Is Penal Substitution Incoherent?: An Examination Of Mark Murphy's Criticisms

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SUMMARY

Some critics of the doctrine of penal substitution have alleged that the doctrine is incoherent because punishment entails an attitude of condemnation or censure towards the person punished, which impossible in the case of Christ. It is shown that this objection is multiply flawed and that a number of viable ways of avoiding the alleged incoherence are available to the penal substitution theorist.

IS PENAL SUBSTITUTION INCOHERENT?: AN EXAMINATION OF MARK MURPHY'S CRITICISMS

Introduction

In setting the stage for his own revisionary atonement theory, Mark Murphy criticizes the traditional Reformation theory of penal substitution as being conceptually incoherent. Our interest here is not in Murphy's theory of the atonement offered as a replacement of the traditional view,[1] but rather in his criticism of the Reformers' theory. Murphy's is not the typical Socinian criticism that penal substitution is unjust and, hence, immoral, but rather that it is incompatible with the very concept of punishment.

One of the strengths of Murphy's treatment, unusual in contemporary discussions of the atonement, is that it is informed by debates going on in the philosophy of law over the theory of punishment. Legal theorists and philosophers of law have poured an enormous amount of thought into the theory of punishment, so we may expect to learn a great deal from them. At the same time we must be mindful that their theories of punishment are not directly transferable to all forms of punishment, not to speak of divine punishment. The punishment which is discussed by legal theorists and philosophers of law is almost invariably punishment as administered by the state as part of a system of justice. As some philosophers have pointed out, such a theory of punishment is too narrow to serve as a general theory of punishment, for punishment also takes place outside the justice system, for example, in the family or schoolroom or workplace.[2] Moreover, while analogous to divine justice, human systems of justice will also have features which are significantly disanalogous to divine justice. To give an obvious example, the state may be forced not to

administer punishment as a result of lack of prison space, due to overcrowding and lack of resources. God is evidently not so hampered. Still, given the widespread presence of forensic and judicial motifs in the biblical texts pertinent to the atonement,[3] we may expect to learn a good deal that is relevant to our topic from the work of legal theorists and philosophers of law on the theory of punishment.

In recent decades legal philosophers have been careful to distinguish within the theory of punishment between the *definition* of punishment and the *justification* of punishment. A definition of punishment will enable us to determine whether some act counts as punishment, while a justification of punishment will help us to determine whether a punitive act is permitted or even required, depending on one's theory. While both of these aspects of the theory of punishment are relevant to the doctrine of penal substitution, Murphy's critique focuses on the definition of punishment.

Murphy's Critique

Murphy sets the familiar moral objections to penal substitution to the side in order to argue that "The problem is not that penal substitution is immoral, but that it is conceptually defective."[4] The problem arises because punishment, in Murphy's view, is not merely an authoritative imposition of hard treatment upon a person for the failure to adhere to some binding standard. Murphy thinks that hard treatment authoritatively imposed for violations of private-law norms, like compensatory awards in tort, or for infringement of various rules in sports are not punishments. He holds, following the suggestion of philosopher of law Joel Feinberg, that a necessary condition of punishment is that "punishment *expresses condemnation* of the wrongdoer, of the wrongdoer as performer of the wrong."[5]

Murphy lists two virtues of Feinberg's suggestion. (1) It carves the cases properly. In contrast to criminal cases, sports penalties and tort awards do not typically involve expression of condemnation. Only in criminal cases are defendants found guilty. (2) It makes intelligible the fact that crimes have guilty mind (*mens rea*) conditions as essential elements. In criminal law one is not found guilty simply for wrongdoing (*actus reus*) if one performed the act unknowingly or without a blameworthy volitional state (e.g., intentionally, recklessly, or negligently) and so lacked a *mens rea*. It also explains the defense strategies of showing that the accused had some excuse or justification for the wrongdoing and so is not to blame.

If this necessary condition of punishment is correctly formulated, Murphy concludes, then

punishment expresses condemnation of the person punished. If that is right, then one cannot punish a person whom one does not take to be worthy of condemnation. And one cannot regard a person as worthy of condemnation unless he has actually done the act for which he is condemned. "Punishing presupposes that the object of punishment has failed in particular respects. . . . If (non-defective) punishment is essentially condemning of the agent who failed to live up to the standard the violation of which justifies the punishment, then penal substitution is unintelligible. We know that attempts to justify it will founder not for moral reasons but for prior conceptual reasons."[6] Murphy concludes flatly, "The classic penal substitution view of the Atonement is incoherent."[7]

Assessment

I think that Murphy's critique of penal substitution is multiply flawed, its principal merit lying in the host of fascinating questions it raises. To begin with, we need to get clear on what exactly the doctrine of penal substitution asserts. According to Murphy, "The penal substitution theory of the Atonement holds that human beings, on account of their sins, deserve to be punished, but that Jesus Christ was punished in our place, so that we no longer bear ill desert."[8] While this is certainly one popular articulation of the theory, it is far from universal. Some defenders of penal substitution recoil at the thought that God punished His beloved Son for our sins. For example, John Stott advises, "We must never make Christ the object of God's punishment."[9] Even in their ringing defense of penal substitution, Steve Jeffery, Michael Ovey, and Andrew Sach do not define penal substitution in such a way as to imply that Christ was punished in our place. Rather they offer the more subtle explication: "The doctrine of penal substitution states that God gave himself in the person of his Son to suffer instead of us the death, punishment, and curse due to fallen humanity as the penalty for sin."[10] If we take the definite description "the punishment due to fallen humanity" referentially,[11] it refers to the withdrawal of God's fellowship and blessing.[12] This Christ suffered on the cross instead of us.

On such an understanding, God afflicted Christ with the suffering which, had it been inflicted upon us, would have been our just desert and, hence, punishment. In other words, Christ was not punished, but he endured the suffering which would have been our punishment had it been inflicted on us. We should not exclude by definition such accounts as being penal substitutionary theories, since Christ on such accounts suffers as our substitute and bears what would have been our punishment, thereby freeing us from punishment.[13] Accordingly, penal substitution in a theological context ought to be understood as the doctrine that God inflicted upon Christ the

suffering which we deserved as the punishment for our sins, as a result of which we no longer deserve punishment. This explication leaves open the question whether Christ was punished for our sins.

Penal Substitution without Punishment

A penal substitution theorist who holds that God did not punish Christ will be unfazed by and perhaps even welcome Murphy's objection. The debate will then move on to the familiar question of the morality of afflicting an innocent person with the suffering which we deserved as the punishment for our sins.

Feinberg thinks that we should not apply the term "punishment" to parking tickets, offside penalties in sports, firings at work, flunkings in school, disqualifications from competitions, and so on, which he calls "penalties" to distinguish them from punishments technically so-called, which always express condemnation. In that case, the defender of penal substitution may borrow Feinberg's distinction between punishments and penalties and say that God penalized Christ for our sins, that Christ paid the penalty for our sins. If God's harsh treatment of Christ did not express condemnation, then God did not punish Christ for our sins, but He may still be said to have penalized him for our sins. Feinberg himself says that inflicting penalties on an innocent person may be even worse than inflicting punishments on an innocent person, in which case the alleged coherence problem collapses to the moral problem.[14] Accordingly, if one's theory of punishment rules out substitutionary punishment by definition, the advocate of penal substitution may simply use a different word than "punishment."

Seen in this light, Murphy is employing what the eminent legal theorist H. L. A. Hart famously called "a definitional stop" to short circuit debate.[15] Anthony Quinton had argued that in order for harsh treatment to be punishment the person afflicted with harsh treatment had to deserve that treatment.[16] The problem with Quinton's definition was that it made it logically impossible to punish the innocent. Yet it is indisputable that innocent people are often found guilty and subjected to harsh treatment for crimes they did not commit. Quinton was forced to say that such persons, though sentenced and treated harshly, were not really punished, technically speaking. Hart's complaint was that ruling out their treatment as punishment by mere definition was just a semantic maneuver that masked important questions about punishment. Murphy employs a similar definitional stop regarding substitutionary punishment. Historically, substitutionary punishment, like punishment of the innocent, apparently does take place.[17] Debate over the justifiability of penal

substitution should not be brought to a halt by a definitional stop.

Murphy rejects the comparison with Quinton, claiming that his objection is not that substitutionary punishment is logically impossible but that it is conceptually incoherent. For the person who is punishing the substitute is committed to holding that the substitute is innocent but worthy of condemnation.[18] I take this to mean that the punisher must regard the substitute as both worthy of condemnation and not worthy of condemnation, which he cannot do. Whether this *aporia* involves a logical impossibility or a conceptual incoherence, it seems to me that the maneuver is still the same: one has just put a definitional stop to substitutionary punishment by defining "punishment" in such a way that the harsh treatment authoritatively inflicted for the violation of a norm on a substitute will not count as punishment. If we simply replace the term "punishment" with "penalty" with respect to God's harsh treatment of Christ, then the alleged incoherence vanishes.

David Lewis responds to the definitional stop as an attempt to short circuit debate over penal substitution by acquiescing to the expressivist's definition of "punishment" but insisting, "I trust that the reader will understand: I mean that the volunteer undergoes something that would have constituted punishment if it had happened instead to the guilty offender."[19] Discussion of the justice of such treatment may then proceed. Lewis' counterfactual characterization is, in fact, in accord with penal substitution as we have defined it.

This serves to dispatch Murphy's coherence objection; but because his critique raises some important and interesting questions, it would be premature to end the discussion here. Accordingly, let us ask how a theorist who holds that God did punish Christ for our sins might respond to Murphy's objection.

Punishment without Expressivism

In order to avoid the definitional stop, Hart maintained that we must recognize certain secondary forms of punishment, such as punishment of persons who neither are in fact nor supposed to be offenders.[20] Accordingly, on Hart's view, substitutionary punishment is one kind of punishment. On this view an expression of condemnation of the person punished is not a necessary condition of punishment.

Murphy's objection to substitutionary punishment is based on what Feinberg called an expressivist theory of punishment, according to which the harsh treatment imposed on a person must express condemnation in order to count as punishment. Murphy does not consider the possibility that the penal substitution theorist might reasonably reject an expressivist theory of punishment. Though

popular, it is not as though the expressivist theory has overwhelming arguments in support.

Consider, first, Murphy's claim that the theory carves the cases properly. This is, in fact, not true. One of the problems with the theory is that the line between punishments and mere penalties in the law does not coincide with the line between condemnatory and non-condemnatory harsh treatment.

Penalties can be very harsh, indeed, and plausibly often express society's "resentment" and "stern judgment of disapproval" for the wrong done.[21] This seems undeniable in cases involving torts such as assault and battery, defamation, fraud, and wrongful death. Arthur Ripstein explains that tort law articulates certain norms of acceptable conduct, and if the plaintiff is to recover damages from the defendant, he must show that the defendant has violated those norms. "The entire proceeding is structured by questions of whether defendant behaved unacceptably towards plaintiff, and whether plaintiff's injury is appropriately related to defendant's mistreatment of her. The structure of a tort action thus expresses the way in which it answers questions about whose problem it is when things go wrong by considering the ways in which people treat each other."[22] The judgement of the unacceptability of the plaintiff's conduct may often be so severe as to express condemnation. Ironically, Murphy himself gives an illustration of the indignation felt by citizens when rich people were permitted to pay strikers' fines, since "a fine is imposed as punishment."[23] Indeed, some torts are also crimes, in which case the act for which compensatory damages are awarded is also the object of condemnation in a criminal verdict. And even for torts that are not crimes, sometimes the damages awarded are actually punitive damages, which exceed the aims of merely corrective justice. Very large awards, in particular, plausibly often express society's strong disapproval of the wrong done to the plaintiff. Even in sports, penalties imposed for fouls like unsportsmanlike conduct and taunting seem to carry censure with them. While these infractions are not crimes, since they are not violations of criminal law, still the penalties imposed for such infractions plausibly express condemnation.

By the same token there are crimes which are punishable, even though such punishments do not seem to express condemnation. For example, crimes involving so-called *mala prohibita* are punishable, even though such punishments may no longer express resentment or stern disapproval, such as punishment for violation of U.S. federal laws against marijuana possession.[24] Moreover, there are in the criminal law cases of so-called "strict liability" in which crimes are committed without fault and yet are punishable. To his credit Murphy acknowledges these, but insists that "these are unusual, severe outliers in the criminal law."[25] These cases are,

in fact, far from unusual, there being many thousands of statutory offenses involving elements of strict liability, including crimes like possession of narcotics or firearms and the selling of mislabeled foods or of prescription drugs without a prescription.[26] Punishments for crimes of strict liability often seem to involve no condemnation of the person involved and yet are still punishments in our criminal justice system. The fact that such crimes are often punished by fines rather than imprisonment is just as plausibly explained by the fact that imprisonment is seen as more severe than fines, rather than seen as carrying condemnation that fines do not.

Crimes of strict liability also go to undermine Murphy's second alleged virtue of the expressivist theory, for no *mens rea* of any sort is required for conviction. Mere wrongdoing suffices, and the law permits no excuses or justification. Indeed, David Ormerod points out that "Where an offence is held to be one of strict liability, not only is it unnecessary for the prosecution to tender evidence of *mens rea* as to the matter of strict liability. . . , they *must* not adduce evidence of D's *mens rea* as to that aspect of the offence," lest D be found to be at fault.[27] Consider, for example, the case of *Pharmaceutical Society of Great Britain v Storkwain Ltd*. A certain pharmacist D sold some prescription drugs on the basis of what, unbeknownst to him at the time, turned out to be a forged prescription. He was convicted of violating the Medicines Act 1968, which prohibits the retail sale of certain drugs without a prescription by an appropriate medical practitioner. This was a strict liability offense, which involved no *mens rea*. Ormerod reports, "There was no finding that D acted dishonestly, improperly or even negligently in acting on that prescription and providing X with the medicines."[28] Summarizing a number of similar cases, Ormerod reflects, "In each of these cases D was not even negligent. He intended the conduct element of offence–to sell medicine or meat or liquor or to possess tobacco–but he was blamelessly unaware of the crucial circumstance element in the *actus reus*–that the tobacco was adulterated, that the meat was unsound, that the person was drunk etc. In each case he was criminally liable despite not having been at fault in relation to this material element of the offence."[29]

Thus, it is simply not true, as Murphy claims, that the line between condemnatory and non-condemnatory harsh treatment coincides with the line between punishments and mere penalties in the law.

In fact, penal substitution in a secular context furnishes itself a powerful counterexample to the claim that punishment inherently expresses an attitude of condemnation toward the person punished. As Hugo Grotius (1583-1645) documents in his classic defense of penal substitution *A Defence of the Catholic Faith*, the punishment of a substitute was well-understood and widely

accepted in the ancient world.[30] Not only so, but those who voluntarily stepped forward to die as a substitute for someone else were universally admired as paradigms of nobility. We moderns may regard such a practice as immoral and ourselves as more enlightened for renouncing it, but it would be an example of cultural imperialism to claim that these ancient societies did not really endorse and even practice substitutionary punishment. To think that because it was unjust, it was not punishment is to confuse the definition of punishment with the justification of punishment, an error made by theorists who similarly held that punishment of the innocent is not really punishment. Just as most theorists today recognize that it is coherent to punish the innocent, so we should acknowledge the coherence of punishing a substitute.

An expressivist theory of punishment is thus by no means incumbent upon the penal substitution theorist. In fact, Leo Zaibert considers Feinberg's expressivist theory to be actually dangerous for a democratic society because what are clearly punitive measures can be rationalized by the state as mere penalties. Zaibert warns, "Pragmatically speaking, the most problematic aspect of Feinberg's view is that it opens up the possibility for the State to inflict painful treatment upon its citizens, a treatment which is 'much worse than punishment', but for which the citizens have fewer defenses than they would if they had been 'merely' punished. 'Even floggings and imposed fastings,' Feinberg continues, 'do not constitute punishments, then, where social conventions are such that they do not express public censure'."[31] The U.S. Supreme Court, Zaibert notes, has had considerable difficulty in interpreting the eighth amendment's prohibition of cruel and unusual punishment because it is unclear what actions count as punishment. One notorious example is the Court's decision in *Fleming v. Nestor* (1960) that deportation is merely an administrative matter and not punishment, despite the fact that deportation in that (and other cases) seems to be punitive.[32] "The widespread standard account makes it easy for the state to abuse its punitive power by masquerading punitive measures as if they were not really punitive, labeling certain governmental acts as merely administrative, as if this label would *deus ex machina* obscure the fact that some such acts are clearly punitive."[33]

A defender of penal substitution could avoid the coherence objection, then, by denying Murphy's claim that the expressive function of punishment is part of the definition of punishment.

Expressivism without Condemnation of Christ

But does an expressivist theory of punishment in fact rule out substitutionary punishment, as we have thus far taken for granted? Not at all, for expressivism as typically formulated is wholly

consistent with penal substitution. Consider, for example, Alec Walen's characterization of some of the necessary conditions of punishment in a standard philosophical encyclopedia:

> For an act to count as punishment, it must have four elements.
>
> First, it must impose some sort of cost or hardship on, or at the very least withdraw a benefit that would otherwise be enjoyed by, the person being punished.
>
> Second, the punisher must do so intentionally, not as an accident, and not as a side-effect of pursuing some other end.
>
> Third, the hardship or loss must be imposed in response to what is believed to be a wrongful act or omission.
>
> Fourth, the hardship or loss must be imposed, at least in part, as a way of sending a message of condemnation or censure for what is believed to be a wrongful act or omission.[34]

Notice that Walen's fourth condition does not require that the person punished is condemned or censured for the act or omission believed to be wrong. Censure could be either of the person who did the act or of the act itself. Similarly, on Feinberg's account "punishment expresses the community's strong disapproval of *what the criminal did*. Indeed it can be said that punishment expresses the judgment of the community that *what the criminal did* was wrong."[35]

Even Murphy's own formulation, intended to show the incoherence of penal substitution, namely, that punishment expresses condemnation of the wrongdoer as the performer of the wrong, does not rule out penal substitution, for it does not require that condemnation be directed toward the person bearing the punishment. Hence, Murphy's inference "if this. . . condition is correctly formulated, then punishment expresses condemnation of the person punished" is a *non sequitur*.[36]

In fact, it needs to be asked whether Murphy has not fundamentally misunderstood expressivism with regard to punishment. Expressivism holds that there is a certain stigma attached to punishment, in the absence of which the harsh treatment is not punishment.[37] It is no part of expressivism that the censure or condemnation expressed by punishment be directed toward a particular person. Expressivist theories of punishment, as typically formulated, are perfectly consistent with penal substitution—which is just as it should be, given the attitudes of those in societies endorsing or practicing penal substitution.

Condemnation of Christ without Personal Sin and Guilt

Now Murphy might insist at this point that his inference, "if this. . . condition is correctly formulated, then punishment expresses condemnation of the person punished," still holds but claim that he did not correctly formulate his necessary condition of punishment. A correct formulation of the expressivist theory of punishment, he might say, would require that condemnation be directed toward the person punished. In view of the typical formulations of expressivist definitions of punishment, however, this move might well look like an ad hoc attempt to rule out penal substitution. But never mind. Would even such a theory rule out Christ's being punished for our sins?

Not necessarily, for one might espouse a theory of penal substitution which includes the imputation of our sin to Christ, such as the Protestant Reformers articulated.[38] On such a theory, Christ, though personally without moral fault, is legally guilty and so condemned by God for our sins. Of course, because our sin was merely imputed to Christ and not infused in him, Christ was, as always, personally virtuous, a paradigm of compassion, selflessness, purity, and courage, but he was declared legally guilty before God. Therefore, he was legally liable to punishment. Thus, given the doctrine of the imputation of sin, Murphy's objection to the coherence of penal substitution is a non-starter, being based on a false assumption, namely, that one cannot regard a person as worthy of condemnation unless he has actually done the act for which he is condemned.

Murphy admits that given the doctrine of the imputation of sin, his objections to the coherence of penal substitution no longer apply.[39] So Murphy's allegation that "the classic penal substitution view" is conceptually incoherent is a self-confessed failure. His rejection of that view must now be based on other, independent objections to the doctrine of imputation, objections that Murphy merely states but does not develop.

Murphy distinguishes two possible imputation doctrines: one that holds that our sins, that is to say, our wrongful acts, were imputed to Christ, and one that holds that our guilt for our wrongful acts was imputed to Christ. Murphy's complaint in both cases is the same: we have no experience of the *transfer* either of moral responsibility for actions or of guilt in isolation from actions from one person to another.[40]

The force of Murphy's objection depends on the probability that if the doctrine of imputation is true, then we should have some experience of such a transfer in human affairs. But why think that? The proponent of penal substitution might plausibly respond that our want of such

experience is hardly surprising, since imputation of sins or guilt is a uniquely divine prerogative.[41] In contrast to Western systems of justice, God embodies in one individual the legislative, judicial, and executive functions.[42] Arguably, God as supreme Lawgiver, Judge, and Ruler is in a unique position to impute the sins and guilt of one person to another. So it would be hardly surprising if imputation of sin, though a divine prerogative, failed to find an analogy in our system of justice.

But are we so utterly bereft of analogies to imputation as Murphy alleges? I think not. Consider first the idea that our wrongful acts were imputed to Christ. On this view, although Christ did not himself commit the sins in question, God chooses to treat Christ *as if* he had done those acts. Such language is formulaic for the expression of legal fictions.[43] The nearly universal understanding of a legal fiction is that it is something that the court consciously knows to be false but treats as if it were true for sake of a particular action. The use of legal fictions is a long established, widespread, and indispensable feature of systems of law.

Penal substitution theorists have typically been understandably leery of talk of legal fictions in connection with their views, lest our redemption be thought to be something unreal, a mere pretense. But such a fear is misplaced. The claim is not that penal substitution is a fiction, for Christ was really and truly punished on such a view. Nor is his expiation of sin or propitiation of God's wrath a fiction, for his being punished for our sins removed our liability to punishment and satisfied God's justice. All these things are real. What is fictitious is that Christ himself did the wrongful acts for which he was punished. Every orthodox Christian believes that Christ did not and could not commit sins, but on the present view God adopts for the administration of justice the legal fiction that Christ did such deeds.

Penal substitution theorists will sometimes object to the employment of legal fictions in the doctrine of the atonement because God's legally justifying us has real, objective results. Someone whose debt has been legally remitted, for example, really becomes free of the burden of financial obligation to his former creditor. But such an objection is based upon a misunderstanding of the role of legal fictions in the achievement of justice. A legal fiction is a device which is adopted precisely in order to bring about real and objective differences in the world.

Take, for example, the classic example of a legal fiction employed in *Mostyn v. Fabrigas* (1774). Mr. Fabrigas sued the governor of the Mediterranean island of Minorca, then under British control, for trespass and false imprisonment. Since such a suit could not proceed in Minorca without the

approval of the governor himself, Mr. Fabrigas filed suit in the Court of Common Pleas in London. Unfortunately, that court had jurisdiction only in cases brought by residents of London. Lord Mansfield, recognizing that a denial of jurisdiction in this case would leave someone who was plainly wronged without a legal remedy, declared that for the purposes of the action Minorca was part of London! Frederick Schauer observes, "That conclusion was plainly false and equally plainly produced a just result, and thus *Mostyn v. Fabrigas* represents the paradigmatic example of using a fiction to achieve what might in earlier days have been done through the vehicle of equity."[44]

Or consider the legal fiction that a ship is a person.[45] The adoption of this fiction by U.S. federal courts in the early 19th century came about because of the efforts of ship owners to evade responsibility for violating embargo laws and carrying unlawful cargo, including slaves. When the ships were seized, the captains and crews passed on legal responsibility to the ship owners, who in turn produced innocent manifests while denying any knowledge of the illegal activity of the captains and crews. The courts responded by making the ship itself (herself?) the person against whom charges were brought. By the end of the century this fiction became the settled view of ships in maritime law, so that the "offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the wrong done."[46] According to Lind, the "ontologically wild" fiction of ship personification had profound and beneficial results, facilitating the condemnation and forfeiture of offending vessels and producing a more just, coherent, and workable admiralty jurisprudence.[47]

Holding that God, in His role as supreme Judge, adopts for the purposes of our redemption the legal fiction that Christ himself had done the deeds in question in no way implies that our forensic justification before His bar is unreal. Thus, through the device of legal fictions we do, indeed, have some experience of how legal responsibility for acts can be imputed to another person who did not really do the actions, thereby producing real differences in the world outside the fiction.

Consider now the second alternative, that God imputes to Christ, not the wrongdoing itself, but the guilt of our wrongdoing.[48] It is worth noting that the question does not, *pace* Murphy, concern the *transfer* of guilt from one person to another, in the sense that guilt is removed from one person and placed on another. For the defender of the doctrine of imputation does not hold that when my guilt is imputed to Christ, it is thereby removed from me. Guilt is merely replicated in Christ, just as, according to the doctrine of original sin, Adam's guilt was replicated in me, not transferred from Adam to me. Adam remains guilty, as do I when my guilt is imputed to Christ. The entire rationale of penal substitution is, rather, the removal of guilt by punishment.

What is at issue, then, is whether we have any experience of the *replication* of guilt in a person different than the person who did the act. The question is not the removal of the primary actor's guilt but the imputation of guilt for his wrong-doing to another as well. So understood, we are not wholly without analogies in our justice system.

In civil law there are cases involving what is called vicarious liability. In such cases the principle of *respondeat superior* is invoked in order to impute the liability of a subordinate to his superior, for example, a master's being held liable for acts done by his servant. On the contemporary scene this principle has given rise to a widespread and largely uncontroversial principle of vicarious liability of employers. An employer may be held liable for acts done by his employee in his role as employee, even though the employer did not do these acts himself. Cases typically involve employers' being held liable for the illegal sale of items by employees but may also include torts like assault and battery, fraud, manslaughter, and so on. It needs to be emphasized that the employer is not in such cases being held liable for other acts, such as complicity or negligence in, for instance, failing to supervise the employee. Indeed, he may be utterly blameless in the matter. Rather the liability incurred by his employee for certain acts is imputed to him in virtue of his relationship with the employee, even though he did not himself do the acts in question. The liability is not thereby transferred from the employee to the employer; rather the liability of the employee is replicated in the employer. In cases of vicarious liability, then, we have the responsibility for an act imputed to another person than the actor.

It might be said that in such civil cases guilt is not imputed to another person but mere liability. This claim may be left moot, for vicarious liability also makes an appearance in criminal law as well as civil law.[49] There are criminal as well as civil applications of *respondeat superior*. The liability for crimes committed by a subordinate in the discharge of his duties can also be imputed to his superior. Both the employer and the employee may be found guilty for crimes which only the employee committed.[50] For example, in *Allen v Whitehead* the owner of a café was found to be guilty because his employee, to whom management of the café had been delegated, allowed prostitutes to congregate there in violation of the law. In *Sherras v De Rutzen* a bartender's criminal liability for selling alcohol to a constable on duty was imputed to the licensed owner of the bar. In such cases, we have the guilt of one person imputed to another person, who did not do the act. Interestingly, vicarious liability is another case of strict liability, where the superior is held to be guilty without being found blameworthy, since no *mens rea* is required.[51] He is thus guilty and liable to punishment even though he is not culpable.

Thus, the vicarious liability that exists in the law suffices to show that the imputation of our guilt to Christ is not wholly without parallel in our experience. In the law's imputation of guilt to another person than the actor, we actually have a very close analogy to the doctrine of the imputation of our guilt to Christ.[52]

Now obviously much more deserves to be said about the doctrine of imputation, principally about the justification for imputing one person's wrongdoing or guilt to another. Vicarious liability is not infrequently complained to be unjust. But that is a different question from the question whether we find analogies to imputation in Western systems of justice, which we do. It should be evident that Murphy's cursory dismissal of the doctrine of imputation of sin is thus far too quick. Given that it belongs to the classic Reformation theory of the atonement and invalidates by Murphy's own admission his objection to the coherence of penal substitution, we have good reason not to dismiss the doctrine of imputation preemptorily but to explore it further.

Conclusion

Murphy may be thanked for alerting Christian philosophers to the relevance of debates over the definition of punishment in the philosophy of law to the doctrine of the atonement, particularly to penal substitution. But his discussion of the coherence of penal substitution is not sufficiently nuanced. Not all advocates of penal substitution hold that Christ was punished for our sins. Murphy's attempted definitional stop to substitutionary punishment is a mere semantic maneuver which can be adroitly circumvented, if one wishes, by affirming that Christ was penalized for our sins. It is not, in any case, incumbent upon Christian or legal philosophers to adopt an expressivist definition of punishment. But if we do, the typical articulations of expressivist theories, including Murphy's own, are perfectly compatible with penal substitution, which is just as it should be, given the attitudes expressed toward penal substitutes in societies recognizing the justice of such a practice. Finally, even if we adopt a definition of punishment that is so narrowly construed as to rule out normal cases of penal substitution, that does not, by Murphy's own admission, subvert the Reformers' doctrine of penal substitution, predicated as it is on the doctrine of imputation, a doctrine which is not without legal analogies in our own experience. Thus, there are multiple responses to Murphy's objection available to the penal substitution theorist, depending on how many of Murphy's premises one accepts; and even if one accepts them all, the charge of incoherence has not been sustained.[53]

[1] Murphy proposes that God actually punishes us for our sins rather than Christ by subjecting us to the harsh treatment of seeing our Lord so terribly mistreated. He admits that such a view cannot take literally such crucial biblical texts on the atonement as Is 53.5; II Cor 5.21; Gal 3.13 to the effect that Christ was chastised, made sin, and cursed; but neither can Murphy's view take seriously texts crucial for the doctrine of justification like Rom 3.21-26; Eph 2.8-9, since his theory subverts justification by grace through faith in favor of our sin's being expiated by our being punished for our sins. It is not enough that Murphy allows room for divine forgiveness with respect to any compensation God might have demanded from us, for our justification is wrought on his theory by our bearing our own punishment.

[2] A point especially, perhaps even excessively, emphasized by Leo Zaibert, *Punishment and Retribution* (Aldershot, Hants: Ashgate, 2006).

[3] See Leon Morris, *The Atonement: Its Meaning and Significance* (Downers Grove, Ill.: IVP, 1983), chap. 8 "Justification."

[4] Mark C. Murphy, "Not Penal Substitution but Vicarious Punishment," *Faith and Philosophy* 26 (2009): 255.

[5] Ibid., p. 256. Murphy's view actually differs somewhat from Feinberg's, as we shall see. Murphy thinks that "if punishment condemns only the act, it is hard to see why we are so set on ascertaining the precise identity of the wrongdoer. . . . The best way to characterize the condemnation, then, is that it is of *the wrongdoer in a certain respect*, that is, as a performer of the wrongful action."

[6] Murphy, "Not Penal Substitution," p. 257. Oddly, Murphy allows that "perhaps one can [express condemnation of someone whom one does not take to be worthy of condemnation], but then the punishing act will be defective" (Ibid., p. 256). There is a genuine tension in Murphy's exposition in this respect. Sometimes he speaks as though punishment entails that the person punished be worthy of condemnation, just as honoring entails that the person honored be worthy of praise. From this characterization the counter-intuitive consequence follows that the undeserving cannot be punished or praised, an ironic consequence in light of Murphy's unfortunate illustration of Lance Armstrong's being honored for winning the Tour de France! Other times Murphy speaks

as though punishment entails that the person inflicting the punishment *regard* the person being punished as worthy of condemnation, which would allow for the innocent to be mistakenly punished. This characterization still has the counter-intuitive consequence that a tyrant, say, cannot punish a person whom he knows to be innocent. Murphy seems to sense the difficulties here and so backpedals to the position that such harsh treatment is punishment, but it is defective punishment. Unfortunately, Murphy does not explain what it means for punishment to be defective, other than saying that when a case of punishing fails to meet the necessary conditions he lists, we have "a case of *defective* punishment" (Ibid., p. 255). It had better not mean *unjust*, or the coherence objection collapses to the moral objection. I therefore take it that defective punishment is not truly punishment.

[7] Murphy, "Not Penal Substitution," p. 260.

[8] Ibid., pp. 253-4.

[9] John Stott, *The Cross of Christ* (Leicester: IVP, 1986), p. 151. *Cf.* I. Howard Marshall: "It is not a case of God punishing Christ but of God in Christ taking on himself the sin and its penalty. Indeed, at some point the challenge needs to be issued: where are these evangelicals who say that God punished Christ? Name them!" (I. Howard Marshall, "The Theology of the Atonement," in *The Atonement Debate,* ed. Derek Tidball, David Hilborn, and Justin Thacker (Grand Rapids, Mich: Zondervan, 2008), p. 63.

[10] Steve Jeffery, Michael Ovey, and Andrew Sach, *Pierced for Our Transgressions: Rediscovering the Glory of Penal Substitution*, Forward by John Piper (Wheaton, Ill.: Crossway Books, 2007), p. 21. Similarly, David Hilborn, in describing the recent controversy over penal substitution among British evangelicals, offers this characterization of penal substitution: "Penal substitution presents Jesus' crucifixion as a vicarious sacrifice which appeased or 'propitiated' God's wrath towards sin by paying the due 'penalty' for that sin, which is suffering, death, and condemnation" (David Hilborn, "Atonement, Evangelicalism and the Evangelical Alliance: The Present Debate in Context," in *The Atonement Debate,* p. 19). The use of "scare quotes" with the word "penalty" suggests some diffidence about the word, which may accordingly be understood referentially by those who, like Stott, deny that God punished Christ. Tilborn reports that the Evangelical Alliance preferred the more straightforwardly biblical imagery of Christ's 'paying the price' of our sin (1 Cor 6.20; 7.23) and allowed this to carry the implication of penal substitutionary sacrifice.

[11] That is, we consider the referent or denotation of the description, however it may be

described. On the difference between an expression understood referentially and attributively, see Keith Donnellan, “Reference and Definite Descriptions,” *Philosophical Review* 75 (1966): 281-304.

[12] Jeffery, Ovey, and Sach, *Pierced for Our Transgressions*, p. 301. Cf. Francis Turretin’s characterization of Christ’s dereliction on the cross as God the Father’s withdrawing from him the beatific vision and suspending the joy and comfort and sense and fruition of full felicity (*Institutes of Elenctic Theology* 14.11).

[13] These features serve to distinguish such an account from satisfaction theories. On such an account the harsh treatment deserved by wrongdoing is still administered, even if it is not punishment due to the absence of condemnation. I think the important question remaining about such accounts is whether divine justice would thereby be satisfied, but that is a different debate.

[14] Joel Feinberg, “The Expressive Function of Punishment,” in *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970), p. 112.

[15] H. L. A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968), p. 5.

[16] A. M. Quinton, “On Punishment,” *Analysis* 14 (1954): 133-142.

[17] See below, note 30. Some atonement theorists have also pointed to plausible examples involving punishment of everyone in a group for wrongs done by only some members of that group (Steven L. Porter, “Swinburnian Atonement and the Doctrine of Penal Substitution,” *Faith and Philosophy* 21/2 [2004]: 236; Daniel J. Hill and Joseph Jedwab, “Atonement and the Concept of Punishment,” in *Locating Atonement: Explorations in Constructive Dogmatics*, ed. Oliver D. Crisp and Fred Sanders [Grand Rapids, Mich.: Zondervan, 2015], pp. 144–145). I see no non-question-begging reason that we must agree with Leo Zaibert that in every such case the non-culprits are being either victimized or punished for other wrongs (Zaibert, *Punishment and Retribution*, p. 42). Again, we must be careful to avoid confusing the question of whether, e.g., a teacher punishes a whole class for deeds done by some members of the class with the question of whether the teacher’s so doing is justifiable.

[18] Murphy, “Not Penal Substitution,” p. 258, note 10.

[19] David Lewis “Do We Believe in Penal Substitution?”, *Philosophical Papers* 26/3 (1997): 209, note 1. In his discussion of Lewis, Murphy ignores Lewis’ response to the attempted definitional stop. Instead, Murphy claims that the person paying a fine on behalf of someone else is not punished because that person is not condemned. But Lewis has already said that he will

acquiesce to saying that the substitute is not “punished”; however, he avoids Murphy’s definitional stop by construing penal substitution to mean that the substitute bears the harsh treatment which would have been punishment had it been inflicted on the person deserving it.

[20] Hart, *Punishment and Responsibility*, p. 5.

[21] The fusion of resentment and reprobation (stern disapproval) is what Feinberg calls condemnation.

[22] Arthur Ripstein, “Philosophy of Tort Law,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law,* ed. Jules Coleman and Scott Schapiro, assoc. ed. Kenneth Einar Himma (Oxford: Oxford University Press, 2002), p. 658. “Tort law,” says Ripstein, “decides whose problem something is by looking at how people are allowed to treat each other” (Ibid., p. 686).

[23] Murphy, “Not Penal Substitution,” p. 258.

[24] Douglas Husak, “*Malum Prohibitum* and Retributivism,” in R. A. Duff and Stuart P. Green, eds., *Defining Crimes: Essays on the Special Part of the Criminal Law*, Oxford Monographs on Criminal Law and Justice (Oxford: Oxford University Press, 2005), pp. 65-90. Despite the lack of condemnation of violators, such laws are often taken to serve a useful purpose and so are not repealed.

[25] Murphy, “Not Penal Substitution,” p. 256.

[26] See David Ormerod, *Smith and Hogan’s Criminal Law*, 13th ed. (Oxford: Oxford University Press, 2011), chap. 7, “Crimes of Strict Liability,” for many examples.

[27] Ibid., p. 157.

[28] Ibid., p. 155.

[29] Ibid., p. 157.

[30] Hugo Grotius, *A Defence of the Catholic Faith concerning the Satisfaction of Christ, against Faustus Socinus*, trans. with Notes and an Historical Introduction by Frank Hugh Foster (Andover: Warren F. Draper, 1889), chap. IV. See further Simon Gathercole, *Defending Substitution: An Essay on Atonement in Paul* (Grand Rapids, Mich.: Baker Academic, 2015), chap. 3. According to Gathercole, the pre-eminent example of substitutionary death in classical literature is Euripides’ Alcestis, who was willing to die in place of her husband Admetus. In Romans 5.7-8 Paul compares the death of Jesus with other heroic deaths that his Roman readers might have

known. Gathercole thinks that Alcestis may well be the example that Paul had in mind.

[31] Zaibert, *Punishment and Retribution*, p. 113. The embedded quotations are from Feinberg.

[32] Ibid., pp. 48, 54.

[33] Ibid., p. 4.

[34] Alec Walen, "Retributive Justice," *Stanford Encyclopedia of Philosophy* June 18, 2014 http://plato.stanford.edu/entries/justice-retributive/.

[35] Feinberg, "Expressive Function of Punishment," p. 100 [my emphasis]. An even stronger attitude or judgement of condemnation on the part of the community may be directed as well toward *what the criminal did*.

[36] Murphy, "Not Penal Substitution," p. 256. I have lately discovered that this same jump in Murphy's argument has been pointed out by Hill and Jedwab, "Atonement and the Concept of Punishment," pp. 139-53. They point out, "it is not a feature of Murphy's definition that the one punished has to be the one that failed to measure up to the binding standard; nor does his definition specify that the one punished has to be the one condemned. . . . Of course, this could be added as a fifth condition, but, in the absence of argument, this would simply beg the question."

[37] See Ormerod's observation:

> "It is the courts that take it upon themselves to decide whether it [an offence] is a 'real' or 'quasi' crime. They do so on the basis that an offence which, in the public eye, carries little or no stigma and does not involve 'the disgrace of criminality',[128] is only a quasi-crime. Then, strict liability maybe imposed because 'it does not offend the ordinary man's sense of justice that moral guilt is not of the essence of the offence.' [129]
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> [128]Per Lord Reid in *Warner v Metropolitan Police Comr* [1969] 2 AC 256 at 272.
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> [129]ibid. cf *Wings Ltd v Ellis*. . . . See also *Matudi* [2003] EWCA Crim 697" (Ormerod, *Smith and Hogan's Criminal Law*, pp. 169-70).

[38] Martin Luther, *Commentary on St. Paul's Epistle to the Galatians*, trans. Theodore Graebner, Christian Classics Ethereal Library (Grand Rapids, Mich.: Zondervan, 1939), pp. 63-64. See the

similar, if more cautiously expressed, views of the great French Swiss Reformer John Calvin *Institutes of the Christian Religion* II.16-17.

[39] Murphy, “Not Penal Substitution,” p. 259.

[40] Ibid.

[41] So John Owen, *A Dissertation on Divine Justice: or, the Claims of Vindicatory Justice asserted* (London: L. J. Higham, [n.d.] Latin version 1653), p. 157; *cf*. the “theological response” of Paul Jensen, “Forgiveness and Atonement,” *Scottish Journal of Theology* 46/2 (1993): 150-1.

[42] Contrast the U.S. separation of powers, according to which Congress defines crimes and their punishments, the judiciary interprets and applies those laws and punishments, and the executive holds the power of pardon (Jeffrey Crouch, *The Presidential Pardon Power* [Lawrence, Kan.: University Press of Kansas, 2009], p. 14). In God’s case all these powers are vested in the same person.

[43] The seminal treatment of contemporary discussions is L. L. Fuller, “Legal Fictions,” *Illinois Law Review* 25 (1930): 363–399; idem (1931): 513–546; idem (1931): 877–910. The more distant progenitor is Hans Vaihinger, *The Philosophy of ‘As if,’* [1911] trans. C. K. Ogden, 2d ed. International Library of Psychology, Philosophy, and Scientific Method (London: Kegan Paul, Treach, Trubner, & Co.; n.d.).

[44] Frederick Schauer, “Legal Fictions Revisited,” in *Legal Fictions in Theory and Practice*, ed. Maksymilian Del Mar and William Twining, Law and Philosophy Library 110 (Switzerland: Springer Verlag, 2015), p. 122. By “equity,” Schauer has reference to recourse to “an elaborate series of Chancellor’s courts known as courts of equity, in order to gain equitable relief from the rigidity of law.”

[45] Described colorfully by Douglas Lind, “The Pragmatic Value of Legal Fictions,” in *Legal Fictions in Theory and Practice*, ed. Maksymilian Del Mar and William Twining, Law and Philosophy Library 110 (Switzerland: Springer Verlag, 2015), pp. 95-96.

[46] *The John G. Stevens* 170 U.S. 113 (1898), p. 122, cited by Lind, “Pragmatic Value of Legal Fictions,” p. 95.

[47] Lind, “Pragmatic Value of Legal Fictions,” p. 96.

[48] What follows could have also been said with respect to the vicarious liability of corporations as

persons in the eyes of the law. Ormerod explains, “Corporations have a separate legal identity. They are treated in law as having a legal personality distinct from the natural persons–members, directors, employees, etc–who make up the corporation. That presents the opportunity, in theory, of imposing liability on the corporation separately from any criminal liability which might be imposed on the individual members for any wrongdoing” (Ormerod, *Smith and Hogan’s Criminal Law*, p. 256). But because corporate persons might be thought by some to be legal fictions, I leave them aside to focus on the vicarious liability of human beings. It is also worth noting that vicarious liability may also, via the so-called delegation principle and attributed act principle, involve the imputation of acts and not just guilt to innocent persons (Ibid., pp. 277, 279). In that case appeal to legal fictions as an analogy to imputation of sins becomes superfluous.

[49] See L. H. Leigh, *Strict and Vicarious Liability: A Study in Administrative Criminal Law*, Modern Legal Studies (London: Sweet and Maxwell, 1982).

[50] Leigh notes that vicarious liability takes two forms. In one, a person is held liable for the acts of another who has a *mens rea*, while in the other, more typical case, a person is held liable for the act of another where the act of the other person amounts to an offense of strict liability (Leigh, *Strict and Vicarious Liability*, p. 1). For the two examples here see Ormerod, *Smith and Hogan’s Criminal Law*, pp. 274, 277.

[51] Indeed, the superior is entirely innocent, having neither an *actus reus* nor a *mens rea*, but is declared guilty by imputation. Note, moreover, that in a criminal case involving vicarious liability, the punishment of the employer may satisfy for the employee as well. In fact, the employer may actually be charged as the principal in the crime and his employee as a mere accessory, in which case only the punishment of the employer can satisfy for both. This looks for all the world like penal substitution.

[52] Murphy might complain that our experiences of imputation involve only a legal and not a moral transaction. But it is characteristic of the Reformation doctrine of salvation that “justification” and “condemnation” are precisely forensic terms and that imputation is a legal transaction. See, e.g., Morris, *The Atonement*, chap. 8, “Justification,” esp. pp. 187, 196; John Murray, *The Imputation of Adam’s Sin* (Grand Rapids, Mich.: William B. Eerdmans, 1959), p. 84, who insists, “And neither are we to posit any such notion as the *transfer* from Adam to us of the moral character involved in his trespass” (cf. pp. 86-87). Indeed, the forensic nature of justification is Pauline. Observing that “The imagery of the law court predominates through the language of justification” in Romans, New

Testament scholar Andrew Lincoln comments,

> "In restating his solution in 3:21-26, the apostle stays with his picture of the law court from 3:19 not only through his mention of righteousness with its forensic connotations but also through his assertion that, although righteousness cannot come through the law, both the law and the prophets act as *witnesses* to the righteousness of God which comes through faith in Jesus Christ. . . . God's righteousness is the power by which those unable to be justified on the criterion of works are set right with him and being set in a right relationship with God involves his judicial verdict of pardon" (Andrew T. Lincoln, "From Wrath to Justification. Tradition, Gospel, and Audience in the Theology of Romans 1:18-4:25," in *Pauline Theology*, vol. 3: *Romans*, ed. David M. Hay and E. Elizabeth Johnson (Minneapolis: Fortress, 1995), pp. 146-8).

Pardon is a fascinating topic in its own right. Pardon is a legal act which does not change the moral status of the person pardoned. Our legal pardon by God needs to be supplemented by moral sanctification if we are to become all that we are in Christ. It might be thought with Socinus that God's pardoning our sin precludes the satisfaction of divine justice by Christ on our behalf. In fact, however, pardons are typically given *after* a person's sentence has been served and his crime expiated by punishment in order to restore fully his civil rights. Analogously, God's pardon of us is based on Christ's fully discharging substitutionally our sentence and restores to us or bestows upon us the full privileges of children of God. Finally, pardons can be conditional and can be refused. Similarly, God's pardon on the basis of Christ's sacrifice can be either freely accepted, in which case it is efficacious, or freely refused, in which case we remain liable for our sins. See provocative discussions by Henry Weihofen, "The Effect of a Pardon," *University of Pennsylvania Law Review* 88 (Dec., 1939): 177-193; Samuel Williston, "Does a Pardon Blot Out Guilt?" *Harvard Law Review* 28/7 (May, 1915): 647-663; Mark Strasser, "The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution," *Brandeis Law Journal* 41 (2002): 85-154.

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