

The Technology of Guilt

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I. Introduction

Arguably, the most important event in criminal law is the determination of guilt. Indeed, the entire intellectual architecture of criminal law is directed towards a moment when a court declares the subject guilty, or not. That determination, through ‘due process of law’, is essential to the legitimization of punishment. Without this mechanism, punishment is simply an exercise in violence and oppression. The declarative moment, at the conclusion of a rule-governed process of evidence and reason, transforms the brutality of the state into lawful enforcement of law and legitimate action in the eyes of the world. This process is fundamental to the political and intellectual economy of the criminal law, and necessarily invites questions: what is this process; where did it come from; and what are its characteristics? This article aims to answer these questions by drawing on the work of Michel Foucault, situated in a legal analytic, for the purpose of proposing new ways of thinking about the concept of guilt, and how it is determined in criminal law. The overarching position of the paper is that a genealogy of guilt reveals ancient links between modern techniques for determining guilt, theology, and the construction of truth. We begin by considering the idea of guilt and how the criminal law makes that assessment.

In English, the word ‘guilt’ is derived from an Old English root word, *gylt*.¹ It is, in fact, one of many words found in the Anglo-Saxon language concerned with guilt, shame and breach of duty.² It is a term with a composite meaning, generally understood as a *feeling of personal responsibility* for wrongs done, commonly recognised by others. Here guilt has an affective, social and psychological component, associated with a recognition that the person is at fault, either for some positive action or a failure to act when law or conscience required it. But guilt can

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¹ ‘Guilt, n’, *OED Online* (Oxford University Press, March 2019) <www.oed.com/view/Entry/82364>.

² There are a large number of terms in (Old) English concerned with ‘guilt’, including *gylt* (breach or violation of the law); *ðewisc-firen* (to have committed a shameless sin); *a-gyltan* (failure of duty; to offend or sin against). See Joseph Bosworth and Thomas Toller (eds), *An Anglo-Saxon Dictionary* (Oxford University Press, 1921).

also refer to the *attribution of culpability* for wrongs done, whether the actor accepts responsibility for it or not. These two aspects of guilt are of some importance in the criminal law since the voluntary expression of guilt is typically factored into assigned punishment, while the process of attribution of guilt is routinely structured into the process of fact-finding at trial. It is this latter aspect of guilt that is the focus of this essay.

The legal literature on the concept of guilt tends to focus on the idea of fault as the proper foundation for the attribution of ‘guilt’, normally on the basis that the public is justified in attributing responsibility for wrongs committed by the accused, even if the accused does not suffer the expected degree of psychological discomfort. In this respect, legal theory is primarily *objective* in its assessment of guilt, proceeding to then attempt to analyse the rule structures that enable this to take place. Here much of the focus is on a distinction between fault and action, with emphasis placed on the state of mind of the accused at the time, often in the context of debates about morality. In other words, the focus of legal understanding is essentially linked to the mechanisms of attributing guilt, the exceptions, and the rational justification for doing so.³ Although these canons provide authoritative accounts of the way in which guilt is constructed in law and legal theory, most legal writers tend to refer to a limited number of authorities as statements of rule and principle, without going further. One of the important historically grounded exceptions is Professor George Fletcher’s account of the links between criminal law and religion.⁴ What is of particular value here is the complex links identified between language, political and moral theory as providing critical foundations in the criminal law. Of particular note is a specific consideration of ‘guilt’.⁵ In his analysis of ‘guilt’, Professor Fletcher argues that all of the European languages contain words linked to ‘guilt’, both in the sense of the distinction between innocent or not, and the sense of shame that comes from the knowledge of wrong. The explicit link with religion comes from the Judaic legal tradition, where deep links are found between conceptions of sin, pollution and breaches of the laws of God. But what is missing from Fletcher’s elegant treatise is the links with the modern. The aim of this essay is to address this gap by undertaking a genealogical perspective using Foucault’s historical analytics.

³ H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008 [1968]); Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons, 2nd ed, 1961); George Fletcher, *Rethinking Criminal Law* (Oxford University Press, 3rd ed, 2001 [1978]); Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013); Anthony Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge University Press, 2007); Nicola Lacey and Celia Wells, *Reconstructing Criminal Law: Critical Perspectives on Crime and Criminal Law* (Butterworths, 1998); Nicola Lacey, ‘Responsibility and Modernity in Criminal Law’ (2001) 9(3) *Journal of Political Philosophy* 249; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 2nd ed, 2001).

⁴ George Fletcher, *The Grammar of the Criminal Law* (Oxford University Press, 2007).

⁵ Ibid 298-339.

To begin, it is helpful to consider the idea of guilt as constituting a judgement of the self and others. Guilt, both subjective and objective, involves making decisions concerned with notions of fault. This necessarily involves intellectual processes, drawing on certain forms of knowledge. This aspect of guilt makes the subject a prime candidate for thinking about the links between law and guilt as a technical form of reasoning, or ‘technology’. Here we are speaking about ‘technology’ as intellectual, as opposed to physical artifacts; something that loomed large in Foucault’s thinking.⁶ Foucault invited us to think about ‘technology’ in a nuanced way; to consider technology as a ‘matrix of practical reason’. Foucault argued that knowledge does not exist in isolation as a single unity or object, but rather interacts with an array of practices and intellectual systems of knowledge-types, all of which are in a perpetual state of motion and embody a means of power. Indeed, the ability to determine what, in fact, becomes recorded as ‘knowledge’ is fundamental to understanding the nature of power. This is important for lawyers to understand, because we tend to view legal principles in a linear way, often in isolation, and often in obedience to an ‘authoritative source’,⁷ without truly appreciating different conceptions of knowledge, and the network of institutional, intellectual and social practices that operate within and around the concepts we take for granted as the foundations of ‘law’. Of particular relevance for this essay is the recognition that knowledge has the ability to operate through layers of thought, which function both as explicit and *a priori* conceptions that have an unquestionable weight of principle in the absence of clear origins.

Foucault’s use of ‘technology’ draws on the Greek word *techne* (τέχνη), an idea concerned with art, craft and application. Such knowledge is purposefully deployed. For Foucault, ‘techne’ is ‘a practical rationality governed by a conscious goal’,⁸ as opposed to devices made to make labour efficient. In particular, Foucault was interested in the ways in which Greek and Roman philosophy directed itself towards the ‘art of government’:

⁶ It is worth noting that Foucault explicitly draws on Habermas in his discussion on technologies in ‘Sexuality and Solitude’: Michel Foucault, ‘Sexuality and Solitude’ in Paul Rabinow (ed), *Michel Foucault: Essential Works of Michel Foucault, 1954-1984* (Robert Hurley trans, Penguin, 1997) vol 1: Ethics, 175-184. For an excellent overview of the relationship between Foucault and Habermas, and the influence of Habermas on Foucault’s work, see Amy Allen, ‘Jürgen Habermas (1929-)’ in Leonard Lawlor and John Nale (eds), *The Cambridge Companion to Foucault* (Cambridge University Press, 2014) 616-623. For a remarkable analysis of Foucault’s evolving ideas around technology, see Michael Behrent, ‘Foucault and Technology’ (2013) 29(1) *History and Technology: An International Journal* 54.

⁷ Aulis Aarnio, *Reason and Authority: Treatise on the Dynamic Paradigm of Legal Dogmatics* (Dartmouth Publishing, 1997); Geoffrey Samuel, ‘Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?’ (2009) 36(4) *Journal of Law and Society* 431.

⁸ Michel Foucault, ‘Space, Knowledge and Power’ in James Faubion (ed), *Michel Foucault: Essential Works of Foucault, 1954-1984* (Robert Hurley trans, Penguin, 1994 [1982]) vol 3: Power, 349-364, 364.

If architecture, like the practice of government and the practice of other forms of social organisation, is considered a *tekhne*, possibly using elements of sciences like physics, for example, or statistics, and so on... that is what is interesting. ... the disadvantage of this word *tekhne*, I realize is its relation to the word 'technology', which has a very specific meaning. A very narrow meaning is given to 'technology': one thinks of hard technology, the technology of wood, of fire, of electricity. Whereas government is also a function of technology: the government of individuals, the government of souls, the government of the self by the self, the government of families, the government of children and so on.⁹

In other words, 'tekhne' extends to specific intellectual ideas directed to the government of the living. In his later works, Foucault was interested in the ways the Greeks and Romans practised self-discipline, personal restraint and conceptualised the 'good life'; the 'art of living' (*tekhnē tou biou*). Living a good life involved exercising 'care of the self' in order to achieve personal mastery; physically, morally and psychologically.¹⁰ This 'technology of the self' became integral, he argued, to Western culture as a practice of government, both of the 'self', but also populations, for the ostensible purpose of improvement and governance. This has been achieved through the evolution and practice of technologies:

[T]here are 4 major types of ... technologies, each a matrix of practical reason: (1) *technologies of production*, which permit us to produce, transform, or manipulate things; (2) *technologies of sign systems*, which permit us to use signs, meanings, symbols, or signification; (3) *technologies of power*, which determine the conduct of individuals and submit them to certain ends or domination, an objectivising of the subject; (4) *technologies of the self*, which permit individuals to effect by their own means, or with the help of others, a certain number of operations on their own bodies and souls, thoughts, conduct, and way of being, so as to transform themselves in order to attain a certain state of happiness, purity, wisdom, perfection, or immortality... These four types of technology hardly ever function separately ... Each implies certain modes of training and modification of individuals, not only in the sense of acquiring certain skills, but also in the sense of acquiring certain attitudes. ... This encounter between

⁹ Ibid.

¹⁰ Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress' in Paul Rabinow (ed), *Michel Foucault: Essential Works of Foucault, 1954-1984* (Robert Hurley trans, Penguin, 1997 [1983]) vol 1: Ethics, 253-280, 259-260.

the technologies of domination of others and those of the self I call 'governmentality'.¹¹

Technologies involve distinct ways of doing and ways of knowing deployed internally and externally in the constitution of the self and others. Central to these technologies is the articulation of norms, truth, and their threshold of acceptance. In the context of criminal law, this link between ways of knowing and doing is endemic. As observed by Tyrone Kirchengast,¹² the criminal trial is a fundamental assemblage of technologies concerned with the ascertainment of truth. Central to this is the question of guilt. The 'technology of guilt', I suggest, is a matrix of practical reason intended to adjudicate the guilt or innocence of a person, with the concurrent effect of justifying the infliction of punishment and acting as a deterrent. It operates subjectively on the offender as a mechanism for recognising personal fault and being deserving of punishment, and objectively by institutions as the offender being deserving of punishment. In this respect, it is something of a hybrid of the four technologies outlined by Foucault. It is a technology that allows the decision-maker to conceptually identify the other as an offender, and worthy of punishment in the eyes of the community, and, at least in the early life of the criminal law, in the eyes of God (at a theological level), or as offenders against the collective conscience (at the moral level). It involves the production of truth; the allocation of a sign; the application of power; and mobilises a technology of the self in the offender and other. In this respect, guilt is not only a form of constructing the subject; it is also a form of knowledge and associated practice in the construction of truth. This form of reasoning and associated social and personal effect I will refer to as the *technology of guilt*.

The purpose of this technology is a multi-dimensional production of *truth*. For the purposes of the law, the mechanism serves to establish and test the truth of particular assertions (eg, the person is, or is not, guilty of a crime). Here the technology of guilt serves a social and declaratory purpose in establishing an objective truth. For the victim, the technology of truth serves to validate the experience of crime and the desire for revenge. Here the technology of guilt has an effective purpose. Finally, the technology of guilt has a hermeneutic function, being linked to the perception and psychology of the subject, and the observer. The denunciation of the court and community serves, at some level, to reconstruct identities and the logic of the subject and those who are witness to the denunciation. In this way, the technology of guilt provides an important link between Foucault's conceptions of power and the government of the self and his unfinished links between law and power.¹³

¹¹ Michel Foucault, 'Technologies of the Self' in Paul Rabinow (ed), *Michel Foucault: Essential Works of Foucault, 1954-1984* (Robert Hurley trans, Penguin, 1997 [1982]) vol 1: Ethics, 223-251, 224-225 (emphasis added).

¹² Tyrone Kirchengast, *The Criminal Trial in Law and Discourse* (Palgrave Macmillan, 2010).

¹³ Michel Foucault, 'The Ethic of Care for the Self as a Practice of Freedom: An Interview with Michel Foucault on January 20, 1984' (1987) 12(2-3) *Philosophy and Social Criticism* 112; Michel Foucault, 'What Our Present Is' in Syl re Lotringer (ed), *The*

Having outlined some ideas around the technology of guilt, let us turn to the road ahead. The technology of guilt intersects and is enmeshed with a form of reasoning found in the criminal law, which legal philosophers and jurists clearly link to the attribution of fault. In the Anglo-European tradition, this is fundamentally linked to the coincidence of a guilty state of mind and a prohibited act, circumstance or result.¹⁴ This concept is derived from a Latin maxim: *actus non facit reum, nisi mens sit rea*.¹⁵ This concept rests at the heart of criminal law in the English and European legal traditions. A consideration of its legal origins is the subject of Part II. Here the two main lines of authority will be considered. In the English legal tradition, the concept is traced through a series of cases that lack any consistent chain of application. Rather, the concept appears as distinct moments over time; finding its earliest clear expression in the *Leges Henrici Primi* in the 11th century. And yet we find even earlier expressions in the writings of St Augustine in the 9th century, suggesting early Christian influence, and, as Fletcher identifies, even earlier links to Judaic law. The second line of authority is traced through the Napoleonic Penal Codes, which, in turn, draw directly from the earlier Roman Codes of Justinian. This apparent fusion of Christian and Roman reasoning is fundamental to the technology of guilt. In Part III, we return to Foucault to consider specific components of this technology, looking at the role of *confession*, *inquiry* and *avowal* as central foundations. Here *confession* assumes pride of place in the constellation of evidence used in the determination of guilt. But it cannot operate alone. It works concurrently with other devices, including the formal *inquiry*, where guilt or innocence is determined out of the evidence, and through the practice of *avowal*, where the verbal assertions of testimony play a leading role in the adjudication of guilt. We then conclude with a discussion on the question of origins of the concept, the significance of this technology for legal and judicial reasoning, and its ontological role in creating new subjectivities.

Politics of Truth (Lysa Hochroth and Catherine Porter trans, Semiotext(e), 2007) 129-143.

¹⁴ I note that care needs to be taken here in making universal assumptions. Criminal law is particularly susceptible to local and universal changes over time. As observed by Fletcher, European legal systems have experimented with different models of fault attribution over time. For example, current legal systems tend to focus on 'act based' fault (*Tatstrafrecht*), whereas other models have included 'attitude based' fault (*Gesinnungsstrafrecht*) and 'actor based' fault (*Täterstrafrecht*). Here the former is concerned wholly with the personal motive of the accused, regardless of the act, while the latter is concerned with the accused's membership of a particular group or kind of human being. See Fletcher, above n 4, 27ff.

¹⁵ There are various translations of this term, but broadly the term expresses a core principle of the criminal law: that an act does not make a person guilty unless the mind is also guilty.

II. A Genealogy of Guilt

A. This Mind, This Body, This Crime

As is well known, in modern criminal law a person may only be punished, legally, after the presentation of admissible evidence in a court that proves, beyond a reasonable doubt, that the person has committed a crime. The evidence must address nominated elements of the offence found in the law. The prosecution has the legal obligation to satisfy the elements of the offence(s) charged, combined with the obligation to disprove the existence of defences should they be enlivened. English and European legal systems have evolved such that the elements of a crime are constituted by the combination of certain ‘physical’ and ‘mental’ elements. While it is true that there are many offences that do not require proof of fault, being strict or absolute liability, even then the law tends to extend a defence of ‘honest and reasonable mistake’, or some statutory defence. The elements in law are typically linked to concepts such as conduct, circumstances and results prescribed as unlawful by a sovereign power.¹⁶ Assessment of these elements is a principal concern in a criminal trial and constitutes an essential mechanism by which guilt is attributed to the accused where it is otherwise denied. However, the matrix is complicated because the facts of a case not only determine liability but are also relevant to culpability (punishment). In other words, the legal components of the elements are essential to the determination of whether the person is liable for punishment, while the *intensity* of certain factual matters intersecting with those elements are essential for determining the extent of ‘guilt’; that is, the extent of punishment once liability has been found. In this way, the essential technology of the criminal law requires analysis of the relationship between the physical and fault dimensions of a criminal charge to determine the fact and extent of ‘guilt’. But it raises an important question: where did this process originate?

Legal scholars tend to focus on, and search for, definitive sources of authority for factual and legal propositions. Lawyers tend to look at the past to determine authority in the present and routinely aim to ascertain certainty by seeking singular statements of authority, or the distillation of principle where there are competing authorities. The value of Foucault is to reverse that focus and disrupt the present by questioning that present by using the authority of the past. Foucault, drawing on Nietzsche, cautioned against the idea of assuming there is a single origin for moral or intellectual conceptions. In *Nietzsche, Genealogy, History*, Foucault outlined the challenge in searching for threads of knowledge: ‘Genealogy is gray, meticulous, and patiently documentary. It operates in a field of entangled and confused parchments, on documents that have been scratched over and recopied many times.’¹⁷ For legal scholarship, this is an important methodological distinction in undertaking

¹⁶ In Australian law, for example, these conceptions are explicitly applied in the *Criminal Code 1995* (Cth) ch 2.

¹⁷ Michel Foucault, ‘Nietzsche, Genealogy, History’ in Paul Rabinow (ed), *The Foucault Reader* (Penguin, 1986) 76-100.

documentary research, arguably augmenting the classic attention to case research by sensitising the researcher to the presence of both linear and concurrent fragments of knowledge within the corpus of law and the surrounding contextual narratives. This is significant in trying to discern the evolution and possible origins of the essential interest of the criminal law in the coincidence of guilty action and guilty minds as the foundation of liability. In other words, the starting assumption is to assume there is no starting point or single authority. We begin by considering the position in the English (common law) tradition.

B. The Anglo-Australian Legal Tradition

The English legal tradition has global reach on account of its exportation into the various territories and former colonies of the British Empire. As a result, the intellectual moves originating in English law are familiar to many jurisdictions around the world. As the author was trained in the Australian common law tradition (a Federal system), it is a useful place to begin and will be familiar to many readers. At common law, the technology of guilt is embodied in the Latin maxim ‘actus non facit reum nisi mens sit rea’. Loosely translated, it means ‘the act is not made guilty unless the mind is guilty’. It is one of the fundamental principles of criminal liability. Despite being well established in Australian law, there have been few attempts to engage with its meaning or origins. In *Ryan v The Queen*, Windeyer J appears to sum up the general judicial view on this by simply stating that because the elements of an offence are stipulated in legislation it is generally ‘unnecessary for us to enter the discussion among textbook writers of what for the purposes of the maxim *actus non facit reum nisi mens sit rea* is the ‘act’.¹⁸ Simply put, it is unnecessary in most cases for judicial officers to devote time and energy in analysing the nuances of the Latin or to engage with the origins of the term. This is not contentious, because the judicial task is to decide cases before the court. It would be very unusual if that would require a judge to delve into the historical origins of the term. In those rare cases where reference is even made to the term, Australian judges tend to defer to the English authorities on point.¹⁹

¹⁸ (1967) 121 CLR 205, 239.

¹⁹ *Castle v R* (2016) 92 NSWLR 17; *Environment Protection Authority v Tyco Water Pty Ltd* (2005) 142 LGERA 241; *Registrar of the Supreme Court v Herald & Weekly Times* [2004] SASC 129; *R v Ardler* (2003) 175 FLR 272; *R v Morris* [2002] ATSC 12; *Palmer v Ostrowki* [2002] WASC 39; *R v Taib; ex parte DPP* [1999] 2 Qd R 649; *Defina v The Queen* (Unreported, 3 March 1993, VSC)(Marks J); *State Rail Authority v Hunter Water Board* (1992) 28 NSWLR 721; *Reynolds v Grealish* (Unreported, 28 October 1988) (Walsh J); *Nationwide News v Bitter* (1985) 38 SASR 390; *He Kaw Teh* (1985) 157 CLR 523; *Prothonotary v Collins* (1985) 2 NSWLR 549; *MacDonald v R* [1983] 1 NSWLR 729; *Ianella v French* (1968) 119 CLR 84; *Ryan v The Queen* (1967) 121 CLR 205; *Vallance v R* (1961) 108 CLR 56; *Proudman v Dayman* (1941) 67 CLR 536; *Francis v Rowan* (1941) 64 CLR 196; *Thomas v R* (1937) 59 CLR 279; *Marshall v Foster* (1898) 24 VLR 155.

The only reported case where a detailed consideration of the origins of the doctrine is considered is *R v S*, where O'Brien J stated:

The ecclesiastics, not only from their religious doctrines, but from their training in the principles of the Roman law, had a continuing influence in directing the secular law towards the mental attitudes of the accused, as well as having an influence upon the conditions in royal pardons, so that the pardon might accord with the degree of blame in the given case. It was under these influences that the maxim 'actus non facit reum nisi mens sit rea' came to be used to express the concept that merely to produce the prohibited harm does not involve a man in liability to punishment unless, in addition, he could be regarded as morally blameworthy. It is said that the maxim originated in a remark by St Augustine, who said 'reum linguam non facit nisi mens rea', a statement which was later used in connection with the offence of perjury in the so-called Laws of Henry I. The maxim is indelibly fixed in the common law through the centuries to the present day as a declaration of the principles of common law as to criminal responsibility. In the application of this maxim, no man can be convicted of crime, unless the two requirements which the maxim contemplates are fulfilled, namely, that there be both the physical element of *actus reus*, and the mental element of *mens rea*.²⁰

In this case, the accused raised the defence of mental illness in relation to charges of discharging a loaded firearm to prevent arrest. In a lengthy and scholarly decision, O'Brien J was called on to consider in detail the nature of *mens rea* in the context of mental illness. Drawing on cases and academic commentary, His Honour concluded that the concept of guilt, and its link with criminal responsibility, had its origins as a moral concept, originally determined by an objective assessment of the conduct of the accused in the sense of a departure from the expected standards of conduct. Over time, that objective assessment has been replaced with a subjective standard – although the objective limb has survived in some areas of the criminal law.²¹ As can be seen, O'Brien J points to ancient origins, drawing on both Ecclesiastic and Roman conceptions merging into the English legal tradition and

²⁰ [1979] 2 NSWLR 1, 24.

²¹ Ibid 25: 'The importance of the maxim "actus non facit reum nisi mens sit rea" was in its emphasis upon the necessity for a mental element in crime. But *mens rea* began as a matter of morality, and the test which was applied to ascertain whether it existed in a particular case was an objective test... The courts, looking at the facts, considered whether these showed a picture of a man who had behaved in a manner which fell below the accepted ethical standard of the time, that is to say in a manner which was wrong because it fell below what was regarded as moral rectitude according to that standard. Such a standard is, of course, unsatisfactory as a test of liability because, being the product of emotional reactions of mankind, it is both vague and unstable. Nevertheless, its introduction into English law achieved much, because it directed attention to the working of the human mind as the chief factor in delinquency. *Mens rea*, in this early sense, has lived on in the law in the defence of infancy or insanity.'

subsequently finding life on a continent unknown to Europeans at the time of the merger. Consequently, the Australian position draws explicitly from a limited range of cases, containing echoes of a more distant past.

These echoes are distinctly Latin in origin, coming into Australian law, predictably, through its English ancestry. In *Haughton v Smith*, Lord Hailsham made this observation:

Before proceeding further, I desire to make an observation on the expression '*actus reus*', used in the quotation above. Strictly speaking, though in almost universal use, it derives, I believe, from a mistranslation of the latin aphorism: '*Actus non facit reum nisi mens sit rea*'. Properly translated, this means 'An act does not make a man guilty of a crime, unless his mind be also guilty'. It is thus not the *actus* which is '*reus*', but the man and his mind respectively. Before the understanding of the latin tongue has wholly died out of these islands, it is as well to record this as it has frequently led to confusion.²²

Lord Hailsham's recognition that the term was misleading because it was based on a mistranslation of Latin was echoed by Lord Diplock in *R v Miller*, who not only affirmed the misleading aspects of bad Latin, but also affirmed the general meaning:

This expression is derived from Coke's brocard ... 'et actus non facit reum, nisi mens sit rea,' by converting, incorrectly, into an adjective the word 'reus' which was there used correctly in the accusative case as a noun. As long ago as 1889 in *Reg v Tolson* (1889) 23 QBD 168, 185-187, Stephen J when dealing with a statutory offence ... condemned the phrase as likely to mislead, though his criticism in that case was primarily directed to the use of the expression 'mens rea'. In the instant case ... it is the use of the expression 'actus reus' that is liable to mislead ...

My Lords, it would I think be conducive to clarity of analysis of the ingredients of a crime that is created by statute, as are the great majority of offences today, if we were to avoid bad Latin and instead to think and speak . . . about the conduct of the accused and his state of mind at the time of that conduct, instead of speaking of actus reus and mens rea.²³

The Latin is, to a large extent, an anachronism; but the essential principle of a union of action and mind remains current. In *R v G* the House of Lords again affirmed the principle as a foundation of English law.²⁴ Lord Bingham synthesised a more nuanced conception of the meaning of the term, and in so doing has expanded and clarified the current meaning:

²² [1973] 3 All ER 1109, 1113-1114.

²³ [1983] 2 AC 161, 174.

²⁴ [2003] UKHL 50.

[I]t is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule *actus non facit reum nisi mens sit rea*. The most obviously culpable state of mind is no doubt an intention to cause the injurious result but knowing disregard of an appreciated and unacceptable risk of causing an injurious result or a deliberate closing of the mind to such risk would be readily accepted as culpable also. It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if (for reasons other than self-induced intoxication: *R v Majewski* [1977] AC 443, [1976] 2 All ER 142) one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.²⁵

As could be expected, this reasoning has been influential in Australian cases.²⁶ Despite the anachronism, the term quickly became accepted as correct in Australian law. We have, then, the concept, based on a Latin maxim, received from English case authorities. The difficulty here is the statement was obiter, and in *Haughton* was made as an observation on the meaning of ‘actus reus’ in the context of a charge of attempt, and without a clear line of authority for the principle.

The principle of a fusion between ‘actus reus’ and ‘mens rea’ as the foundation of guilt is often described as the ‘rule in Tolson’s case’.²⁷ *Tolson’s case* was decided in 1889 before the Queen’s Bench in England. Here a woman was charged with bigamy after her husband disappeared and she then remarried.²⁸ When her husband reappeared after six years she was charged, but ultimately acquitted, because of the existence of an honest and reasonable mistake of fact. The absence of a ‘guilty mind’ made the fact of a bigamous marriage excusable in the eyes of the law. Justice Willis held:

There is no doubt that under the circumstances the prisoner falls within the very words of the statute. She, being married, married another person during the life of her former husband, and, when she did so, he had not been continually absent from her for the space of seven years last past. It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent. It is a principle of natural justice, says Lord Kenyon CJ, that *actus non facit reum, nisi mens sit rea*. The intent

²⁵ Ibid [32].

²⁶ *Banditt v R* [2005] HCA 80.

²⁷ *R v Tolson* (1889) 23 QBD 168.

²⁸ The exact same issue came before the High Court in Australia in *Thomas v R* (1937) 59 CLR 279, which drew explicitly on *Tolson*.

and act must both concur to constitute the crime... The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but it must at least be the intention to do something wrong. That intention may belong to one or other of two classes. It may be to do a thing wrong in itself and apart from positive law, or it may be to do a thing merely prohibited by statute or by common law, or both elements of intention may coexist with respect to the same deed.²⁹

Justice Cave added:

At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim *actus non facit reum, nisi mens sit rea*.³⁰

Tolson and *Haughton* both refer to an earlier authority, *Fowler v Padget* (1798).³¹ Fowler's case concerned bankruptcy, in which the Chief Justice, Lord Kenyon (referred to in *Tolson*), declared: 'bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender: but it is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*. The intent and the Act must both occur to constitute the crime'.³²

The conundrum here is that neither *Tolson* nor *Fowler* cite any authorities for the proposition that guilty actions and guilty mind must coincide to constitute a crime. The pursuit of the origins of the concept in English law seems to elude us at this point. It seems, therefore, that the concept appeared at some earlier stage, probably in the eighteenth century, and was so well established that it was simply assumed knowledge. That conclusion is somewhat confirmed by a much later reference to the concept in *R v Miller*,³³ a 1982 decision of the House of Lords. Here Lord Diplock not only confirmed *Haughton v Smith* and *Tolson*; His Honour also observed that the term could be sourced in *Coke's Institutes of the Laws of England*. Coke's *Institutes* were published between 1628 and 1644. In the *Second Institute* Coke makes a reference to '*actus non facit reum nisi mens sit rea*' in respect of criminal liability for a person of 'unsound mind'—holding that a 'madman' could not be guilty due to absence of reason and discretion.³⁴ The rationale seems to be that the absence of reason rendered the action 'without guilt'. Such actions lacked moral turpitude. But, again, we have no authority for the proposition.

²⁹ (1889) 23 QBD 168, 171-172 (emphasis added).

³⁰ Ibid 181.

³¹ (1798) 7 TR 509.

³² Ibid 514.

³³ [1983] 2 AC 161.

³⁴ Edward Coke, *First Part of the Institutes of the Laws of England* (J & W Clarke, 1832) 255.

Where, then, does the proposition emerge? The answer, it seems, is tied to England's connection with a larger European legal (and theological) connection.

C. The European Legal Tradition

The European legal tradition in criminal law was heavily influenced by four key knowledge strands. The first is the enduring influence of the Napoleonic Codes. The second is Roman law. The third is Ecclesiastic law. The fourth is local/customary law. Clearly, the 'European tradition' is not a singular entity, nor is it correct to assume a linear history. While there is considerable diversity in the content and historical evolution of the European legal tradition (within which the English tradition is unique), like the common law tradition, the European tradition also emphasises the importance of a coincidence of prohibited acts, circumstances or results, and the state of mind of the offender. The following table sets out how this relationship is described in several of the current European Codes:

Country	Source	Statement
France	Criminal Code of the French Republic (<i>Code pénal</i>), Article 121-3	There is no felony or misdemeanour in the absence of an intent to commit it. ³⁵
Germany	Criminal Code 1988 (<i>Strafgesetzbuch</i>), Section 5	Unless the law expressly provides for criminal liability based on negligence, only intentional conduct shall attract criminal liability. ³⁶
Poland	Penal Code 1997, (<i>Prawo karne</i>), Article 8	A crime may be committed only with intent; the misdemeanour may also be committed without intent, if the law so stipulates. ³⁷

³⁵ English translation available at <<https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>>. This translation is that of Professor John Spencer QC (2005). Article 121-3 of the 2016 Code reads: 'Il n'y a point de crime ou de délit sans intention de le commettre ...'.

³⁶ The official translation of the Code was undertaken by Michael Bohlander <https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.pdf>. The German reads: 'Strafbar ist nur vorsätzliches Handeln, wenn nicht das Gesetz fahrlässiges Handeln ausdrücklich mit Strafe bedroht.'

³⁷ English translation available at <<https://www.legislationline.org/documents/section/criminal-codes/country/10/Poland/show>>.

Spain	Criminal Code 1995, Article 5	No punishment whatsoever shall be imposed in the absence of either mens rea or negligence. ³⁸
Sweden	Swedish Penal Code 1967, Section 2	Unless otherwise stated, an act shall be regarded as a crime only if it is committed intentionally. ³⁹
Switzerland	Swiss Criminal Code 1937, Article 12	Unless the law expressly provides otherwise, a person is only liable to prosecution for a felony or misdemeanour if he commits it wilfully. ⁴⁰

As is always the case in comparative work, there are serious limitations in translations of concepts. In German law, for example, the English translation of ‘intentional’ fails to capture the nuances. There is no single German word at play. The term used is *vorsatz* and sometimes *absicht* (‘knowingly, wilfully, and with specific intent’). Liability, in turn, depends on the combination of objective facts constituting a crime, and the coincidence of a particular state of mind (*tatbestand*). That state of mind can include matters that are foreseen as a direct and necessary consequence of actions (*dolus directus*) and foreseen as a possible consequence (*dolus eventualis*).⁴¹ Consequently, there is always a risk in comparative work to assume terms have singular equivalents in other languages or systems. It is not my purpose to engage with a detailed doctrinal consideration of how mens rea is categorised and understood across Europe. The undertaking is well beyond the scope of this paper. Rather, the purpose is to highlight the commonality and existence of a conceptual technology concerned with the evaluation of guilt found throughout the European legal tradition. What is important, though, is to recognise a shared set of ideas around the importance of a sense of ‘guilt’ as fundamental to criminal law. Doubtless the current law has a complex history, involving the impact of the rise of the European Union, the reconstruction of law in the wake of the fall of the Soviet Union in Eastern Europe, the occupation of Germany and Italy after World War II, and, perhaps more importantly, the impact of the Napoleonic Codes.

The *Code Pénal* was originally passed in 1791. It was replaced in 1795 by the *Code des délits et des peines*, and finally settled as the *Code Pénal* in 1810. It remained law in France until 1994 when it was updated. The *Codes* rely heavily on

³⁸ Ministerio de Justicia, *Criminal Code* (2011), available at <<https://www.icj.org/wp-content/uploads/2013/05/Spain-Criminal-Code-1995-eng.pdf>>.

³⁹ A bilingual Swedish-English Criminal Code is available at <<https://www.government.se/48d6e0/contentassets/5315d27076c942019828d6c36521696e/the-swedish-criminal-code.pdf>>.

⁴⁰ Authorised English translation available at <<https://www.admin.ch/opc/en/classified-compilation/19370083/index.html>>.

⁴¹ I am indebted to my colleagues, Dr David Tomkins and Professor Christoph Antons, for their notes and instructions on *vorsatz*.

references to intention and knowledge (eg, *avec connaissance*) as fundamental to liability. In particular, where an offender ‘acted with full knowledge’ (*avec discernement*) (section 67), this was the basis for more severe punishments, in stark contrast to the offender who was ‘mad’ and acted in the absence of their mind⁴² – who was otherwise not guilty of a crime (section 64). Here we see a familiar dynamic, combining prohibited action and the guilty mind forming the basis of liability, as well as culpability influencing the scope of punishment. The difficulty we have with Codes is that, of themselves, they only make declarations of the concepts and devices. As a source of the historical and intellectual narrative, they are declaratory, rather than archival. There is no clear trace of principle. Rather, the Code necessarily reflects elements of what might be called an epistemic circulation: principles operating within and beyond the consciousness of legislators – particularly the members of Napoleon’s Code Commission (Tronchet, Portalis, Bigot de Préameneu and Malleville), charged with the task of developing a new set of Codes in August 1800.

Despite its links with the Revolution, the Code was not a radical departure from the form of law or a complete erasure of the so-called *ancien droit*. On the contrary, the members of the Code Commission were, in fact, all jurists schooled in ‘pre-revolutionary’ law, and the shift into Codification and the emphasis on ‘reason’ had been underway for decades. As Lobingier observed, King Louis XI (1423-1483) began moving towards codification of law as early as the fifteenth century. Consequently, there were numerous attempts to consolidate and the codify ordinances between 1500 and 1747. When the government of France became vested in the National Assembly in 1789, the moment had arrived for codification, changes, and adaptation, rather than a complete change in the form and substance of the criminal law.⁴³ For our purposes, what is significant is that while many areas of law were changed and codified, the mechanisms used to determine guilt remained unchanged. If anything, the role of rational thought and directed will was strengthened. This is not surprising, given the role that ‘reason’ and the mind played in the Renaissance and the subsequent ‘Age of Reason’. The leading intellectuals of the seventeenth and eighteenth centuries emphasised the place of reason and liberties in the social, political and legal life of humanity.⁴⁴ If anything, the technology of guilt enabled judges to give evidence-based decisions, thereby removing any perception of arbitrariness in proceedings. The judicial officer was not only formally separated from the executive arm of government; his or her reasons were now perceived as being rule-governed. With Napoleon’s conquest of much of Europe and

⁴² ‘Il n’y a ni crime ni délit, lorsque le prévenu était en état de démence au temps de l’action...’

⁴³ Charles Lobingier, ‘Napoleon and His Code’ (1918) 32(2) *Harvard Law Review* 114.

⁴⁴ Cesare Beccaria, *On Crimes and Punishment* (Henry Paolucci trans, Bobbs-Merrill, 1963) [trans of: *Dei Delitti e delle Pene* (1794)]; Cesare Lombroso, *Crime: Its Causes and Remedies* (Patterson Smith, 1911); John Locke, *Two Treatises on Government* (Routledge and Sons, 1884 [1684]); Charles Montesquieu, *The Spirit Of The Laws* (Anne Cohler, Basia Miller and Harold Stone trans, Cambridge University Press, 1989) [trans of: *De l’esprit des lois* (1748)]; Thomas Hobbes, *Leviathan* (Penguin, 1968 [1651]).

reorganisation of the legal system and civil administration, these principles appear to have become quickly entrenched, largely, it seems, because they were broadly compatible with existing ideas and processes.

The Napoleonic Code was not unique in introducing evidence-based inquiry in Europe. These practices were much older. It can be seen in an earlier merger of law, state and religion in the form of the *Constitutio Criminalis Carolina* (1532).⁴⁵ The 'Carolina' was a criminal code, of sorts, enacted in an attempt to provide a single criminal law and procedure for the Holy Roman Empire under Charles V (1519-1556). This is significant because the Empire, at this time, covered virtually all of Western Europe, including Germany, Italy and Spain, but excluding France and England. It was a vast Empire requiring a legal infrastructure incorporating the Italian law schools. This is a significant period because the consolidation of criminal law under Charles V coincided with the Reformation, conflict with the Ottoman Empire, and a highly diverse feudal administration of numerous cities, principalities and bishoprics. It was a period when local loyalties and religious sensibilities intensified to fanaticism. Here we find a structural merger of inquiry drawn from the Inquisition, applied in the context of an autocratic state forced to deal with the combination of heresies, feudal violence and the government of vast territories.⁴⁶

Of present interest is the fact the 'Carolina' was concerned with finding the 'truth', but is notorious because it specifically endorsed confessions obtained under torture, validated by repeating the confession when not being tortured.⁴⁷ It is also significant because the 'Carolina' was strongly influenced by Canon law and the educational background of those administering it. Here we find enormous diversity, ranging from jurists formally trained in the northern Italian law schools, through to local authorities and clerics without any legal training, but charged with administering the law. What is important here is the interpretation of the text was heavily influenced by the level of education of those interpreting the 'Carolina' – often based on Christian hermeneutics, inquiry and introspection.⁴⁸ The 'Carolina' was often used in conjunction with Canon law in the investigation and prosecution of heresy and witchcraft and was later denounced by Friedrich Spee in *Cautio Criminalis* (1631) for the cruelty of obtaining confessions under torture, and for the generally unreliable validity of confessions so obtained. Of note is the explicit role that *intention* and action played in the determination of guilt, particularly the divisions between

⁴⁵ A copy, in German, of the 'Carolina' is available at <www.juraexamen.info/wp-content/uploads/jura-2015-143.pdf>. An English translation of key provisions of the 'Carolina' is located in John Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Harvard University Press, 1974). There is very little written in English on the Carolina. Langbein's work remains the classic English treatment.

⁴⁶ Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge University Press, 2009).

⁴⁷ It should be noted, however, that the 'Carolina' in fact was an attempt to regulate and restrict the use of torture, rather than introducing it.

⁴⁸ Langbein, above n 45.

intended actions (*Vorsatz*) and unintended but criminally negligent actions (*Fahrlässigkeit*).⁴⁹ Here we find a clear instance of the merger between the inquiry into the mind of the accused, relying on inquiry and confession, and the determination of guilt based on objective and subjective elements. It would seem that across the Holy Roman Empire, juridical practices were looking to determine guilt through the twin concepts of forbidden actions and guilty mind well before the Napoleonic Codes.

According to Langbein,⁵⁰ a similar development can be seen in France in 1539 with the passing of an *Ordonnance Royale*, now known as the *Villiers-Cotterets*. Enacted by Francis I, the *ordonnance* was similar to the *Carolina* in that it attempted to codify criminal law and procedure, which consolidated ‘inquisition’ as a key form of the criminal trial process. Like Germany, France was not a singular entity. Justice tended to be local and heavily linked to the feudal divisions of the country, with a strong role for both communal and ecclesiastic courts. Unlike Germany, France had a prosecutor’s office empowered to investigate and prosecute crime (the *procureur du roi*) as early as 1302. It became a powerful institution in its own right by the time *Villiers-Cotterets* came into being. In addition, French administration, legal education and procedure had reached the point in 1539 that a legal profession, magistracy and prosecution office were in effective operation, unlike the Holy Roman Empire, which would not see anything like that for some centuries after. A critical component of this administration was not only a more identifiable legal profession and system of legal process; it also involved the stronger integration of Canon law and process as part of the ‘inquisitionsprozess’. What is critical is the investigation of crime in the form of examination and cross-examination of the accused, for the purpose of reaching ‘conclusions’. But again, the *Villiers-Cotterets* was not a comprehensive code. According to Langbein, the *ordonnance* was part of a much larger web of jurisprudence that continued to operate at the time. It makes no specific mention of the intellectual devices used by the *procureur* in the determination of ‘conclusions’, apart from the detailed documentation of testimony, comparative analysis of it, and the justification of torture. It is undeniable, however, that the *procureur* engaged in the process of evidence-based reasoning designed to enable conclusions to be made as to the guilt or innocence of the accused.

D. Holy Roman Reason

Without attempting a comprehensive theory of or engagement with three distinct and complex legal histories, it appears there was a merger of ideas from custom, Roman and Canon law in the Anglo-European legal systems. These elements we might call ‘Holy Roman Reason’, and appear to have had pan-European reach by virtue not only of the political reach of the boundaries of the Holy Roman Empire, but also of the larger reach of the Church, and the role of the growing number of law schools and

⁴⁹ Klaus Geppert, ‘Die Peinliche Halsgerichtsordnung Karls V (die "Carolina")’ (2015) 2 *Juristische Ausbildung* 143.

⁵⁰ Langbein, above n 45, 243-251.

legally trained actors that began to be established in Europe during the Middle Ages.⁵¹ It also seems that the prosecution of heresy played a major role in this development. Indeed, it may well be the case that heresy and the inquisition play a much greater role in the history of criminal law and procedure than legal scholars may be aware of. By the time the *Carolina* was passed, the formalities of prosecuting heresy were well established, particularly in the wake of the trial of Jan Hus in Bohemia in 1412. In a scholarly examination of the trial, Thomas Fudge found that heresy trials were no different to ordinary criminal trials in this period, being governed by a surprisingly sophisticated procedure drawing explicitly on Gratian's codification of Canon law, and the decretals of Pope Innocent III (*Nichil est pene* and *Licet Heli* (1199) and *Qualiter et quando* (1206)), which required heresy to be prosecuted in the form of inquisition.⁵² In this respect, prosecutors were known as 'doctors of souls'. In the prosecution of heresy, the intellectual and spiritual association with actions were critical for the determination of guilt, as was the confession and personal recognition of the accused of their departure from true faith. Repentance was the ideal goal, but the unrepentant heretic was beyond saving, and routinely burned at the stake. What is remarkable about this type of prosecution is that heresy (and sorcery) were treated just like any other crime – the only difference being that it was prosecuted by ecclesiastics, who then handed over the offender to local authorities for secular punishments if repentance was not forthcoming.

An equally important earlier example of the synthesis of ideas of reason, guilt, sin and law was Aquinas. In the *Summa Theologica* (1274 AD), Aquinas devoted a good deal of thought to the question of intention, will and knowledge, and their association with action. He did so because it was essential, he believed, in understanding the nature of knowledge and the nature of sin. Indeed, the conception of sin depended on the exercise of 'free choice' in the knowledge of 'good and evil'. For Aquinas, a subtle distinction existed between the will (the mental control of the body for certain ends), and reason (concerned with knowledge, discernment and directing action). The will could manifest sin where it directed the body to achieve wrongful acts; whereas reason could also manifest sin where it was informed by a defect in truth, ignorance, or failure to correct desire.⁵³ Aquinas translated many of his principles into questions relating to law, notably merging ideas of sin, guilt and reason in his analysis of homicide. Aquinas drew a distinction between murder and manslaughter. What is significant here is that negligently causing death was not, in Aquinas' view, wholly excusable, as the 'want of care' leading to death could still be regarded as blameworthy – but not to the same degree.⁵⁴ We find here an important analysis of action, inaction, and the state of mind. Given that his work was highly

⁵¹ James Brundage, *The Medieval Origins of the Legal Profession* (University of Chicago Press, 2008).

⁵² Thomas Fudge, *The Trial of Jan Hus: Medieval Heresy and Criminal Procedure* (Oxford University Press, 2013) 75-80.

⁵³ Thomas Aquinas, *Summa Theologica* (Christian Classics, 1981). In particular, see First Part of the Second Part, Questions 12 (Of Intention) and 74 (Of the Subject of Sin).

⁵⁴ Ibid. See Second Part of the Second Part, Question 64 (Of Murder).

influential in the subsequent formation of ecclesiastic law and theology, it seems very likely that many of his ideas concerning guilt, sin and its determination were influential in subsequent thinking around guilt used in legal analysis.

Aquinas did not, of course, write in a vacuum. His writing was very much influenced by theological, legal and philosophical scholarship: notably the work of St Augustine, Roman/Canon law, and Greek philosophy (particularly Plato and Aristotle). His work was inevitably shaped by significant *a priori* knowledge concerning guilt and the mechanisms used to assess it. It appears, though, that Aquinas may well have been a key point of intellectual transference between the classical age and the Continental legal tradition, particularly in the importation of a nuanced Roman legal concept concerning the ‘guilty mind’ through the influence of his work in the pre-Reformation church. A good deal of the *a priori* knowledge was, of course, the extensive amount of Roman law that was actively being revived and disseminated throughout western Europe (and, indeed, remained in unbroken succession in the Byzantine world at that time). Roman law is a huge field of knowledge, stretching back more than 1500 years before Coke, with a vast array of sources in both Latin and Greek, which incorporate a specific technical language, and a complex system of civil and criminal laws and jurisdiction. It is no surprise, then, that the Romans also had their own (pre-Christian) methods for the assessment of the ‘guilty mind’ – without the enmeshed conception of sin that would subsequently characterise the idea in the Christian West. Robinson’s survey of the early Roman sources confirms that the Romans made a clear distinction between action and mind, and the coincidence of them distinguished a crime from something else.⁵⁵ Roman law, from a very early stage,⁵⁶ included the idea of ‘dolus’ as instrumental in the determination of guilt. ‘Dolus’ was what we understand as the idea of the ‘guilty mind’. It was based on intentional or careless conduct in the knowledge of wrong. Over time distinctions were made between subjective and objective standards of knowledge, which marked the point of departure for penalties – with a subjective standard regarded as more blameworthy than others.⁵⁷ The Romans believed the ‘guilty mind’ had to merge with the prohibited fact, the *actus reus*, to constitute a ‘crime’ – but they did so without attaching ideas of ‘sin’ that subsequently came to characterise the idea of ‘guilt’ in the Judeo-Christian tradition. However, this view certainly relied on a merger between the offender knowing and intending what they were doing was wrongful. We find, therefore, the basic elements of our familiar logic for criminal law has Roman origins, so it is no surprise that Latin is the language that captured the concept, and remains with us today. But, as Fletcher has observed, Latin is but one language that expresses the term – but it is not the only one. There is a distinct “vocabulary” of guilt, as well as heuristic devices that evaluate it.⁵⁸ It seems likely that because Roman law was so influential across Western Europe, through the

⁵⁵ Olivia Robinson, *The Criminal Law Of Ancient Rome* (Johns Hopkins University Press, 1995) 14-22.

⁵⁶ Ibid 16. Robinson traces the concept to the Twelve Tables, which dates the concept to at least 450BC.

⁵⁷ Ibid.

⁵⁸ Fletcher, above n 4, 298-301.

combination of Empire and restoration of law in the early Middle Ages, that the idea of 'dolus' was easily aligned with the language of guilt rooted in Christian thinking. These two strands of thought – Roman and Church – provided a major source of *a priori* knowledge concerning the determination of guilt. But this does not explain how or where the concept made its way into the common law. Where, then, did it cross into English law?

E. Transmission into English Law

The first documented English laws appeared in the South-East of England around 800 AD. This coincided with Saint Augustine's establishment of the first monasteries and churches in that region. These laws were expressed in Anglo-Saxon.⁵⁹ The first laws (the *Laws of Aethelberht*) consisted of lists, following a basic formula: 'If a person does X, they are liable to punishment'. These formulas suggest absolute liability offences and reflected the oral traditions operating at the time. This model of pronouncing law was typical of the Anglo-Saxon mode of law-making, being statements of law from the King. There was no recorded use of mechanisms to determine guilt, outside of the use of 'oath making' and violence. The problem here is that such statements did not differentiate between civil and criminal law. It is wrong, of course, to assume that the early phase of English law made a distinction between criminal actions and civil actions. Tort and crime were merged for centuries before they eventually became distinguished. As was the case with continental Germanic law, the laws of the early Anglo-Saxons were effectively forms of regulated warfare. In this respect, the influence of Augustine and the early church in introducing written laws that attempted to reduce violence through compensation was revolutionary.⁶⁰ But something changed in English law, and that change was the growing recognition of the role of intention and knowledge in the nature of offending. Tracing when and where that took place is not easy.

One of the developments of some importance here is the gradual division between tort and crime. Baker argued that what distinguished *felony* from other forms of conduct causing injury or loss (such as civil wrongs) was the notion of wickedness, where a person did an act intending the outcome, motivated by malice.⁶¹ Hence the distinction between crime and tort was largely one concerned with *mens rea*. This idea of a distinction between intention, knowledge, and outcome has deep roots in English law. Baker's reference here was to an early case in trespass, *Hulle v Orynge*, popularly known as the 'Case of Thorns'. Interestingly, the distinction rests on a familiar maxim:

⁵⁹ Lisi Oliver, *The Beginnings of English Law* (University of Toronto Press, 2002).

⁶⁰ Ibid; Bruce O'Brien, *God's Peace & King's Peace: The Laws of Edward Confessor* (University of Pennsylvania Press, 1999).

⁶¹ John Baker, *An Introduction to English Legal History* (Oxford University Press, 2002) 523-525.

If a Man assault me and I lift up my Staff to defend myself, and in lifting it up hit another, an Action lies by that Person, and yet I did a lawful Thing. And the Reason of all these Cases is, because he that is damaged ought to be recompensed. But otherwise it is in Criminal Cases, for there *actus non facit reum nisi mens sit rea*.⁶²

Hulle v Orynge was decided in the fifteenth century, and again we find an endorsement of the concept without clear sources. It seems well accepted that action, intention, knowledge, and consequence needed to be linked in the determination of guilt with respect to a crime, guilt with respect to a civil wrong, and accidents that may or may not be considered guiltless. As discussed above, these distinctions appeared to be entrenched across Europe by 1500, and in this respect, the ‘Case of Thorns’ echoes a well-accepted chain of judicial reasoning, but this assumption provides little assistance in pinpointing some point of origin.

As observed by Justice O’Brien in *R v S* (discussed above), it seems that the first explicit reference to this concept is in the *Leges Henrici Primi*, the ‘Laws of Henry the First’. These were written in the mid 12th-century (c 1115), with surviving manuscripts dating between 1201 and 1330. This 12th century source is of critical importance because it is the first major attempt at consolidation of English laws since the Roman occupation – but it also marked a radical departure from Anglo-Saxon English as the language of the law to Latin. It is plausible that this may have been an accident of history. Libermann’s examination of the original *Leges* suggests the unknown author of that text was also the author of another law code, the *Quadripartatus*.⁶³ It appears that author was from France, and not a speaker of (Old) English, as he apparently struggled in translating the earlier works and associated concepts and produced a number of flawed translations in earlier versions of the manuscripts. A reconstruction of his identity indicates he was known to the Archbishop of York and was certainly familiar with the Vulgate Bible. It seems likely he was a cleric, and his knowledge of ecclesiastic matters and Christian morality are strong features in the *Leges*. Book 5 of the manuscript includes this statement: ‘Reum non facit nisi mens sit rea’ / ‘A person is not to be considered guilty unless he [or she] has a guilty intention.’⁶⁴ Downer concludes that the author may have mistranslated the Latin, observing that the contemporary sources used the term ‘Ream linguam non facit nisi mens rea’ / ‘The tongue is (not guilty) unless the speaker is’, and was most likely drawing on the (then) recent work of Ivo of Chartres, whose *Panormia* was incorporated into Canon law.⁶⁵ But Downer also links the expression to St

⁶² *Hull v Orange*, YB Mich 6 Ed 4, f 7, pl 18 (1466).

⁶³ Leslie Downer (ed), *Leges Henrici Primi* (Leslie Downer trans, Oxford University Press, 1972) 37-44.

⁶⁴ *Ibid* 94-95.

⁶⁵ Downer refers to Ivo’s *Panormia*, Chapter VIII, III and 116. This book is not yet available in English, but is in the process of transliteration. A copy of the Latin, confirming Downer’s view, is available at <https://ivo-of-chartres.github.io/panormia/pan_8.pdf>. See *Ivo of Chartres: Works in Progress*

Augustine's *Sermones*; an observation also made by Baker,⁶⁶ and in the earlier work of Pollock and Maitland.⁶⁷ Here the learned authors argue that the expression, properly understood, is confined to perjury, and was never intended to be a statement of general legal principle. When we turn to St Augustine (also referred to by Aquinas), we find that Augustine used the term in the context of a sermon against perjury. Here, in Sermon 180, Augustine was concerned with the problem of Christians being compelled to 'swear an oath'. The Sermon is concerned with the book of James (5:12), where a directive had been given to avoid swearing oaths that might lead to perjury. Augustine concluded: 'What makes the difference is how the word comes forth from the mind. The only thing that makes a guilty tongue is a guilty mind.'⁶⁸ This passage was written as a sermon, not as a legal maxim – its purpose was to convey a message. The sources used by Augustine were Biblical – in this case, the Letter of James, which is not so much concerned with the consciousness of guilt, as an exhortation to the early Christians (among other things) to avoid the practice of swearing oaths and the need to exercise restraint in the uses of speech. As it happens, a theological reading of James confirms that James was explicitly drawing on Leviticus (19:12-18), which is very much concerned with the consciousness of guilt in the form of sin, along with a variety of rituals and forms of atonement.⁶⁹ This link confirms the argument of Fletcher outlined above, that the concept of guilt is rooted in the theological concepts of sin and atonement.

But as we have seen, conceptions of guilt are not unique to the Judeo-Christian tradition. There are linguistic markers concerned with guilt in pre-Christian Anglo-Saxon, and certainly in pre-Christian Roman law. The evidence indicates that ideas of guilt, sin and atonement were entrenched for centuries before English and Continental law began to crystallise in written codes and influential ecclesiastic works, such as Ivo and Aquinas. We know that the 12th century is a turning point in English law because, at this stage, the revival of legal education in Europe was based largely on the study of Roman law and texts. Glanville, Bracton and Bernard were all influenced by the revival of Roman law and its teaching in European universities. These scholars were not only influenced by Roman law; they necessarily merged common law, legislation and an ecclesiastic education. As observed by Pollock and Maitland, the intellectual sources influencing the *Leges* were numerous, but also likely included well-established custom practised across England. This is a period in which important distinctions between 'dolus', 'culpa' and 'causa' began to play a leading role in the logical framework of English law – or at least began to be recorded

(editions prepared by Bruce Brasington, Martin Brett and Przemyslaw Nowak)
<<http://web.colby.edu/canonlaw/tag/ivo-of-chartres/>>.

⁶⁶ Baker, above n 61, 523.

⁶⁷ Frederick Pollock and Frederic Maitland, *The History Of English Law Before The Time Of Edward I* (Liberty Fund, 2nd ed, 2010) 475-476.

⁶⁸ Augustine, *Sermons (148-183)* (John Rotelle ed, Edmund Hill trans, New York City Press, 1992) vol 5, 315.

⁶⁹ Grant Osborne, 'Commentary on the Letter of James' in *ESV: Study Bible* (Crossway, 2008) 2387-2399, esp 2398.

as playing such a role. It seems safe to conclude that the conceptual device of guilty act and guilty mind, which has its origins in Roman law, merged with ecclesiastic and local practices during the 12th century. Given the powerful role that the Church played in England in this period, the role of ecclesiastic education in the lives of those conceiving, writing and interpreting law, and the merger of Roman law with English law, it seems likely that this idea of the coincidence of guilty mind and action as a technique in legal reasoning emerges in the tenth through twelfth centuries through the influence of religious and Roman law. However, the theological origins are much deeper. In essence, we are dealing with epistemic threads operating at multiple sites over time that exercised a profound influence in the theory and practice of the determination of guilt, rather than any specific rule of law transmitted from one generation to the next in a prescriptive form.

III. Theorising Technologies of Guilt

At the heart of the criminal process is a fact-finding technology based on a complex interplay between confession, inquiry and oaths as guarantees of truth. Criminal procedure is fundamentally concerned with practices and knowledge systems intended to ascertain the truth, at least so far as it is possible. As a fact-finding mission, it is an unusual process: it looks into the past through the artifacts and narratives of the present. Much of that process is concerned with ascertaining the link between the accused and the physical aspect of the crime(s), and the subjective state of mind of the accused. Here we find important overlaps between reason and morality in the assessment of culpability. At this point, we will move beyond the traces of origin and return to how we may explain aspects of guilt-finding. As discussed at the outset, one way of doing so is to theorise this practice as a matrix of practical reason, concerned as it is with the interplay of subjective and objective inquiry. This matrix has a role in constructing a ‘regime of truth’ that requires speakers to engage in specific acts and forms of speech in order to mobilise actions that assert or present the truth.⁷⁰ In doing so, I am suggesting we can open new perspectives on the underlying epistemic structures of the criminal law.⁷¹ In this segment, I will draw on Foucault’s later work on aspects of the confession as a technology of truth.

A. Confession

Confession has a particularly important place in the ‘speech acts’ of the criminal law.⁷² The declaration, or statement, of the accused person that they have committed a crime, has always been recognised as a powerful form of denunciation. However,

⁷⁰ Michel Foucault, *On the Government of the Living* (Graham Burchell trans, Palgrave Macmillan, 2014) 93.

⁷¹ For thoughtful and detailed examination of the epistemic threads in law, see Jan Christoph Suntrup, ‘Michel Foucault and the Competing Alethurgies of Law’ (2017) 37(2) *Oxford Journal of Legal Studies* 301.

⁷² For a classic account of the concept of speech acts, see John Searle, *Speech Acts : An Essay In The Philosophy Of Language* (Cambridge University Press, 1969).

the centuries-old experiences of law and prosecution have shown that confessions are not always reliable. Much depends on the circumstances in which they were obtained, and the motivation of the person making the confession. In law, the problem of confession is its actual reliability; but as a *form* of practice, the confession has pride of place in fact-finding. Ironically, it seems that the confession owes far more to Christian theology and practice than it does to judicial practice. Confession has been a critical feature of the Judeo-Christian tradition since its inception and occupied a central theme in Foucault's writing. In a detailed exploration of the early writings of the church, through to the post-Reformation practices following the Council of Trent (1545-1563),⁷³ Foucault concluded that the practice of confession gradually intensified as a system of knowledge and power, first as a technique for spiritual practice and development of faith; then as a technique for the identification and repression of heresy; and subsequently for the consolidation of faith in a post-Reformation world. Knowledge of the self through asceticism and self-discovery shifted to expand into knowledge of others through judgement. The power mobilised through the theological practices of pastoral knowledge and ministry centred on the development of a disciplinary power of the self, and in so doing, a corresponding responsibility. The subject of pastoral knowledge, ideally, was simultaneously self-governing, while also exercising a profound influence over others through a combination of normative force, knowledge and practice intended to direct the soul towards salvation. Drawing on Habermas, Foucault argued that there were three techniques through which individuals were able to articulate and express identities and self-understanding: techniques of production;⁷⁴ techniques of signification or communication;⁷⁵ and techniques of domination.⁷⁶ Foucault went beyond these practices to include a fourth set of practices, in which the practice of confession was critical:

techniques that permit individuals to effect, by their own means, a certain number of operations on their own bodies, their own souls, their own thoughts, their own conduct, and in this manner so as to transform themselves, and to attain a certain state of perfection, happiness, purity, supernatural power. Let us call these techniques 'technologies of the self.'⁷⁷

⁷³ The Council of Trent was the formal response of the Catholic Church to the rise of Protestantism in northern Europe. Held over 18 years, the Council involved major restatements of Catholic doctrine, including the practice of confession and the nature of sin. See Hubert Jedin, *History of the Council of Trent* (Dom Graf trans, Thomas Nelson & Sons, 1957) [trans of: *Geschichte des Konzils von Trient*].

⁷⁴ Foucault, above n 6, 177: 'the techniques that permit one to produce, to transform, to manipulate things...'.

⁷⁵ Ibid: 'the techniques that permit one to use sign systems...'.

⁷⁶ Ibid: 'the techniques that permit one to determine the conduct of individuals, to impose certain ends or objectives'.

⁷⁷ Ibid.

What was fundamental in this set of practices was the ascertainment of certain forms of truth; knowledge of the self, knowledge of weakness, knowledge of guilt. And part of this technique involved not only revelation of that truth to the self, but revelation to others, if transformation, healing and growth was to be achieved:

Christianity is a confession. This means that Christianity belongs to a very special type of religion – those which impose obligations of truth on the practitioners. Such obligations...are numerous. [T]here is the obligation to hold as truth a set of propositions that constitute dogma, the obligation to hold certain books as a permanent source of truth, and obligations to accept the decisions of certain authorities in matters of truth. Everyone in Christianity has to duty to explore who he is, what is happening within himself, the faults he may have committed, the temptations to which he is exposed. Moreover, everyone is obliged to tell these things to other people, and thus to bear witness against himself.⁷⁸

According to Foucault, these practices evolved primarily in religious institutions (notably monasteries) over centuries, principally to enable control over sexual behaviour in the context of gender-segregated communities. In this context, a complex interplay between an examination of self, enunciation of virtues and vice, the commission of, and temptation to sin, the systems of penance and punishment become part and parcel of monastic life.⁷⁹ Forgiveness and integration of self and soul with the Divine order and the community rested upon the practice of confession, renunciation, and penance. It was a process that required consciousness of guilt, submission to authority – temporal and epistemological – followed by acquiescence to practices of the penitent, and eventually ceremonial reconciliation.⁸⁰ The practice of ‘wrong-doing’ followed by ‘truth-telling’, was known as *exomologesis*; a process of recognising and voluntarily giving an account of consciousness of guilt and sin. Crucially, by tracing the classical origins of the term to Sophocles’ *Oedipus Rex*, Foucault illustrates that *exomologesis*, as a concept, had links to both religious and judicial practices long before its entrenchment in Christian practice.⁸¹

It appears, then, that confession, as a function of truth-telling, is highly valued because of its unique link with the subject – principally because it is a performative

⁷⁸ Ibid 178.

⁷⁹ Michel Foucault, ‘The Battle for Chastity’ in Paul Rabinow (ed), *Michel Foucault: The Essential Works of Michel Foucault, 1954-1984* (Robert Hurley trans, Penguin, 1997) vol 1: Ethics, 185-197. Foucault was referring to the detailed treatise on monastic life and discipline presented in John Cassian’s *Institutiones* and *Conferences*. Writing in the early 5th century AD, Cassian was a major influence in the articulation of rules and practices of religious houses, particularly monks. It is clear that Cassian was highly influential throughout Europe, including England. See Stephen Lake, ‘Knowledge of the Writings of John Cassian in Early Anglo-Saxon England’ (2003) 32 *Anglo-Saxon England* 27.

⁸⁰ Michel Foucault, *Wrong-Doing: Truth-Telling* (Stephen Sawyer trans, University of Chicago Press, 2014) 105.

⁸¹ Ibid 57-89, 105.

act that is recognised as part of a symbolic action in which the confessor is invoking a recognised action of supplication in effort, at one level, to seek peace within the self, and the community at large. There will, of course, be substantial variation in the integrity of the act of confession – ranging from active distortion and obfuscation, to lies, and even self-sacrifice; but at the same time, the revelation of those things that are not otherwise in the knowledge of the community remains highly prized. The revelation of that which is unseen, unknown, and particularly that which is accompanied by genuine contrition, is the first step in a process that allows for the adjudication of guilt, both in terms of the liability of the offender, as well as that penance to be imposed sufficient to dispense with the crime. It seems that a confession, given in good faith, in an expression of regret and contrition, is a form of submission to an external power given for both the expiation of guilt, as well as an entreaty for reconciliation with the community that has been the victim of transgression. It is perhaps for this reason that this kind of evidence and action is regarded not only as valuable evidence of crime but also more likely to attract judicial approval in the form of mitigation of sentence. Although the modern judicial officer is not so much interested in the expiation of sin, it is certainly the case that the modern expression of judicial power is linked to the assessment of guilt, recognising that a voluntary confession is not only of critical probative value but is routinely an expression of remorse. Confession provides one mechanism through which acceptance of that can be recognised and factored into the sentencing synthesis.

B. Inquiry

The determination of guilt cannot, of course, simply rely on an appeal to conscience. Indeed, it is precisely because offenders avoid accepting responsibility for outcomes, or lack sufficient empathy to recognise wrong-doing, or indeed are convinced of the rectitude of their actions, that the determination of guilt necessarily imports mechanisms that function to determine guilt beyond the confession. Open denial, or at the very least declining to volunteer a confession is the norm. Consequently, forms of investigation have evolved in the denunciation practices of prosecution. As discussed above, there are strong links between the investigative practices involved in the prosecution of crime and heresy. It appears that over time there has been a merger of ecclesiastic and criminal procedure.

For a long period in the history of law, torture was an accepted method for the ascertainment of confession. Torture was, however, not something that was simply about the infliction of pain. Torture, and the threat of it, was both the subject of a specific system of rules and directed to the specific purpose of extracting a confession. The subject was, through pain, tested and prompted into submitting to speaking against themselves; to volunteer and surrender the will in such a way as to provide that evidence that was regarded as most convincing – and to be placed on the path to redemption. The *Carolina*, outlined above, provided a codification of the use and limits of torture. However, the *Carolina* cannot be regarded as being the first of its kind. Indeed, here it appears that torture was well entrenched by the Reformation.

The first great manual of inquisition, the *Directorium Inquisitorum* had been published by Nicholas Eymerich as early as 1376. Eymerich, a Dominican, was appointed as Inquisitor General by Pope Gregory IX, and became involved in the prosecution of heresy in the south of France. The book exceeded 800 pages in length and was written as a practice manual. Here the principal techniques of the inquiry were a process of systematic cross-examination, combined with the threat and use of torture. Like most systems of knowledge, the book did not appear in isolation. It was pre-dated by Bernard Gui's *Practica Inquisitionis Heretice Pravitatis* (1321),⁸² and subsequently influenced an expanded manual on inquisition: the *Malleus Maleficarum* (1487).⁸³ The latter remained a principal source of inquisitorial procedure until well into the sixteenth century and was especially directed towards the eradication of witchcraft and sorcery.⁸⁴

What is noteworthy about this period of European history is the fusion between cross-examination, systematic questioning, deception, and the threat and actual use of torture as forming part of a distinct set of practices. This practice is not only directed towards the physical self. These are practices that are intensely psychological, with a direct appeal to conscience and a threat the goes beyond the physical body to the eternal soul of the subject. When the guilty conscience was involuntary, a system of physical, psychological and spiritual coercion was now a routine part of inquisition. This matrix of power is neatly illustrated in the *Malleus Maleficarum*. Book 3 of that treatise is a prosecutor's manual, detailing the processes and methods for conducting what was, in effect, a summary trial – and conducted in the explicit absence of advocates. The inquiry under torture is explained in detail:

If, after a ... period of time ... has been given to the [accused] and ... advised repeatedly, the judge believes in good faith that the denounced person is denying the truth, they should question him with moderate torture, ...without shedding blood, knowing that questioning under torture is misleading and quite often ... ineffective When the assistants [are] ready, they should strip him (or if it is a woman ... stripped by respectable women...) to remove any device for sorcery that may have been sewn into his clothing ... When the implements are ready, the judge should...

⁸² Gui, like Eymerich, was an inquisitor. He had been appointed by Pope Clement V in 1307 and worked in the prosecution of heretics in the south of France until 1323; most notably the Albigensians. Gui was responsible for 900 prosecutions involving findings of guilt. 42 of these resulted in execution. See Karen Sullivan, *The Inner Lives Of Medieval Inquisitors* (Chicago University Press, 2011) 124-145.

⁸³ The book was originally credited to a German Dominican inquisitor, Heinrich Kramer, but was subsequently associated with Jakob Sprenger in 1519. It is possible Sprenger edited and added to the book after Kramer's death in 1505. It was in continual publication between 1487 and 1669, re-surfacing again in the nineteenth century with the rise of public interest in witchcraft and mysticism in Europe and the United States. See Ronnie Po-Chia Hsia, 'Malleus Maleficarum by Christopher S Mackay' (2008) 123 *English Historical Review* 719.

⁸⁴ Jennifer Deane, *A History of Medieval Heresy and Inquisition* (Rowman and Littlefield, 2011); Henry Lea, *A History of the Inquisition* (Harper and Brothers, 1887).

advise the person ... to confess the truth freely. If he is unwilling, the judge should order the assistants to tie him to the strappado⁸⁵ or fasten him to other implements. They should obey without joy, as if they are upset. Afterwards, he should be released...and again advised. In this advice, he should be informed that he will not be executed. [I]t is legal for the judge to promise to save his life, even though if he confesses, the person will be punished with execution.⁸⁶

It should not be assumed, however, that this form of interrogation was uniformly accepted, or applied, across Europe. Far from it. The use of the more extreme forms of inquisition was the site of a considerable degree of contestation between local, regional and international powers throughout this period. The *Malleus Maleficarum* was, in fact, condemned by the Faculty of Theology at the University of Cologne (recognised as the senior German theological centre at the time), because of its advocacy of torture and ‘illegal’ techniques. Kramer was expelled by the Bishop of Innsbruck in 1486 after complaints about the way in which he was handling an inquisition in that City. Subsequently, a Papal Bull was issued by Pope Innocent VIII that endorsed not only the book but also the persecution of witches and heretics.⁸⁷ For our purposes, a detailed examination of procedures over time is not the aim. Rather, the aim here is to highlight, through the extremes, the scope and extent that the pursuit of truth and consciousness of guilt had assumed by the Reformation.

It is doubtless the intersecting links between theology, confession and power that attracted Foucault in his analysis of the practices of *inquisitio*, which traced the development of practices of establishing truth in the history of European juridical practices. This is, of course, an ambitious undertaking, further complicated by the fact that much of Foucault’s thinking on this topic came in the form of lectures where the precise empirical foundations of his sources are often absent. Foucault’s sources

⁸⁵ ‘Strappado’ is a form of torture in which a person’s hands are tied behind their back, and the body is then suspended from that rope so that the person’s full weight is carried at the shoulders. Mackay describes the process: ‘The traditional method of examination (known as the “strappado”) was to tie the suspect’s hands behind his back, then haul him off the ground with a pulley attached to his hands; this had the effect of putting all the weight of the body on the shoulders, which would eventually become disjointed (an effect that could be hastened by either attaching weights to the feet or letting the suspect drop and then precipitously halting the fall before he hit the ground). This simple but brutal method could be effective enough in extracting a confession from anyone, but in the mania to extract confessions during the major periods of witch hunting, the accusation of sorcery was treated as a *crimen exceptum*, that is, a charge exempted from the usual legal precautions, and extreme measures were taken to ensure that the suspects admitted the “truth”’: Christopher Mackay (ed), *The Hammer of Witches: A Complete Translation of the Malleus Maleficarum* (Cambridge University Press, 2009) 29.

⁸⁶ Ibid 545-546.

⁸⁷ Ibid; Karen Jolly, Edward Peters and Catharina Raudvere, *Witchcraft and Magic in Europe* (Athlone Press, 2001) vol 3: The Middle Ages.

are, however, both present and implied. This aspect of Foucault's work presents a real problem for legal scholarship, grounded as it is in the precise use of primary sources. Foucault's historical analyses are found in numerous lectures, scattered throughout his *oeuvre*. On the topic of a history of 'inquiry' and juridical practices, lectures that Foucault gave in Rio de Janeiro in 1973 ('Truth and Juridical Forms')⁸⁸ and then at the University of Louvain in 1981 ('Wrong-Doing: Truth-Telling')⁸⁹ are the most significant. Foucault argued that the development of juridical practices has played a critical role in the resolution of disputes, the punishment of wrongs, and the attribution of responsibility. This is a human universal. In the western tradition, the evolution of the *inquiry* has been fundamental to juridical practice. In his analysis of that evolution, Foucault considered moments in time that had distinct influence in the present: images from pre-Christian Greece and Rome, ancient German practices, and particularly the ecclesiastic practice of pre- and post-Reformation churches. Each historical order imposed its own attributes but was always concerned with establishing the foundation of a dispute, the existence of a wrong, and the foundations of responsibility. In other words, it was a fact-finding process intended to ascertain forms of truth. Foucault wrote: 'The inquiry made its appearance as a form of search for truth within the judicial order in the middle of the medieval era. It was in order to know exactly who did what, under what conditions, and at what moment, that the West devised complex techniques of inquiry'.⁹⁰

The characteristics of the inquiry in Europe have deep roots, and each of the great historical moments has left an indelible imprint in the sands of time. Foucault began with the ancient Greeks. According to Foucault, the Greeks passed down the revolutionary idea that the people had the right to judge those who governed them. Democracy expected, and demanded, that those who governed, as much as those who caused injury, should be accountable. In particular, the shift away from the notion of personal combat and contestation, to the use of witnesses⁹¹ able to assert oral testimony were powerful cultural movements.⁹² To this Foucault argued there were three *techniques* in the inquiry: (i) the insistence on 'rational forms of proof and demonstration'; (ii) the role of rhetoric and persuasion in assembling proof to reconstruct and present the truth; and (iii) a new form of practice knowledge produced by the inquiry itself. What Foucault does not mention is a fourth moment of significance for the western legal tradition: the shift away from spoken law, towards

⁸⁸ Michel Foucault, 'Truth and Juridical Forms' in James Faubion (ed), *Michel Foucault: Essential Works of Foucault 1954-1984* (Penguin, Editions Gallimard ed, 1994) vol 3: Power, 1-89. 'Truth and Juridical Forms' was the name given to five lectures delivered by Foucault at the Pontifical Catholic University in Rio de Janeiro in May 1973.

⁸⁹ Foucault, above n 80. These lectures were recently discovered and published in 2014. The lectures seem to draw quite heavily (with numerous extensions) on the material presented in Rio in 1973.

⁹⁰ Foucault, above n 88, 5.

⁹¹ Ibid 33: 'The witness, the humble witness, solely on the action of the truth he saw and he utters, can single handedly defeat the most powerful of men.'

⁹² Foucault examined a number of Sophocles' plays, most notably *Oedipus the King*, as archives of the character of Greek law: Foucault, above n 88, 16-33.

written forms of law, notably by Draco and Solon. This is a seminal moment in the history of law in the western legal tradition.

Foucault then shifts to the middle ages. The move is a stark one, as it glosses over centuries of Roman law – particularly the extensive codification of law and sophisticated jurisprudence of the late Empire, which did not disappear in the Eastern Empire. It is a common misconception that Roman law and practice simply vanished. Roman law continued uninterrupted in large parts of the Eastern Mediterranean, and significant pockets throughout the former Empire.⁹³ While Foucault is certainly aware of the impact of Rome, one of the major failings in his analysis of the growth of the inquiry is the absence of any serious consideration of the contribution of Rome. It may well be that his view on the Roman contribution to the forms of knowledge was fundamentally one of export and colonisation across Europe, rather than actually contributing something essentially different to the forms of knowledge of the Greeks. Here Foucault suggests that the most important developments for the inquiry were not Roman but drawn from the Germanic and Ecclesiastic traditions. What allowed this to happen was the collapse of the Roman Empire in the west, and the indigenous laws of the various Germanic people who took control.⁹⁴ The laws and method of inquiry in the Middle Ages, in his view, were heavily influenced by Germanic law and customs.

In contrast to the Greek tradition, Germanic law⁹⁵ was characterised by individuals and their families and tribes accusing another for some wrong or grievance. These accusations were between individuals and groups, as opposed to being presented to some authority. Criminal accusations were, in effect, a form of war between the accuser(s) and the accused. In this tradition, the law served the purpose of imposing constraints on what would otherwise be open violence and acts

⁹³ John Maurice Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 39-78; Warren Treadgold, *A History of the Byzantine State and Society* (Stanford University Press, 1997); John Bury, *History of the Later Roman Empire: From the Death of Theodosius I to the Death of Justinian* (Dover Publications, 1958) vol 2; Angeliki Laiou and Dieter Simon (eds), *Law and Society in Byzantium, Ninth-Twelfth Centuries* (Harvard University Press, 1994); Peter Stein, *Roman Law in European History* (Cambridge University Press, 1999).

⁹⁴ 'In the European Middle Ages, one sees a kind of second birth of the inquiry, which was slower and more obscure than the first, but had much more success. The Greek method of inquiry had remained stationary, had not achieved the founding of a rational knowledge capable of indefinite development. By contrast, the inquiry that arose in the Middle Ages would acquire extraordinary dimensions. Its destiny would be practically coextensive with the particular destiny of so-called "European" or "Western" culture': Foucault, above n 88, 34.

⁹⁵ Foucault here specifically refers to Tacitus. Presumably he is referring to Publius Cornelius Tacitus, the Roman Historian, who wrote a history of Germany (*De Origine et situ Germanorum*). This book does contain a number of references to ancient German law and customs, although in rather more detail than suggested by Foucault. See James Rives (ed), *Tacitus: Germania* (James Rives trans, Oxford University Press, 1999).

of revenge. The end result could be the death of the offender, but equally, the peace could be purchased through the payment of an agreed level of compensation. That compensation could be mediated by an agreed mediator. Importantly, the process of penal accusation at this time contained no formal system in inquiry or fact-finding, rather it depended on the right to extract revenge against the accused.⁹⁶

In Foucault's thesis, this underlying Germanic custom of regulated violence remained at times dormant, and at other times current, during the life and subsequent decline of the Roman Empire. When the Roman Empire finally collapsed and was replaced by various Germanic kingdoms, Roman law was replaced by customary laws largely concerned with the use and threat of violence in the assertion of juridical power in a system that morphed into feudalism under the Merovingians and the Carolingians. In this system of law the essence of juridical power lay in the distinction between violence and compromise, crystallising around a system of fact-finding based around a variety of tests of the truth: (i) social tests involving assembling sufficient witnesses to attest guilt or innocence; (ii) formal utterances of specific accusation and denial; (iii) the swearing of oaths; and (iv) physical tests of the body, which included combat and enduring ritually inflicted pain. Foucault argued that this form of fact-finding was a 'regulated, ritualized continuation of war.'⁹⁷ This form of fact-finding changed during the twelfth century.

The significant moment was a move away from the establishment of truth through ritualised violence and courage, towards a renewed interest in evidence, reason and systematic forms of interrogation:

What was invented in this reformulation of law was something that involved not so much the contents of new knowledge as its forms and conditions of possibility. What was invented in law was a particular way of knowing, a condition of possibility of knowledge whose destiny was to be crucial in the Western world. That mode of knowledge was the inquiry, which appeared for the first time in Greece and which, after the fall of the Roman Empire, remained hidden for several centuries.⁹⁸

Foucault argued that the model of inquiry that evolved across Europe over several centuries imported characteristics of Roman/Ecclesiastic and Germanic law and custom, but also evolved into something new. The inquiry was its own apparatus, involving both specific personnel and process, as well as distinct systems of knowledge of the application. The inquiry was no longer a contest between individuals. The inquiry was a distinct 'mode of proceeding'. The process involved submission by the parties to an external power. The inquiry involved individuals whose function was to act as prosecutor as a representative of the monarch. Although the prosecutor, theoretically, was an ally of the victim, in time the prosecutor replaced

⁹⁶ Foucault, above n 88, 34-36.

⁹⁷ Ibid.

⁹⁸ Ibid 40.

the victim,⁹⁹ representing the interests of the monarch, who was also aggrieved by the crime committed. In this respect, the prosecutor came to rely on an increasing proliferation of declared laws of general application. The prosecution was effective to the extent to which the monarch was now seen to be able to inflict, as of power and right, punishments on the offender, which included violence inflicted in the body, but also the right and power to demand compensation and confiscation.¹⁰⁰

The mechanism that legitimised the power to punish was the inquiry. And it, too, came to involve specific techniques and forms of knowledge. Fundamentally, the inquiry was oriented towards two kinds of fact-finding process. The first was linked to situations where the offender was seen and caught (the ‘flagrant offense’). Here the inquiry functioned as a formal process of witnesses declaring their observation of the accused and the presentation of the accused to the courts for punishment.¹⁰¹ The second form of inquiry (*inquisitio*) involved the representative of the sovereign summoning a body of individuals from the area, or knowledgeable about certain things, and then requiring them to speak to the representative about what they knew on that topic. The representative would then be in a position to make a decision based on a collective body of knowledge presented, with a view to then resolving the dispute.¹⁰²

One of the most important variations of this practice was the form of *inquisitio* that evolved in the Church. While monarchies rose and fell throughout Europe, the Church was able to retain a surprising degree of continuity and archival learning that meant that the form of inquiry remained a present body of knowledge. The Church not only deployed the inquiry for the purpose of the management of its own land and property disputes; it also deployed the model in the prosecution of crime and, as discussed above, heresy. Here the inquiry took the form of a personal visit by a senior representative of the Church to a particular region (*visitatio*), charged with conducting a general investigation into matters of concern within the Diocese (*inquisitio generalis*), and, if a matter required attention, a specific inquiry (*inquisitio specialis*) could be ordered, involving the systematic questioning of suspects and witnesses under the threat of excommunication or other spiritual (and temporal) threats.¹⁰³ Foucault concluded:

This model – spiritual and administrative, religious and political
– this method of managing, overseeing, and controlling souls was

⁹⁹ For a scholarly account of this transition, see Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave Macmillan, 2006).

¹⁰⁰ Foucault, above n 88, 42-43.

¹⁰¹ Ibid 44.

¹⁰² Foucault cites the *Domesday Book* as a major example of attempts to resolve a litany of complaints about property that emerged in England after William the Conqueror’s invasion of England in 1066, using this form of inquiry: ibid 45.

¹⁰³ Ibid 46. I have also considered this aspect of investigation in Brendon Murphy, ‘Deceptive Apparatus: Foucauldian Perspectives On Law, Authorised Crime And The Rationalities Of Undercover Investigation’ (2016) 25(2) *Griffith Law Review* 223.

found in the Church: the inquiry understood as a gaze focused as much on riches and possession as on hearts, acts and intentions. It was this model that was taken up and adapted in judicial procedure.¹⁰⁴

The value in Foucault's position is his invitation to trace distant threads of practice and knowledge in the contemporary. Here we find the origins of inquiry in the need to discover the nature and sources of disputes, and the legitimation of the exercise of power in the form of violence and the sanctity of the soul. The form of practice here is multi-nodal, in the sense of oath-swearing, the presentation of evidence (normally in the form of oral testimony), systematic questioning, and a primary focus on facilitating or compelling a confession or being in a position to confidently denounce the accused in the face of denials.

C. Avowal

Foucault's lectures at Louvain in 1981¹⁰⁵ substantially extended earlier thinking on juridical practices; most notably on the way confession plays the critical moment in the juridical process in the quest for truth. Confession plays this function because of the act of 'avowal'. In this context, Foucault uses 'avowal' in a specific way. Avowal is more than a mere statement that confesses a truth: '[A]vowal is a verbal act through which the subject affirms who he is, binds himself to this truth, places himself in a relationship of dependence with regard to another, and modifies at the same time his relationship to himself.'¹⁰⁶

In other words, avowal involves a complex interplay between knowledge the confessor has about themselves, the revelation of that knowledge to others, submission to the judgement and actions of an external power, and penance as a commitment to alter future behaviour. This practice, known in the Christian tradition as *exomologesis*, lies at the core of penal and juridical practice.¹⁰⁷ In this context, the theological practice is interested in the ways in which consciousness of sin is identified, articulated and addressed, with a view to reconciliation with the Divine and the community. Contrition is linked to the combination of both consciousness and confession of sin to self and the Divine.

While Foucault is a giant in philosophy, he was not a legal scholar.¹⁰⁸ One issue with confession and avowal is this assumption that there is either genuine remorse or personal recognition of wrong. Judicial practice has long recognised that sometimes individuals simply do not accept any personal responsibility for wrongs committed, even in the face of a confession. Confession can simply be a resignation of denial in the face of compelling evidence. For this reason, we might suggest that Foucault's

¹⁰⁴ Foucault, above n 88, 47.

¹⁰⁵ Foucault, above n 80.

¹⁰⁶ Ibid 64.

¹⁰⁷ Ibid 91-124.

¹⁰⁸ Foucault concedes this himself: 'I am not a lawyer or jurist.' See Foucault, 'What Our Present Is', above n 13, 142.

concept of avowal consists of the double-move. The first is the personal commitment to a recognised truth, as Foucault argued. The second is the sovereign practice in avowal, linked to confession as an expression of fear and submission in the face of compelling evidence before a temporal power able to inflict punishment. This form of avowal was not considered by Foucault, but nevertheless forms an operative component of avowal, as it forces the accused to recognise the external relationship with a sovereign force.

IV. Conclusions

In all genealogies, a good deal of ground is covered. And this is true of this paper. In the preceding pages, the origin of the criminal law's central concept – guilt – was problematized for its apparent absence of a source. The genealogical account that followed illustrates that the search for a definitive source is elusive and likely impossible. The concept of guilt operates in multiple sites and processes, socially, legally, philosophically, and morally. It appears to be a trans-cultural concept throughout time and space. In its transmission over time, it does seem that the twin threads of Roman logic and Christian ethics played significant roles in the conceptual formation, preservation and transmission of the concept across Europe. We have also seen how the concept of 'guilt' not only carried with it distinct moral elements; it also imported specific techniques and methods of application in the form of inquiry, confession and avowal. All of these conceptions have very old roots, finding echoes throughout time, and finding life in some of western civilisation's earliest written sources.

In Genesis 3 we encounter the record of the 'fall of humankind', as Adam and Eve disobey the instructions of God by eating the apple, as it is popularly known. But a close reading of Genesis 2:17 and 3:5 reveals something different. It is not just an apple tree. It is the 'tree of knowledge of good and evil'. The serpent whispered to Eve that the fruit would not kill them if they ate it; 'your eyes will be opened, and you will be like God, knowing good and evil.'¹⁰⁹ Consciousness of wrong is a pivotal moment in the life of humanity. Human beings possess a moral compass, and this recognition of the good and the evil is of critical and absolute importance to criminal law. It provides a foundation for a range of criminal sanctions concerned with public standards of decorum, the bedrock of sentencing in the form of a comparative analysis to evaluate the gravity of the wrong and the concept of culpability. As observed by Fletcher, it is likely born out of the shared experience of being aggrieved by the harms caused by others, and the personal and collective desire to prevent such actions, and to punish when they do occur. But there is also collective recognition that not all actions are intended, and that expressions of contrition and remorse form a part of the collective and personal willingness to set aside demands for punishment (in most cases). Theological writings attach weight to the idea of *willing* disobedience and breach of commandments as the foundation of sin, which, at a minimum, separates

¹⁰⁹ Genesis 3:5 (ESV).

humanity from their Creator and Creation. Those writings can be seen most clearly in the *Summa Theologica* of Aquinas, where much of the second volume of that treatise is devoted to questions of sin, guilt and separation of humans from God. Here is a triune conception of critical value to criminal law: reason, prohibition and consequence. The assessment of culpability rests on the willing breach of a prohibition, with a recognised consequence for that breach. At a secular level we are presented with an intuitive synthesis concerned with the assessment of culpability, a rational technology assembling concepts and evidence. But beyond this is the remnant of a *process* of an inquiry undertaken by none other than God itself questioning the actions and conscience of the offender in the complete knowledge of the facts – an overlap of the ecclesiastic/theological links between church and state.¹¹⁰

The extent to which we owe this deeply theoretical dynamic to religion is open to debate. We know the conceptual model is not uniquely theological; we find the *dolus* in Roman law, and we certainly find the language of Roman law carried into the laws of England. But the laws of England (and Europe) were fundamentally influenced by Christianity and were constructed over a deep cultural layering of the cultures and customs of those people who occupied, settled and colonised Europe. In the case of England, this involved an interface between Christianity, Anglo-Saxon and Danish custom. Indeed, in 1676 Sir Matthew Hale famously stated in *Rex v Taylor* that ‘the Christian religion is part of the law itself, therefore injuries to God are as punishable as injuries to the king or any common person.’¹¹¹ The point here is that one of the deeply rooted, and essential, features of the Judeo-Christian tradition is the notion of sin and its associated consciousness of guilt, and this notion merged with and became fundamental to the technology of guilt within the conceptual and pragmatic framework of the criminal law. This begins almost immediately in the Old Testament, in Genesis, and in the Twelve Tables, and merges over the centuries to remain with us today.

A Foucauldian perspective invites a consideration of the conditions of possibility, and the deeply rooted threads and images of fact-finding and practices of denunciation for the wrong that resides in the great repository of legal histories. In this field, it is possible to consider why it is that the Anglo-European legal systems have placed such importance on the concept of ‘guilt’ as being essential in the determination of blameworthiness, and the technique of merging guilty/wrongful actions and guilty minds in the determination of guilt. It also opens a space where we can think about why it is that we place such a high price on confession as a source of truth in the determination of ‘guilt’ – it functions as an avowal not only to the truth of events and motives that might never have been known, but also of the submission of the accused to a recognition of relationships with others and, in the best-case

¹¹⁰ I am indebted to Professor Judith Hahn of the Faculty of Catholic Theology, Ruhr University Bochum, for her insights on the links between crime and theology. For a scholarly examination of Canon Law and the Standard of Proof in criminal trials, see Judith Hahn, ‘Moral Certitude: Merits and Demerits of the Standard of Proof Applied in Roman Catholic Jurisprudence’ (2019) 8 *Oxford Journal of Law and Religion* 300.

¹¹¹ (1676) 86 ER 189.

scenario, a plea and commitment for penance through punishment. Conversely, where the confession is not voluntarily surrendered, the evidence presents a 'speaking truth' that enables a tribunal of fact to ascertain images of a confession from the event itself. Inquiry enables images of truth and guilt to emerge from an assemblage of ignorance.

It seems to me that it is, ultimately, impossible to identify, with any precision, a precise genealogy of 'actus non facit reum'. This would appear to be one of those deeply embedded epistemic threads, best undertaken by historians of ideas and classicists rather than legal scholars. This kind of intellectual dynamic is typical of attempts to identify the precise origins of deeply rooted conceptions. Nietzsche and Foucault both recognised this phenomenon, arguing that certain kinds of intellectual clusters are 'already there' – and as such avoided attempts to undertake linear genealogies.¹¹² The lesson, I would suggest, is this: at a very early stage in the life of the criminal law, a fusion took place between the clinical logic of Roman law and the theological logic of Christianity. That fusion involved incorporating the familiar idea of sin and guilt with the apparatus of state laws as it began to evolve concurrently with centralised governments in England. The Sovereign, for all intents and purposes, was the manifestation of the nearest thing we had to Divine power on earth. Willing breaches of sovereign commands are the foundations of medieval and contemporary criminal laws. This conceptual technique permits evaluation of guilt based on accident, intent, and knowledge – even recklessness. In this sense, here we find an example not of religion providing a specific source of criminal law, but of a technique to determine guilt. That technology is far more significant than any precise prohibition. It is the architecture of the essential method of adjudication.

¹¹² Foucault, above n 17, 78.