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III. CONCEPTIONS, VALUE AND LAW

In Western civilization, a rationally ordered universe and human rationality are the central tenets of theology and moral philosophy. Conceptions, values, and principles implied by these premises have become entrenched in social and legal institutions. Concluding that religious teachings, even those of antiquity, are consistent with modern legal principles is reasonable, and almost common sense. An inquiry into whether this relationship is to any extent causal is fascinating. Professor Jerome Hall, the first President of AMINTAPHIL, discusses the relationship between the Christian doctrine of atonement and principles of modern criminal law.

BIBLICAL ATONEMENT AND MODERN CRIMINAL LAW*

JEROME HALL**

The organization of a Section on Law and Religion in 1976 by the Association of American Law Schools (after Watergate) was followed in 1977 by the incorporation of the Council on Religion and Law. My participation in both led to the study of theology and especially to the question, what, if anything, can a legal scholar, particularly one specialized in penal law and the philosophy of law, contribute to the literature on the interrelations of law and religion? In the English-speaking world not many legal scholars have written on this subject, and none, to my knowledge, on the interrelationship of religion and modern criminal law.¹ I here confine my discussion to the Bible and, more particularly, to some of the writing on atonement by Christian theologians.

The central focus of Christianity is on the crucifixion and resurrection of Jesus Christ, and the relevant theme, originating in the Old Testament

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1. See J. HALL, *LAW, SOCIAL SCIENCE AND CRIMINAL THEORY*, chs. 1 and 2 (1982).

and frequently addressed in the New Testament, is that of atonement. Both the Old Testament and the New Testament accept and emphasize the vicarious significance of the sacrifice—the lamb in the Old Testament, Jesus in the New Testament. The one sacrificed takes on itself or himself the sins of Israel or the sins of all mankind. Likewise, the sacrifice frees all Israel or all mankind from sin, and the consequence is reconciliation with God.

But modern 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 bother. 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?

There have been innumerable interpretations of atonement but for the present purpose they may be divided into two types or classes—the legal interpretation and the antilegal interpretation posited solely on God's love. Not that the legal interpreters did not appreciate God's love; that would be inconceivable in any Christian theologian. But they also recognized the "wrath of God," his hatred of evil, and his frequent threats to impose harsh sanctions.² For obvious reasons, I shall be particularly interested in the legal interpretation, for it is there that we find both the direct influence of law on religion and theology, and the influence of religion through its theological view of atonement on penal law. There are many statements in the Old Testament that express or imply one or more of the ideas that define "atonement." "And Aaron shall offer the bull, as a sin offering for himself, and shall make atonement for himself and for his house . . . and shall lay both his hands upon the head of the goat and send him away into the wilderness . . . and make atonement for himself and for the people." (Lev. 16:6, 21, 24).

One thousand years separate the authors of the earliest books in the Old Testament from the later prophets who spoke of God not as jealous or hating but as a loving father and merciful judge. Indeed, it is in Isaiah

2. This simplification of the difference between the principal types of interpretation will be more fully elucidated in the following discussion.

53 where one finds the later expression of atonement to which Christian theologians constantly refer and rely on as prophetic of the coming of Jesus as Messiah. "He was despised and rejected by men. . . . Surely he has borne our griefs and carried our sorrows. . . . He was wounded for our transgressions . . . upon him was the chastisement that made us whole, and with his stripes we are healed. . . . He bore the sins of many, and made intercession for the transgressors."

In the New Testament, Jesus, the perfect man-God, "died for the ungodly;" (Rom. 5:6) "while we were enemies we were reconciled to God by the death of his Son. . . ." (Rom. 5:10) "Then as one man's (Adam's) trespass led to condemnation for all men, so one man's act of righteousness leads to acquittal and life for all men." (Rom. 5:18, also Heb. 7:25). "By his wounds you have been healed." (1 Peter 2:24; also Col. 1:14). "This was to fulfill what was spoken by the prophet Isaiah. . . ." (Matt. 8:17). "Christ redeemed us from the curse of the law. . . ." (Gal. 3:13). "Behold, the Lamb of God, who takes away the sin of the world." (John 1:29).

What have the theologians whose interpretations have been called "legal" said about these passages in the Bible? Tertullian (c. 155 A.D.—230 A.D.), one of the most erudite of the Church fathers, was said by some to be a Roman lawyer and he was even identified, probably mistakenly, with the jurist Tertullianus. In any case, the schools in Carthage, where Tertullian studied, taught rhetoric, law and philosophy, and every educated Carthaginian knew a great deal of the dominant Roman law.³

Certainly Tertullian's treatises bear the unmistakable marks of a legal mind. His *Apology Against the Heathen*⁴ is a lawyer's brief criticizing Roman procedure in the trial of Christians. Tertullian spoke of "God's wrath" and his "eternal penalties."⁵ His central terms—debt, satisfaction, compensation, guilt—have obvious legal connotations.⁶ He empha-

3. ". . . (Tertullian) displays a thorough and (it is claimed) profound knowledge of Roman Law." (T. BARNES, *TERTULLIAN* 23 (1971) citing Beck, *Romisches Recht Bei Tertullian and Cyprian* (1930)). "Secondly, knowledge of Roman law was not the exclusive prerogative of *iuris consulti*. It was a necessity for advocates pleading cases in court and also a normal possession of the educated man." *Id.* at 24.

4. TERTULLIAN, *APOLOGETIC AND PRACTICAL TREATISES* published in 10 LIBRARY OF FATHERS OF THE HOLY CATHOLIC CHURCH 6-12 (1854).

5. *Id.* at 146, 366.

6. "The old Roman law conception appears . . . in Tertullian's portrayal of God as Judge and in his teaching that the relationship of man to Him is pre-eminently that of a criminal to his judge." J. MORGAN, *THE IMPORTANCE OF TERTULLIAN IN THE DEVELOPMENT OF CHRISTIAN DOGMA* 54 (1928). For examples of Tertullian's use of other legal terms, see MORGAN, *id.* at 67-76.

sized man's duty to make "satisfaction to God by repenting of his sins."⁷ "How foolish, moreover, how (unjust) . . . not to pay the price (repentance) and yet to stretch forth the hand for the merchandise— For at this price the Lord hath determined to grant His forgiveness."⁸ Repentance was "satisfaction,"⁹ appeasement of the wrath of God and avoidance of punishment.¹⁰ "God sitteth over us as a Judge to exact and to maintain that righteousness . . . and with a view to this establisheth the entire sum of His law. . . ."¹¹

One derives Tertullian's legal interpretation of the atonement by bringing together relevant statements in several of his essays. It was Anselm who provided the classic legal interpretation in a systematic, tight, logical discussion—the renowned *Cur Deus Homo*.¹² He was born in 1033 (d. 1109) in Piedmont and studied law in Pavia. His thought reveals the influence of the feudalism of his time, of Lombard law and the Church's penitentials. "[T]o sin," he said, "is nothing other than not to render to God what is due."¹³ "What is the debt which we owe to God? Whoever does not pay to God his honor due Him dishonors Him and removes from Him what belongs to Him. . . ."¹⁴ "Indeed God's wrath is nothing other than his will to punish."¹⁵ Repayment for the dishonor is not sufficient unless "in proportion to the injury caused by the dishonoring, he makes some restitution which is acceptable to the one whom he has dishonored. Satisfaction ought to be proportional to the measure of the sin."¹⁶ When earthly rulers "rightly exercise retribution, the Lord Himself does it; for they have been ordained by Him to this end."¹⁷ It follows inexorably that either the dishonor of God is "repaid" or there will be punishment.¹⁸ Thus, in the end, God cannot be dishonored.

The next step in Anselm's argument is that no man, indeed, not even all human beings, can make sufficient satisfaction since all men are sinners. Christ was a logical necessity since the required satisfaction can

7. TERTULLIAN, *supra* note 4, at 358.

8. *Id.* at 359.

9. *Id.* at 370.

10. *Id.* at 371.

11. *Id.* at 353.

12. 3 ANSELM OF CANTERBURY (J. Hopkins, H. Richardson, trans., 1976).

13. *Id.* at 67.

14. *Id.* at 68.

15. *Id.* at 55.

16. *Id.*

17. *Id.* at 69.

18. *Id.* at 71.

only be paid by someone who is sinless. Sin calls for payment “greater than any existing thing besides God. . . . Therefore only God can make this satisfaction.”¹⁹ But since man ought to make this satisfaction and since only God can make it, “it is necessary that a man-God make it.”²⁰

The logic of this argument is evident in its successive steps—God’s honor, the sinner’s disobedience, God’s wrath, the need for satisfaction, and the inability of sinners to justify sinners—hence the Virgin birth and the incarnation of the man-God who pays the price and effects the reconciliation.²¹ In later discussions of the atonement there are variations from the rigor of Anselm’s treatise, but *Why God Became Man* set the parameters of those discussions whether pro or con the legal interpretation.

Calvin (1509-1564) studied law at Orleans and Bourges; hence it is not surprising that he praised law as God’s commands “that he might lift their minds higher.”²² Law also admonishes, is a necessary deterrent²³ “and urges them on in well-doing.”²⁴ “The law shows the righteousness of God. . . .”²⁵ He anticipated Jhering and Fuller: “. . . if the forms of the law be separated from its end, one must condemn it as vanity.”²⁶ Alvin wrote of “God’s fearful vengeance against the whole of mankind.”²⁷ But God, while not ceasing to love his children, is “wondrously angry toward them . . . he would frighten them . . . to humble their fleshly pride, . . . and arouse them to repentance.”²⁸ Although “they who . . . provoke his wrath . . . will not escape his vengeance,”²⁹ “. . . it is not, properly speaking, punishment or vengeance, but correction and admonition.”³⁰ A secular judge “applies the penalty to the crime itself. But when a father . . . corrects his son, he does not do this to take ven-

19. *Id.* at 102.

20. *Id.*

21. See Anselm’s essay, *The Virgin Conception and Original Sin*, *id.* at 143. The influence of ancient Greek mythology and metaphysics on Christology is beyond the scope of this paper.

22. J. CALVIN, *Institution of the Christian Religion*, 20 LIBRARY OF CHRISTIAN CLASSICS 349 (J.T. McNeill ed. 1960).

23. *Id.* at 358-59.

24. *Id.* at 360.

25. *Id.* at 354.

26. *Id.* at 349.

27. *Id.* at 244-45.

28. *Id.* at 577.

29. *Id.* at 659.

30. *Id.*

geance on him or to maltreat him but rather to teach him. . . ."³¹

"[T]he whole human race perished" because of Adam's disobedience.³² "This is our acquittal: the guilt that held us liable for punishment has been transferred to the head of the Son of God."³³ ". . . God's judgment was satisfied by that price."³⁴ Calvin writes of Jesus' sacrifice as "his act of expiation" to "appease the father's righteous wrath."³⁵ Jesus' "pleading,"³⁶ his intercession as man's advocate, brings "our acquittal,"³⁷ "[t]he curse . . . was transferred to him . . . (who) clothed us with his purity."³⁸

Opposition to legal interpretation of atonement, based in part on Clement and Abelard, was eloquently expressed by Bushnell, an American clergyman, in 1874.³⁹ Bushnell argued that Jesus did not suffer for justice but in self-sacrifice. It dishonors God, indeed it implies that he is immoral, to say that he "accepts the pains of the good in payment of the pains of the bad."⁴⁰ The legal interpretation of atonement describes "a coarse commercial transaction."⁴¹ Law is defective, first, because it is penal and does not bring about reform by free choice. And, second, it is negative in its prohibitions.⁴² Bushnell uses the model of the family and the school; the mother or the teacher corrects out of love. Their correction is "not judicially penal . . . for it is not graded by the desert of actions, but by what is wanted for the future benefit and due correction of the actors."⁴³ It is not "a substantive measure of their ill-desert."⁴⁴

Bushnell thought there was "no such thing" as "a penalty undeserved." Moreover, there is no "common measure" in undeserved penal-

31. *Id.* at 340. "In the dogma that the whole human race is condemned on account of the sin of its first parents, the doctrine of collective responsibility has reached its pitch." WESTERMARCK, 1 *THE ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS* 50-51 (1971).

32. Calvin, *supra* n.22, at 509, 510.

33. *Id.* at 351.

34. *Id.* at 467.

35. *Id.* at 502.

36. *Id.* at 509.

37. *Id.* at 510.

38. H. BUSHNELL, *FORGIVENESS AND LAW* (1874). See Rashdall, *The Abelardian Doctrine of the Atonement*, in *DOCTRINE AND DEVELOPMENT* 128 (1898).

39. Bushnell, *supra* n.39, at 86.

40. *Id.* at 91.

41. *Id.* at 109.

42. *Id.* at 134.

43. *Id.* at 135. Bushnell says "the word *justice* does not occur once in the New Testament. . . ." *Id.* at 141.

44. *Id.* at 143-44.

ties and deserved ones.⁴⁵ It is contrary to the spirit of the New Testament to list a set of “vocables” as substitutes for penalty, compensation, transferable merits, sins carried over, sins accepted for the sinner and so on. These “theological counters” and “computations of atonement” are “to any Christian believer” a “very sad affair,” not “altogether spurious,” but “artificial.”⁴⁶ In even stronger terms a contemporary theologian wrote: “To speak as if the Son . . . appeased or propitiated God . . . is blasphemy.”⁴⁷

In a similar vein, the philosopher-theologian, H. Rashdall, critical of every aspect of the legal interpretation, argued that Jesus’ death could help others only in the way that the acts of other righteous persons could help others—by their example, stimulating benevolence.⁴⁸ He also rejected the view that Christ’s death was a ransom paid to the Devil or to God.⁴⁹ “God is a loving Father who will pardon sin upon the sole condition of true repentance.”⁵⁰ He seeks reconciliation, or at-one-ment. Tertullian’s theory is “coarsened and legalized,”⁵¹ “poisoned by the substitution of legal for moral conceptions.”⁵² To Rashdall, Anselm employed Lombard conceptions of civil law—satisfaction, debt and *Wergild*.⁵³ His “notions of justice are the barbaric ideas of an ancient Lombard king or the technicalities of a Lombard lawyer. . . .”⁵⁴ Most interesting is Rashdall’s rejection of “the attribution of guilt to all humanity for the sin of one, nor can the payment of a penalty by the sinless Christ rationally or morally be considered to make any easier or any juster the remission of the penalty which man owes for his own sin.”⁵⁵ “We have no right to pronounce just in God what would have seemed the highest injustice among men.”⁵⁶

Rashdall strikes his heaviest blow on the retributive theory of punishment. That theory, he states, is implied in the emphasis on expiation and penalty in all legal interpretations of atonement. It is “a survival of

45. *Id.* at 95.

46. F. DILLISTONE, *THE CHRISTIAN UNDERSTANDING OF ATONEMENT* 244 (1968).

47. H. RASHDALL, *THE IDEA OF ATONEMENT IN CHRISTIAN THEOLOGY* 35 (1919).

48. *Cf. Mark* 10:43-45; *Matthew* 20:26-28.

49. RASHDALL, *supra* note 48, at 48.

50. *Id.* at 249.

51. *Id.* at 253.

52. *Id.* at 351-52.

53. *Id.* at 355.

54. *Id.*

55. *Id.* at 356.

56. *Id.* at 422.

primitive modes of thought . . . it cannot be rational to inflict an evil except as a means to good—the good of the offender or of others.” It is inconsistent with the Christian ethic of love and the character of God. “Even on the retributive view of punishment it is impossible to defend the punishment of the innocent in place of the guilty.”⁵⁷

In his recent book⁵⁸ Hans Küng, a Catholic theologian, adds some surprising innovations in his criticism of the legal interpretations of the atonement. For him God is “wholly love.”⁵⁹ Conspicuously omitted from his Index are the terms “penance,” “punishment,” “wrath of God” and “Hell.”⁶⁰ After listing the “juridical concepts” used in legal interpretations—“law, guilt, penalty, reward, penance, expiation, ransom, satisfaction, reconciliation, restitution,”⁶¹ he characterizes those interpretations as “a re-Judaizing process in the name of Christianity.”⁶² More surprising is his statement that the idea of original inherited sin, upon which the necessity of the God-man’s intercession depends, “seems problematic.”⁶³ He rejects the theory of redemption on which the legal interpretation rests because it is legalistic, based on Roman law, “legal niceties” and human justice, not on the “grace, mercy and love” characteristic of the New Testament.⁶⁴ He even rejects “sacrifice” emphasized in the legal interpretation. “Is God so cruel, even sadistic, that his anger can be appeased only by the blood of his Son?” Instead of “sacrifice,” Kung would substitute “*voluntary personal self-surrender*” . . . “self-giving.”⁶⁵ Instead of “expiatory sacrifice,” Kung offers “reconciliation, representation, redemption, liberation.”⁶⁶ For Kung, “God loves sinners more than his righteous.”⁶⁷ “He forgives instead of condemning, liberates instead of punishing, permits the unrestricted rule of grace instead of

57. H. KUNG, ON BEING A CHRISTIAN (E. Quinn, trans., 1976).

58. *Id.* at 435.

59. Jesus often threatened hell, everlasting fire and “gnashing of teeth.” *Matthew* 5:22, 30; 8:12; 11; 23; 13; 42; 18:8, 9. “Wrath of god” is a frequent expression in the New Testament, *Matthew* 3:7; *Romans* 1:18; *Ephesians* 5:6.

60. KLUNG, *supra* note 58, at 421.

61. *Id.*

62. *Id.* at 422.

63. *Id.* at 423. Similarly, “[i]t [redemption] is . . . an outstanding example of a legal notion being taken up and made into a religious notion by priests and prophets.” D. DAUBE, *STUDIES IN BIBLICAL LAW* 42 (1947).

64. Kung, *supra* note 58, at 424-25. KUNG omits any reference to Jesus’ first words on the cross—the first line of *Psalms* 22.

65. KUNG, *supra* note 58, at 426.

66. *Id.* at 274. Kung’s italics.

67. *Id.* at 313.

law The God who prefers the sinner . . . the prostitutes and adulterers to their judges, the law-breakers and outlaws to the guardians of the law."⁶⁸ "He is a God who lavishes his grace on those who do not deserve it."⁶⁹ "He is not a God of law, but a God of grace."⁷⁰

The distinguished theologian, Emil Brunner, provides a detailed refutation of the anti-legalist interpretations of the atonement.⁷¹ They err, he argues, in thinking that the only alternative to Anselm is the "wholly subjective" view that "the death of Jesus was a sublime and noble martyrdom."⁷² Their most serious defect is that they trivialize guilt. "If the Cross merely denotes the removal of a religious error (namely, that God is not an angry Judge) then guilt is not taken seriously,"⁷³ Moreover, if "guilt is merely error, and God is nothing but love, there is no need for forgiveness; . . . all you need is to know it."⁷⁴

"Divine punishment also issues necessarily from the Holiness of God,"⁷⁵ but at the same time there is "the overwhelming reality of forgiving love."⁷⁶ "That God can be both at once, the One who 'is not mocked,' and the One who 'doth not deal with us after our transgressions,' that neither aspect is sacrificed to the other . . . this fundamental theme of the whole Bible is the message of the Cross. . . ."⁷⁷ Accordingly, although Jesus' Passion is not a penalty, certainly not a transaction, "it is a sacrifice, a vicarious action" in which Jesus identified himself wholly with the human race.⁷⁸

Instead of deprecating law, Brunner eulogizes it. "The law is the manifested Will of the Lord God. . . . All order, all significance, all beauty, all trustworthiness, all constancy, all fidelity and all faith, all truth and all good, are based . . . upon the Law, which constitutes the intrinsic

68. *Id.* at 435. Tillich has echoed this: ". . . justice is the structural form of love without which it would be sheer sentimentality . . . there are no conflicts in God between his reconciling love and his retributive justice." P. TILlich, 2 SYSTEMATIC THEOLOGY 174 (1957).

69. KUNG, *supra* note 58, at 314. "thus the law is an enemy. . . . The Divine Love cannot be imprisoned in the categories of merit and justice. . . ." G. AULEN, CHRISTUS VICTOR 68 (A. Herbent trans. 1966).

70. E. BRUNNER, THE MEDIATOR (O. Wyon trans. 1934).

71. *Id.* at 439.

72. *Id.* at 471.

73. *Id.* at 472.

74. *Id.* at 464.

75. *Id.* at 449.

76. *Id.* at 452.

77. *Id.* at 495.

78. *Id.* at 461.

content of His Will. . . .”⁷⁹ “[This law] demands the divine reaction, the divine concern about sin, the divine resistance to this rebellion, and this breach of order. . . . If this were not true there would be no seriousness in the world at all; there would be no meaning in anything, no order, no stability . . . chaos and desolation would be supreme.”⁸⁰ The Bible is “full of such juridical expressions . . . guilt, remission of guilt, judgment, judge, punishment, accusation, condemnation, pardon, release. . . .”⁸¹

I leave it to the reader to choose which, if any, interpretation of biblical atonement he prefers. The problem discussed here is an interdisciplinary one based on certain interrelations of law and religion. More narrowly, it is focused on the legal interpretation of atonement and especially on the opposition of vicarious and individual responsibility.

Pervading all of these problems is that of interpretation itself—what the theologians call exegesis or hermeneutics. A Christian theologian will interpret Isaiah 53, indeed most of the Old Testament, as prophetic of the coming of Christ while a Jewish theologian will provide a very different interpretation of that Testament, including Isaiah 53. So, too, Kung’s negative view of Hinduism and Buddhism is far different from that of adherents to those world religions. Just as lawyers are influenced by their clients’ interest and interpret statutes in conformity with that given end, so does a theologian’s conception of God determine his interpretation of a religious text. Just as lawyers pick and choose among the cases so do theologians select those biblical passages that support their ordained goal. In the practice of law, however, subjectivity is diminished by the adversary system either directly as in the Anglo-American system or indirectly as in the civil law systems and, also, in both, by the impartiality of the judge.⁸²

Certain other generalizations regarding the interpretations of biblical atonement may be ventured. First, both legalists and anti-legalists agree that Jesus bore all men’s sins. But the reasons differ widely—from a belief in orthodox Christology to the simple belief that Jesus identified with

79. *Id.* at 444.

80. *Id.* at 465.

81. See J. HALL, *Religion, Law and Ethics*, in *LAW, SOCIAL SCIENCE AND CRIMINAL THEORY* (1982).

82. In Judaism “atonement . . . is effected through suffering by the individual himself. This is where Judaism and other religious systems differ most widely from Christianity, which does not think of atonement as affected by man’s effort or suffering. . . . Christianity met [this problem] with its Christology.” O.S. RANKIN, *ISRAEL’S WISDOM LITERATURE* 122 (1954 reprint of 1936). See I. al Farqi, *Islum*, in *THE GREAT ASIAN RELIGIONS* 312 (W. Chan ed. 1969).

all suffering, sinful humanity.⁸³

Second, both sides seem to agree that Jesus' life, if not his crucifixion, was necessary for the salvation of sinful humanity, although again "necessary" is given different interpretations ranging from acceptance of orthodox views of original sin and the incarnation to the inspiration of his life "unto death."

Third, the legalists praise law and retributive justice, while the anti-legalists criticize and condemn both. For the former, law, far from being a burden,⁸⁴ represents God's communication of his righteousness, his guidance, and his loving chastisement to lead people away from evil and toward goodness. For the anti-legalists, acceptance of law even as a minimum standard turns quickly to criticism of law as "legalistic" and, in any case, as far inferior to God's loving grace. The parallel of that with Plato's criticism of law in *The Statesman* and his preference for the justice and wisdom of the philosopher-king are striking. Equally significant are the biblical foundations of the perennial debates between deontologists and utilitarians regarding punishment.

We can better understand atonement *vis-a-vis* present-day problems of penal law if we first take a backward glance at the place of collective responsibility and retribution in past ages. Only then can we appreciate the fact that our ancestors were not irrational in their penology. Moreover, that history is a necessary prolegomenon to a realistic grasp of present problems, for in that wider perspective we may discover not only that the past can guide us toward feasible reforms but also that it imposes limits on utopian plans to uproot retributive justice.

From the perspectives of sociology and modern penal law collective responsibility seems superstitious and based on the myth that a society is a great ego, a person separate from the interactions of individuals; and it is outrageous from an ethical viewpoint since it imposes punitive sanctions on innocent persons. But history reveals interesting relevant facts. First, in pre-industrial societies, both ancient and modern, social groups are so closely knit in intimate contact and association (whose unity was symbolized in the leadership of a chief or ruler) that it is the most natural

83. *Psalm 19*. See A. BUCHLER, *STUDIES IN SIN AND ATONEMENT* (Intro. by F.C. Grant, 1967).

84. See H. ROBINSON, *THE HEBREW CONCEPTION OF CORPORATE PERSONALITY* (1964). In the thought of ancient Israel "sin was more than guilt; it was pollution. It infected the whole neighborhood . . . his city, his tribe or nation, and also their cattle and crops." F. Grant, *Prolegomenon*, in A. BUCHLER, *STUDIES IN SIN AND ATONEMENT XXI, XXVII* (1967).

thing in the world to think not of or as an individual but, instead, to think in concepts of the family, the clan, the community, or the nation. Only with industrialization and the loosening of ties does individualism make its appearance. Accordingly, we should distinguish present-day sociological conceptions of the group from the corporate idea that dominated biblical times.⁸⁵

But, secondly, it has become clear that there was not simple unilinear evolution starting solely from the idea of corporate responsibility and ending in the substitution of the ethic of individual responsibility. From ancient times, moral leaders, including dramatists of ancient Greece, limited corporate liability by insisting that the innocent should not be punished for crimes committed by others. Moreover, as we shall see, although the pendulum has swung far from collective to individual liability, corporate liability is by no means completely absent in contemporary society, even from present-day law. It was usually the prophets who spoke of the *nation's* blessings and its liability. But Jeremiah and Ezekiel (Ez. 18) were among the first to criticize collective liability, especially the punishment of innocent persons for the sins of others.⁸⁶ It is also noteworthy that in many cases when God punished the nation, it was not for its sin but because of the ruler's sin; the king was the "owner" of the people.⁸⁷ Still, collective thinking was dominant.

Westermarck cites literally hundreds of examples of collective responsibility among the ancient Greeks, Hebrews, Christians, Japanese, Koreans, Persians, Hindus and Teutons as well as among many primitive peoples.⁸⁸ He also gives instances of the rejection of collective liability.⁸⁹ Sin was regarded as a contagious disease which could be transferred to

85. O. Rankin, *supra* note 82 at 53-54, 70. Recent studies by anthropologists support the view expressed in the Bible, namely, that individual responsibility was sometimes advocated along with collective responsibility. One anthropologist even says: "In fact, individual responsibility always exists inside corporate groups." In the pre-industrial societies which this anthropologist studied, collective responsibility was manifested in relation to other groups, that is, when a member of group A killed a member of Group B. MOORE, *THE ALLOCATION OF RESPONSIBILITY* 100 (M. Glickman ed. 1972). See T. ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 134 (1954).

86. D. Daube, *supra* note 64, at 162-63.

87. E. WESTERMARCK, 1 *THE ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS* 32, Ch. 2 and 19 (1917); L. HOBHOUSE, *MORALS IN EVOLUTION* 70-104 (1916); POLLOCK, MAITLAND, 1 *HISTORY OF ENGLISH LAW* 678 (1923).

88. "[F]or another's sin let me not suffer." RIG-VEDA ii, 28; 29; Westermarck, *supra* note 87, at 49. See, *Deuteronomy* 24:16 and 2 *Kings* 14:6.

89. Westermarck, *supra* note 87, at 61.

others and spread like an epidemic.⁹⁰ This led to the ritual of "transfer-ring" the sins of the people to the sacrificed animal or the human sacrifice.⁹¹

Because collective responsibility means strict liability, the punishment of innocent persons, it is abhorrent to the modern mind. As Kant put it, penal liability is not "*transmissible* . . . like a financial indebtedness . . . only the culprit can bear [punishment] which no innocent person can assume even though he be magnanimous enough to wish to take it upon himself for the sake of another."⁹² Nevertheless, the universality of collective responsibility in past ages, the group mind-set rather than individualism (although alleviated from early times by pleas to spare the innocent), the likelihood that deterrence was also advanced by the threat to punish a wrongdoer's family, clan or nation—these and other factors described above made acceptance of the concept of collective responsibility natural and normal.

There is another phase of social experience that must be considered if we are to understand biblical atonement, namely, the role of the hero in history. If "society," viewed either as the aggregate of individuals or as a separate holistic entity, can be harmed (e.g. in ways that distinguish crimes from civil damages)⁹³ it is also true that society benefits from the sacrifice and contributions of its heroes—its great religious and moral leaders, its artists, scientists and scholars. All through history people have identified with and sung the praises of great men and women. Indeed, Carlyle hardly exaggerated when he included "Hero Worship" in the title of his book since, for him, "Universal History, the history of what man has accomplished in this world, is at bottom the History of the Great Men. . . ."⁹⁴

A more circumspect study of heroes emphasizes "the vicarious gratification of the [people's] yearnings through his presumed traits and

90. *Id.* at 63. Quoting Frazer: The Victim must be a "representative of the community . . . accepted as a substitute on the principle of social solidarity." *Id.* at 67-68. See D. BROWNING, *ATONEMENT AND PSYCHOTHERAPY* (1966).

91. I. Kant, *Religion Within The Limits of Reason Alone* 66 (T. Greene, H. Hudson trans. 1934).

92. See J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 240-246 (1960).

93. T. CARLYLE, *HEROES, HERO WORSHIP AND THE HEROIC IN HISTORY* 1 (1840). "Such great teachers are very few in the world. . . . They alone can carry us to the life divine." R. SRIVASTAVA, *COMPARATIVE RELIGION* 241 (1974).

94. S. HOOK, *THE HERO IN HISTORY* 22 (1943).

achievements.”⁹⁵ Krishna took human form when the need to overcome unrighteousness became urgent, Buddha’s compassion went out to all suffering humanity, and many heroes in Ancient Greece were believed to be the sons of gods or goddesses. Nor is it only the great who elicit praise and gratitude. Many soldiers have sacrificed their lives that their comrades might live, and countless other “ordinary” persons never mentioned in the history books make daily sacrifices that others may benefit. It is in this perspective that versions of the atonement emphasizing Jesus’ identification with all troubled, rejected men and women have great proximity to the experience of gratitude and love that people have felt for their heroes.⁹⁶

If we combine reverence for the hero and the gratitude and affection he or she inspires—if we join that to normal acceptance of collective responsibility especially in past ages, it is no great leap from that platform to Biblical atonement in both its connotations—bearing the sins of others and the consequent benefit to the sinners. The above experience is projected into a religious faith.

My concern here, however, is not theological, but secular,⁹⁷ especially with the interactions of law and religion. Indeed, positive law and religion are so intertwined, both in the Bible and in the Qur’an, that it is no exaggeration to speak of the legal component of religion, of law *in* religion. There is no better evidence of that than the writing of the theologians who for centuries advocated legal interpretations of atonement.

If we glance at our present situation we find that some of the relevant concepts are still operative. Samuel Johnson said: “No man is thought the worse of here, whose brother was hanged.”⁹⁸ But humanists are rare, and who can doubt that the families of some convicted criminals are often ostracized and suffer other discriminations? In wartime hostages are taken or killed, prisoners in a concentration camp are held responsible for the conduct of all the prisoners, and teachers penalize an entire class for the misbehavior of one student, especially if he does not confess.

95. Compare Kant regarding the “superhuman.” “[H]is distance from the natural man would then be so infinitely great that such a divine person could no longer be held up as an *example* of him. Man would say: If I too had a perfectly holy will all temptations to evil would of themselves be thwarted in me . . . I too should take upon myself not only willingly but joyfully all sorrows . . . even to the most ignominious death, since I would see before my eyes the glorious and imminent sequel.” Kant, *supra* note 91, at 57-58.

96. For my support and defense of religious faith *see supra* note 92, at 57-58.

97. For my support and defense of religious faith *see supra* note 1, at 16-26.

98. Daube, *supra* note 64, at 188.

There is strict vicarious liability in modern legal systems when an innocent employer is fined because of his employee's misconduct. Innocent stockholders pay the fines assessed against the corporation and they also benefit from most actions of the managers.⁹⁹ In international relations, political leaders may provoke wars, and innocent lives are lost. Thus, collective responsibility remains very much alive. Much of it, perhaps most of it, does not fall within the precise meaning of "crime," "criminal law" or "punishment;" this, indeed, has been said by many scholars about strict penal liability. But the liability of associations, social sanctions, and the work of social agencies are important aspects of the wider context in which modern systems of criminal law can be placed to the advance of knowledge of that law.

There is a final problem to be confronted which raises the most insistent of all the issues. Following precedent, we have been saying thus far that the legal interpretation of atonement was influenced by Roman or Lombard or feudal law. But if we press beyond those indubitable legal factors, if we seek the cause of many of their penal provisions, we find at the bottom of them—retribution. The usual description of the evolution and progress of retribution seems persuasive. First came instinctive retaliation against aggression. Second, comes vengeance which is supported by social norms,¹⁰⁰ and is limited by a sense of equivalence and reciprocity, as in barter. Finally, there emerges a principle of retribution which is refined over the years until it becomes the retributive justice that moral philosophers espouse.

The Bible and the history of theology reveal the outlines of the perennial battle between those who would punish sinners and criminals because they were intentional wrongdoers and those who would deter or reform them. They also reveal the commingling of retributive and utilitarian concepts. The sinner deserves to be punished, and punishment will also deter potential sinners; but most of all the Bible teaches that what is paramount is the reform of wrongdoers, i.e., reconciliation with God, resulting from repentance, restitution, and forgiveness.

99. H. MANNHEIM, *GROUP PROBLEMS IN CRIMINAL PUNISHMENT* 43 (1955) distinguishes strict liability from that imposed on members of a union or partnership by reliance on the act of members in joining those associations. But surely the act of one who buys stock or joins a union is a very slender reed on which to rest punitive sanctions.

100. H. KELSEN, *SOCIETY AND NATURE* 52, 55 (1943) W. McCulloch wrote that among the Koupoules of India "the greatest misconduct is the forgiveness of an injury, the first virtue, revenge." KELSEN, *id.* at 64-65. Kelsen says at p. 235 that the retributive principle is the origin of the idea of causation.

In modern times the issues have been cast in sharper, mutually exclusive terms. At the one extreme is Kant's scorn of the crass utilitarianism that defends punishment *only* because it would deter others. For him, every human being should be treated as an end in himself, not as a means to extrinsic objectives. *Desert* is the only justification for punishing anyone. At the other extreme is Henry Sidgwick, the eminent moral philosopher, who wrote that he had "an instinctive and strong moral aversion to it [retribution] . . . it is gradually passing away from the moral consciousness of educated persons in most advanced communities. . . ." But he admitted that "it is still perhaps the more ordinary view."¹⁰¹ Even stronger was Rashdall's condemnation of retribution. For him, "it cannot be rational to inflict an evil except as a means to good—the good of the offender or of others."¹⁰²

It is not my present purpose to unravel the complexities of the voluminous literature on "punishment."¹⁰³ But I should like to suggest a possible way to advance discussion of this subject.

Retribution is a universal phenomenon and experience among primitive as well as among civilized people, in ancient Greek drama, in the Old and New Testaments.¹⁰⁴ It is implied or expressed in every legal system, even in those that explicitly reject it and then go on to impose punitive sanctions on criminals in proportion to the gravity of the harms they commit. Critics of retributive justice like Sidgwick and Rashdall believe that all thoughtful persons reject it (*pace* the heirs of Kant of Hegel) but they regretfully acknowledge that "ordinary" people still support it. Even Plato, on whom Rashdall relied, seems to have made room for it. The plain fact, like it or not, is that retribution, crude or refined, has been and is *inevitable*. Responsibility will vary from collective to individual, or both may coexist, but retribution is constant. Although many academic utilitarians continue to ignore that fact or to argue as though it can somehow be made to disappear, non-academic utilitarians simply accept the inevitable and try to minimize its effect when its manifestation in specific penalties does not further deterrence or rehabilitation.

The factual inevitability of retribution supports the position I have long advocated: (1) the primacy of retributive justice on the ground of

101. H. SIDGWICK, *THE METHODS OF ETHICS* 281 (1901).

102. Rashdall, *supra* note 48, at 421, 422.

103. See Hall, *supra* note 92, at ch. 9, and consult the Index in J. HALL, *LAW, SOCIAL SCIENCE AND THEORY* (1982).

104. *Matthew* 13: 41-44; 16:27; *Mark* 9:42.

desert (guilt) and (2) the advance of the utilitarian ends of punishment (deterrence and rehabilitation) so far as they do not trivialize or exceed the limits of justice.¹⁰⁵ The pendulum has swung sharply in the direction of retributive justice and, unfortunately, in recent legislation in the United States rehabilitation has been ignored or rejected. Religion can remind us of the importance of helping wrongdoers develop an appreciation of moral values. Especially suggestive are modern versions of the legal and the anti-legal interpretations of atonement. What the philosopher-king will do in Utopia or God in heaven is a matter of faith. So far as the secular problems of crime and punishment are concerned, legal scholars will agree that sound positive law has great value. Still it seems necessary to stress the fact that even the soundest penal law limits what can be achieved in reliance solely on it. In all world religions much emphasis is placed on the reform of wrongdoers, thought of as turning them from evil to goodness or as their advance in knowledge and understanding. There can be little doubt that this aspect of religion has inspired the reform of penal institutions and much concern for the rehabilitation of their inmates.

105. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 130 (1st ed. 1947). 307-308 (2nd ed. 1960). This was not a discovery or a novelty. In 1797 Kant wrote: "He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens." I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (J. Ladd trans. 1965).
