<sup>167</sup> and the *poena medicinalis*,<sup>168</sup> the theologian Castro takes a fundamental step in the history of law: he no longer knows any other punishment than the real one. That is to say, if someone gets 'punished' for someone else's deeds, he will consider it medicine (for instance when sons are punished for their fathers) or satisfaction (in the case of Christ), but not punishment. He therefore cuts the word *poena* out of Aquinas' concepts of *poena satisfactoria* and *poena medicinalis*. In the absence of guilt he systematically uses the word *afflictio*<sup>169</sup> rather than *poena*, the latter now being exclusively connected to the principle of guilt as the consequence of a "*proprium peccatum praeteritum*"<sup>170</sup>.

### 2.1.4 The impact of the principle of guilt

Although Castro's *poena*-doctrine far from caused a Kuhnian revolution, it was the condition of possibility of the eventual hegemony of the principle of guilt in legal culture. In the 16<sup>th</sup> century the mentality is changing. From the moment onwards that the principle of guilt started being consolidated, surrogate punishment stands in greater need of legitimation.<sup>171</sup> Utterances as "*si puniretur innocens, fieret illi iniuria*"<sup>172</sup> or the identification of an "*odium irrationale*"<sup>173</sup> at work in the punishments of entire cities do not allow for generalized conclusions, but are nevertheless indications of a shifting mindset, which we will now attempt to elucidate.

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<sup>166</sup> For the whole section on Thomas, cf. MAIHOLD, *Strafe für fremde Schuld*, pp. 152-169.

<sup>167</sup> Translation: an avenging or retributive punishment.

<sup>168</sup> MAIHOLD, *Strafe für fremde Schuld*, pp. 174-176.

<sup>169</sup> *Afflictio* means 'pain, torment, suffering'.

<sup>170</sup> CASTRO, *De potestate legis poenalis*, lib. 1, c. 3, p. 15. Translation: "a sin personally committed in the past."

<sup>171</sup> This is why many of the arguments in our description of the legitimation of the doctrine of surrogate punishment are taken from 16<sup>th</sup> century authors. On the other hand, some aspects treated in this section are actually coming from Thomas, rather than from the 16<sup>th</sup> century. As was mentioned before, we are only providing a thematical and schematical sketch of *Strafe für fremde Schuld* and therefore a strict chronological approach could not be maintained. Nevertheless, in general we can still maintain that the 16<sup>th</sup> century is a *caesura* in the doctrine of surrogate punishment.

<sup>172</sup> VITORIA, *Comentarios a la Secunda secundae de Santo Tomás*, tom. V, ad 2 II, q. 108, a. 4, p. 235ss (non vidi), cf. MAIHOLD, *Strafe für fremde Schuld*, p. 175. Translation: "if an innocent would be punished, injustice would be done to him".

<sup>173</sup> FARINACCI, *Praxis et theoricæ criminalis.*, lib. 1, tit. 3, q. 24, num. 151, p. 198. Translation: "an irrational hate".

### 2.1.4.1 Divine and human punishment revisited

As the temporal version of divine retribution was connected to the rise of the doctrine of surrogate punishment, so are eternal punishments to its demise.<sup>174</sup> Simancas<sup>175</sup> claims that human justice must refrain from punishment when a sound judgment considering a crime can not be formed, but that God will punish every culprit. Therefore earthly and divine justice are fundamentally different, since only the last is fully permeated by the principle of guilt.<sup>176</sup> Azpilcueta<sup>177</sup> bridges the gap by claiming that human law is founded upon natural law and therefore indirectly on divine law. This connection is granting the principle of guilt open access to the earthly sphere, whereas in the old canonist tradition it only reigned the heavens.<sup>178</sup>

An intriguing maverick is Bartolomé de Medina,<sup>179</sup> whose reflections upon the principle of guilt lead to radical conclusions. Starting from God's *potestas absoluta*, implying his radically free will, he argues the Lord can even decide to send culprits to heaven and innocents to hell. The principle of guilt that was always lacking in divine punishment on earth is now dissolved in heaven as well. If God however punishes innocents, this cannot be considered a punishment in the true sense. The principle of guilt, originally developed as a doctrine for eternal and spiritual punishment, has now been cut loose from its origin.<sup>180</sup>

### 2.1.4.2. The symbolical exclusion of surrogation from the core of criminal law

Under the weight of the principle of guilt, surrogation is gradually excluded from criminal law by an (almost) systematic process of re-labeling, to which we shall now turn. This means that surrogative measurements either are completely cut loose from the concept of punishment and live on in other categories, or that they are absorbed by the *poena medicinalis* and therefore are no longer considered to be real punishments. This doesn't mean surrogate 'punishment' no longer took place, but it is highly indicative, we think, of a new sense of justice with which criminal law now wanted to be identified. We will illustrate this by contrasting early scholastic opinions -on for instance the passion of Christ-, with the interpretations of the late scholastics, wherein the influence of the principle of guilt is already clearly sensible.

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<sup>174</sup> See for instance CASTRO, *De iusta haereticorum punitione libri tres*, lib. 2, cap. 11, pp. 182-184 (non vidi). Cf. MAIHOLD, *Strafe für fremde Schuld*, pp. 280-281.

<sup>175</sup> Jacopo Simancas was a 16<sup>th</sup> century lawyer and professor in Salamanca. As inquisitor he wrote on questions connected to heresy and its punishments. Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 83.

<sup>176</sup> "*iudicium illud occultissimum inter deum et hominem, quod forum conscientiae vocant, tantum distat a foro civili, quantum caelum a terra*". Translation: "that most hidden tribunal between God and man, which is called the forum of conscience, is as different from the *forum externum* as heaven from earth." Cf. J. SIMANCAS, *De catholicis institutionibus*, in *Tractatus de iudiciis criminalibus <acrae> inquisitionis*, Venetiis, 1584, tit. 9, num. 248, p. 131; MAIHOLD, *Strafe für fremde Schuld*, p. 232.

<sup>177</sup> Martin de Azpilcueta (1493-1586), also known as Dr. Navarrus, studied at Alcalá de Henares and got his doctoral degree in Salamanca, where he later became professor of canon law. The last twenty years of his life he was counselor at the *Sacra Poenitentiaria* in Rome. Cf. DECOCK, *Theologians and Contract Law*, pp. 40-41.

<sup>178</sup> MAIHOLD, *Strafe für fremde Schuld*, p. 205.

<sup>179</sup> Bartolomé de Medina (1527-1580) was a dominican theologian and a student of Vitoria. He was the first defender of moral probabilism. Cf. DECOCK, *Theologians and Contract Law*, p. 75.

<sup>180</sup> B. de MEDINA, *Expositio in primam secundae Angelici Doctoris. D. Thomae Aquinatis*, Salamanticae, 1578, ad 1-2, q. 87, a.7, p. 789 (non vidi), cf. MAIHOLD, *Strafe für fremde Schuld*, pp. 190-192.

## A) The passion of Christ

Anselm's doctrine of atonement struggles with the question why the most innocent of all had died on the cross. He thinks that every sin should necessarily be followed by a punishment or an act of satisfaction.<sup>181</sup> The original sin therefore must be compensated to God. This can only be done by someone who hasn't been contaminated by sin, in other words by the God-man Christ.<sup>182</sup> In voluntarily providing *satisfactio* for humanity's sins, the *passio Christi* was considered to be a case of surrogate punishment. By using legal terminology, Anselm's doctrine of atonement has coined the concept of legal surrogation inexistent in Roman law, which was subsequently introduced in secular and canon law.<sup>183</sup> In Anselm's wake Thomas could write "*Christus poenam sustinuit satisfactoriam, non pro suis, sed pro nostris peccatis.*"<sup>184</sup> Castro, applying his exclusively sin-oriented *poena*-doctrine, sees the passion no longer as *poena*, but as *satisfactio pur sang*. *Satisfactio* resembles punishment because it is a compensation, but differs from it because it is voluntary and restores the relationship with God rather than with society. Moreover, it leaves, in contrast to the new doctrine of guilt-orientated punishment, room for surrogation.<sup>185</sup>

## B) The killing of innocents in war

Since in war innocents are killed as a consequence of what their leaders have done, the late scholastics treat this theme in narrow connection to surrogate punishment. Thomas' illuminated prohibition to sacrifice innocents to the common good breaks down under the weight of the utilitarian logic. Late scholastics will legitimate the killing of innocents in war as a means to preserve the state or the *bonum commune*. The conjunction of utilitarian logic, beneficial effects and innocent victims make the laws of war an independent incarnation of the spirit found in the *poena medicinalis*.<sup>186</sup>

## C) Varia

-The corporal repercussions of the fall are now considered by some authors to be accidental rather than substantial punishments, indicating they can't count as real *poenae*. Others explained them as *poena medicinalis*.<sup>187</sup> Still others don't give way and keep on considering it as real punishment.<sup>188</sup>

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<sup>181</sup> ANSELMUS, *Cur deus homo*, cap. 15, p. 74.

<sup>182</sup> Idem, *op. cit.*, cap. 20-23, pp. 86-91.

<sup>183</sup> MAIHOLD, *Strafe für fremde Schuld.*, pp. 271-276.

<sup>184</sup> THOMAS, *Summa Theologiae*, 1-2, q. 87, a. 7, solutio ad 3, p. 569. Translation: "Christ underwent a satisfactory punishment not for his, but for our sins."

<sup>185</sup> MAIHOLD, *Strafe für fremde Schuld.*, pp. 271-272. Our presentation of *satisfactio* is very reductive. For more information, see: Idem, *op. cit.*, pp. 242-258.

<sup>186</sup> Idem, *op. cit.*, pp. 261-263.

<sup>187</sup> They argue that suffering the corporal repercussions of the fall would contribute to the salvation of the soul, would deter others from sinning, would offer satisfaction for sins of the past and cause future betterment. THOMAS, *Summa theologiae*, 1-2, q. 87, a. 7, solutio ad 1, p.569; CASTRO, *De potestate legis poenalis*, lib. 1, cap. 3, p. 19.

<sup>188</sup> D. de SOTO, *De iustitia et iure*, edited by V. Diego Carro and M. González Ordoñez, Madrid, 1967, lib. 1, q. 6, pp. 56-57. (The dominican Domingo de Soto (1494-1560) was an important theologian, who became Vitoria's successor in Salamanca. His "*De iustitia et iure libri X*" offers a theological treatment of legal questions.) Thomas seems to be feeling much for both positions, see THOMAS, *Summa theologiae*, 1-2, q. 87, a. 7, propositio 1, p. 568, solutio ad 1, p. 569. Cf. MAIHOLD, *Strafe für fremde Schuld.*, pp. 95, 266-270.



-Since irregularity was not connected to any guilt it was no longer designated as punishment, but as *indecentia*.<sup>189</sup>

-The punishment of coming generations for the crimes of their forefathers threatened in Exodus is relabeld *poena* or *afflictio medicinalis* by respectively Castro and Soto.<sup>190</sup> The medicinal aspect is to be found in the effects for the souls of those suffering and in its preventive capacity.<sup>191</sup>

-The punishment of the sons of traitors and heretics is rejected in cases of little influence of the parents on the children<sup>192</sup> or is repudiated altogether. Whether customary laws just go against it, or it is the guilt-orientated concept of punishment that does the job, the fact is that surrogatively punishing sons is being removed from the domain of criminal law.<sup>193</sup>

-Collective punishment becomes an exclusive branch of the *poena medicinalis*.<sup>194</sup>

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<sup>189</sup> Translation: impropriety.

<sup>190</sup> CASTRO, *De potestate legis poenalis*, lib. 1, cap. 3, p. 19; SOTO, *De iustitia et iure*, lib. 1, q. 6, p. 56.

<sup>191</sup> MAIHOLD, *Strafe für fremde Schuld.*, pp. 277-285.

<sup>192</sup> We have touched upon this under the heading "Who is being punished?".

<sup>193</sup> Idem, *op. cit.*, pp. 286-311.

<sup>194</sup> Idem, *op. cit.*, pp. 337-348.

### 3. Law and desacralisation

In this section we will provide a primordially but not exclusively Girardian interpretation of the doctrine of surrogate punishment. After demonstrating the affinity between sacrifice and *Strafe für fremde Schuld*, we will engage in further philosophical analysis concerning the role that for instance excommunication, the original sin, the principle of guilt or legal reasoning in general might have played in the process of mankind's emancipation from the sacred.

#### 3.1 *Strafe für fremde Schuld*, a remnant of sacrifice?

It is evident that Maihold has not described any phenomenon that might even come close to a scapegoat mechanism or a sacrifice as Girard defines it. Nevertheless, we think that Girard's theory can provide us with all the necessary hermeneutical tools to make sense of *Strafe für fremde Schuld*. What we aim for is a coherent interpretation not only of how this institution functions, how it selects its victims and the way it is legitimated, but also of the theology that stands in the back. We think that most of what surrogate punishment is about can be grasped in two words: sacrificial logic. The elimination of surrogation from criminal law would then correspond to the rejection of this logic, seen by Girard as Christianity's influence on the course of history.

##### 3.1.1 The notion of surrogation and the sacrificial selection of victims

Whereas sacrifice entails deadly ritual violence, surrogate punishment refrained from death penalties and even bloodshed. The core both institutions have in common, however, is substitution or surrogation. This should make us willing to inquire whether there are more similarities. After all, sacrifice comes in many different forms. It might be bloody, or it might be purely symbolical. Maybe it might even seem to come -in a very bleak and modified form- through a legal verdict, since litigation has much in common with ritual. It has an aspect of mimetic struggle where opponents bombard each other with highly formalised accusations and arguments, and culminates in a verdict, an act of violence -symbolical or not- that ends the violence and has the last word. Since Girard stressed the fact that sacrifice did not overtly substitute for a specific member of society, say a culprit, surrogate punishment isn't sacrifice, but seems to be tributary to its spirit. Let us keep in mind the example of the Chuchki tribe, whose practice to provide with a substitute for the culprit seems to have been an intermediate state between sacrifice and justice. It seems that surrogate punishment could be something as a next step, a further evolution of the Chuchki practice. In *Strafe für fremde Schuld* we have a case not of exclusive surrogation, meaning that only the surrogate is confronted with violence, but rather of additional surrogation, meaning that both the culprit and a surrogate are being punished,<sup>195</sup> at least when it was possible for the culprit to be identified. In contrast to the Chuchki's situation, institutional structures were already well enough in place to avoid the risk of reciprocal violence to get out of hand. Therefore the need is felt to punish the culprit. On the other hand, a sacrificial taste for surrogation is still casting its shadow over criminal law, as becomes obvious in the specific selection of the surrogates. Girard asserted that some, badly integrated social categories were selected to be sacrificed because their deaths would less likely spark vengeance. In Maihold's account surrogates or punished innocents in general are all somehow marginal elements of society. At the lower end of the spectrum of marginality we find: unemancipated sons, sons of heretics and those

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<sup>195</sup> This element does not appear clearly in Maihold's text, as far as we know, but he personally confirmed me this was the case.

guilty of lese-majesty, wives, sons of priests, illegitimates, reified subjects, lunatics and servants. In the case of animals, cities and other inanimate objects, the danger of vengeance is of course inexistent. At the upper side of the spectrum we see: rulers, the ruler's wife. The only category of surrogates that doesn't appear in Girard's theory are groups, but we will come back to that. Just like in the Chuchki society, the 'sacrificial' selection is in fact guided by the awareness of the identity of the culprit. It is always in the immediate surroundings of the culprit that the surrogate is found. The weight of the upcoming principle of guilt has narrowed down the scope of arbitrariness of the selection of victims.

By connecting surrogate punishment to Chuchki practice, we have shown that the doctrine of surrogate punishment and its demise deserves a place in the grand scheme that Girard has sketched as an evolution from sacrifice to modern justice and its principle of guilt.

### 3.1.2 The theme of undifferentiation

A further argument that might support our thesis that surrogate punishment is a remnant of sacrifice and therefore shows similarities with primitive preoccupations is the noteworthy presence of the threat of imitation. Girard claimed that primitive taboo was in essence anti-mimetical. Violent mimesis or vengeance was to be avoided at all costs in the primitive world. And now we see appearing as a permanently repeated ground for surrogate punishment this very mimesis or the threat of it. The medicinal objective of this type of punishment was in fact to prevent mimesis from happening, or to sanction it when it did happen. Therefore, this type of justification of surrogate punishment approaches the very core of primitive taboo. Insight in the mimetical nature of mankind is for instance present in the following quote of Aquinas: "*peccatum unius derivatur in alterum per imitationem*",<sup>196</sup> meaning: "the sin of one is being mimetically spread to the next". In most authors the mimetical nature of men is reduced to biological heredity, but the genius of Castro saw in mimesis a social phenomenon. Girard further claims that mimesis is the cause of undifferentiation. Although the sources only hammer upon mimetical undifferentiation between father and son, the selection of the victims and even the surrogate punishment itself might attest to a hidden presence of the theme of undifferentiation. Girard writes: "La violence maléfique se conçoit comme une force qui agit sur les plans les plus divers, physique, familial, social, et qui, partout où elle s'implante, se propage de la même façon; elle fait tache d'huile, elle gagne *de proche en proche*"<sup>197</sup> This is exactly what surrogate punishment is seeming to do as well. It spreads violence *de proche en proche*. Legal violence doesn't only affect, in this case, the culprit, but also his direct environment, those in other words most likely to be infected by his criminal behaviour and at the same time those socially or biologically most undifferentiated from him, namely: his family, his sons, his wife, his city and subjects. Although legal punishment, or sacred violence among the primitives, is conceived, according to Girard, as *une violence bénéfique*, because of its potential to end the contagion of violence, the surrogate punishment itself seems to be imitating the disease it is trying to remedy. In order to avoid the mimetical spreading of crime<sup>198</sup> it is widening its scope and strikes down on the group or family as a whole. Collective punishment does not differentiate out of fear of undifferentiation. It operates by *cordon sanitaire (poena medicinalis!)*. Intriguing is the theme of (un)differentiation in the exemption of some categories to be surrogately punished. In the cases of heresy and lese-

<sup>196</sup> THOMAS, *Summa Theologiae*, 2-2, q. 108, a. 4, solutio ad 1, p. 673.

<sup>197</sup> GIRARD, *La violence et le sacré*, p. 90 (original italics).

<sup>198</sup> Think of the Livius' quote mentioned by Maihold in the context of collective punishment: "*ne quid ex contagione noxae remaneret penes nos*". Cf. footnote 122.

majesty, punishment for offspring that barely stood under the influence of the father was debated and exempted were: adoptive sons, emancipated sons, sons who turned their father in and daughters. One could argue that in all these cases symbolical difference between the culprit and his offspring remains clear enough not to extend the scope of legal violence towards the 'usual suspects'.<sup>199</sup> When surrogate punishment, as *poena medicinalis*, is a remedy to prevent further imitation, it actually functions as a means to differentiation.

### 3.1.3 Sacrificial logic as legitimation

Another peculiar legitimation of surrogate punishment is the appeal to overtly sacrificial - utilitarian - logic.

Sacrifice is deviating violence on dispensable categories to protect the indispensable ones, hereby safeguarding society as a whole. This line of reasoning is sensible in *Strafe für fremde Schuld*: a finger might be cut off to save the arm. When Vitoria transfers this train of thought to argue for the death penalty, it becomes obvious the *poena medicinalis* is in full resonance with Caiaphas infamously stating: "*better that one man die for the people than that the whole nation perish.*"<sup>200</sup>

One of the functions of sacrifice was to appease emerging social unrest. This very aspect seems to be hinted at by Raymundus, who explains that Augustine would only excommunicate collectively "*cum homines sunt turbati*".<sup>201</sup> The unity restored by a sacrificial catharsis that follows the turmoil is alluded to by Thomas' description of the goal of surrogate punishment as: "*ad commendandum unitatem humanae societatis*".<sup>202</sup>

Besides providing social cohesion, sacrifice is also re-establishing social order. Vitoria advanced the *ratio legis* as one of the goals of punishment. We shouldn't be too much disturbed by the fact that he doesn't mention this as an objective of the *poena medicinalis*, under which surrogate punishment also in his thinking resorts, since no other author discussed by Maihold comes so close to describing and defending scapegoat mechanisms as Vitoria. In fact, Maihold mentions in his conclusion that for Vitoria the preservation of the state and the *bonum commune* gain such a weight, that the principle of guilt is actually superseded, as his account of the death penalty attests.<sup>203</sup> In Vitoria the scapegoat tendencies seem to have broken out of the cocoon of the surrogative doctrine to infect the

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<sup>199</sup> In this context it might also be noted that when the father doesn't get punished for the sins of the son, this might be because he is not belonging to a social category suitable for providing sacrificial victims.

<sup>200</sup> John, 11:50; cf. GIRARD, *Le bouc émissaire*, p. 163.

<sup>201</sup> RAYMUNDUS, *Summa de poenitentia*, lib. 3, tit. 32, § 6, p. 732.

<sup>202</sup> THOMAS, *Summa Theologiae*, 2-2, q. 108, a. 4, solutio ad 1, p. 673. We must hereby indicate that Thomas - and Augustine, his source of inspiration concerning this matter - explain the restored unity as an increase in social control brought about by the possibility of surrogate punishment (A. AUGUSTINUS, *Quaestionum in Heptateuchum*, lib. 6, q. 8, pp 315-316; THOMAS, *Summa Theologiae*, 2-2, q. 108, a. 4, solutio ad 1, p. 673; see also footnote 142). We think, however, it is reasonable to assume that also our sources must be speculating upon what are the true reasons for surrogate punishment. They are providing us with rational schemes to explain their world and their institutions. We should take their account as an interesting source of how they view the matter, without granting them the capacity to have the final word on the explanation of the social phenomena they describe. Therefore, at some points, in order to gain insight, we must have the courage to deconstruct our sources, as Girard is teaching us to do, provided we can offer a better and more coherent account of certain social dynamics. In this matter we think that is the case. Therefore we take the liberty not to dwell upon Thomas' and Augustine's explanation of the effect of surrogate punishment, but rather rearrange the described effect in a sacrificial reading of the doctrine of *Strafe für fremde Schuld*. We should furthermore take into account that descriptions of our own violence normally undergo numerous transformations, as Girard has shown.

<sup>203</sup> For his account on the death penalty see also footnote 155. Cf. MAIHOLD, *Strafe für fremde Schuld*, p. 355.

whole of his criminal theory. Therefore we consider it legitimate to blur to some extent his conceptual difference between the *poena retributiva* and the *poena medicinalis*.<sup>204</sup> His mentioning of *supplicium* or sacrifice in the context of the death penalty evokes the sacred light in which we think the whole doctrine of surrogate punishment should be seen. Augustine's justification of surrogate punishment as "*disciplina sancitur*"<sup>205</sup> both attests to the reestablishment of the social order as to the sacred, since *sancire* doesn't only mean 'to confirm, ratify', but also 'render sacred, establish as inviolable'. Girard's idea that primitive taboo has its origin in a sacrificial crisis seems here to be mirrored, if one would accept our reading, in the legal universe, where surrogate punishment resonates with sacrifice and the law with taboo.

In treating the passion of Christ as a case of surrogate punishment, the link between *Strafe für fremde Schuld* and a scapegoat mechanism becomes crystal clear. That Maihold's sources don't describe the passion in terms of a scapegoat mechanism, but as a *satisfactio*, is because they are still caught up in web of sacrificial theology.

### 3.1.4 Typical accusations of undifferentiating crimes

In mythology, as in persecutionary texts, we are confronted with accusations of crimes that dissolve the crucial differences a society is built upon. These crimes are often inversions of established hierarchies, like patricide or regicide. The omnipresence of two of the most serious crimes always referred to in justifying surrogate punishment, namely heresy and lese-majesty, are another argument that supports our sacrificial reading. They seem to be on a par with the crimes typically attributed to scapegoats. Lese-majesty inverts the hierarchy upon which the feudal/monarchic world was built. Heresy, on the other hand, is the sin that unites the rejection of the essential differences the church professes in her dogmatic teachings. In pre- and early modern times, a heretic obviously is not fundamentally different from a scapegoat. Although the intention to abide by the principle of guilt is sensible in most legal texts we have mentioned, exceptions are systematically found when a crime forms an intrusion of the sacred, here incarnated in two institutions traditionally mediating the divine, namely church and state. The old maxim that punishment mirrors the crime (*Spiegelstrafe*)<sup>206</sup> now appears in a new light: in the face of sacrilege, punishment seems to acquire the violence of the sacred and strikes down innocents. The decline of the doctrine of surrogate punishment could therefore be interpreted as the desacralisation of criminal law.<sup>207</sup>

### 3.1.5 Biomedical thinking and social transcendence

Merging social and medical categories was a hallmark of the primitive world orbiting around the institution of sacrifice and its purifying effects. It is therefore very significant that surrogate

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<sup>204</sup> As a loose remark it is also worth noting that, although Vitoria considers sacrificial practice in the New World an infringement of divine and natural law, he doesn't think this can justify punishment of the pagans. Although he doesn't approve of sacrifice, his mentality might be more on a par with pre-Columbian cultures than he would himself have guessed. See: VITORIA, *Relectio de temperantia*, 1538, II, num. 7, p. 352, in *Vorlesungen I-II. Völkerrecht, Politik, Kirche* (non vidi), cf. MAIHOLD, *Strafe für fremde Schuld*, p. 180.

<sup>205</sup> AUGUSTINUS, *Quaestionum in Heptateuchum*, lib. 6, q. 8, p. 315.

<sup>206</sup> Cf. the *lex talionis*: "an eye for an eye, a tooth for a tooth", Ex, 21, 24.

<sup>207</sup> We are not so far from Durkheim's position here, which saw the decline in the severity of punishments in the course of legal history as a consequence of desacralisation. Cf. E. DURKHEIM, *Deux lois de l'évolution pénale*, 1899-1900, pp. 20-25:

[http://classiques.uqac.ca/classiques/Durkheim\\_emile/annee\\_sociologique/an\\_socio\\_3/evolution\\_penale.pdf](http://classiques.uqac.ca/classiques/Durkheim_emile/annee_sociologique/an_socio_3/evolution_penale.pdf).

punishment is so often described in biomedical terminology, as *poena medicinalis*, which has exactly the same social benefits as sacrifice, namely at the same time being a remedy of existing and a prevention of further escalating violence or crime. We have already dealt with the sacrificial catharsis and the reestablishment of order to explain the medicine surrogate punishment is said to be. But its effects even reach the heavens: as being surrogatively punished contributes to the salvation of the soul, the punishment is appeasing God. To explain this, we must turn to Girard's elaboration of Durkheim's concept of social transcendence. According to Girard the crowd is transferring features belonging to itself (e.g. its power and violent behaviour) to the scapegoat, who is transcendentalized. *Ipsa facto* the sacred has become a projection screen of the crowd. (Alcuin already discarded this image of God, when he wrote to Charlemagne: "*Nec audiendi qui solent dicere, Vox populi, vox Dei, quum tumultuositas vulgi semper insaniae proxima sit*"<sup>208</sup>). So it is the *vox populi*, rather than the *vox Dei*, that craves for sacrifices, punishment or satisfaction. The spiritual benefits of the *poena medicinalis* are therefore to be explained by the sacrificial theology of the sacred. The appeased God is nothing else than an image of an appeased crowd, transformed in the machinery of the sacred which renders human violence almost unrecognisable. It is because historical Christianity never fully accepted the New Testament God, detached from the violent sacred, that our sources still describe the passion of Christ in terms of *satisfactio*, which is offered in fact not to the Lord, but to the crowd. It is moreover the *vox populi* of sacrificial theology that stands behind the divine punishments, which are so difficult for our sources to make sense of. It is no coincidence that they almost exclusively refer to the Old Testament when dealing with divine surrogate punishment. Could it not be sacrificial theology that is slowly but steadily being rejected, when it is advised not to imitate the seemingly unjust and impenetrable aspects of temporal divine retribution on innocents? By eventually organising human justice around the principle of guilt, the internal organisation of the *poena aeterna* is imitated, whereas God's taste for innocent victims is turned down as a mimetic model. Since law traditionally mediated transcendence, Maihold's legal evolution might reflect a theological process of desacralisation. If a growing insight in the social dynamics of exclusion is disrupting the scapegoat mechanism, if God is being purified from the arbitrary violence the crowd has been projecting on Him '*depuis la foundation du monde*', then a gradual expulsion of violence towards innocents in the legal system that is deemed to mediate Him fits the grand scheme of things. It might even be worth considering if law is not merely an effect, but one of the contributing causes of desacralisation.

### 3.1.6 Victimary signs

Victimary signs are social or corporal anomalies that attract hostility, particularly of crowds. Social marginality is crucial in selecting surrogate victims, a theme we already covered. Corporal anomalies cause irregularity, attesting to the fact that defects provoke exclusion. Divine punishments as well seem to be provoked by social factors that generate exclusion, such as hatred, poverty, scandals, leprosy or bodily defects. This is again the *vox populi* disguised as *vox Dei*. Divine corporal punishment in the form of defects might in the first place be an attempt to explain the injustice and moral indifference of nature, but maybe there is more to it. Referring again to social transcendence, we could construe the following circle: some people have congenital abnormalities, which makes them into scapegoats. The

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<sup>208</sup> Art. Alcuin in *Encyclopædia Britannica. Encyclopædia Britannica Online Academic Edition*. Encyclopædia Britannica Inc., 2013. Web. 27 Jul. 2013: <http://www.britannica.com/EBchecked/topic/13477/Alcuin>. Translation: "Nor should we listen to those who say, 'The voice of the people is the voice of God,' for the turbulence of the mob is always close to insanity" (this translation is the only one that is not my own).

aggression of the crowd is projected on God. Since God is the crowd, his wrath thunders down upon those with bodily defects. Cause and effect moreover seem to merge in the corporal defect, being the 'cause' of attracting the hostility of the crowd at the same time as the effect of the punishment of a God that originated out of the scapegoat mechanism. The corporal anomaly is therefore a hinge-joint between divine and human aggression. Refusing to label defects or the exclusion they induce as true punishment, is an indication that criminal law is going through a process of desacralisation.

### 3.1.7 The Punishments

The human punishments imposed upon the innocents are never corporal, nor capital. They are economical, imply the loss of honour, or consist of an interdict. Girard claims that our tendencies towards victimage did not disappear, but got less violent and more symbolical. This is reflected in the punishments mentioned. *Strafe für fremde Schuld* seems to be a bleak remnant of sacrifice, which never required its victims to be guilty. The mild punishments are one of the reasons, besides the link to a crime and its appearance in legal structures, why we do not propose to call surrogate punishment a sacrificial institution, but rather see it as its remnant. The refusal to spill blood upon innocent victims fits the framework of a theology, traced by Whitman, which narrowed the Jewish taboo on blood down to the avoidance of spilling innocent blood, by sanctioning it with eternal damnation. Judges were therefore always hesitant to inflict blood punishment, even when they were convinced of the guilt of the accused.<sup>209</sup> When a capital sentence nevertheless pops up in the doctrine of surrogate punishment, it is one that doesn't involve bloodshed, because it is merely the civil death sentence of a city, meaning its destruction and the loss of privileges. Moreover, since the principle of guilt is already announcing itself, surrogate punishment is struggling to be accepted as justice, as legitimate -though symbolical- 'violence'. That is why it was discussed at length and needed extensive legitimation. That might also be the reason for its mild punishments. Real violence deemed to be (half) illegitimate would after all have more likely sparked revenge.

### 3.1.8 The killing of innocents in war

Girard said that war was, next to sacrifice, another way to divert internal dissension onto external victims.<sup>210</sup> Thomas, although also using sacrificial logic as we have mentioned above, clearly rejects any kind of human sacrifice. Innocents can't be sacrificed for the common good. Aquinas therefore stands really "between the gospel and myth", as Girard would have it, demonstrating both sacrificial tendencies as an awareness of their social function and a partial rejection of this proclivity. We saw that the late scholastics however came back Thomas' position and developed the laws of war in the spirit of the *poena medicinalis*, allowing the killing of innocents in war for the sake of the common good. War, sacrifice and the *poena medicinalis* come to the fore as interconnected phenomena, by sharing sacrificial logic as their common organisational principle.

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<sup>209</sup> J.Q. WHITMAN, *The Origins of Reasonable Doubt. Theological Roots of the Criminal Trial*, New Haven-London, 2008, pp. 28-49.

<sup>210</sup> In some pre-Columbian cultures war and sacrifice are even intimately linked, because bellicose activity had the explicit goal of providing a steady flow of sacrificial victims to the altars.

### 3.2. The peculiar case of excommunication

Excommunication, a spiritual punishment that presupposed a voluntary death sin, formed the starting point of the gradual process of consolidating the principle of guilt in earthly justice. This is intriguing, because the phenomenon of excommunication resembles, to some extent, the traditional scheme of expulsion typical of scapegoat mechanisms: an excommunicate is deprived of all his rights resulting from his status as a Christian and can be considered in the eyes of the church an exile or a stranger,<sup>211</sup> who is handed over to Satan and is even described by the canonist Lyndwood as “a limb of the Devil”.<sup>212</sup> Certainly the earlier medieval examples<sup>213</sup> of the use of excommunication as a curse, designed to strike down and kill the excommunicate,<sup>214</sup> seem to exhibit the archaic identity between violence and the sacred as described by Girard.<sup>215</sup> But another tradition is found, becoming dominant in the 12<sup>th</sup> century and elaborated in the *Corpus iuris canonici*, in which excommunication appears not as a curse but as a legal sanction. Excommunication can incur automatically, *latae sententiae* -without judicial process or the verdict of a judge-, just by committing an act punishable by excommunication. This form of excommunication, restricted to the *forum internum*,<sup>216</sup> is according to Helmholz a ‘legalized’ relict of the primitive curse.<sup>217</sup> Behind this disturbed relationship with God we can easily recognize the retaliating God of the primitive sacred. The so called danger of contagion of excommunication, namely the fact that at least in theory anyone -except his near family- communicating with the excommunicate is also excommunicated,<sup>218</sup> forms a clear reminiscence of the fear of spreading impurity we encountered in primitive religions. Since excommunication is as *maxima poena* -again: in theory- a consequence of transgressions deemed to be particularly heavy (once more we meet, among others, heretics, but also schismatics or those committing violent acts against clerics), we again meet the accusations typically uttered against scapegoats.

But this is as far as the comparison with archaic religion seems to go, because there are many elements that point us into another direction. Excommunication can namely become a matter of the *forum externum*,<sup>219</sup> when the crime was simply known to the public or when the verdict is pronounced by the ecclesiastical authority -*excommunicatio ferendae sententiae*. This type of excommunication finds its legitimation in Paul, who says in his letter to the Corinthians that the excommunicated is to be labelled as a sinner (*nominatur*)<sup>220</sup>. Helmholz

<sup>211</sup> A. BOUDINHON, art. *Excommunication*, in *The Catholic Encyclopedia*, New York, 1909. 20 Feb. 2013: <http://www.newadvent.org/cathen/05678a.htm>.

<sup>212</sup> W. LYNDWOOD, *Provinciale seu Constitutiones Angliae*, Oxford, 1679, p 264 (non vidi), Cf. HELMHOLZ, *The Spirit of Classical Canon Law*, p. 375.

<sup>213</sup> 9<sup>th</sup> to mid 12<sup>th</sup> century.

<sup>214</sup> HELMHOLZ, *The Spirit of Classical Canon Law*, pp. 370-372.

<sup>215</sup> This primitive type of excommunication is based upon St. Peter’s curse against Ananias and Saphira. Acts 5: 1-10.

<sup>216</sup> In our contemporary western culture, law regulates external actions. Transgressions of rules are dealt with in court -whether that be an ecclesiastical or a secular one. These courts are the *forum externum*. What has disappeared in our world is the “jurisdiction over man as a spiritual being”. In the court of conscience, *forum conscientiae*, or *forum internum*, the believer stood over against God as his judge. Often, at least in the Catholic tradition, God was mediated by a priest in the confessor’s bench, which formed a parallel court room. The reformation however has gradually transformed conscience to a subjective realm, whereas “the rules of conscience were originally thought to be almost as objective as legal rules”. DECOCK, *Theologians and Contract Law*, pp. 27-28.

<sup>217</sup> HELMHOLZ, *The Spirit of Classical Canon Law*, p. 383.

<sup>218</sup> V. BEAULANDE, *Le malheur d’être exclu? Excommunication, réconciliation et société à la fin du Moyen Âge*, Paris, 2006, p. 25.

<sup>219</sup> See footnote 216.

<sup>220</sup> I Cor. 5:11.



says that “this meant more than the simple fact of his guilt. It meant that there had been a *finding* of his guilt.”<sup>221</sup> Next to gathering evidence, the accused can defend himself and has the right of appeal to a higher court.<sup>222</sup> Gratian was also very conscious of the fact that unjust sentences were likely to be passed. This could be the case when a prelate issued excommunication *ex animo*, meaning “out of his own hatred, jealousy, or spite”<sup>223</sup> or it could be unjust *ex causa*, “as when the reason for which the person was excommunicated did not exist.”<sup>224</sup> Worth mentioning is also the fact that excommunication is a *poena medicinalis*, which has as its ultimate goal the reintegration of the sinner into society and a reconciliation with God, by enforcing through the punishment, nothing else than a regained obedience of the Church’s law.<sup>225</sup>

We think the evolution of the institution of excommunication might be explained by a gradual emancipation from the primitive religious mindset. What we see after all is an evolution from the blind sacred force of a curse towards -at least when it comes to *excommunicatio ferendae sententiae*- more rationality, the finding of evidence, the right of defence, and the awareness of the possibility of erroneous decisions. In other words, the arbitrariness and the absolute conviction (or indifference) of guilt, that was so essential in primitive conflict resolution by means of victimage, is being gradually replaced by a process of hesitation that precedes the verdict, a procedure Latour has identified as one of the key elements that distinguishes law from other social regimes which produce truth-claims.<sup>226</sup> Furthermore there is an evolution from a mortal curse towards an attempt not only not to exclude, but to reintegrate. Or rather, the exclusion is no longer the final solution, it is a temporal means towards a more peaceful restoration of order. It is very significant, we would argue, that the principle of guilt found its first steady ground in an institution so similar to a scapegoat mechanism and moreover deeply entangled with primitive categorisations of violence. This paradox seems too illustrative to be regarded a coincidence. We have the impression that procedural law and the principle of guilt are tearing down an institutionalised scapegoat mechanism. In excommunication we witness the very process of desacralisation in progress: we still tend to exclude victims, but do it in less dramatic and bloody ways, and we start questioning the veracity of their guilt. It might be objected that excommunication does not have anything to do with scapegoat mechanisms. Where, after all, is the bloodthirsty crowd? The crowd comes in disguise. It is hiding behind the God of sacrificial theology, whose presence structures the whole institution of excommunication, whether His powers are invoked by a curse, operate automatically (*latae sententiae*), or are mediated by an ecclesiastical judge sentencing in His name.

### 3.3 Is the doctrine of the original sin part of the original sin?

The relationship of the doctrine of the original sin to the principle of guilt is ambivalent. Sometimes the original sin provides guilt when for a modern public there is none, as in the case where Thomas traces back a *poena medicinalis* to the original sin, or when the

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<sup>221</sup> HELMHOLZ, *The Spirit of Classical Canon Law*, p. 373.

<sup>222</sup> Ibidem.

<sup>223</sup> Idem, *op. cit.*, p. 379.

<sup>224</sup> Ibidem.

<sup>225</sup> Idem, *op. cit.*, pp. 367, 376-378.

<sup>226</sup> “cette lenteur, cette lourdeur, ces hésitations continues, forment précisément la matière première du juste.” Cf. B. LATOUR, *La fabrique du droit. Une ethnographie du Conseil d’État*, Paris, 2004, p. 104.

consequences of the fall are considered to be a real punishment. This is one of the strategies in dealing with surrogate punishment, namely to claim it wasn't surrogative after all. Another strategy is to push what can't be reduced to proper guilt in the last instance, out of the concept of strict punishment. This is the case when the consequences of the fall are described as merely accidental punishment, rather than as substantial punishment. Although in theory the principle of guilt is corroborated by this line of reasoning, both strategies seem dangerously undermining it to a modern eye, to say the least. A legitimating guilt almost appears as a *deus ex machina*, or punishment can be grounded on nothing else than biological reasons. Original sin is moreover a construction to make sense of corporal abnormalities as a legitimate divine punishment. Without even wanting to stress more than necessary the evident dangers involved in a biological foundation for punishment, the original sin seems to play a very perverse role. It seems to be a construction that makes it possible to consider punishing innocents as legitimate. The doctrine of the original sin is starting to look like an original sin as could be deduced from the Girardian perspective, namely: the detestable tendency to make innocent victims, legitimating this fact by professing their guilt and refusing to reject a social order that was built upon the blood of innocents. A Girardian original sin is therefore connected with the sin of the scapegoat mechanism as the origin of culture. When the doctrine of the original sin is legitimating punishment of innocent victims, it clearly takes part in violent cultural order, in fact it reinforces the awkward tendencies culture was, according to Girard, founded upon. The doctrine of the original sin might thus be a good example to understand the claim mentioned above, that "historical Christianity became one of the principal mechanisms for hiding its own revelation."<sup>227</sup>

### 3.4 Anselm's doctrine of atonement and law as the vehicle of revelation?

The explicit treatment of the *passio Christi* as an example of *Strafe für fremde Schuld* is an important argument for our claim that there is sacrificial logic at work in the heart of this institution. Maihold's statement that Anselm's use of legal terminology in the description of the passion of Christ coined a concept of legal surrogation hitherto unknown to Roman law, which facilitated the reception of the legal surrogation in both secular as canon law, is intriguing. Roman law perhaps didn't know the concept of legal surrogation,<sup>228</sup> because Romans were not sufficiently aware of the scapegoat mechanism or the role surrogation therein plays, which only came to light in the gospel. They were still too much intricated in sacrifice<sup>229</sup> for its scholars to unravel its functioning. One way to interpret the appearance of surrogation as a legal category in the middle ages is that law started to reveal the scapegoat mechanism in a partial way. All the sacrificial elements we have listed up above, might even testify more to the demise of scapegoat mechanisms than to the primitive sacrificial nature of the institution of surrogate punishment. Is the scholarship on surrogate punishment not to some extent a token of desacralisation or modernity, because it carries on revealing, in the wake of the bible, *des choses cachées depuis la fondation du monde*, like the innocence of the victims, or the "*odium irrationale*"<sup>230</sup> at work in surrogate punishment, or the danger of mimesis? Legal thinking may therefore very well be a vehicle of the revelation of the nature of human violence. In the first place by explicitly creating room for the category of innocent surrogate victims. The innocence appears to be given, and was not revealed at some point during the development of the doctrine Maihold described. Possibly it was given because the

<sup>227</sup> FLEMING, *René Girard*, p. 144 (original italics deleted).

<sup>228</sup> At least in criminal law, that is.

<sup>229</sup> After all they still sacrificed animals and in the arena bloody spectacles appeased the roaring crowd.

<sup>230</sup> FARINACCI, *Praxis et theoricæ criminalis.*, lib. 1, tit. 3, q. 24, num. 151, p. 198.

medieval world was as much founded upon the revelation of scapegoat mechanisms as on its renewed theological obfuscations. If Christ's death is described as a *poena satisfactoria* or later an *afflictio satisfactoria*, we have an element of surrogation that is clearly coming to the fore. However, the revelatory description of this mechanism of surrogation in legal terms is being countered by a recuperation into sacrificial theology, because satisfaction is an act by which you appease God and not humans. The stress on the voluntariness of satisfaction is of course a reflection of Christ voluntarily undergoing his fate. But since surrogate punishment was not restricted to voluntary acts of satisfaction, but was also connected to involuntary medicinal punishment, the insight in sacrificial mechanisms demonstrated in our sources has clearly outgrown the confined area of voluntariness. Surrogate punishment seems an institutionalised version of failed victimage, namely a victimage where the victims appear as victims. Persecuting plainly innocents may have been an intermediate stage humanity needed to gain more insight in the scapegoat mechanism. This stage might have made it easier to subsequently denounce the institutionally revealed sacrificial logic and structure the legal system around the principle of guilt.

### **3.5 Bartolus' *fictio iuris*: a first glimpse of the guilty crowd?**

Bartolus dealt with group identity through the concept of the legal personality of a group. This *fictio iuris* was elaborated by Gandinus stating that groups can have a common will when they all commit a crime or issue a common decision leading to it. Although this aspect is being discussed as an argument for collective punishment, and as such as a case where innocents might be struck, there might be a different side to this story. The doctrine of collective punishment is ambivalent and is revealing in a paradoxically two folded way: besides a preoccupation to punish innocents, the crowd appears as an entity that could be guilty. Bartolus even stated that one murderer can imply the guilt of all. These two elements in the revelation of human violence are being merged, but nevertheless appear in an intimately connected way. Legal texts, just as virtually any other type of text, only partially indicate the dynamics of human violence, but it is nevertheless striking that law is providing categories that make it possible, however insufficient and unclear as it may still be, to contemplate the crowd as the culprit. Another very revealing detail is the fact that Covarrubias legitimates surrogate punishment as a deviation of natural law that must be based upon a consensus, an element clearly reflecting the anonymity of the crowd in Girard's universe.

### **3.6 The possible role of the principle of guilt in mankind's emancipation from the sacred**

We have dwelled quite some time on explaining all God's nasty sides by the hypothesis of social transcendence. But what about this fundamental idea that God only punishes the guilty, at least in the afterlife? How did this come to be? We can explain this along similar lines by inserting Girard's idea that primitive crowds were extremely convinced of the guilt of their victims. This element of accusatory mimesis got sacralised and resulted in a God structured around the principle of *suum cuique tribuere*. Although the source of this principle may have been an imagined guilt, nevertheless the principle itself seems to have been in line with a fundamental sense of justice. But the sacred had also absorbed, according to Girard, all forces that menaced humankind, like the brute and random violence of nature. The violence of the sacred was therefore fundamentally double: it punished culprits and thundered down on innocents as well. That the divine principle of justice has become

dominant over other less favourable aspects of the sacred could be explained by Charles Taylor's account of the axial revolution in religion, a process he describes as an ethical transformation of the divine: gods who were in pre-axial civilisations thought to be fundamentally ambivalent, become unambiguously good in post-axial religions, like Judaism and Christianity. However, this process is never fully achieved and pre-axial elements continue to live on as underflows of the sacred (for instance as evil spirits). The transcendent good emerging out of the axial revolution now becomes "the cosmic frame [that] can set the standard by which human social orders are to be judged and criticised."<sup>231</sup> And this seems to be exactly what is happening when our sources overtly state that the divine principle of justice is to be imitated on earth. The pre-axial remnants of the primitive sacred, which could perhaps here be identified with a God punishing innocents on earth, are increasingly hard to deal with, because they don't fit the general scheme of the divine good. On the other hand, it could count as a typical aspect of an axial religion that the divine punishment of innocents on earth, although we haven't understood the rationality behind it, are in the end to be considered as just and good. Nevertheless our sources, deeply influenced by the gospel that takes the side of the innocent victim, demonstrate a subversive resistance in claiming that those elements of divine justice diverting from the principle of guilt are not to be imitated and can't serve as standards for the *civitas terrena*. Under the hypothesis that social (and political) reality is structuring metaphysics as much as metaphysics, once originated, is structuring the social, we can interpret this refusal to imitate certain features of God as the upcoming need to revise the sacred. By adopting an image of God that exerts retaliation, but by increasingly rejecting his acts of retaliation on innocents as a social model, lawyers and theologians are maybe in a very subtle way announcing the need to continue the process of 'moralising' God that started in the axial revolution. In accepting, as a model, a God that retaliates crime, one still is caught in the web of sacrificial theology, one still is enthralled to the social transcendence and a God totally detached from violence as in the gospel does not yet appear. But in on the other hand rejecting, as a model, a God retaliating on innocents, there seems to be a calling for a new image of God, at least purified from the disturbing arbitrariness of crowd violence, a God in other words, that partially underwent the desacralising critique of the gospel on myth. Rather than imagining a purified ethical deity, some have taken the process of desacralisation to the next level, attacking now the very concept of justified divine retaliation as incarnated in the principle of guilt. Bartolomé de Medina claims that, considering the *potestas absoluta Dei*, God can send the just to hell and the unjust to heaven, and by doing this He can not be thought to enact punishment in the strict sense. The refined concept of guilt-oriented punishment now projected on God seems to function as a kind of critique of the divine. In other words, because God is omnipotent he can exert arbitrary violence, which is no longer to be considered as legitimate violence. In this image of God, the principle of guilt as the divine axiom of justice has disappeared. A God that has unlimited force over the individual and is able to choose his victims at random strikingly resembles a bloodthirsty mob, randomly exerting absolute force on its victims. Paradoxically but significantly it is at the moment when God is, through his *potestas absoluta*, getting disconnected from the world -since nor our rationality nor the book of nature can provide access to his being, which is endless and could have created other worlds guided by other principles<sup>232</sup>- that the most salient and repulsive element of social transcendence, namely its random violence in its naked essence, undisguised by a principle of guilt, is revealingly appearing in His image. In being totally other (*Deus ab-solutus et*

<sup>231</sup> C. TAYLOR, art. *What Was the Axial Revolution?*, in *Dilemmas and connections. Selected Essays*, Cambridge (Mass.), 2011, p. 375.

<sup>232</sup> H. BLUMENBERG, *Die Legitimität der Neuzeit*, Frankfurt am Main, 1966, pp. 121-122.

*absconditus*), God has become, at least at the ethical level, similar to the mob. Blumenberg has stressed the importance of this nominalistic absolute transcendent deity as a key factor of its disappearance and the subsequent rise of secularisation. Girard had pointed out that human evil is hidden under the veil of the sacred. If we connect both thinkers, we could launch the idea that it would have been convenient for transcendence to disappear altogether once it manifested our violence in an unveiled way, once the sacred became more a revelation than an obfuscation of random violence. Maybe atheism is another ultimate human strategy not to be confronted with our own foul nature. It was safer to cast Him out as the scapegoat of last resort, as Girard would have it. If our analysis would cut any wood, it appears that the reflections on punishment did play a role in the process of secularisation, in the sense that they have deepened out the unbridgeable gap between this world and the next, between the arbitrary violence of the sacred and the principle of guilt that is now, in de Medina's philosophy, a fully secular element. And it was exactly this detachment between heaven and earth, this gap, that has been, according to for instance Gauchet,<sup>233</sup> the driving force behind the gradual disappearance of the transcendent dimension as the structuring force of society.

The principle of guilt now appears under a different light. For the sake of understanding, let us summarize and clarify our line of thinking. 1) The accusatory mimesis of a scapegoat mechanism got sacralised, creating a God that punished, among others, culprits. This sacred version of the principle of guilt is just an illusion of the mob. 2) The axial turn taken by Judaism has made the principle of guilt dominant what divine retaliation is concerned. Since the scapegoat mechanism was already partially revealed in the Old Testament, the illusions of mob dynamics are gradually giving way and make room for a possible rebirth of the principle of guilt. 3) In Christianity, the scapegoat mechanism and its accusatory mimesis are unveiled. The principle of guilt metamorphoses: it no longer functions to make innocent victims, but rather protects them. 4) Under influence of the gospel, human justice increasingly strives not to imitate divine arbitrariness in punishment and structures itself around the desacralised principle of guilt. This could indicate a, possibly repressed, desire to desacralise God by rejecting the innocent victims the sacred brings about. 4) The desacralised principle of guilt now functions as a possible inroad to overtly attack the sacred and unmask God's arbitrary violence. 5) The cold and cruel God of nominalism was repressed in its totality. As one of the possible reasons for His disappearance, the new critical light the desacralised version of the principle of guilt sheds on Him, might be taken into consideration.

## Conclusion

We have approached the legal doctrine of *Strafe für fremde Schuld* from a Girardian perspective. By applying the explanatory potential of the scapegoat hypothesis as a hermeneutical tool, a principle of organisation, we have aimed to give the body of texts presented by Maihold a new and internally coherent interpretation.

The specific nature of surrogate punishment consists in providing, next to the culprit, an additional surrogate suffering a punishment for a crime he didn't commit. We have argued that this institution stands as an intermediate stage between sacrifice and a modern legal system revolving around the principle of guilt. The following elements were identified as

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<sup>233</sup> M. GAUCHET, *Le désenchantement du monde*. passim.

being connected to sacrifice and primitive religion: 1) the notion of surrogation and the punishment of innocents; 2) the selection of victims by victimary signs; 3) a preoccupation to avoid mimetic undifferentiation and the contamination of crime; 4) sacrificial logic, going from utilitarian statements to mentioning the re-established peace and order after turmoil; 5) biomedical thinking; 6) the presence of *crimina atrocissima* to legitimate the punishment of innocents; 7) the killing of innocents in war.

In the doctrine of surrogate punishment all elements of traditional mythology are popping up without being obfuscated by the sacralisation of the victim, just as we could have expected from a body of texts of persecution. But these specific texts of persecution are something revolutionary, since they themselves profess, in the spirit of the gospel, to persecute innocents. This makes them as much a relict as a deconstruction of sacrificial logic and its underlying scapegoat mechanism. Referring to Heidegger's distinction between *pseudos* as dissemblance and truth (*a-lètheia*) as un-concealment,<sup>234</sup> we propose to call these *a-lèthei*-ic rather than *pseudo*-texts of persecution, since they not only refrain from dissembling they hunt down innocents, but also reveal the hidden core (*lèthè*) of the truth (*a-lètheia*) of human violence. Not only the central position of the innocent victims, but also the mentioning of the *passio Christi*, the willingness to consider the possibility of a guilty crowd, and a growing sense of injustice about the whole doctrine, make *Strafe für fremde Schuld* an *a-lèthei*-ic remnant of sacrifice. No wonder then that the institution eventually collapses under the weight of its auto-revelation. The gradual expulsion of this remnant of sacrifice out of the concept of (true) punishment and into medicinal punishment and other labels, needs to be interpreted in the light of the shockwave of desacralisation that the disruption of the scapegoat mechanism caused in western history. Not only did the centrifugal power of secularisation or desacralisation differentiate between preventive violence on innocents (*poena medicinalis*) and retaliating violence on culprits (*poena retributiva*), it most of all banned the former from the core of criminal law, now being allowed to operate only in its periphery. Law no longer had the violence of the sacred at its disposal. The struggle to detach punishment from scapegoat tendencies is clearly sensible in for instance the history of excommunication. The process of desacralisation however encountered mighty opposing forces such as sacrificial theology -explained as social transcendence- and its accomplice, the doctrine of the original sin, both of which still cherished a vengeful and often unjust God and granted him access to the legal realm by labelling his arbitrary violence on innocents true punishment. It is by reorganising itself rigidly around the principle of guilt that law waged battle with the sacred. By using this very principle to criticise God's power to punish innocents as unlawful, law is showing its potential not only as a vehicle but as a possible side-engine of secularisation. Just as violence on innocents is excluded from human justice, so is a cold and frightening deity that can arbitrarily punish innocents banned from the heavens.<sup>235</sup> In ravaging a sacrificial God generated by social transcendence and by shattering the remnants of sacrifice in penal law, the principle of guilt has its part in the victory of the cross over Satan. It deserves to be seen as manifestation of the paraclete or "l'avocat universel, le préposé à la défense de toutes les victimes innocentes, le destructeur de toute représentation persécutrice".<sup>236</sup> And just as this principle crushed surrogate punishment, other legal precepts, like the presumption of innocence, seem to have had similar effects on further legal institutions connected to scapegoat mechanisms, like for

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<sup>234</sup> R. BERNET, *Le secret selon Heidegger et „La lettre volée“ de Poe*, art. in *Archives de philosophie*, 2005/3, 68, pp. 379-400.

<sup>235</sup> And of course, as a matter of political theology, the absolute power in the political realm tends to follow the same trend.

<sup>236</sup> GIRARD, *Le bouc émissaire*, pp. 289-290 (original italics).

instance torture, by means of which virtually any innocent can be transformed into a 'culprit'.<sup>237</sup> The results of this paper should therefore be nothing more than a first inroad into a broader philosophical exploration of how scapegoat mechanisms were disrupted in the course of the history of criminal law.

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<sup>237</sup> For a very interesting account of the disappearance of torture in criminal law, cf. M. SCHMOECKEL, *Humanität und Staatsraison. Die Abschaffung der Folter in Europa und die Entwicklung des gemeinen Strafprozeß- und Beweisrechts seit dem hohen Mittelalter*, Köln-Weimar-Wien, 2000.

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