

ARCHAIC CRIMINAL CODES AND PENITENTIAL INDULGENCES

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The intersections between several ancient criminal codes² and Christian indulgences are striking. Both systems regulate human behaviour by imposing money penalties on wrongdoers. Further, both appraise harm,³ restore religious harmony, regulate markets, provide restitution and are heavily status dependent. This is not to say, of course, that there are no significant divergences. While it was less extreme in the eleventh than the sixteenth century, the revenue generating function of penitential indulgences was considerably more important than that of the ancient criminal codes. Indulgences were also, at least ostensibly, voluntary. While there were elements of choice in the criminal codes, their penalties were certainly not self-imposed. Ultimately, though, the two systems have intertwined histories and purposes, and are rife with commonality.

This Article will first discuss the origins and purposes of composition in “archaic criminal codes.”⁴ While Hammurabi’s Code, the Twelve Tables and the Lombard Laws⁵ emerge at wildly different times and in different places, they share a set of common principles.⁶ Section I.A will discuss the emergence of the commutation of punishment into money payments in these codes. Section I.B will go on to describe the apparent purposes of price-setting (as listed in wergeld tables) in these sets of criminal law. Chief among them are apparent efforts to regulate markets, monopolise violence, provide restitution and restore religious harmony and balance. These purposes prove remarkable not just because of the similarities between codes, but because they foreshadow the underpinnings of indulgences so well

Section II.A maps the emergence of indulgences – with particular attention paid to purgatory and monastic penitence. The nature of indulgences changed dramatically between the time they became prevalent and the Protestant Reformation. Although they were initially primarily tools of personal salvation

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² Hammurabi’s Code, the Twelve Tables and Rothari’s Edict are the ancient codes primarily relied on for the purposes of this Article.

³ Here, “appraise” is meant in the most basic sense of the term. A particular harm is given a specific monetary value.

⁴ James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices*, 71 CHI-KENT L. REV. 41, 45 (1995).

⁵ The Lombard Laws are here meant to indicate Rothari’s Edict.

⁶ Whitman, *supra* note 4, at 45-46.

for Catholic sinners, they, fairly or not, came to be understood as a revenue generating device for the church (and state). Indulgences, did serve other purposes, though, and the most obvious of these was restoring what can be styled as individual religious harmony. This, and the market regulation and restitution involved in the selling of indulgences will be explained in Section II.B. The central purpose of this Article, however, is to examine the intersection of composition in early criminal codes and composition in the penitential system (which takes the form of indulgences).

Section III elaborates on the commonalities of origin and purpose in the codes and indulgence system. Both systems seek to restore religious harmony and social balance; both regulate markets and compensate victims; and both pay strict attention to the status of the actors they regulate. These systems may also signal movement away from punitive shaming (or at least a system in which it is the only option) – with indulgences as part of a move from public to private penance and with composition as an alternative to shaming mutilation.

Section III also outlines crucial differences in the nature of the two systems. The criminal codes appear less concerned with generating revenue than indulgences (especially 16th century indulgences), and indulgences are likely less concerned with monopolizing violence than the codes. There is also a crucial difference between the designated recipients of the forfeited money– a fundamental element of both systems. While indulgence payments go to the church (and, as will be discussed, to public, secular purposes), the criminal codes largely call for payments directly to the individual harmed. This may speak both to the nature of the wrongs done and to divergent cultural and religious understandings of to whom behavioural obligations are primarily owed. Despite these differences, though, it is the common means and ends that are most remarkable. Both sets of regulations seek to maintain and restore order. That they both do so through a system of money payments for disorderly behaviour is remarkably interesting.

I. Price-Setting and Composition in Hammurabi’s Code, the Twelve Tables and the Lombard Laws

A. *Nature and Origins of Composition in Ancient Criminal Codes*

Before judging whether a meaningful comparison can be made between the dictates of the ancient criminal codes identified in the introduction and the requirements of Catholic indulgences, it is important to establish that the criminal codes can be meaningfully grouped together. This grouping is largely dependent on James Whitman’s *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices*.⁷ Whitman supports discussing these codes collectively as follows,

⁷ *Id.*

[T]he Germanic “barbarian codes,” the Twelve Tables of Roman Law, the “Book of the Covenant” preserved in Exodus, the ancient Near Eastern Codes, and a number of others. . . derive from a startling variety of times and places . . . [yet] these archaic codes do indeed show some remarkable uniformities across early cultures. In particular, they tend to display two different kinds of regulation, both strikingly widespread . . . regulation involving what we may call “mutilation and mutilation penalties”; and regulation involving money penalties”⁸

The codes, then, all regulate behaviour through systems of mutilation penalties (the talionic system) and money penalties (with specific prices chosen for specific harms). While establishing the relationship of talion and price setting is crucial to this Article’s argument, talionic justice is otherwise outside the Article’s scope.

This is ultimately a discussion of price setting, and what that price setting is meant to achieve. In the Code of Hammurabi, as an example, talionic penalties are listed alongside money damages as punishment for criminal acts.⁹ While there has been much discussion of an evolution in criminal penalties away from the violence of talionic penalties and toward the leniency of composition, it is more likely they coexisted. It appears, in fact, they could often be substituted for one another in specific instances (as differentiated from an understanding of composition replacing talion in a broad scale, multigenerational evolution).¹⁰

The Twelve Tables, which emerged in Rome some 1300 years after the Code of Hammurabi was compiled in Babylon, also “set out to offer an exhaustive account of the law.”¹¹ It too put money compensation and talionic penalties side by side, and the two forms of recompense “were constantly interrelated, with composition as a way for the offender to ransom himself out of talionic punishment at the victim’s option.”¹² Further, The Twelve Tables represented a system of Roman law based in a “religious system tied to the invocation of the aid and intervention of the gods.”¹³ The importance of gods, religion and spiritual balance will be returned to in the discussion of the purposes of money

⁸ *Id.*

⁹ The Code of Hammurabi (ca 1760 B.C.), available at <http://www.wsu.edu/~dee/MESO/CODE.HTM> (last visited May 7, 2008).

¹⁰ J.K. Mikliszanski ‘*The Law of Retaliation and the Pentateuch*’ 66 J. BIBLICAL LIT. 295-303, 297 (1947). (“It has therefore been inferred that for all other injuries offenders could purchase their peace and that the stipulated penalty – an eye for an eye – fixed the appropriate measure of alternative compensation.”).

¹¹ Whitman, *supra* note 4, at 75.

¹² Mathew S. Levine, *Punishment and Willingness to Pay* 40 GONZ. L. REV. 329, 364 (2005).

¹³ Whitman, *supra* note 4, at 72.

penalties in the criminal codes and in the discussion of similarities between the roots and dictates of composition and indulgences.

It should also be noted, and will be returned to, that the imposition of criminal money damages (and talionic penalties) were a powerful expansion of state control. Further, it is likely that the state, in criminalizing private violence, also sought a monopoly on violence.¹⁴ The self-help model of the development of criminal law holds that states stepped in and enforced money penalties for crimes as society lost its taste for vengeful feuding and violence.¹⁵ Whitman points out, however, that talionic penalties (characterised by punitive physical harm and mutilation) did not simply evaporate as human beings reached a higher developmental plane and came to prefer the gentility of compensatory fees. Instead, the penalties are coexistent and interrelated (as in the Twelve Tables, for example). What is true, however, is that the states were highly concerned that the penalties, either talionic or pecuniary, be just.

These codes must also be understood within the context of broader attempts by authorities to control markets. “[T]he setting of composition is only a sub-category of . . . the more general category of price-setting. Many of the composition enactments are associated with other forms of price-setting both of commodities and of wages. Price-setting is thus a particularly prominent feature of the Laws of Hammurabi”¹⁶ These ancient states appeared highly interested in setting just prices – both for commodities and for harms – and it appears they believed the market, left to its own devices, would not generate them.¹⁷

B. Purposes of Composition in Ancient Criminal Codes – Controlling Violence, Regulating Markets, Restoring Religious Harmony, Providing Restitution.

As mentioned above, the forbearers of these codes were likely concerned with both controlling violence and regulating market activity (two fertile areas for expanding state power and imposing order). Both talionic equivalence and just prices serve to limit the severity of retaliatory punishments – and preclude escalatingly violent feuds. Hegel took human beings to be naturally violent, and crafted the enormously influential argument that they undergo a slow civilization toward nonviolence (as illustrated by the replacement of violent talionic punishments with humane financial penalties). Human beings are

¹⁴ *Id.* at 43 (citing Max Weber, *Wirtschaft und Gesellschaft: Grundriss Der Verstehenden Soziologie* 516 (5th ed. 1976)).

¹⁵ Whitman, *supra* note 4, at 41-43.

¹⁶ *Id.* at 51.

¹⁷ *Id.* at 81. “On their face, the archaic codes belong, not to a modern world characterized by the policing of the streets, but to a pre-modern world characterized by the deeply felt need to set just prices. What early authorities arguably clamped down upon was, not violence, but the market”

simply moving from one stage to the next in a progression toward the current status quo (which, conveniently, is the highest state humanity has ever attained). This paradigm is rendered unlikely by the fact that wergeld coexisted with talionic penalties. Further, “Most have concluded that the original meaning of an ‘eye for an eye’ in the *Pentateuch* related to monetary compensation for the injured eye, rather than the infliction of an identical (or even similar) injury on the wrongdoer.”¹⁸

Regarding market control, “composition is not a general category of primitive regulation; like talionic mutilation, composition is a sub-category of a broader and more widespread category -- in this case the category of price-setting and market policing.”¹⁹ It may simply be that state actors believed that if wrongdoing was compensated by just prices, order and harmony would follow. It may not have been, however, that it was strictly a sense of social order that was desirable. Whitman holds that the appropriate context in which to understand just prices is within “the ever-mysterious psycho-social dynamic of money -- a dynamic easily linked to magico-religious beliefs.”²⁰ Punitive fines could have been a method of restoring a sense of social harmony, a social harmony necessarily dependent on religious harmony.²¹ The authorities who crafted these criminal codes were “often closely connected with religious and temple functions as they were, may very well have aimed at all kinds of theological and cosmological ordering.”²²

Finally, wergeld was explicitly intended to compensate the injured party – and was not exclusively intended as a form of retaliation. Wergeld tables are fascinating both for the proposition that money can compensate a physical injury²³ and in determining exactly how much money is appropriate. These punishments are necessarily both compensatory and retaliatory, and Daube believed “that the biblical understanding of retaliation *itself* included an element of compensation . . . [a]nd he identified various Rabbinical opinions that ‘punishment includes restitution’ in the sense that ‘punishment itself compensates the party wronged for his loss.’”²⁴

These criminal codes serve a number of interests. Through them, the state may have sought to monopolize violence and control markets by setting and

¹⁸ Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment* (citing J.H. HERTZ, THE PENTATEUCH AND HAFTORAHS 405 (2nd ed., London: Soncino Press, 1993)).

¹⁹ Whitman, *supra* note 4, at 80.

²⁰ *Id.* 81.

²¹ Money penalties as a means to religious harmony will be discussed extensively in Section IV.

²² Whitman, *supra* note 4, at 76.

²³ Though it seems reasonably straightforward that a victim is made worse off when physically harmed and better off when given money.

²⁴ Whitman, *supra* note 4, at 81 (citing DAVID DAUBE, STUDIES IN BIBLICAL LAW (New York: Ktav Publishing House Inc, 1969) 103).

enforcing just prices (for harms, just as they would for goods). The codes also formalize a system in which victims receive restitution and a sense of community wide social order is established. This social order is, crucially, rooted in magico-religious beliefs,²⁵ and money itself (as integrated into the criminal justice system) may have had independent sacrificial and religious significance. Wrong-doers were either required to forfeit money or could ransom whichever of their body parts was in jeopardy by paying a fine. In so doing, they restored an inherently religious social order. This paradigm echoes loudly when coins clink in the indulgence chest.

III. Indulgences

A. *Origins*

Penance, the repentance of sins, has a long history in Christianity. “While early evidence is not abundant, it seems that in its first millennium Christianity featured some form of penance for serious sins.”²⁶ These penances likely originated in monasteries, and in these monasteries, each sin was assigned its own particular penance.²⁷ Initially, penances took the form of “varying numbers of strokes or blows,” though “in time physical sanctions became more diversified and non-physical sanctions were added.”²⁸ This system evolved, however, and ultimately it became established that,

[T]he penances imposed by individual confessors, almost universally expressed as a set number of days or years to be spent fasting on bread and water, might be commuted, on occasion through the payment of a forfeit, either in money or in kind, or elsewhere by the substitution of a shorter but sharper penitential ‘shock.’²⁹

The sale of indulgences thereby grew out of the doctrine of purgatory and penance. This system necessarily relied on the Christian conception of individual guilt, and the understanding that sins must be atoned for. That sinners could put themselves back in good socio-religious standing by suffering physical punishment or paying a fee is striking. It is also interesting that penance and indulgences came from, in large part, a desire to lessen the time that would need to be spent in Purgatory (before ascending to heaven). Put

²⁵ See note 19.

²⁶ Levine, *supra* note 11, at 366 (citing Richard P. McBrien, 2 CATHOLICISM 777-78 (1980)).

²⁷ Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition 66 (1983) [hereinafter, Berman, Law and Revolution].

²⁸ *Id.*

²⁹ Nicholas Vincent, Some Pardoners' Tales: The Earliest English Indulgences, 12 TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY, Sixth Series 23, 27 (2002)

simply, “one who shared in the indulgence would have a shorter time in purgatory.”³⁰

It was ultimately the church that meted out these punishments and set these prices, however, and Christians believed the church had full power to remit sins. “The explanation that was to become widely accepted was that indulgences were a gift placed at the Church's disposal through the sufferings and good works of Christ and his saints.”³¹ Priests absolved Christians of their sins, and Priests came by this capability when Christ transferred “the keys of the kingdom” to St. Peter – “with the power to bind and to loose.”³² Individuals performing penance, and, as will be discussed below, purchasing indulgences, were tapping into the store of good will Christ had accumulated.

Penance was initially extremely harsh, though, and indulgences emerged as a commutation of physical forms of penance. Strictly speaking, “[an] indulgence is not a forgiveness of past sin . . . on the contrary, an indulgence is merely a remission, by the application of Christ’s merits, of the whole or a part of the temporal punishment due to forgiven sin.”³³ This is possible because the guilt of a sin and the “temporal punishment due for a violation of God’s order” are distinguishable.³⁴ For this reason, both confession and penance are necessary to lessen the time people must otherwise spend in purgatory.³⁵ Penance and indulgences evolved conceptually between the eleventh and sixteenth centuries, so it can become difficult to pin down a succinct and comprehensive definition. The description above is perhaps best characterized as “thirteenth-century scholastic theory,” though it does ultimately describe the ostensible purpose of indulgences (even when they veered toward blatant fund raising).³⁶

B. *The Nature of Indulgences*

³⁰ Dr. Nikolaus Paulus, *Indulgences as a Social Factor in The Middle Ages* 15 (J. Elliot Ross trans., 1922).

³¹ *Id.* at 51.

³² BERMAN, *supra* note 26, at 172 (citing Matthew 16:19).

³³ PAULUS, *supra* note 29 at 9.

³⁴ *Id.*

³⁵ *Id.* “The guilt of the sin may be forgiven [by confession] while the temporal punishment remains (to be dealt with in either purgatory or through penance.” Further, “one who shared in the indulgence would have a shorter time in purgatory.” *Id.* at 9. Paulus goes on to point out that theologians relied on scripture to justify this dichotomy. “Thus David’s sin with the wife of Urias was forgiven, but nevertheless he had to make satisfaction for it through the sorrow of losing the child (II Kings, XII, 13, 14).

³⁶ Vincent, *supra* note 28, at 27. Indulgences can be difficult to describe in large part because they rely on controversial and fuzzy theology. Even St. Thomas Aquinas, while “certain of the salutary effects and the authority by which indulgences are granted” was not certain of “the precise benefits that they confer: an attitude in which he follows most earlier commentators.

Indulgences “in the present form” emerged in the eleventh century.³⁷ They were exceptionally rare before 1140, though “the apparent increase in the issue of indulgences after 1140 may be more a function of archival practice than a proof of any real increase in the issue of such documents.”³⁸ In the eleventh century, however, penitential manuals, “which provided numeric formulas for how much penance each particular sin required”³⁹ began spreading “from Ireland, Wales, and Scotland to the Anglo-Saxon and Frankish kingdoms . . . to Spain, to Lombardy, to Rome itself and to Scandinavia.”⁴⁰ With the spread of these manuals came the spread of the practice of commuting penance into a purchased indulgence. It is also worth noting that penitential manuals included a great deal of “what would later be called secular crimes.”⁴¹ It is here that the link between penitential manuals (price lists for purchasing indulgences after sinning) and ancient criminal codes with wergeld tables (price lists for crimes) becomes clear.⁴²

The replacement of temporal punishment with a purchased penance required that indulgences initially be given in fractions of the imposed penance.”⁴³ Ultimately, though, “these commutations finally came to be specified in days corresponding to the amount of satisfaction that would be made by doing penance for that number of days according to the ancient discipline.”⁴⁴ Every sin had its own penance and according indulgence price. Further, although indulgences have become infamous, they were initially widely accepted. The “great doctors of the medieval church” established a doctrinal foundation for indulgences,⁴⁵ and

For once the practical experience of the English Church, the theology of the Paris schools and the legislative powers of the papacy appear to have been distilled into a single canonical formula. The effect of this formula is clear. Henceforth, the indulgence was established as a customary and properly licensed instrument.⁴⁶

In order to reach heaven, Christian sinners must repent, and repentance in the form of traditional penance was exceedingly difficult. Beginning in the eleventh

³⁷ See, e.g., *id.* at 23; PAULUS, *supra* note 29 at 14.

³⁸ Vincent, *supra* note 34, at 39.

³⁹ Levine, *supra* note 11, at 366.

⁴⁰ BERMAN, *supra* note 26, at 69.

⁴¹ *Id.*

⁴² This comparison will be the subject of Section IV.

⁴³ PAULUS, *supra* note 29 at 10.

⁴⁴ *Id.*

⁴⁵ Reinhold Kiermayr, *How Much Money was Actually in the Indulgence Chest?* 17 SIXTEENTH CENTURY J. 303, 303 (1986).

⁴⁶ Vincent, *supra* note 34, at 55.

century, it became widely accepted doctrine that such penance could be commuted into the purchase of indulgences.⁴⁷

C. *Restoring Religious Harmony*

Indulgences, as “fines for a sinful life,” were believed to facilitate salvation.⁴⁸ They simply restore “God’s order” after it has been violated by a sin. In this sense, indulgences are a tool to restore religious harmony. Christians inevitably stray and must repent and be punished. The penitential requirements of early monastic communities, however, were exceedingly harsh. As explained in Sections I.A and I.B, the church had the biblical authority to commute this penance into an indulgence, and by purchasing an indulgence, sinners could restore the religious order they had upset.

Indulgence doctrine (and the conception of purgatory it relied on), however, became distinctly unpopular in the sixteenth century. “Lutherans condemned with special vehemence the Roman Catholic doctrine of purgatory, with its theory of specific penalties to be paid, either in this world or the next, in proportion to the sinfulness of acts.”⁴⁹ One anti-Catholic pamphlet, in describing indulgences sold in penitential manuals, charged that “all the Arts of Man could not have invented more gross or villainous sins than the Popish Clergy do put to sale.”⁵⁰ It went on to characterize the sale of indulgences as blasphemous greed on the part of imposters and Catholic Church leaders alike.⁵¹

⁴⁷ It is also possible there were recruitment benefits to the indulgence system beyond lower penitential standards. “During the first millennium of the Christian church, there was no separate sacrament of reconciliation. Forgiveness of sins was the function of baptism, and while the effects of venial or less serious sins could possibly be overcome by other means, the commission of a mortal or very serious sin after baptism was highly problematic. To overcome this problem, individuals often waited until they grew old before receiving baptism. Eventually, however, the church developed the sacrament of reconciliation, allowing individuals to feel confident in being baptized early in life without the fear of committing a major sin before death. Perhaps this change allowed the church to retain post-baptism sinners and give individuals the incentive to become a full member of the church early in life.” Klick, *Salvation as a Selective Incentive*, 26 *INRLEC* 15 (2006).

⁴⁸ Kiermayr, *supra* note 43, at 303

⁴⁹ Harold J. Berman, *The Transformation of Western Legal Philosophy in Lutheran Germany* 62 *S. CAL. L. REV.* 1573, 1582-83 (1989).

⁵⁰ The book of rates now used in the sin custom-house of the Church and Court of Rome : containing the bulls, dispensations, & pardons for all manner of villainies & wickednesses : with the several sums of monies given & to be paid for them – Reprinted and sold by J. Eedes at A2 (I have no idea how to cite this).

⁵¹ *Id.* “if a man shall acknowledge himself guilty of any such [sin], in confession to an ordinary Confessor, He can only tell him where the Popes Bankers reside, who are to absolve him, and will gladly receive him, for he bring with him the price of his sin.”

Lutherans went on to say that the doctrine had no Biblical foundation, and that it implied “that people could work off their sins, so to speak, and thus earn eternal salvation. God, said Luther, will accept the faithful person ‘just as he is,’ still a sinner but faithful and hence liberated from his or her alienation.”⁵² The indulgence system was ripe for abuse, and was, accordingly, abused.⁵³ Despite abuse and theological bickering, the truth is likely that indulgences were meant to serve the causes of both personal salvation (and order restoring) and fundraising. To deny the latter in defence of the former is to deny reality. Legitimately or not, indulgences were widely used to generate revenue.

D. *Raising Revenue*

Indulgences have been characterized as both “revenue generating instruments as well as agents of Christian Justice.”⁵⁴ As an example, the primary motivation behind the Mainz-Magdeburg indulgence was “to raise money for a papal dispensation (of questionable legitimacy) and for St. Peter’s Basilica”⁵⁵ Stating explicitly that one can facilitate salvation by making money payments creates very strong charitable incentives, and while such donations remain voluntary (as will be discussed further in Section III), empirical examination has shown that the incentives proved effective.⁵⁶ The discussion above referred to the fact that indulgences were a highly controversial phenomenon by the time of the Protestant Reformation. “In Article 28 of the Ninety-Five Theses, Luther singles out for special criticism Tetzels famous ‘sales pitch:’ ‘the moment the coin clinks in the bottom of the chest, the soul flies to heavenly rest.’”⁵⁷ Beyond the normative issues, however, the more important point is that indulgences were intended to raise revenue.

The money raised was used to fund grand buildings (as with St. Peter’s Basilica) and many other public works.⁵⁸ As such buildings were intended to glorify God, it stood to reason that an individual contribution would act to

⁵² Berman, *supra* note 48, at 1596 (citing M. LUTHER, NINETY-FIVE THESES (1517), ARTICLE 36, IN LUTHER’S WORKS (J. Pelikan et al. trans. & eds. 1955-1976), at 28.).

⁵³ Kellogg and Haselmayer fairly point out that, “It should also be noted, though, that “The truth would seem to be that our impressions of the pardoner are derived so completely from representations of his abuses that we are in danger of forgetting that they are abuses—that under canon law very few indeed of the pardoner’s actual practices were permitted.” Alfred Kellogg & Louis Haselmayer, *Chaucer’s Satire of the Pardoner*, 2 PMLA, 66 (1951).

⁵⁴ Kiermayr, *supra* note 43, at 303.

⁵⁵ *Id.* at 308.

⁵⁶ Klick, *supra* note 46, at 15. (“Catholics contribute significantly more to their churches as they approach death than do members of Protestant denominations. More generally, this Article suggests that church doctrines influence behavioural incentives, and religious leaders may be able to capitalize on these behavioral effects for the benefit of their church.”).

⁵⁷ Berman, *supra* note 48, D. Martin Luthers Werke, Kritische Gesamtausgabe (1883-1974), at 234. (Note 15)

⁵⁸ See generally PAULUS, *supra* note 29 (describing all manner of public works funded by indulgence revenue).

forgive sin. Interestingly, however, indulgences have also been described as “based on the principle of revenue sharing” between the religious and secular, as money was often divided between the church and local secular authorities.⁵⁹ As Paulus puts it, “Fasting or some other such penance was changed into a contribution of money or service to some useful public undertaking.”⁶⁰ Individuals need clear a lower bar to reach salvation, and society benefits as well.

E. *Ancillary goals of indulgences*

Penitentials did not just call for direct pay to the church, but often instead demanded “compensation of victims and assistance of their relatives.”⁶¹ Indulgences were hereby intended to restore order from multiple directions. One particularly apt example occurs “in cases of beating, the offender might be required to pay for medical treatment of the victim, to do his work, and to make compensation.”⁶² Stolen property “was also subject to restitution.”⁶³ This explicitly compensatory ingredient in indulgences is strikingly similar to the demands of the ancient criminal codes, and will be addressed in Section IV.

Finally, there are, as in the criminal codes, elements of market control in the practice of indulgences. It is no coincidence that a (harshly critical) anti-Catholic pamphlet called penitential manuals “The market of the man of sin.”⁶⁴ Through the indulgences system, churches established and controlled a market in which sinners purchased blocks of time they would otherwise spend in purgatory. That the church manufactured this market does not belittle the significance of the market itself, or the church’s control over it.

III. The Intersection of Indulgences and Composition in the Archaic Criminal Codes

A. *Convergences*

⁵⁹ Kiermayr, *supra* note 43, at 305.

⁶⁰ PAULUS, *supra* note 29 at 7. Paulus goes on to list “Churches, schools, hospitals, and other charitable institutions; bridges dams, roads, harbours, and fortifications, and the stimulation of such important social movements as Crusades and Truce of God.” *Id.*

⁶¹ BERMAN, LAW AND REVOLUTION, *supra* note 26, at 70.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Sodom fair: or, The market of the man of sin [electronic resource] : Containing, a true account of the prices of the Pope’s pardons and dispensations; being a treatise very useful and necessary for all young English papists who intend to take Holy Orders, or travel through Italy; and all such as intend to be cheated both out of their souls and money. To which is added, the history of adultery, as it is now at Rome by law established; with the life of Clement the Sixth, and blasphemous bull which he published for the year of jubele, 1350 (published 1688) *available at* http://gateway.proquest.com/openurl?ctx_ver=Z39.88-2003&res_id=xri:eebo&rft_id=xri:eebo:image:37343

There is a clear conceptual overlap between composition in the archaic criminal codes and indulgences. Both are fundamentally concerned with countable, monetary punishments which imply a reliance on the individual guilt of the rule-breaker. Criminals and sinners owe a debt to society,⁶⁵ and Nietzsche, among others, conceived of guilt as inextricably linked and dependent on the concept of debt.⁶⁶ Wrong-doers must then repay their debt in order to return themselves to good standing and restore order. Shaming punishments like mutilation or public penance did not deal in the countable or in terms of debt, but were instead concerned with shifting status. In the archaic codes, however, people could ransom their limbs and avoid such mutilation by making a payment to the individuals they harmed. By purchasing indulgences, Catholic sinners were similarly replacing physical suffering (an extended fast, a number of lashes) with financial payment.

In the codes and the indulgence system, the seeming impossibilities of identifying the appropriate quantities of recompense in combination with the confidence with which they were actually calculated, speaks to divine intervention. In both, legitimacy is necessarily dependent upon divine authority. As Whitman puts it, “The real difficulty in understanding the early codes, arguably, is understanding the origins of the idea of value-equivalence.”⁶⁷ Early authorities were highly concerned that the equivalences they chose be just, and it is “plausible that the early authorities meddled as a way of setting magico-religiously, or “scientifically,” proper rates.”⁶⁸ This was also true for indulgences, “the Roman Church...through its judicial organs...and through its scholars, has steadily aimed at making precise what it has all along felt could never lend itself to precision.”⁶⁹

Penance must necessarily “be susceptible to precise numerical measurement.”⁷⁰ Each sin required a particular period in purgatory, and each purchased indulgence relieved such a period. Though Thomas Aquinas noted that some “believe[d] that God alone can know the period of penance owing

⁶⁵ “Society” likely includes both secular and religious communities – and the desire for social and spiritual order.

⁶⁶ Levine, *supra* note 11, at 369 (citing Friedrich Nietzsche, *On the Genealogy of Morals* 44 (Douglas Smith trans., Oxford Univ. Press 1996) (1887) (bracketed German inserted by Smith) Nietzsche: “[H]ave the previous exponents of the genealogy of morals had even the slightest inkling that the central moral concept of ‘guilt’ [Schuld] originated from the very material concept of ‘debt’ [Schulden]?”

⁶⁷ This asks both why anyone would exchange valuable goods for metal and why a particular quantity of metal is appropriate.

⁶⁸ Whitman, *supra* note 4, at 82.

⁶⁹ Book Note, E. Emerton, *A History of Auricular Confession and Indulgences in the Latin Church* by Henry Charles Lea Source: *The American Historical Review*, Vol. 2, No. 1, (Oct., 1896), pp. 113

⁷⁰ Vincent, *supra* note 34, at 30. This was particularly interesting because it was true “at a time when the average man or woman is assumed to have had only the vaguest idea of their own age measured as a span of years, of the complex mathematical calculations that had to be made if a sinner were to assess their own chances of salvation.” *Id.*

for any sin,”⁷¹ and although it ultimately received severe Lutheran criticism, the Catholic Church claimed broad authority to set such prices.⁷² “Canon lawyers were concerned above all with measuring the offense against God,”⁷³ and ancient authorities were concerned with measuring offenses against “magico-religious” order. Both then appraised harm and set their calculations down in code form.

1. Restoring Order

The idea of bringing the world back into religious harmony (semi-magical) is central to both systems. For the ancient criminal code, “Robertson Smith in particular analyzed the system of money penalties as closely linked to the system of sacrifice: Atoning payments were made, not only to human victims of violence, but also to the gods.”⁷⁴ Further, “Authorities, often closely connected with religious and temple functions as they were, may very well have aimed at all kinds of theological and cosmological ordering.”⁷⁵ While not well understood, there was clearly a sacred element to money and the just regulation of markets through prices setting. Whitman continues,

“Our sources show the tradition that the Twelve Tables (451/450 b.c.) were promulgated at the same time as, and somehow in connection with, two price-setting statutes: the *lex Aternia Tarpeia* of 454 b.c. and the *lex Menenia Sestia* of 452 b.c. Both of these statutes were concerned, in somewhat mysterious ways, with setting the correct bronze equivalents for animals. Both also had some, again somewhat mysterious, connection with controlling the assessment of fines by magistrates.”⁷⁶

Even rules that appear secular “for example that one who slays a freeman should pay 100 shillings wergeld and one who slays a nobleman should pay 300 shillings wergeld – were in fact wholly bound up with the moral and religious rules of the society.”⁷⁷ Systems “of pecuniary compensation for injuries” were inextricable from “the system of fate and honour which fused law with religion.”⁷⁸ Money was sacred, and the religiosity of the restoration of order is plainly evident.

⁷¹ *Id.*

⁷² Here the church took its authority from the Biblical passages: “Christ told the Apostles, ‘Whose sins you shall forgive, they are forgiven them’ (John, XX, 23) and ‘Whatsoever you shall loose upon earth, shall be loosed also in heaven’ (Matt., XVIII, 18).” PAULUS, *supra* note 29 at 11.

⁷³ BERMAN, LAW AND REVOLUTION, *supra* note 26, at 189.

⁷⁴ Whitman, *supra* note 4, at 67 (citing W. Robertson Smith, Lectures on the Religion of the Semites (1889) at 378-379.).

⁷⁵ *Id.* at 72.

⁷⁶ *Id.* at 53.

⁷⁷ Berman, Law and Revolution, *supra* note 26, at 80.

⁷⁸ *Id.*

This is remarkably similar to the indulgence system's conception of "temporal punishment due for violating God's order" – which is then ultimately commuted into a purchased indulgence.⁷⁹ As Levine puts it, "Hegel believed that the purpose of punishment is to "annul" crime by inflicting an injury on the criminal to cancel out the injury that criminal had inflicted on society."⁸⁰ This is a distinctly Christian conception of atonement – although, for the purposes of penitence, the injury should be self-inflicted. An individual who does wrong must atone and suffer for it; by making an indulgence payment (as commuted suffering), he does exactly that.

2. Creating more attainable, humane standards

In commutation, both systems move toward a more humane, attainable restoration of divine order. Physical suffering is replaced with money payments. Coins can be substituted for mutilation and self-flagellation. Clearly, in archaic codes, the replacement of mutilation with monetary payments signalled a more permissive standard. Use of the term "ransom" is not accidental, and the alternative to such money payments was often profoundly ghastly. The question then becomes whether the same phenomenon is present in the penitential indulgence system. Unsurprisingly, it is.

Early Christianity was exceedingly demanding. With the introduction of "tarrified penance," however, salvation became distinctly more attainable. "In Anglo-Saxon and Frankish practice, for example, a year's fasting on bread and water might be redeemed for the payment of twenty-six solidi, the price of a slave or the recital of 300 masses."⁸¹ Very few people could reasonably have been expected to fast for a full year. Further, it was entirely possible that the penance an individual owed, as measured in days, exceeded the period he could reasonably expect to live.⁸² This strictness was nearly impossible to maintain, but "the ecclesiastical authorities" wanted to preserve the "theoretical value" of the "traditional penitential regulations."⁸³ Commuting long fasts to prayers and alms for good works was an attempt to maintain this theoretical value while expanding the population of individuals who could bear the penitential burden.

3. Status

⁷⁹ PAULUS, *supra* note 29 at 9.

⁸⁰ Levine, *supra* note 11, at 355 (citing George Hegel, *Philosophy of Right* 71 (T.M. Knox trans., Clarendon Press 1967) (1821)).

⁸¹ Vincent, *supra* note 34, at 30 (citing "Vogel, *Enmmissiodne spechis*, ch. 5, pp. i8, 25-6, 31").

⁸² Examples include a man referred to in the Anglo-Saxon Council of Clovesho (747) whose diverse offences had earned him 300 years of fasting. Alexander Murray, *Confession before 1215*, 3 *TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY* 60 (1993).

⁸³ PAULUS, *supra* note 29 at 14.

Both systems are also meaningfully differentiate penalties based on the status of the offender. Hammurabi's Code and the Twelve Tables impose wildly different penalties on high status and low status people (though, for the most part, money damages are more likely to be imposed when a higher-status person commits a crime against a lower-status person). Also, many early Germanic laws demonstrate a pronounced "keying of price to status."⁸⁴ In these criminal codes, social standing was of paramount importance in determining the appropriate sanction for crimes. This keying is again mirrored in indulgence prices.

The wealthier a sinner was, the more he paid for indulgences.⁸⁵ This is consistent with the broader doctrine that an indulgence purchased for the same price by a rich man and a poor man implies unequal suffering. Levine elaborates on this,

The relationship between offense and penalty is not one of simple exchange, of a mathematical proportion that provides the correct deterrence or that properly annuls the guilt of the crime. Actors who are willing to pay the penalty for their offense may understand and accept the mathematical proportions involved; but they downplay the other factors-- remorse, reconciliation, respect for the moral determinations of law--and decide for themselves which factors are and are not worthy of respect. Thus, ex ante willingness to pay the penalty for an offense can sometimes be a justifiable reason for increased punishment or blame, as a vindication of legal norms that go beyond deterrence and retribution but are nonetheless a crucial part of our sense of guilt and punishment.⁸⁶

Further, clergy and lay people, who clearly occupied different socio-religious strata, faced different penalties for committing sin. "[I]t was a firm principle of canon law that a cleric who commits a criminal act commits a greater sin than a layman who commits the same criminal act."⁸⁷ Both archaic criminal codes and the penitential system are, then, heavily status dependent. Interestingly, though, the archaic codes impose lesser penalties on high status people while high status people face stiffer fines when purchasing indulgences. This is an important reminder that the systems, despite their conceptual similarities, have meaningful differences as well.

B. *Divergences*

⁸⁴ Whitman, *supra* note 4, at 52.

⁸⁵ Kiermayr, *supra* note 43, at 302.

⁸⁶ Levine, *supra* note 11, at 378.

⁸⁷ BERMAN, LAW AND REVOLUTION, *supra* note 26, at 191.

The most obvious of these differences is that, in the archaic codes, the money paid as fines goes to the victim, while indulgences are paid directly to the church. Also, it is true that, as mentioned above, there are elements of restitution in indulgence payments, and some money may go to the individual harmed, but the church receives the vast majority of these funds. Indulgences restore God's order, because a sin that harms another person is ultimately conceived of as a sin against God. Wergeld, on the other hand, restores social order by directly compensating an injured party. While the archaic codes, and the penalties they impose, are infused with religious significance, they require a person to person transaction. This difference is particularly striking because, as mentioned in Section II.D, one of the primary purposes of indulgences was to generate revenue (both for the church and for secular authorities). Such a purpose appears largely absent from the criminal codes.

Further, criminal penalties in the archaic codes were enforced by the state (and, therefore, involuntary). While victims may have had the option of "demanding payment in place of mutilatory vengeance,"⁸⁸ these penalties were not self-imposed. The will of the party making amends is, then, not as important as the compensating act (here, making a wergeld payment) itself. The church, however, stressed that indulgence money was given entirely voluntarily – this was the only way in which it could have any moral force. Were such payments involuntary, they would not signal true repentance and no time in purgatory would be forgiven. Thomas Aquinas, for example, stated "that charity and good works, necessary for salvation, were voluntary and could be considered man's own."⁸⁹

A final difference is the extent to which wrong-doers were aware of the penalties they had accumulated. The Twelve Tables were progressive in that they alerted the general public to the specific laws that governed them. They represented a movement from arbitrary punishment toward punishment only in cases of personal guilt. An individual only paid fines for which a crime was readily known. This stands in contrast with indulgences, which could compensate for "sins which had been forgotten and which were therefore unconfessed."⁹⁰ Even more interestingly, there were suggestions that the church may not always get the penitential calculations right. It was, therefore, better to purchase additional indulgences, as "God would honour the indulgences, but not necessarily concur with the penances decreed on earth, excess indulgences would serve to offset any penance decreed in the court of heaven which the sinner had not been made aware of before death."⁹¹ This quote suggests not only that churches may not always have done the

⁸⁸ Whitman, *supra* note 4, at 56.

⁸⁹ Klick, *supra* note 46, at 21.

⁹⁰ Vincent, *supra* note 34, at 44.

⁹¹ *Id.* at 56.

commutation conversion as God would have, but also that people may be responsible for sins they did not know they had committed. This stands in stark contrast with the archaic criminal codes.

IV. Conclusion

Wergeld tables and penitential manuals are superficially similar. They list harms, and each harm has a specific value. The individual who perpetrated the harm must then make amends by forfeiting the designated sum of money. The functional similarities between these two systems, however, are even more striking than their similarities in form. Both the ancient criminal codes and the indulgences system was concerned with restoring socio-religious order. Crimes (or sins) created disharmony, and the payments specified by their respective tables restored that harmony. The criminal codes and indulgence system were also meant to control violence (which can, perhaps, be subsumed into enforcing order) and regulate markets. In doing this, both systems reflect a heavily status-dependent world view. Individuals with different statuses suffered different repercussions for their actions. In the criminal codes, a higher status person was treated more leniently, while the penitential system held higher status people to a higher standard.

Indulgences were meant to generate revenue in a way archaic criminal penalties were not, and did not require particularized knowledge of wrongdoing, while the criminal codes did. Indulgences were also ostensibly voluntary, while the criminal penalties were not. Ultimately, though, while these differences are significant, and should be acknowledged, they do not carry the day. If Hammurabi's Code, the Twelve Tables and the Lombard Laws can all be included in the same genetic tradition, it appears that medieval penitential indulgences are part of that tradition as well.

The tradition continues to the present day, and the links between ancient criminal codes, penitential indulgences and contemporary criminal codes are evident. Standards of proportionality in criminal law are a foundational principle of modern law – and formed the heart of composition in these historical codes as well. Criminal statutes that call for either a period of incarceration or the payment of a fine are also familiar to modern criminal law. Contemporary law still seeks to restore social order through retributivist punishment, and it still relies on lawmakers to determine exactly how much money a wrongdoer should forfeit for vandalism or assault or arson. That the principles undergirding, and the purposes of, ancient criminal codes and penitential indulgences are plainly logical to a modern reader speaks to their centrality to modern philosophies of criminal law. The genetic tradition of the Hammurabi's code and medieval penitential indulgences is alive and well.

