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PUNISHED FOR THE CRIMES OF ANOTHER:
WHAT SECULAR LAW CAN TEACH US ABOUT THE CRUCIFIXION
AND THE ATONEMENT

Introduction

Thank you for being here this evening. The title of my lecture is "Punished for the Crimes of Another: What Secular Law Can Teach Us About the Crucifixion and the Atonement." As you might have guessed, this lecture is being given in satisfaction of my interdisciplinary field exam in systematic theology. Thus, I look forward to exploring the interesting and complex relationship between the two disciplines of law and theology with you over the course of the next hour or so.

In recent years, a number of scholars have examined how theology and religion can illuminate the study of secular law.¹ For example, some scholars have explored the biblical foundations (for example, the Ten Commandments or the

¹ See, e.g., Harold J. Berman, *Law and Logos*, 44 DePaul L. Rev. 143 (1994); Mulford Q. Sibley, *Religion and Law: Some Thoughts on Their Intersections*, 2 J.L. & Religion 41 (1984). For a groundbreaking essay in this area of scholarship, see Samuel Enoch Stumpf, *Theology and Jurisprudence*, 10 Vand. L. Rev. 885 (1957).

Levitical laws) of a wide variety of secular law doctrines ranging from criminal law² to property law³ and consumer credit law⁴ to equal protection law.⁵ Other scholars have looked at the connections between methods of biblical exegesis and legal interpretation.⁶ Still others have looked to the connections between the historical development of religious law (for example, Medieval canon law) and secular law.⁷ As someone who has practiced tax and employee benefits law over the last fifteen years, I was amused to come across the work of a tax professor who used Judeo-Christian ethical principles to critique contemporary tax policy issues such as the flat tax and the consumption tax!⁸

² See George P. Fletcher, *Punishment, Guilt and Shame in Biblical Thought*, 18 Notre Dame L.J. Ethics & Pub. Pol'y 343 (2004); Clifford S. Fishman, *Old Testament Justice*, 51 Cath. U.L. Rev. 405 (2002).

³ See Richard H. Hiers, *Transfer of Property by Inheritance and Bequest in Biblical Law and Tradition*, 10 J.L. & Religion 121 (1993).

⁴ See Paul B. Rasor, *Biblical Roots of Modern Consumer Credit Law*, 10 J.L. & Religion 157 (1993).

⁵ See Richard H. Hiers, *Biblical Social Welfare Legislation: Protected Classes and Provision for Persons in Need*, 17 J.L. & Religion 49 (2002); George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 Colum. L. Rev. 1608 (1999).

⁶ See Samuel J. Levine, *Jewish Legal Theory and American Constitutional Theory: Some Comparisons and Contrasts*, 24 Hastings Const. L.Q. 441 (1997); Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 Harv. L. Rev. 813 (1993).

⁷ See, e.g., R.H. Helmholz, *Natural Human Rights: The Perspective of the Ius Commune*, 52 Cath. U.L. Rev. 301 (2003); see also Harold J. Berman, *The Influence of Christianity Upon the Development of Law*, 12 Okla. L. Rev. 86 (1959); Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* 23-235 (1993) (discussing historical themes with respect to law and religion).

⁸ See Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 Va. Tax Rev. 671 (2006).

Comparatively little has been written, however, about the flip side of the equation. That is, little has been written on the ways in which *secular law* might shed light upon the study of theology. In other words, how might secular law doctrines (for example, contracts, torts, civil procedure, and criminal law) help to deepen our understanding of traditional Christian dogmatic categories such as the Word of God, the being of God, Jesus Christ, the Holy Spirit, creation, salvation, humanity, the church, and the life to come?⁹

In this lecture, I hope to show how the secular law can enrich our study of theology. Specifically, I will focus on the law of vicarious criminal punishment, which is the controversial doctrine of punishing an innocent person for the crimes committed by another person.¹⁰ I intend to demonstrate how the law of vicarious criminal punishment can shed some light upon the penal substitution theory of atonement, which argues that Jesus Christ died on the cross in order to take on the punishment that God had imposed upon humanity for original sin.¹¹

⁹ See Christopher Morse, *Not Every Spirit: A Dogmatics of Christian Disbelief* (1994).

¹⁰ By contrast, vicarious liability is not uncommon in the area of tort. In that context, employers are generally held liable for the losses that are caused by their employees under the theory that the employers are in the best position to minimize risk and also to bear any losses suffered by the injured party. The difference is that tort liability deals with compensation for losses, which can be borne by a third party, whereas criminal liability deals with punishment, which generally cannot be borne by a third party. See, e.g., Peter Cane, *Responsibility in Law and Morality* 176 (2002) ("It is one thing to require a person to repair harm done by another in the breach of the law, but quite a different matter to punish a person for another's wrongdoing.")

¹¹ Although this lecture focuses on the Christian theological doctrine of the atonement, the concept of vicarious criminal punishment also appears in the Hebrew Bible, such as the scapegoat in Lev 16 as well as the suffering servant in Isa 53. See, e.g., Cuthbert Lattey, *Vicarious Solidarity in the Old Testament*, 1 *Vetus*

Overview

In the first part of this lecture, I will outline the penal substitution theory of the atonement. I will then discuss some of the critiques by contemporary theologians with respect to this theory of atonement as being "ludicrously unfair" and an "abusive theology that glorifies suffering."¹²

In the second part of this lecture, I will examine the secular law with respect to vicarious criminal punishment (that is, the idea that an innocent person can be punished for another person's crimes). Although this principle is generally disfavored in criminal law, there *are* a number instances in which vicarious criminal punishment is permitted with respect to certain relationships between superiors and subordinates: (1) parent and child; (2) owner and pet; (3) host and guest; and (4) employer and employee.

In the third and final part of this lecture, I will demonstrate how secular law principles of vicarious criminal punishment can inform the theological doctrine of penal substitutionary atonement. Specifically, I will argue that the concept of "headship" over a family or other group is the key to understanding the various cases in which vicarious criminal punishment is permitted in secular law. This

Testamentum 267 (1951); *see also* Daniel G. Finestone, *The Vicarious Death of Christ in the Light of the Old Testament*, 97 *Bibliotheca Sacra* 34 (1940) (tracing the theological idea of substitutionary punishment through the Hebrew Scriptures).

¹² *See infra* § 2.

concept of headship can also be helpful in deepening our understanding of the atonement. In other words, viewing Jesus Christ as the "head" of the human race (for example, as the head of the corporate "Body of Christ") can help us make better sense of the penal substitution theory of atonement.

1. Atonement and Penal Substitution

The atonement is one of the most important -- yet controversial -- doctrines in Christian theology. Literally speaking, atonement comes from the words "at-one-ment," or the reconciliation between God and a sinful and fallen humanity as a result of original sin.¹³ Specifically, atonement theory deals with the significance of the incarnation, life, death, resurrection, and coming again of Jesus Christ with respect to the human condition. The central question of atonement theory, in the words of St. Anselm of Canterbury, is "Cur Deus homo?" (that is, "why did God become a human being?").¹⁴

Despite its importance to Christian theology, there has never been an "official" theory of atonement. For example, some theologians have viewed the atonement in terms of a *ransom*, in which God pays off Satan by offering Satan the "bribe" of Jesus Christ on the cross in exchange for the souls of human beings, but

¹³ See *Atonement, in Handbook of Christian Theology* 44-46 (Donald W. Musser & Joseph L. Price eds., 2003).

¹⁴ See Jaroslav Pelikan, *The Christian Tradition: The Growth of Medieval Theology (600-1300)* 144 (1978) (noting that Anselm's famous treatise can be viewed as an effort to "discover the reason why Jesus' death could justly be counted by God as vicarious").

ultimately snatches Jesus Christ away through the victory of the resurrection. Other theologians have viewed the atonement in terms of *satisfaction*, in which the damage inflicted by humanity to God's infinite honor (as a result of original sin) can be restored only by the sacrificial death of Jesus Christ, who, as the Word-made-flesh,¹⁵ is the only being who is both divine and human, and thus is the only one who can satisfy the infinite debt owed to God. Still others have seen the atonement in terms of *moral influence*, in which the horrific tragedy of Jesus Christ's death moves a sinful humanity to change its ways.¹⁶

One of the more controversial theories of atonement is that of *penal substitution*, which was developed by John Calvin and other reformed theologians in the sixteenth century. Because of its biblical roots, penal substitution remains the preferred atonement theory of many evangelical and traditionalist Christians today.¹⁷

Under this theory, "God gave [God]self in the person of [God's] Son to suffer instead of us the death, punishment and curse due to fallen humanity as the penalty for sin."¹⁸ In other words, the penal substitution theory of atonement is based upon

¹⁵ See John 1:14.

¹⁶ For a discussion of ten different types of atonement theories, see Peter Schmiechen, *Saving Power: Theories of Atonement and Forms of the Church* (2005).

¹⁷ See, e.g., Millard J. Erickson, *Christian Theology* 840 (2d ed. 1998) (concluding that the penal-substitution theory of atonement is a "rich and meaningful truth" and the most compelling of all the theories).

¹⁸ Steve Jeffery, Michael Ovey & Andrew Sach, *Pierced for Our Transgressions: Rediscovering the Glory of Penal Substitution* 21 (2007).

the fundamental assumption that all human beings are condemned to die because of Adam and Eve's original sin in the Garden of Eden.¹⁹ Jesus Christ, in the person of God the Son and as the new Adam, "took upon himself and suffered the punishment" that human beings would have otherwise faced. As such, he made "satisfaction and sacrifice" to God the Father through the shedding of his blood and, as such, appeased God the Father's wrath. In this way, Jesus Christ freed us from the "curse of eternal death," and God the Holy Spirit continues to draw us towards repentance and faith.²⁰

The penal substitution theory of atonement has come under fire by many contemporary theologians. William Placher, for example, has described this theory as making "no moral sense" and being "ludicrously unfair."²¹ Placher compares this view of the atonement to a made-for-TV movie called "The Whipping Boy" in which an orphaned servant boy is whipped every time a spoiled young prince misbehaves.²² Placher quotes Martin Luther as saying:

This, then, is the Christian religion . . . One has sinned. Another has made satisfaction. The sinner does not make satisfaction; the Satisfier does not sin. This is an astonishing doctrine.²³

¹⁹ That is, their disobedience of God by eating from the Tree of the Knowledge of Good and Evil.

²⁰ See John Calvin, *Institutes of the Christian Religion*, II.xvi.2 (1536) (setting out the basic framework of the penal substitution theory).

²¹ See William C. Placher, *Christ Takes Our Place: Rethinking Atonement*, 53 Interpretation 7 (1999).

²² *Id.*

²³ Martin Luther, *Lectures on Isaiah*, in 17 *Luther's Works* 99 (H.C. Oswald trans., 1972). See also J.I. Packer, *What Did the Cross Achieve?: The Logic of Penal Substitution*, Tyndale Bulletin 3, 4 (1973) (describing the sixteenth-century

Some of the strongest criticisms of the penal substitution theory of atonement have been raised by feminist theologians. In a well-known and provocative essay, Joanne Carlson Brown and Rebecca Parker argued that this theory is grounded in the notion of God as a tyrant and contributes to an "abusive theology that glorifies suffering":

Is it any wonder that there is so much abuse in modern society when the predominant image or theology of the culture is of "divine child abuse" -- God the Father demanding and carrying out the suffering and death of his own son? If Christianity is to be liberating for the oppressed, it must itself be liberated from this theology. . . . This bloodthirsty God is the God of the patriarchy who at the moment controls the whole Judeo-Christian tradition. . . . We do not need to be saved by Jesus' death from some original sin. We need to be liberated from the oppression of racism, classism, and sexism, that is, from patriarchy.²⁴

I now turn to the secular law of vicarious criminal punishment in the hope that it might shed some light on the penal substitution theory of atonement.

2. Vicarious Criminal Punishment

In general, the criminal law frowns upon punishing one party for the crimes that are committed by another party. Indeed, vicarious criminal punishment is a repugnant concept for most people. As any first-year law student knows, an

theologian Faustus Socinus' critique of this theory as "irrational, incoherent, immoral and impossible").

²⁴ See Joanne Carlson Brown & Rebecca Parker, *For God So Loved the World?, in* Joanne Carlson Brown & Carole R. Bohn, *Christianity, Patriarchy, and Abuse: A Feminist Critique* 1, 26 (1989).

individual must have committed both an *actus reus* (that is, a criminal act) and have a sufficient *mens rea* (that is, criminal intent) before he or she can be punished. By contrast, vicarious criminal punishment requires neither act nor intent. Under such a situation, an "innocent" person is punished in the place of the wrongdoer.²⁵

Not only does vicarious criminal punishment appear to violate the fundamental principles of criminal law, but it also seems to undermine a number of philosophical rationales for punishment. In general, there are five such rationales: (1) retribution (that is, an "eye for an eye" or revenge against the wrongdoer); (2) deterrence (that is, prevention of future similar acts by the wrongdoer or others); (3) expression (that is, societal condemnation of wrongdoing); (4) rehabilitation (that is, restoring the wrongdoer to society); and (5) incapacitation (that is, removing the wrongdoer from society).²⁶ Although the doctrine of vicarious criminal liability may further the first three rationales (that is, retribution, deterrence, and expression), it is unlikely to further the last two rationales of

²⁵ George Fletcher has written extensively on the problem of collective punishment, which is a form of vicarious punishment in which a larger group is punished for the crimes of a subset of that group. See, e.g., George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 *Theoretical Inquiries L.* 163 (2004); see also George P. Fletcher, *Liberals and Romantics at War: The Problem of Collective Guilt*, 111 *Yale L.J.* 1499 (2002) (discussing collective guilt); George P. Fletcher, 1 *The Grammar of Criminal Law: American, Comparative, and International* § 8.6 (2007) (same). For an overview of the law of collective sanctions, see Daryl J. Levinson, *Collective Sanctions*, 56 *Stan. L. Rev.* 345 (2003).

²⁶ For an overview of the philosophical rationales for punishment, see Brian Bix, *Jurisprudence: Theory and Context* 119-23 (2004). See also George P. Fletcher, *Punishment and Responsibility*, in *A Companion to Philosophy of Law and Legal Theory* 514-23 (Dennis Patterson ed., 1996).

rehabilitation or incapacitation, since the wrongdoer himself or herself is ultimately not punished (or at least not as strongly as the innocent party).

Furthermore, vicarious criminal punishment is extremely problematic under a Kantian framework in which the dignity of the human being is paramount. As one legal scholar put it:

[M]odern ethics, especially Kantian, and modern penal law reject both connotations of Biblical atonement and the relevant theology. In modern penal law, for example, one is responsible only for his own crimes, not for those of his wife or brother. So, too, no substitute for the criminal will be punished. The offer of a father to go to prison instead of his convicted son's doing so would be irrelevant, and is hardly conceivable in modern penal law. Hence the principal problem: Is there a sharp conflict between religion on the one side and law and ethics on the other? Or, since one must distinguish religious faith from knowledge of positive law and morality, are the two realms compatible?²⁷

Even a strict utilitarian such as Jeremy Bentham (for whom concerns of human dignity would generally be subsidiary to the maximization of social welfare) has described vicarious criminal punishment as the case in which punishment is "in the most palpable degree mis-seated."²⁸

By contrast, there were many examples of vicarious criminal punishment in the ancient world. For example, under the Laws of Hammurabi, if a lender kills the son of a debtor, then the lender's own son is put to death, even though it was the

²⁷ Jerome Hall, *Biblical Atonement and Modern Criminal Law*, 1 J.L. & Religion 279, 279-80 (1983).

²⁸ See Jeremy Bentham, *The Rationale of Punishment* 289 (1830).

lender who committed the original killing.²⁹ Similarly, under the Middle Assyrian Laws of Mesopotamia, if a married man raped a virgin, then the married man's wife could be raped by the father of the virgin, even though it was the married man who committed the original crime.³⁰ Other examples of vicarious criminal punishment include the T'ang Code in Ancient China under which family members or co-workers of a wrongdoer were punished for certain crimes even if they had no knowledge of the wrongdoing. These are all examples of vicarious criminal punishment because an innocent third party is punished for the acts of the wrongdoer.

It seems that most people would argue that societal norms have "evolved" to such a point that vicarious criminal punishment no longer is a part of our contemporary legal system. Indeed, as a general rule, the Model Penal Code has rejected the idea of vicarious criminal punishment.³¹ That is, individuals should be held liable only for their own criminal acts, which require both a criminal act as well as criminal intent on the part of the wrongdoer.

Interestingly, however, there are a number of situations in which vicarious criminal punishment *does* exist in the secular law. For example, aiding and abetting and conspiracy are well-known exceptions to the general prohibition on vicarious criminal liability. In those situations, individual A is punished for a crime that is

²⁹ See James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. Rev. 29, 45-46 (1996).

³⁰ See *id.* at 51-53.

³¹ See, e.g., Model Penal Code § 2.06 cmt. at 305-06.

committed by individual B, despite the fact that individual A only assisted individual B and did not commit the specific crime that occurred. Furthermore, in the context of felony murder (that is, when a victim is accidentally killed in the course of a felony) both individuals A and B could be punished for murder, even though neither of them intended for the victim's death to occur.

Somewhat surprisingly, the secular law goes even further in terms of vicarious criminal punishment in a number of lesser-known situations. These situations center around four categories of relationships: (1) parent and child; (2) owner and pet; (3) host and guest; and (4) employer and employee. I will now explore each of these four categories in greater detail.

First, there is the category of the parent and child relationship. A number of jurisdictions have adopted "parental responsibility" statutes in which parents are held criminally liable for the crimes that are committed by their minor children, particularly if there is evidence of improper supervision on the part of the parent.³² For example, Louisiana has a statute that subjects a parent to imprisonment for up to six months if the parent allows his or her minor child to drive without a license and such child causes death or serious bodily injury to another person. The same statute also imposes criminal liability upon a parent who allows his or her child to

³² See Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. Rev. ___ (2008) (forthcoming).

associate with a known gang member, a convicted felon, or a drug dealer.³³ Other examples include laws that require criminal restitution by parents for losses resulting from crimes (such as arson) that were committed by their children.³⁴ In these instances, the parents did not commit any of the underlying crimes, nor did they intend for any crimes to be committed. Nevertheless, the parents are punished for the crimes of their children.

Second, there is the category of the owner and pet relationship. These laws hold the owner of a pet criminally liable for the serious bodily injury or death inflicted by the pet, particularly if the owner knew that the pet had a propensity for violence. For example, in *Kansas v. Davidson*,³⁵ the Kansas Supreme Court upheld the conviction of a woman for reckless second-degree murder after her three Rottweiler dogs killed a young child. The court found that the defendant had manifested "extreme indifference to the value of human life" by failing to train her dogs properly.³⁶ As in the case of parent and child liability, the owner of the pet neither committed the acts of violence, nor intended for the violence to occur. Nevertheless, the owner is still punished for the acts of his or her pet.

³³ See LSA-R.S. 14:92.2 (establishing the crime of improper supervision of a minor by a parent or legal guardian).

³⁴ See *In Re D.M.*, 191 S.W.3d 381 (Tex. App. Austin 2006) (ordering parents to pay \$25,000 in restitution for a fire started by their child in a public school).

³⁵ See *Kansas v. Davidson*, 987 P.2d 335 (Kan. 1999).

³⁶ *Id.* at 336.

Third, there is the category of the host and guest relationship. In recent years, a number of jurisdictions have adopted so-called "social host" laws in which the host or owner of the premises on which a social event occurs is held criminally liable for any serious bodily injury or death caused by the guests after they leave the event. For example, a number of statutes address the specific situation of a drinking party at which alcohol is available to underage guests.³⁷ Other examples of vicarious punishment in this context include holding the owner of a drinking establishment criminally liable for serving minors, even though such owner was not present at the establishment at the time the minor was served.³⁸ In all of these cases, the host does not commit the harmful act, nor does the host intend for the harmful act to occur. And yet, the host is punished for the actions of his or her guest.

Finally, there is the category of the employer and employee relationship. A corporation is generally held liable for the crimes of its employees as long as such crimes are committed in the scope of employment and there is a motive by the employee to benefit the company in whole or in part. In such cases, the corporation is held liable even though the corporation's board of directors or senior management did not authorize the act or intend for it to occur. This principle of vicarious criminal liability was upheld by the United States Supreme Court in *New*

³⁷ In some states, a mere negligence standard is sufficient to impose criminal liability. *See, e.g.*, Ariz. Rev. Stat. § 4-241 (negligence); Wash. Rev. Code § 66.44.270 (negligence). For a summary of laws in this area, see National Institute on Alcohol Abuse and Alcoholism, Alcohol Policy Information System, *Criminal Liability for Hosting Underage Drinking Parties*, available at <http://alcoholpolicy.niaaa.nih.gov>.

³⁸ *See Commonwealth v. Koczwara*, 155 A.2d 825 (Pa. 1959).

York Central & Hudson River Railroad v. United States,³⁹ in which the Court upheld a congressional statute that imposed criminal liability upon a railroad carrier for the illegal acts of the carrier's agents. As in the cases above, an innocent party (here, the corporation) is punished for the acts of other individuals (here, the employees). Although a number of scholars have criticized the imposition of vicarious liability in the corporate context as "antithetical" to the goals of the criminal law,⁴⁰ the general rule of holding corporations liable for the criminal acts of their employees remains the norm in the secular law.⁴¹

3. *Headship Liability*

To summarize the discussion so far, we have seen that vicarious criminal liability -- that is, punishing one person for the crimes of another -- is generally disfavored in the secular law. However, we have also seen a number of specific contexts in which vicarious criminal liability *does* exist: (1) parent and child; (2) owner and pet; (3) host and guest; and (4) employer and employee.

One way to think about the above four situations is the concept of "headship" liability. In other words, each of the above situations can be seen as involving the "head" of a family or small group, and it is the head (that is, the parent, owner, host,

³⁹ 212 U.S. 481 (1909).

⁴⁰ See, e.g., Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 Ind. L.J. 411, 412 (2007).

⁴¹ See Roland Hefendehl, *Corporate Criminal Liability: Model Penal Code Section 2.07 and the Development in Western Legal Systems*, 4 Buff. Crim. L. Rev. 283 (2000) (exploring corporate criminal liability from a comparative approach).

and employer) who is held liable for the crimes of his or her subordinates (that is, the children, pets, guests, and employees). In each of those contexts, the head has a special kind of duty and responsibility for the actions of these subordinates, and thus vicarious criminal liability is imposed on the superior member of the relationship.

This type of unidirectional vicarious liability can often be seen in the hierarchical relationship between "superior and subordinate" in certain military organizations. According to Joel Feinberg, a prominent theorist with respect to punishment:

At the lowest rank[,] persons have no authority to command others and are responsible only for their own performances. Officers of the higher ranks have greater authority -- that is, the right to command larger numbers of persons and make them "tools" -- and correspondingly greater answerability for failures. . . . In a way, [this] can be viewed as a system of unidirectional vicarious liability.⁴²

Interestingly, ancient Chinese law also recognized the principle that "those who have increased authority shall also have increased responsibility." Thus, persons in authority (such as government officials) were held to higher standards of conduct and punished more heavily than non-officials for transgressions of such standards. Such officials were also held vicariously liable for acts of rebellion,

⁴² See Joel Feinberg, *Collective Responsibility*, in *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* 57 (Larry May & Stacey Hoffman eds., 1991). According to Feinberg, vicarious liability can be seen in other types of relationships, including relationships of authorization, mastership, and suretyship. See *id.* at 56-61 (discussing vicarious liability).

sedition, or treason by their subordinates, even though the officials may not have known about the offense.⁴³

In addition to the fact that the superior has greater authority over others (and thus great responsibility), the superior is also in the best position to deter wrongful conduct and prevent it from occurring in the first place. Thus, the law views the superior as having certain responsibilities to the community as a whole -- particularly if the criminal act by a subordinate is foreseeable and/or unusually dangerous -- simply by virtue of the superior's actual authority over the subordinate.⁴⁴

I believe that this concept of "headship" liability can be helpful in thinking about the penal substitution theory of atonement. Specifically, Jesus Christ can be seen as the "head" of humanity and the human race. This, in fact, is consistent with the biblical witness of the New Testament. For example, Jesus Christ's headship over humanity is analogized to the hierarchical relationships of the Greco-Roman

⁴³ See Wallace Johnson, *Status and Liability for Punishment in the T'ang Code*, 71 Chi.-Kent L. Rev. 217, 227-29 (1995).

⁴⁴ As noted above, *see supra* note 10, the ability to deter or prevent harmful conduct is particularly important in the context of civil vicarious liability. For example, an employer can raise an affirmative defense to liability in a sexual harassment lawsuit if, among other things, the employer "exercised reasonable care to *prevent* and correct promptly any sexually harassing behavior." See, e.g., *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) (quoting *Burlington Industries, Inc. vs. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998)) (emphasis added). Cf. *American Society of Mechanical Engineers v. Hydrolevel*, 456 U.S. 566, 573 (1982) (noting that the imposition of liability on a standard-setting organization, "which is best suited to *prevent* antitrust violations" by its agents, is most faithful to congressional intent) (emphasis added).

household codes (for example, husband over wife, master over slave, and father over children).⁴⁵ Furthermore, Jesus Christ is seen as the head of the "body of Christ," which is made up of all the members of the Church.⁴⁶ Other biblical images of headship include Jesus Christ as the shepherd who guards his flock from the wolf.⁴⁷

This concept of headship liability is also consistent with the Pauline doctrine of Jesus Christ as the new head, or representative human, who died for all so that all may live.⁴⁸ (This contrasts with Adam, the old head, or representative human, through whom we had inherited original sin.) Indeed, J. Brenton Stearns, a philosopher of religion, has argued that the idea of the representative human being is the key to understanding substitutionary theories of atonement:

I think that what is needed to make sense of substitutionary theories is belief in some kind of mystical participation in Christ as the representative human being. Insofar as one person is thought to stand for all people symbolically, the sufferings undergone by that one person are symbolically the sufferings of all. . . . This fulfills the requirements of justice, because the sinner, in restored good will, participates symbolically in the suffering and final vindication of the representative human being.⁴⁹

⁴⁵ See, e.g., Eph 5:21-6:9, Col 3:18-4:1, Titus 2:1-10, 1 Pet 2:18-3:7.

⁴⁶ See, e.g., Rom 12:4-5, 1 Cor 6:15, 1 Cor 12:27, Eph 1:22-23, Col 1:18, 24.

⁴⁷ See, e.g., John 10:11-21.

⁴⁸ See, e.g., Acts 17:30-31 (Christ's resurrection is an assurance to all of last things); Rom 5:18 (Christ's righteousness leads to life for all); Rom. 5:19 (Christ's obedience makes us righteous); 1 Cor 15:22 (all are made alive in Christ); 2 Cor 5:14 (Christ has died for all); 2 Cor 5:15 (Christ died and was raised for all).

⁴⁹ J. Brenton Stearns, *Divine Punishment and Reconciliation*, 9 J. Religious Ethics 118 (1981); see also J.D.G. Dunn, *Paul's Understanding of the Death of Jesus as Sacrifice, in Sacrifice and Redemption: Durham Essays in Theology* 35-40 (S.W. Sykes ed., 1991) (discussing Jesus Christ as the "representative man").

By viewing Jesus Christ as the head of the human family, I believe that we can recover a more sympathetic reading of the penal substitution theory of atonement. In other words, even though Jesus Christ was technically "innocent" of the stain of original sin, he voluntarily became the head of the human family as a result of the incarnation.⁵⁰ As such, it was not irrational for him to have paid the price for the "crimes" or sins of his subordinates, in the same ways that other superiors (that is, parents, owners, hosts, and employers) are held accountable for their subordinates in the secular law today.

This analogy between vicarious criminal punishment and penal substitutionary atonement is not perfect, of course, in the sense that the subordinate who commits the crime in the secular law context still remains guilty of his or her crime (and thus may still remain liable for punishment), notwithstanding the separate punishment of the innocent superior. By contrast, the guilty sinner is absolved of his or her original sin as a result of the crucifixion of Jesus Christ. Nevertheless, I believe that thinking about penal substitutionary atonement in light of vicarious criminal liability can lead to theological and legal insights that would not otherwise occur by examining such doctrines separately.

⁵⁰ See, e.g., Nicene-Constantinople Creed (381) (affirming that Jesus Christ became human, i.e., "ἐνανθρωπήσαντα" (*enanthrōpésanta*) in Greek or "*homo factus est*" in Latin).

There are some who might object to the notion of "headship" as reinforcing a hierarchical, or vertical, view of authority, which in turn reinforces the subjugation of certain people over others. However, I prefer to think of the headship of Jesus Christ as a way of emphasizing the collective, or horizontal, nature of humanity as a whole. Because we are *all* under the authority of Jesus Christ, we are *all* equals in the same human family. As such, recognizing the headship of Jesus Christ actually leads to a radical sense of equality among all humans.

As a result, this idea of headship reinforces the obligations that we have towards each other and especially those who are the "least" among us.⁵¹ In other words, acknowledging Jesus Christ's headship might actually help us to recover a more "communitarian approach to life."⁵² This communitarian approach places a higher value upon the "greater good of the community" over the rights of the individual, which are usually paramount in a liberal, post-Enlightenment world view.⁵³ In the end, the idea of headship might actually lead us in the direction of the *basileia*, or Kingdom of God, as envisioned in the gospels.⁵⁴

⁵¹ See Luke 9:48.

⁵² Joel S. Kaminsky, *Corporate Responsibility in the Hebrew Bible* 180, 189 (1995).

⁵³ *Id.*

⁵⁴ For a powerful philosophical argument that individuals should be held responsible for the harmful actions of their communities, see Larry May, *Sharing Responsibility* (1992). See also Gregory F. Mellema, *Collective Responsibility* (1997) (surveying the philosophical scholarship on collective responsibility); Saul Levmore, *Rethinking Group Responsibility and Strategic Threats in Biblical Texts and Modern Law*, 71 Chi.-Kent L. Rev. 85, 86 (1995) (rejecting the notion that group responsibility is a "thing of the past"); Kenneth R. Himes, *Social Sin and the Role of the Individual*, in *The Annual of the Society of Christian Ethics* 183 (1986) (discussion collective moral responsibility for sin).

Interestingly, this communal or horizontal view of humanity can also lead us to a different view of religious sacrifice. That is, it can help us move away from an exclusively vertical view of sacrifice as *propitiation* or *expiation* (that is, sacrifice as placating an angry God or wiping away humanity's sin and pollution) and more towards a horizontal view of sacrifice as *communion* (that is, sacrifice as a communal feast of praise and thanksgiving, and of restoring right relationships *within* a community). This, of course, would have profound implications with respect to our theology of church, liturgy, and sacrament.⁵⁵

Conclusion

Before closing, I would like to acknowledge that the penal substitution theory of atonement remains problematic for many people, including perhaps some of you in the audience. Furthermore, I recognize that a number of the underlying theological concepts discussed in this lecture such as the inherited nature of original sin -- and the corresponding need for humanity to be punished by God -- as well as the hierarchical nature of the relationship between Jesus Christ and humanity

⁵⁵ Another interesting connection between vicarious criminal punishment and Christian theology (which is outside the scope of this paper) is the idea of scapegoating. Drawing upon the work of René Girard, Mark Heim has written about the connections between sacrifice and scapegoating, see S. Mark Heim, *Saved From Sacrifice: A Theology of the Cross* (2006), which can be seen as the shifting, or transfer, of punishment from a guilty party to an innocent party.

remain highly contested in contemporary theology,⁵⁶ not to mention in the fields of legal philosophy⁵⁷ and hermeneutics.⁵⁸ In their provocative new book, for example, Rita Nakashima Brock and Rebecca Ann Parker argue that theologies of "redemptive violence" were actually *not* the historical norm during the first thousand years of Christianity.⁵⁹

Nevertheless, I do think that the secular legal doctrine of vicarious criminal punishment is a helpful lens through which we can think about penal substitutionary atonement and Christian theology. By looking at the doctrine under which vicarious criminal punishment is imposed under the secular law, we can think about penal substitutionary atonement as a special case of "headship" liability. That is, the secular law helps us to focus upon the role of Jesus Christ as the head of the human family. Jesus Christ assumes certain obligations to humanity as a whole as a result of his incarnation as the Word made flesh, just as parents are sometimes

⁵⁶ See, e.g., Christopher D. Marshall, *Beyond Retribution: A New Testament Vision for Justice, Crime, and Punishment* (2001) (arguing for a "restorative" approach to criminal justice); T. Richard Snyder, *The Protestant Ethic and the Spirit of Punishment* (2001) (same).

⁵⁷ See Deirdre Golash, *The Case Against Punishment: Retribution, Crime Prevention, and the Law* (2005) (arguing that punishment of criminal offenders is morally unjustified).

⁵⁸ See George P. Fletcher, *Thinking About Eden: A Tribute to Herbert Morris*, 22 *Quinnipiac L. Rev.* 1 (2003) (challenging the doctrine of original sin).

⁵⁹ See Rita Nakashima Brock & Rebecca Ann Parker, *Saving Paradise: How Christianity Traded Love of This World for Crucifixion and Empire* (2008).

held responsible for the crimes of their children, owners for their pets, hosts for their guests, and employers for their employees.⁶⁰

Much more work remains to be done on the relationship between law and theology, and, in particular, on how secular law and jurisprudence might enrich our understanding of theological doctrines. It is my hope that this lecture has been an initial step in that direction.

⁶⁰ In a recent essay, Steven Porter examines penal substitutionary atonement from a philosophical perspective and proposes three additional reasons why Jesus Christ's vicarious punishment makes sense: (1) such punishment is a "more costly form of reparation and penance"; (2) such punishment avoids "further alienation between God and humans"; and (3) the "expressive good" is better served through such punishment. See Steven Porter, *Rethinking the Logic of Penal Substitution*, in *Philosophy of Religion: Reader and Guide* 596, 605-06 (William L. Craig ed., 2002).

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