

Is Penal Substitution Unjust?

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SUMMARY

Penal substitution in a theological context is 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. Ever since the time of Faustus Socinus, the doctrine has faced formidable, and some would say insuperable, philosophical challenges. Critics of penal substitution frequently assert that God's punishing Christ in our place would be an injustice on God's part. For it is an axiom of retributive justice that it is unjust to punish an innocent person. But Christ was an innocent person. Since God is perfectly just, He cannot therefore have punished Christ.

Virtually every premiss in this argument is challengeable. Not all penal substitution theories affirm that Christ was punished for our sins. The argument makes unwarranted assumptions about the ontological foundations of moral duty independent of God's commands. It presupposes without warrant that God is by nature an unqualified negative retributivist. It overlooks the possibility that the *prima facie* demands of negative retributive justice might be overridden in Christ's case by weightier moral considerations. And it takes it for granted that Christ was legally innocent, which is denied by the classic doctrine of imputation. It thus fails to show any injustice in God's punishing Christ in our place.

IS PENAL SUBSTITUTION UNJUST?

Introduction

Penal substitution in a theological context is 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. Notice that this explication leaves open the question whether Christ was punished for our sins. 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."^[1] 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 subtler 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."^[2] If we take the definite description "the punishment due to fallen humanity" referentially,^[3] it refers to

the withdrawal of God's fellowship and blessing.^[4] 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.^[5] Of course, this explication also permits the penal substitution theorist to affirm that Christ was, indeed, punished in our place and so bore the punishment for our sins.

The doctrine of penal substitution, ever since the time of Faustus Socinus (1539-1604), has faced formidable, and some would say insuperable, philosophical challenges. A discussion of such challenges takes us into lively contemporary debates over questions in the philosophy of law, particularly questions about the theory of punishment. Unfortunately, most theologians, and in fact most Christian philosophers, have little familiarity with these debates. The doctrine of penal substitution is almost invariably dismissed by its critics in a single paragraph, even a single sentence, to the effect that it would be unjust of God to punish an innocent person for others' sins, end of discussion.

For example, Eleonore Stump complains,

On the Anselmian kind of interpretation, it is a violation of God's . . . justice . . . not to punish the sins of a human person guilty of those sins. . . . But, according to interpretations of the Anselmian kind, what God does to act compatibly with his. . . justice is in fact to fail to punish the guilty. . . . Worse yet, instead of punishing the guilty . . . , God visits their merited punishment on the innocent. . . . How is justice . . . served by punishing a completely innocent person. . . ?^[6]

Notice how Stump characterizes the so-called Anselmian position on divine retributive justice: it would be a violation of divine justice not to punish the sins of a guilty person. It does not follow from this that that very person must be punished for his sins; someone else might be punished in his place. The objection, then, is the familiar Socinian objection that it would be unjust of God to punish Christ, an innocent person, in our place. Detractors of penal substitution who press this objection almost never develop it in any depth, and Stump is no exception to the rule. There is nothing here to interact with apart from the single question: How is justice served by punishing a

completely innocent person? We need to go deeper.

A theory of punishment should offer both a *definition of punishment* and a *justification of punishment*, aspects of the theory of punishment which legal philosophers have teased apart only in recent decades. 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. Both of these aspects of the theory of punishment are relevant to the doctrine of penal substitution. Indeed, penal substitution is not infrequently discussed in an entirely non-theological context. It will be up to the Christian thinker to make the theological application.

The Alleged Injustice of Penal Substitution

Although some have objected to the coherence of the doctrine of penal substitution on the grounds of the definition of punishment,^[7] the more important and influential objection by far has been to the justice of penal substitution on the grounds of the justification of punishment. Critics of penal substitution frequently assert that God's punishing Christ in our place would be an injustice on God's part. For it is an axiom of retributive justice that it is unjust to punish an innocent person. But Christ was an innocent person. Since God is perfectly just, He cannot therefore have punished Christ. It does no good to say that Christ willingly undertook this self-sacrifice on our behalf, for the nobility of his selfless act does not annul the injustice of punishing an innocent person for deeds he did not do.

The crucial premisses and inferences of this objection appear to be the following:

1. God is perfectly just.
2. If God is perfectly just, He cannot punish an innocent person.
3. Therefore, God cannot punish an innocent person.
4. Christ was an innocent person.
5. Therefore, God cannot punish Christ.
6. If God cannot punish Christ, penal substitution is false.

It follows that if God is perfectly just, then penal substitution is false.

One quick and easy way to deal with this objection would be to adopt a consequentialist theory of justice. Theories of justice may be classified as broadly *retributive* or *consequentialist*. Retributive

theories of justice hold that punishment is justified because the guilty deserve to be punished. Consequentialist theories of justice hold that punishment is justified because of the extrinsic goods that may be realized thereby, such as deterrence of crime, sequestration of dangerous persons, and reformation of wrong-doers. Retributive theories are often said to be retrospective, imposing punishment for crimes committed, whereas consequentialist theories are prospective, aiming to prevent crimes from being committed. It is common coin that on consequentialist theories of justice punishment of the innocent may be justified, in view, for example, of its deterrence value. In fact, one of the main criticisms of consequentialist theories of justice is precisely the fact that on such theories it may be just to punish the innocent. A consequentialist penal substitution theorist could fairly easily provide justification for God's punishing Christ for our sins, namely, so doing prevents the loss of the entire human race. So given a consequentialist understanding of (1), we have no reason to think that (2) is true.

But consequentialism seems ill-suited to serve as a basis for divine punishment because God's judgement is described in the Bible as ultimately eschatological. The ungodly are "storing up wrath" for themselves for God's final day of judgement (Rom 2.5). Punishment imposed at that point could seemingly serve no other purpose than retribution. The Christian consequentialist could say that punishment in hell does have a consequentialist justification, namely, the sequestration of the wicked from the community of the redeemed, just as hardened criminals are removed from society. But since God could achieve this end by simply annihilating the damned, the consequentialist will need to find some non-retributive reason for God's preserving them in existence. In any case, the biblical view is that the wicked deserve punishment (Rom 1.32; Heb 10.29) and ascribes to God retribution (*ekdikēsis*; *avtapodoma*) for sins (Rom 11.9; 12.19), so that God's justice must be in some significant measure retributive.

During the first half of the twentieth century, under the influence of social scientists, retributive theories of justice were frowned upon in favor of consequentialist theories. Fortunately, there has been over the last half-century or so a renaissance of theories of retributive justice, accompanied by a fading of consequentialist theories,^[8] so that we need not be distracted by the need to justify a retributive theory of justice. This change is due in no small part to the unwelcome implication of pure consequentialism that there are circumstances under which it is just to punish innocent people. Unfortunately, it is precisely the conviction that the innocent ought not to be punished that lies behind the claim that penal substitutionary atonement theories are unjust and immoral.

Responses to the Alleged Injustice of Penal Substitution

Penal Substitution without Punishment

It is not widely appreciated that the present objection has no purchase against penal substitution theorists who hold that God did not punish Christ for our sins, since they reject (6). Christ may be said to have voluntarily taken upon himself the suffering which would have been the punishment for our sins, had it been inflicted on us. He may even be said to have willingly paid the penalty for our sins. Our justice system permits people to pay penalties like fines on behalf of other persons without moral protest.[\[9\]](#) Since Christ was not punished for our sins, his voluntarily suffering on our behalf cannot be said to be unjust on God's part. So the objection is pressing only for penal substitution theorists who hold that God did punish Christ for our sins.

Meta-Ethical Contextualization

Suppose that we do accept that God punished Christ. An assessment of (2) requires its contextualization within a meta-ethical theory about the grounding of objective moral values and duties. Who or what determines what is just/unjust? The Protestant proponents of penal substitution were, like Anselm, all advocates of some sort of Divine Command Theory of ethics, according to which moral duties are constituted by divine imperatives. There is no external law hanging over God to which He must conform. Since God does not issue commands to Himself, He literally has no moral duties to fulfill. He can act in any way consistent with His nature. He does not have the moral duties we have, and He will have unique prerogatives, such as giving and taking human life as He wills. He may usually act *in accordance with* duty, to borrow a Kantian phrase, but since He does not act *from* duty, He is free to make exceptions. This is the lesson of the astonishing story of God's commanding Abraham to sacrifice his son Isaac (Gen 22.1-19).

Now if such a meta-ethical theory is even coherent, not to say true, as able proponents like Robert Adams, William Alston, and Philip Quinn have argued it is,[\[10\]](#) then the present objection will have difficulty even getting off the ground.[\[11\]](#) As Hugo Grotius observed in his classic defense of penal substitution *A Defence of the Catholic Faith concerning the Satisfaction of Christ, against Faustus Socinus* (1617), even if God has established a system of justice among human beings which forbids the punishment of the innocent (and, hence, substitutionary punishment), He Himself is not so forbidden. He refused Moses' offer of himself as a substitutionary sacrifice (Exod 32:30-34), just as He refused the sacrificing of Isaac; but if He wills to take on human nature in the form of Jesus of Nazareth and give His own life as a sacrificial offering for sin, who is to forbid Him? He is free to do so as long as it is consistent with His nature. And what could be more consistent with our

God's gracious nature than that He should condescend to take on our frail and fallen humanity and give His life to satisfy the demands of His own justice? The self-giving sacrifice of Christ exalts the nature of God by displaying His holy love.

Retributive Justice and the Divine Nature

Perhaps the best face that can be put on the present objection is to claim that, contrary to Socinus,^[12] retributive justice is part of God's nature, and therefore it is impossible that He act contrary to the principles of retributive justice. Accordingly, (2) is true.

But that raises the question: What is retributive justice? The present objection does not sufficiently differentiate various accounts of retributivism. While a so-called *negative retributivism* holds that the innocent should not be punished because they do not deserve it, the essence of retributive justice lies in so-called *positive retributivism*, which holds that the guilty should be punished because they deserve it. What distinguishes retributivism as a theory of justice is the positive thesis that punishment of the guilty is an intrinsic good because the guilty deserve it. God is a positive retributivist "who will by no means clear the guilty" (Exod 34.7). But the penal theorist may maintain that God is only qualifiedly a negative retributivist, since even if He has prohibited human beings from punishing innocent persons (Deut 24.16), and even if He is too good to Himself punish innocent human persons (Gen 18.25), still He reserves the prerogative to punish an innocent divine person, namely, Christ, in the place of the guilty. This extraordinary exception is a result of His goodness, not a defect in His justice. Hence, (2) is false.

Lest positive retributivism be thought to be too thin a theory of retributive justice to ascribe to God, it should be noted how extraordinarily strong such a thesis is, so strong in fact that it has been criticized as utterly unrealistic on a human level. Leo Zaibert indicts Michael Moore's claim that just desert constitutes a sufficient condition of punishment (i.e., the guilty should be punished because they deserve it) as entailing legal moralism, which would require the state to punish every moral wrong. Legal moralism would require "an impossibly large criminal justice apparatus" which would be "utterly unmanageable and unrealistic."^[13] Even outside the context of the state the implausibility of punishing every immorality is so high that even the staunchest unbridled retributivist has to admit that such a suggestion must be rejected. It is arguably impossible to try to punish every wrong, Zaibert exclaims, without going crazy.^[14] The theist can only smile at this secular theorist's huffing and puffing about a task for which God alone is qualified and capable of carrying out. But at least we see therein how robust is a positive retributive theory of justice, which

can then be further augmented by taking God to be a qualified negative retributivist as well.

This response alone suffices to dispense with the objection; but even more can be said.

Prima Facie vs. Ultima Facie Justification of Punishment

The objection based on (2) also fails to reckon with the fact that the *prima facie* demands of retributive justice can be outweighed in specific cases by weightier moral considerations, so that punishment in such a case may be justified *ultima facie*. Theorists often make this point by distinguishing between justification of the *practice* of punishment and justification of an *act* of punishment. When positive retributivists claim that the guilty should be punished, they are talking about justification of the general practice of punishment, not about specific cases. In specific cases, the act of punishment may not be required in light of overriding considerations, for example, protecting the rights of others or securing a plea bargain in order that persons guilty of even more heinous crimes can be punished.^[15] In such a case the *prima facie* demands of retributive justice are waived.

So Feinberg and Gross observe that there are occasions in which a person can be fully justified in voluntarily producing an unjust effect upon another person. Person *A* may be justified in violating person *B*'s rights when there is no third alternative open to him; but that justification does not cancel the injustice done to *B*. Drawing upon Aristotle's distinction between the just/unjust *quality* of an act and the just/unjust *effect* of an act upon others, they state, "In that case, we can say that *B* was unjustly *treated* although *A*'s act resulting in that effect was not an instance of unjust *behavior*. For an act to have an unjust quality (whatever its effects) it must be, objectively speaking, the wrong thing to do in the circumstances, unexcused and unjustified, voluntarily undertaken, and deliberately chosen by an unrushed actor who is well aware of the alternatives open to him."^[16]

Cases of strict liability, in which a person having no *mens rea* (blameworthy mental state) is nonetheless found guilty and punished because of overriding moral concerns pertinent to public welfare, are good examples of instances in which the *prima facie* demands of negative retributive justice are overridden. 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*. David 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.”^[17] Such cases are 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. 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.”^[18]

Similarly, even if God’s essential justice includes unqualified negative retributivism, the *prima facie* demands of negative retributive justice may be overridden in the case of Christ. In the case of the death of Christ the penal theorist might claim that God is fully justified in waiving the demands of negative retributive justice for the sake of the salvation of mankind. Biblical scholar Donald Carson reminds us, “It is the *unjust* punishment of the Servant in Isaiah 53 that is so remarkable.

Forgiveness, restoration, salvation, reconciliation—all are possible, not because sins have somehow been canceled as if they never were, but because another bore them *unjustly*. But by this adverb ‘unjustly’ I mean that the person who bore them was just and did not deserve the punishment, not that some moral ‘system’ that God was administering was thereby distorted.”

^[19] The penal substitution theorist might maintain that in the specific case of Christ’s death, the demands of negative retributive justice were overridden by weightier moral considerations.

Even the staunchest of contemporary retributivists Michael Moore recognizes that the demands of retributive justice are *prima facie* demands which can be and are overridden in specific cases. That is why Moore is not committed, as Zaibert imagines, to legal moralism. Moore says that we must not confuse the intrinsic goodness of retribution with the categorical duty to carry out retributive justice on every possible occasion. He calls himself a “threshold deontologist,” that is to say, he abides by the categorical norm of morality until doing so produces sufficiently bad consequences as to pass some threshold.^[20] So in the extreme case where one must punish an innocent person or else the world will be totally destroyed, one should punish the person. The penal substitution theorist could similarly claim that God by waiving the *prima facie* demands of negative retributive justice and punishing Christ for our sins has mercifully saved the world from total destruction and was therefore acting compatibly with moral goodness.

Now it might be asked why, if there are weightier considerations prompting God to waive the demands of negative retributive justice in Christ's case, He did not instead waive the demands of positive retributive justice and offer everyone a general pardon for sin. In fact, many of the Church Fathers freely embraced this possibility, as did Aquinas and Grotius after them.^[21] But these thinkers also held that God had good reasons for achieving atonement through Christ's passion. As Abelard and Grotius saw, so doing was a powerful display of both God's love of people and His hatred of sin, which has proved powerfully attractive throughout history in drawing people to faith in Christ, especially as they themselves face innocent suffering.

God's pardoning sin without satisfaction does not, despite first appearances, imply universal salvation, for God's pardon may still require its free acceptance by people, and it is not at all implausible that a world in which the great demonstration of God's love and holiness in the vicarious suffering and death of Christ occurs is a world in which a more optimal number of people come freely to embrace salvation than a world in which free pardon without cost or consequence is offered men. The counterfactuals involved are too speculative to permit us to claim that a general pardon would have been more effective in accomplishing God's ends. Besides, substitutionary punishment of Christ permits God to relax far less His essential retributive justice for the sake of mercy than would be the case with a general pardon, thereby expressing more fully His essential character of holy love.

Punishment and the Imputation of Sins

But suppose that the *prima facie* demands of negative retributive justice are essential to God and could not be overridden, so that (2) is true. Would God be unjust to punish Christ? Not necessarily. For consider (4). Up to this point we have acquiesced in the assumption that Christ was, indeed, innocent. But for penal theorists like the Protestant Reformers, who affirm the imputation of our sins to Christ, there is no question in Christ's case of God's punishing the innocent and so violating even the *prima facie* demands of negative retributive justice. For Christ in virtue of the imputation of our sins to him was legally guilty before God. Of course, because our sins were 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 sins, the present objection to penal substitutionary theories is a non-starter, being based on the false assumption of (4).

Mark 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.[\[22\]](#)

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.[\[23\]](#) 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, however, 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."[\[24\]](#)

Or consider the legal fiction that a ship is a person.[\[25\]](#) 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."[\[26\]](#) 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.[\[27\]](#)

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.[\[28\]](#) 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, after all, the removal of guilt by punishment, not mere imputation.

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.^[29] 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.^[30] 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.^[31] 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.

Imputation of wrongdoing or guilt to a blameless party is thus a widely accepted feature of our justice system. Now sometimes the ascription of vicarious liability is denounced as unjust, though tolerated as a sort of necessary evil due to practical considerations arising from the human impossibility of administering a system of pure justice. That only serves to reinforce the point made above, that the *prima facie* demands of retributive justice can be outweighed by greater goods. But when would the imposition of vicarious liability be even *prima facie* unjust? Arguably, it could be only in cases in which it is non-voluntary. If an employer knows that the exaction of justice's demands from his employee would ruin him and out of compassion for his employee wishes to act mercifully by voluntarily being held vicariously liable for his employee's wrongdoing, how is that unjust or immoral? In the same way, if Christ voluntarily invites our sins to be imputed to him for the sake of our salvation, what injustice is there in this? Who is to gainsay him?

Conclusion

In sum, the objection to penal substitution based on the justification of punishment is insufficiently nuanced. (1) It applies only to theories which affirm that Christ was punished for our sins. (2) It makes unwarranted assumptions about the ontological foundations of moral duty independent of God's commands. (3) It presupposes without warrant that God is by nature an unqualified negative retributivist. (4) It overlooks the possibility that the *prima facie* demands of negative retributive justice might be overridden in Christ's case. (5) And it takes it for granted that Christ was legally innocent, in opposition to the doctrine of imputation. Its failure in any one of these respects is sufficient for the argument's defeat. It thus fails to show any injustice in God's punishing Christ in our place.

[1] 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).

[2] 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. Hilborn 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.

[3] 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.

[4] 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).

[5] These features serve to distinguish such an account from satisfaction theories like Anselm’s. On a penal substitutionary account, in contrast to satisfaction theories, the harsh treatment deserved by sinners is still administered, even if it is not punishment. I think the important question remaining about such an account is whether divine justice would thereby be satisfied, but that is a different debate. See my “Is Penal Substitution Unsatisfactory?” (forthcoming).

[6] Eleonore Stump, *At-Onement* (forthcoming), p. 19. The elisions have to do with satisfaction theories, while my focus is on penal substitutionary theories. By “Anselmian” Stump designates theories which hold that, necessarily, divine justice must be satisfied as a pre-condition of divine

pardon. Thus she is able to classify both satisfaction theories and penal substitutionary theories as “Anselmian.” A less misleading label would be “necessitarian.”

[7] See Mark C. Murphy, “Not Penal Substitution but Vicarious Punishment,” *Faith and Philosophy* 26 (2009): 255-60.

[8] See, e.g., Mark D. White, ed., *Retributivism: Essays on Theory and Policy* (Oxford: Oxford University Press, 2011); Michael Tonry, ed., *Retributivism Has a Past; Has It a Future?*, Studies in Penal Theory and Philosophy (Oxford: Oxford University Press, 2011). Ironically, some theologians, unaware of this sea change, denounce in the strongest terms a God of retributive justice (Steven Finlan, *Options on Atonement in Christian Thought* (Collegeville, Minn.: Liturgical Press, 2007), pp. 97-8), not realizing that their objection to the justice of penal substitution depends on a view of divine justice as retributive, lest God punish the innocent on consequentialist grounds. Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (Oxford: Oxford University Press, 1989), chap. 5, gives a moving account of the horrendous results of consequentialism for our penal system.

[9] David Lewis “Do We Believe in Penal Substitution?”, *Philosophical Papers* 26/3 (1997): 207.

[10] Robert Adams, *Finite and Infinite Goods: A Framework for Ethics* (Oxford: Oxford University Press, 1999); William P. Alston, “What Euthyphro Should Have Said,” in *Philosophy of Religion: A Reader and Guide*, ed. Wm. L. Craig (Edinburgh: Edinburgh University Press, 2002), pp. 283-98; Philip L. Quinn, *Divine Commands and Moral Requirements* (Oxford: Clarendon Press, 1978).

[11] I have since discovered a forceful statement of this point by Alvin Plantinga, “Comments on ‘Satanic Verses: Moral Chaos in Holy Writ’,” in *Divine Evil?: The Moral Character of the God of Abraham*, edited by Michael Bergmann, Michael J. Murray, and Michael C. Rea (Oxford: Oxford University Press, 2011), pp. 113-14.

[12] Socinus holds that what he calls punitive justice (or vengeance) is not an essential property of God, any more than is His mercy. If punitive justice were an attribute of God, then God could under no circumstances forgive sins; likewise were mercy a divine attribute, God could under no circumstances punish sins. Rather what is essential to God is His uprightness (*rectitudo*) or fairness (*aequitas*). But whether He punishes sin is up to His free will. Similarly, mercy (*miser cordia*) is an essential property of God only in the sense that God is loving. But whether God chooses to pardon sinners is up to His free will. Ironically, objectors to penal substitution need retributive justice to belong essentially to God, lest the Divine Command Theorist say that God

freely determines that it is just to punish Christ, however innocent he may be.

[13] Leo Zaibert, *Punishment and Retribution* (Aldershot, Hants: Ashgate, 2006), p. 161.

[14] *Ibid.*, pp. 183-5.

[15] See Samuel T. Morison, "The Politics of Grace: On the Moral Justification of Executive Clemency," *Buffalo Criminal Law Review* 9/1 (2005): 77-86. It is precisely on these grounds that the claim of the pure retributivists that pardons given out of any other reason than advancing justice are unjust and therefore unjustified is vulnerable. A pardon given out of mercy may be unjust in a *prima facie* sense but nonetheless justified *ultima facie* in view of overriding moral considerations.

[16] Joel Feinberg and Hyman Gross, eds., *Philosophy of Law*, 2nd ed., (Belmont, Calif.: Wadsworth, 1980), p. 286. An anonymous referee for this journal furnishes the example of the state's exercise of eminent domain. In such a case a home owner may suffer the terrible injustice, which may be deeply felt and bitterly resented, of being stripped of his home, but the state does not act unjustly in bringing about this effect because of overriding justificatory reasons.

[17] David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed. (Oxford: Oxford University Press, 2011), p. 155.

[18] *Ibid.*, p. 157. In fact, in cases of vicarious liability (see below), a person may be held criminally liable and punished even though he has neither an *actus reus* nor a *mens rea*! Such punishment seems *prima facie* unjustified but is justified *ultima facie* by overriding considerations.

[19] D. A. Carson, "Atonement in Romans 3:21-26," in *The Glory of the Atonement: Biblical, Historical, and Practical Perspectives*, ed. Charles E. Hill and Frank A. James III (Downers Grove, Ill.: InterVarsity Press, 2004), p. 133.

[20] Michael Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Oxford University Press, 1997), p. 158.

[21] For the most vigorous contemporary defense of a non-necessitarian penal substitution theory, see Blaine Swen, "The Logic of Divine-Human Reconciliation: A Critical Analysis of Penal Substitution as An Explanatory Feature of Atonement" (Ph. D dissertation, Loyola University, Chicago, 2012).

[22] Murphy, "Not Penal Substitution," p. 259. This complaint is very common, both among philosophers (*e.g.*, Philip L. Quinn, "Christian Atonement and Kantian Justification," *Faith and*

Philosophy 3/4 [1986]: 445, 456; Richard Purtill, "Justice, Mercy, Supererogation, and Atonement," in *Christian Philosophy*, edited by Thomas P. Flint [Notre Dame, Ind.: University of Notre Dame Press, 1990], p. 38; Eleonore Stump, *Aquinas* [New York: Routledge, 2003], p. 436) and theologians (Otfried Hofius, "The Fourth Servant Song in the New Testament Letters," in *The Suffering Servant: Isaiah 53 in Jewish and Christian Sources*, ed. Bernd Janowski and Peter Stuhlmacher (1996), trans. Daniel P. Bailey [Grand Rapids, Mich.: Eerdmans, 2004], p. 168). The next few paragraphs draw upon my "Is Penal Substitution Incoherent?" *Religious Studies* (forthcoming).

[23] 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.).

[24] 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."

[25] 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.

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

[27] Lind, "Pragmatic Value of Legal Fictions," p. 96.

[28] 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 (in

which case they furnish another illustration akin to ship personification of the imputation of sins), 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.

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

[30] 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.

[31] 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.