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THE BIBLICAL TRADITION AND THE LAW

STUDY SERIES

Readings on the Biblical

FOUNDATIONS OF THE CRIMINAL LAW

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INTRODUCTION

These readings are designed for law students and lawyers who desire to examine the foundations of the criminal law from a biblical perspective. The excerpted articles and books provide a starting point. The questions and comments are designed to encourage further reflection or discussion on the basic issues involved in modern criminal justice theory and practice.

This collection is intended to help lawyers and future lawyers apply the scriptures to modern legal problems and theories. While God's Word provides the ultimate standard, specific answers to particular problems are sometimes elusive. This is not an excuse for Christian lawyers to ignore biblical principles; on the contrary, it should spur us on to discuss, debate, and work through solutions, as have the great thinkers of the Church through the centuries. Through the guidance and power of the Holy Spirit, we must evaluate our legal system, our calling as lawyers, and our role as ministers of justice, according to the Word of the One who has called us. I challenge you to prayerfully do that as you work through these pages.

A NOTE ON THE FORMAT

The following excerpts are just that—excerpts of longer, deeper treatments of the subject at hand. These snippets are only a beginning; that is, they encourage further study and discussion, rather than providing the final word on the criminal law. While they address some key issues and provide applicable scriptural principles, they cannot provide the "whole story" of the criminal law from a biblical perspective. Use them as motivation for further study.

The textual material of the articles has been heavily edited and, in some cases, reorganized to highlight a particular issue. In addition, many footnotes have been omitted, and the ones that remain have been renumbered. Numbered footnotes are those that appear in the original article, and the editor's footnotes are marked with an asterisk (*). For uniformity, minor changes in citation form have been made.

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PART I – SOME GENERAL OBSERVATIONS

A. Separate Spheres

The view that church and state are somehow separate entities with separate spheres of God-given jurisdiction is a consistent, but by no means uniform, thread in church history. A simple illustration is a homily by John Chrysostom, in which he discusses the events of II Chronicles 26 as background for the sixth chapter of Isaiah.

St. John Chrysostom, The Fourth Homily on the Text "I Saw the Lord . . ." (trans. Oliver O'Donovan and Joan Lockwood O'Donovan)[*]

Now it happened that this Uzziah, king and crowned head as he was, conceived a high opinion of his own justice, and driven by self-esteem to overreach his station, went into the temple. I will tell you how it happened: he went, we are told, into the Holy of Holies and said, "I propose to offer incense." He laid claim to the priest's prerogative, though he was king! "I propose to offer incense," he said, "since I am a just king." Ah, but king! stay within the bounds of your own authority! The king's authority is bounded in one way, the priest's in another. . . . The king is assigned the management of earthly business; the sphere of the priest's authority is located in heaven, for "whatever you bind on earth shall be bound in heaven" (Matt. 16:19). The king is charged with what must be done here; and I – when I say "I," I mean, of course, "the priest"—I am charged with what must be done in heaven.

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The king, then, is entrusted with the care of our bodies, the priest with our souls. The king may remit our financial debts, the priest remits our moral debts. The one uses coercion, the other persuasion. The one bears weapons that may be seen and felt, the other bears weapons of the spirit. The one goes to war against foreign hordes, whereas *my* war is waged against demons! Yes, the priest's office is higher, which is why the king submits to the priest's hands laid upon his head, and throughout the Old Testament priests anointed kings.

Yet *this* king went beyond his mark, overriding the limits of the royal office, and sought to acquire new powers; he marched high-handedly into the temple proposing to offer incense. And what did the priest say? "It is not for you, Uzziah, to burn incense!" (2 Chron. 26:8). What outspokenness! No slavish temperament there! His tongue in tune with heaven, his freedom unabashed, he had an angel's viewpoint in a mortal's frame! He bestrode the earth, a citizen of heaven! He saw the king, but did not see the purple. He saw the king, but did not see the crown. Don't talk to me of sovereignty where there is unlawfulness! "Not for you, king, to burn incense in the Holy of Holies!" You

[*] OLIVER O'DONOVAN AND JOAN LOCKWOOD O'DONOVAN, FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 98-99 (1999). (Translated from Jean Dumortier, ed., Sources Chretiennes edition (Paris 1981)).

overstep the mark. You want what was not given you, and so will lose even what you were given. "Not for you to burn incense, but for the priests," not your prerogative, but mine. Did I take your imperial purple? Then don't you take my priesthood!

* * * *

But King Uzziah brooked no warning, but bursting with his lunatic idea, pushed on into the temple and drew open the veil of the Holy of Holies, meaning to offer incense. What did God do? Since the priest was subjected to indignity and his priestly warning disregarded, there was nothing left for him to do; for a priest has no more at his command than outspoken rebuke; he cannot resort to arms, seize hold of a shield, brandish a spear, draw a bow, let fly a missile – only, as I say, rebuke outspokenly. Since, then, the priest had uttered his rebuke and the king was unmoved, but resorted to arms, shields, and spears, and deployed his superior strength, the priest, declaring his innocence before God, said, "What lies with me, I have done, and there is no more that I can do. Come thyself to aid thy downtrodden priesthood, when laws are flouted and sacred ordinances set at nought!" What, then, did the God of mercy do? He punished the offender, so that "leprosy broke out on his forehead" (2 Chron. 26:19). For arrogance will always meet its recompense.

B. Christian Political Theory and Political Obligation

Even if we take for granted that the roles of "priest" and "king" are separate and distinct, the question of the boundaries and content of their respective powers remains a difficult question. Professor A.P. d'Entreves has pointed out that the questions of political duty and authority are at the heart of political theory and Christian theology.

From A.P. D'ENTREVES, THE MEDIEVAL CONTRIBUTION TO POLITICAL THOUGHT: THOMAS AQUINAS, MARSILIUS OF PADUA, RICHARD HOOKER (1959).

[T]o put it briefly, the history of political theory is to me first and foremost the history of the attempts to solve the problem of political obligation. It may therefore be said of this history, as of all true history, that it is . . . contemporary history. . . . What makes such history contemporary history is not the projection of our own petty schemes and preconceptions into the past, but the realization that, however remote those ideas and doctrines may seem, the problem to which they respond remains a constant one and, despite all change of circumstance, is the problem which still faces us the moment we begin to reflect on and inquire into the foundations of authority and the grounds of political obligation.

[This lecture] is a study of a particular answer which has been given to the problem of political obligation, and of its meaning to us. It is an analysis of a system which we call medieval because it was constructed in its complete outlines by medieval thinkers, but which, as a system of values, obviously calls for consideration not only *sub specie historiae*, but also *sub specie aeterni*. For it remains one of the main possible answers which can be given to that problem which was first set forward as an object of inquiry by the Greeks and has since been one of the most stimulating factors of our western culture: the problem of authority, of obedience, of political obligation.

* * * *

Let me then try to sum up very briefly what I conceive to be that contribution [of these medieval thinkers]. . . . .

[T]he problem of political obligation raised [several issues] for the medieval mind. First and foremost among these, if not in actually promoting theoretical developments, certainly in stirring the deepest emotional reactions, we must take into account the religious issue. . . . . The really important fact . . . is surely that the problem of authority and obligation was felt by the medieval mind primarily to involve a religious issue, and urgently to require an answer which should be in accordance with the principles of the Christian faith. It is from this point of view that we can understand . . . the extraordinary ingenuity of medieval thinkers in developing, from the bare letter of some well-known texts of the Scriptures, a whole programme of social and political action . . . .

One, and perhaps the most discussed of these texts, seemed indeed to provide a direct answer to the problem of political obligation.

> Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained by God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation. For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? Do that which is good, and thou shalt have praise of the same: for he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is minister of wrath upon him that doeth evil. Wherefore ye must needs be subject, not only for wrath, but also for conscience sake.[1]

The whole history of Christian political theory can well be said to be nothing else than an uninterrupted commentary on this text. The teaching which it contains marks the radical opposition between the classical and the Christian approach to politics. It implies that political values can no more be conceived or represented as a purely human concern. They involve the deepest religious implications. Obedience has ceased to be a merely political problem; authority has assumed a sacred character. Yet from these basic assumptions very different inferences could be and were, in fact, drawn. The Christian notion of obedience has in time been developed into a doctrine of passive obedience as well as into a theory of the religious duty of resistance; the idea of the sacred character of authority has provided the background both of the divine right of kings and of limited and responsible government. Medieval political thought is deeply involved in these issues. It is thoroughly imbued with the idea that authority and obedience are at bottom not merely a political, but a religious concern. . . . But behind this particular attitude, which certainly deserves to be considered as the result of particular historical circumstances, there lies a contribution to political thought which is of permanent value. The idea that authority, whatever its origin, its forms, or its aspects, has in itself some element that is and never can be merely human; that therefore the exercise of power is a source less of rights than of duties, and obedience is due less to man than to principles; that it is the subservience to the divine order of justice which alone can legitimate political rule and give it a 'divine' character: such principles, which medieval thinkers contrived to develop from the original sources of Christian experience, have become outstanding landmarks of Christian political thought, and must remain such unless Christianity abdicates all hope of constructive political action and takes refuge in a passive acceptance of the powers that be.

Very much the same remarks can be made with regard to another passage from the New Testament, which is even more commonly conceived to express a leading principle of Christian politics, and records the words of our Lord: 'Render unto Caesar the things which are Caesar's, and unto God the things that are God's.'[2] Here again we find at the root of the Christian outlook an idea which flatly contradicts the older conception of

[1] *Romans* 13.1-6.
[2] *Matthew* 22.21.

politics. As the highest attainment of human life, as an embodiment of the ultimate end of the individual, the ancient state, as a great classical scholar once put it, was both a state and a Church. Christianity, although preceded in this path by dissolvent philosophical criticism, marks the definite cleavage between political and ethical values, a cleavage which necessarily leads to an opposition, if not actually to a conflict of allegiances. The true Christian, as the officials of the Roman state very soon experienced, as all state-officials are sooner or later bound to realize, is a man who does not necessarily refuse obedience, who may even sometimes believe it his duty to practise passive obedience, but who never will rally to a theory and practice of undivided allegiance, nor accept Caesar's word for an ultimate authority.

FOR FURTHER THOUGHT AND DISCUSSION

1. Is it useful to understand obedience to the civil ruler as a "religious duty?" Why or why not?

2. Is the exercise of civil authority a "religious" duty in the same way as is obedience to that authority?

3. Does Romans 13 compel obedience to ungodly authority? Are there limits to the obligation to submit to earthly rulers? Where are sources of these "limits," if any?

PART II –
A BIBLICAL MODEL FOR DEALING WITH SIN AND CRIME

In short, both the exercise of civil power and obedience to it are "religious" issues, as relevant today as they were to medieval Christians. The sticky questions remain, however, about how *we are to carry out our religious obligations in the civil arena. A person's particular worldview ("religious" or otherwise) wholly dictates the answer to those questions. In the following excerpt, Professor Jeffrey Tuomala articulates this truth as it relates to one's particular view of the atonement of Christ.*

Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice*, 38 AM. J. JURIS. 221 (1993).

Legal doctrines are justified by, and remain coherent as a part of, a particular worldview. . . . The doctrine of Christ's atonement is of singular importance for theories of punishment, as it is the judicial archetype of the way in which God deals with sin and crime. Treatises on the atonement are rich with illustrations from, and analogies to, the civil law. Remarkable parallels appear between the four principle views of Christ's atonement and currently debated theories of civil justice. The civil magistrate, as "minister of God for justice," should deal with crime and civil wrongs according to the same principles by which God deals with sin through the atonement. The justification of a particular theory of atonement justifies a corresponding view of civil justice.

If the civil magistrate should deal with civil wrongs "according to the same principles by which God deals with sin," then political theory is indeed a theological task. That is, one's view of God and his dealings with the world will determine the theories of justice that one accepts as valid.

Professor Tuomala details four separate views of the atonement of Christ at length and then explains the theory of civil justice that is justified by each such view. By way of introduction, he explains:

The satisfaction, governmental, moral influence, and mystical theories of atonement correspond to retribution, deterrence, rehabilitation, and social justice. The satisfaction theory teaches that justice is an immutable attribute of God's character demanding full payment of the law's penal and compensatory sanctions for man's sin. It alone holds that Christ's vicarious death was necessary to satisfy justice as a condition of salvation, and that its primary effect was to change God's judicial disposition toward man. Likewise, only retribution requires punishment based on moral desert and does not focus on its prospective effect on the offender.

The governmental and moral influence theories concede that man deserves punishment, but they deny that anything in God's nature requires it. Christ's work is not a vicarious

satisfaction of justice, but rather the most efficient means of inducing a change of behavior, either through fear by his exemplary death (governmental) or through love by his exemplary life and death (moral influence). Deterrence and rehabilitation similarly justify sanctions in terms of their utility in promoting the social goal of behavioral change through fear or treatment.

Christ's death is basically irrelevant in the mystical theory which teaches that through the incarnation humanity is divinized, they effecting an essential oneness of God and man. Social justice theories parallel this in that moral fault and sanctions are irrelevant to the goal of promoting community or reconciliation of all within society.

Atonement theories cannot be viewed in isolation from the theological systems to which they belong. A particular view of the atonement entails a view of human nature and of the Holy Spirit. All of the atonement theories except satisfaction confuse the work of Christ and the Holy Spirit and have a fallacious view of sin and human nature. This has an important parallel in views of civil justice which confuse the jurisdictions of church and state. Christ's work establishes an objective basis for reconciliation by satisfying justice, while the Holy Spirit makes reconciliation a subjective reality by revealing truth and transforming lives. The state is entrusted with the ministry of justice through the power of the sword,[1] while the church is entrusted the ministry of reconciliation[2] through the power of the Spirit. Just as God has not given the church the sword of steel necessary to exact justice, he has not given the state the sword of the Spirit[3] necessary to transform the sin nature of wrongdoers and reconcile parties.

A. SATISFACTION THEORY OF ATONEMENT

* * * *

The Reformers taught that God created man righteous and governed their relationship by a covenant of law, rewarding obedience with life and disobedience with death.[4] All men were on probation in Adam whose sin brought guilt and a sentence of death on all mankind. As a result, everyone is born with a sin nature that inevitably produces specific sinful acts, both of which deserve punishment.[5] As sin is a personal offense against God and not against an impersonal government, His judicial disposition toward sin is one of wrath and determination to exact justice.[6]

Yet even while man chose to be an enemy of God and was under his wrath, God loved man and sent his son to fulfill all the demands of justice in man's place by his life and his

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[1] *Romans* 13:4 [quotation omitted].
[2] 2 *Corinthians* 5:19b-20 [quotation omitted].
[3] *Ephesians* 6:17.
[4] [JOHN CALVIN,] THE INSTITUTES OF THE CHRISTIAN RELIGION, bk. 1, ch. xv [hereafter, *The Institutes of the Christian Religion*]; *Genesis* 1:27-29, 2:15-17; 3:14-24. *See also Exodus* 24 and *Deuteronomy* 28 (these events were covenant renewal ceremonies).
[5] *The Institutes of the Christian Religion*, bk. 2., chs. i-iii and ch. xvi, para. 3; *Romans* 3:9-23; 5:12-21; *Ephesians* 2:3; *Psalm* 51:5. *See also* [Archibald A. Hodge,] *The Atonement*, ch. vii [(1967)].
[6] *The Institutes of the Christian Religion*, bk. 2, ch. xvi, para. 1; *Psalm* 51:3-4; *Romans* 1:18.

death.[7] Scripture characterizes Christ's death not only as a punishment but as a payment. Justice demands both.[8] An offender deserves to be punished (retribution) and he owes payment (restitution) to the offended party. Christ's judicially imposed death on Calvary as punishment and payment was typified and prophesied in the Old Testament.[9] While Christ's death satisfied the negative aspects of the law, his life of perfect obedience satisfied the positive requirements, meriting the reward of eternal life.

God did not have to save man, but having chosen to, the only means compatible with justice was Christ's substitutionary atonement. He could not simply remit punishment nor accept less than full satisfaction without himself acting unjustly.[10] In so doing he does not conform to a principle of justice that exists independently of himself, but rather to the eternal personal attributes of his own character. Since his very character is just, all of his laws and ways reflect his justice. Justice is not the product simply of God's will, but rather of his unchanging nature.[11]

Through Christ's substitutionary death the objective ground for the expiation (removal) of man's guilt, and thereby the propitiation (appeasement) of God's wrath, was established. Christ's work is the objective ground for God's reconciliation to man and man's to God.[12] As all men enter the world under the guilt of sin and wrath of

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[7] *The Institutes of the Christian Religion*, bk. 2, ch. xvi, para. 4: For it was not after we were reconciled to him by the blood of his Son that he began to love us, but he loved us before the foundation of the world, that with his only-begotten Son we too might be sons of God before we were anything at all. *Romans* 5:9-11; *Ephesians* 2:4-5; *Colossians* 1:21; I *John* 4:7-12.

[8] *The Institutes of the Christian Religion*, bk. 2, ch. xii, para. 3:

> Therefore our Lord came forth very man, adopted the person of Adam, and assumed His name, that he might in his stead obey the Father; that he might present our flesh as the price of satisfaction to the just judgment of God, and in the same flesh pay the penalty which we have incurred.

Isaiah 53:5: "But he was pierced for our transgressions, he was crushed for our iniquities; the punishment that brought us peace was upon him, and by his wounds we are healed." I *Peter* 2:24: "He himself bore our sins in his body on the tree, so that we might die to sins and live for righteousness; by his wounds you have been healed.: *Psalm* 49:7-9: "No man can redeem the life of another or give to God a ransom for him---the ransom for a life is costly, no payment is ever enough--that he should live on forever and not see decay." I *Peter* 1:18-19: "For you know that it was not with perishable things such as silver or gold that you were redeemed from the empty way of life handed down to you from your forefathers, but with the precious blood of Christ, a lamb without blemish or defect."

[9] The ceremonial law, in particular the sacrificial system, is typical of Christ's work on the cross (e.g., *John* 1:29; *Hebrews* 10:1-7). Redemption was both by payment (e.g., the temple tax of *Exodus* 30:12-16, release of slaves in *Leviticus* 25:25-28, and cost of sacrificial offerings) and by substitutionary death (e.g., animal sacrifices of *Leviticus* 1-7). *See also The Atonement*, ch. viii.

[10] *The Institutes of the Christian Religion*, bk. 2, ch. xii, para. 1; *Matthew* 26:42; *Romans* 3:25-26; *Galatians* 2:21; *Hebrews* 9:22. *Romans* 3:25-26 is one of the most important passages on the forensic significance of Christ's death. The position that Christ's death was necessary is defended in 1 C.E.B. CRANFIELD, THE EPISTLE TO THE ROMANS 208-18 (1975); and 1 JOHN MURRAY, THE EPISTLE TO THE ROMANS 116-21 (1959).

[11] *Deuteronomy* 32:4; *Psalm* 92:15; *Matthew* 5:48; *Revelation* 4:8. *See also* THE ATONEMENT, ch. xvi.

[12] *The Institutes of the Christian Religion*, bk. 2, ch. xvi, para.2: "[Christ] with his own blood expiated the sins which rendered them hateful to God, by this expiation satisfied and duly propitiated God the Father, by

God, there remains a need to apply the benefits of Christ's work experientially to individuals. This subjective application of the benefits of the atonement is the work of the Holy Spirit.

Due to the moral corruption inherited from Adam no one is able to satisfy the terms of the covenant of law. God has established a new covenant that man might have forgiveness of sin and eternal life on the condition of faith in Christ's work.[13] But this spiritual condition is so desperate that he is unable to exercise faith as a meritorious ground of salvation. The very faith by which he trusts in Christ is a gift from God. Because all men are hopelessly dead in sin, it is only after a spiritual birth (regeneration) by the work of the Holy Spirit that one can exercise this gift of faith.[14] Justified by faith the believer no longer stands under the sentence of death. God having been reconciled to man by the work of Christ, man is now reconciled to God through the work of the Holy Spirit. But salvation is both a crisis experience (regeneration and justification) and a growth process (sanctification) in which the entire nature of man is being transformed to conform to the image of God in which he was created. The believer is reconciled to God and is being reconciled to God through the agency of the Holy Spirit. The Reformers clearly distinguished the work of Christ establishing the objective ground for reconciliation (redemption accomplished) and the work of the Holy Spirit effecting an actual reconciliation (redemption applied). All of the other views of atonement denigrate the work of the Holy Spirit or deny his existence as a distinct person in the Trinity.

B. RETRIBUTION--RESTITUTION

> [R]etributivism . . . holds that criminals deserve punishment proportionate to the moral blameworthiness of their offense. Punishment is not justified by its usefulness as a means to attain the ends of reducing crime or rehabilitating criminals. In its logical and strongest form the magistrate must punish to the full extent of desert.

Retribution has several attractive features which most utilitarians try to incorporate, only to compromise their own position. Since law has a necessary moral content it places limits on what conduct can be criminalized. In fact, the entire guilt-finding process with its focus on *mens rea* is premised on the retributive presupposition that human beings are morally responsible. The state may punish only the guilty, and punishment is limited by desert. The retributive position gives the entire criminal process, form criminalization to adjudication to punishment, a coherence.

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this intercession appeased his anger, [and] on this basis founded peace between God and man . . . ." *Romans* 3:25; *Hebrews* 2:17; 1 *John* 2:1-2; 4:10 (see King James Version for its rendering of these verses).

[13] All of the redemptive convenants with man since the fall have been covenants of grace, including the Mosaic. The New Covenant is different not because it is a covenant of grace rather, than law, but because the mediator of that covenant is Jesus Christ, God's own Son.

[14] Commenting on 2 Thessalonians 2:13 Calvin reminds the reader that "faith itself is produced only by the Spirit." *Institutes,*, bk. 3, ch. I, para 4. Calvin further explains that "we require a transformation not only in external works but in the soul itself." *Id*., bk. 3, ch. iii, para. 6. *John* 3:1-21; *Ephesians* 2:1; *Titus* 3:5-7.

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To reflect the satisfaction theory, civil sanctions must include restitution (payment to the victim) and retribution (payment to the offender in cases of crime). Most retributivists have come to equate criminal justice with punishment and are often careful to distinguish restitution which is seen as a matter exclusively of tort law.

Despite this fact, there has been an increased concern for victims of crime and their role in the justice system. One aspect of this concern has been to promote compensation and restitution, but these schemes do not seem to fit under retribution, deterrence or rehabilitation. Some writers promote restitution as a substitute for punishment, which is the same error Anselm made believing justice may be satisfied simply by payment. Without both restitution and retribution there is not satisfaction of justice, and therefore, no objective ground for reconciliation of parties to each other, or offenders to the community.[15] Because most victims are without means to pursue civil remedies, or the losses are too small to justify litigation, there is a cumulation of unsatisfied victims and unreconciled offenders which leads to disillusionment and disrespect toward the law. Punishment is also necessary to satisfy justice from the victim's and society's perspective. The desire to see criminals punished need not be irrational or vindictive, and we should be reluctant to call a man good who does not respond with some indignation towards the wickedness he sees in the world and satisfaction in seeing it punished.

Most writers do not address the question of whether the state has a right to punish; however, it is answered in the course of showing why Christ's atonement is the model for civil justice. Romans 1:18-32 says that the "wrath of God is revealed from heaven" against all sin, and that because of this revelation in nature and the conscience, all men know they are under judgment. Romans 13:1-7 says that God established the state with the magistrate as his servant, who is "an agent of wrath to bring punishment on the wrongdoer." As an agent exercising delegated authority, the magistrate must administer justice by the same principles that God dealt with all sin through Christ's atonement.

The civil magistrate's authority, as delegated from God and modeled on the atonement, is severely limited when compared to the practices of modern states. Contrary to conventional wisdom, the sphere of activities subject to state intrusion is limited by connecting law and morality. First, the state has no authority to criminalize acts that are not morally wrong. The modern state is a major offender of this principle. Second, even though God's judgment is against all sin, including thoughts, the civil magistrate has authority only over conduct. Third, he has authority to criminalize only some kinds of immoral conduct.[16] Even though all crime is sin (immorality) not all sin is to be punished as crime.

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[15] Biblical law implements both restitution (e.g., *Exodus* 22:1-4) and retribution (e.g., *Exodus* 21:12-17; *Deuteronomy* 25:1-3).

[16] Unlike the first two principles, this principle cannot be drawn from the Romans 13 passage or the principles of justice involved in Christ's atonement. It can only be proven by an appeal more generally to

The principle of delegated authority places further strictures on the state. It has no institutional authority to establish or administer programs designed to change the character or offenders or potential offenders.[17] Although retribution-restitution's focus is essentially backward-looking, by satisfying the demands of justice it restores victims and expiates guilt thereby establishing a basis for reconciliation of the offender to his victim, the community and himself.

As God's agent of grace the church also has an expressly delegated and limited authority. Its institutional role includes proclaiming truth, disciplining individuals and nations, feeding the poor, restoring relationships, and promoting community.[18] To exercise this ministry of reconciliation the church is entrusted with "the sword of the Spirit," fulfilling its role as gifted and empowered by the Holy Spirit.[19] Through the church's ministry the Holy Spirit applies the salvation Christ secured. The reconciliation of man to God provides the exclusive basis for the reconciliation of man to man and for true community.[20] Just as there is a distinction between the work of Christ and the work of the Holy Spirit, there is a corresponding separation of state and church. The modern state is notorious for neglecting justice and appropriating the role of the church, a role for which the state is neither entrusted nor empowered.

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Although my primary aim has not been to offer a comprehensive case for a particular view of atonement and civil justice, I have argued that only the satisfaction and retribution-restitution views are distinctly different and justifiable in terms of Christian theology and a biblical worldview. It is a larger and more basic matter still to offer a defense of one's worldview. Perhaps that is why most writers do not even try to articulate the basic presuppositions from which they work. The fact of the matter is that everyone operates on the basis of certain presuppositions, whether they do so self-consciously and honestly or not. Recognizing that these presuppositions are based on faith does not mean that they must be at odds with knowledge or operate in a separate realm. Rather we believe that we might know, and there is a wonderful communion between thought, action and faith that is properly grounded.

> For it is true that the more richly we are nourished in Holy Scripture by the things that feed us through obedience, the more accurately we are carried along to the things that satisfy through knowledge. . . . Certainly this is just what I say: He who will not believe will not understand. For

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principles of law and justice found in scripture. Generally, the state in scripture has a limited subject matter jurisdiction. As God's agent, with a ministry of justice, the state may use coercion only in those situations where there is a delegation of authority.

[17] Biblically this is the jurisdiction of the family (e.g., *Deuteronomy* 6:4-9; *Ephesians* 6:4) and the church (e.g., *Deuteronomy* 33:10; *Acts* 2:42).

[18] *John* 16:5-15; *Romans* 15:5; 2 *Corinthians* 5:11-21.

[19] *The Institutes of the Christian Religion*, bk. 2, ch. xvi, para. 16; *Ephesians* 6:17.

[20] *Psalm* 133; John 17:23; *Ephesians* 4:1-6.

> he who will not believe will not gain experience, and he who has not had experience will not know.[21]

FOR FURTHER THOUGHT AND DISCUSSION

Tuomala points out that "justice" is not an arbitrary result of God's dealing with men, but exists, as "truth," as part of God's nature and character. Therefore, discerning the operation of Justice in God's word is the best method of developing a political worldview-- a theory of civil justice-- that is based upon truth. In order to properly interpret individual passages regarding crime, torts, and civil law, it is necessary to view God's dealings with men throughout history in light of a *comprehensive* view of scripture and God's purposes.

1. How might you sharpen your Biblical perspective regarding issues of law and justice? List two or three steps you will take to that end:

2. Consider the application of the retributive, deterrence, rehabilitation, and social justice theories to the following:

a. The death penalty

b. Rehabilitation and the prison system

c. Corporal Punishment

d. Victim compensation statutes.

[21] Anselm, *Letter of Anselm to Pope Urban II*, *in* A SCHOLASTIC MISCELLANY: ANSELM TO OCKHAM 97, 97-98.

PART III – THE JURISDICTION OF THE STATE IN PUNISHING SIN AND CRIME

Are there some things that the state may not punish, even "wrongful acts" or "sins"? Where does the civil power derive its authority to punish at all? If it is from God, as Jeff Tuomala argues above, may the magistrate punish all that is sin in the eyes of God?

Professor Craig Stern addresses these questions of jurisdiction in the following excerpts. First, he discusses the problem of the role of the state in punishing wrongdoers in the context of the classic problem of "moral luck." In the second reading, he tackles the even tougher issue of what particular sins are within the jurisdiction of the criminal and civil laws.

A. LIMITED JURISDICTION I

Craig A. Stern, *Crime, Moral Luck, and the Sermon on the Mount*, 48 Cath. Univ. L. Rev. 801 (1999).

Consider the following hypotheticals. Alexander, intending to kill Carl, takes careful aim, fires, and inflicts a wound that proves instantly fatal. Alexandra, intending to kill Carol, takes careful aim, fires, and inflicts the merest dent in Carol's bicycle. Alexander and Alexandra share equal intention, skill, and equipment. But the wind unexpectedly blows askant Alexandra's bullet, saving Carol's life. If both shooters suffer arrest and conviction for their shots, Alexander likely will face the death penalty or a long prison term, while Alexandra will receive a relatively short prison term. A difference in wind has rendered Alexander guilty of murder, Alexandra of attempted murder.

Whatever the theory of criminal law and punishment, these results appear anomalous, if not unjust. Both shooters harbored the same intent, both indulged in the same conduct and both imposed the same risks. Though the difference between the resultant loss of life and the dent in a bicycle is of extreme importance to questions of compensation central to tort law, why should this difference matter in criminal law at all? The conduct to be deterred is identical for both actors. Both manifest equal need for reform or incapacitation. Both seem to deserve equal punishment for the wickedness of their intent and conduct. Can the wind really matter so much? [FN9] The criminal law of perhaps every jurisdiction in the United States would treat Alexander and Alexandra very differently.[1]

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[1] "Almost always, the penalty for an attempt to commit a capital crime or an offense for which the penalty is life imprisonment is set at a specific term of years of imprisonment." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 349 (2d ed. 1995) (stating that attempted felonies receive lesser punishment than completed ones). Unlike civil governments today, it seems that fourteenth-century England did punish attempted murder with the death penalty as equivalent to murder as influenced by Roman and canon law. See Albert Kiralfy, *Taking the Will for the Deed: The Mediaeval Criminal Attempt*, 13 J. LEGAL HIST. 95, 95 (1992). This practice revived later. See Stephen J. Schulhofer, *Harm and Punishment: A Critiqueof Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV.

The problem our shooters raise is known in philosophical quarters as the problem of moral luck, an oxymoronic label designed to carry the weight of the philosophic analysis of the question. For how can the moral quality of an act or an actor hinge upon luck?

Professor Stern ultimately concludes that moral jurisdictional principles and God's divine providence, not "luck," provide the answer to the question.

The cases of Alexander and Alexandra . . . present an odd prospect. From one vantage point, we are sure that both are equally guilty, and that the wind could not make a difference in their desert: they both performed the same act with the same intent. From another vantage point, we are sure that they are by no means equally guilty, and that the wind has made all the difference: Alexander is a murderer, Alexandra is not. How does one reconcile these seemingly irreconcilable conclusions?

[B]oth conclusions may be true, properly understood. While in absolute moral terms, both actors may share equal guilt, in the moral region assigned to civil government for enforcement, each bears different guilt. This harmony is not due to a different concept of justice, to the invasion of tort into criminal law, or to some other distinction between the substance of justice before God and before civil government. What is at work is a jurisdictional principle. Civil government administers God's justice, but only in part. The two vantage points view the cases from these respective jurisdictions.

Consider the scriptural bases for this distinction between God's perfect justice and man's attempts at justice::

1497, 1524 (1974) ("During Coke's time, efforts were occasionally made to punish unsuccessful attempts to kill as murder, but this approach was considered too severe and soon abandoned.").

Early American jurist James Wilson taught that

[t]he law of nature, it is admitted on all hands, measures crimes by the intentions, and not by the event. Should a standard, different from that which has been established by unerring wisdom, be adopted by uninformed man? Should not that rule, which is observed by the law divine, by laws which are human? ... Is it not shocking to reason ... and destructive of virtue, to contend, that the ill consequence of an act is more to be considered than its immorality? ... The subtle distinctions, which casuists make between moral and political delinquencies, are offensive to common sense.

[John E.] Witte & [Thomas C.]Arthur, [*The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment,* 10 J. L. & RELIGION 433,] 463 n.93 (quoting James Wilson, Lectures on Law (1790-1792), *in* 2 THE WORKS OF JAMES WILSON 341, 343-44 (James D. Andrews ed., 1896)).

Sir William Blackstone explained that attempt is punished less than the completed offense in these words:

For evil, the nearer we approach it, is the more disagreeable and shocking; so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it: and it is an encouragement to repentance and remorse, even till the last stage of any crime, that it never is too late to retract; and that if a man stops even here, it is better for him than if he proceeds: for which reason an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape, or murder.

4 WILLIAM BLACKSTONE, COMMENTARIES *14. This reason would not obtain in cases of completed attempts like Alexandra's. Would Blackstone therefore have held that she be punished the same as Alexander?

Two fundamental Christian doctrines support the view that simultaneously finds Alexandra as morally guilty as Alexander and yet not deserving of equal criminal punishment. Both doctrines are central to the faith that largely shaped the laws and morals of America. Both find expression in the Sermon on the Mount.

The Sermon begins with the Beatitudes:

Blessed are the poor in spirit: for theirs is the kingdom of heaven. Blessed are they that mourn: for they shall be comforted. Blessed are the meek: for they shall inherit the earth. Blessed are they which do hunger and thirst after righteousness: for they shall be filled. Blessed are the merciful: for they shall obtain mercy. Blessed are the pure in heart: for they shall see God. Blessed are the peacemakers: for they shall be called the children of God. Blessed are they which are persecuted for righteousness' sake: for theirs is the kingdom of heaven. Blessed are ye, when men shall revile you, and persecute you, and shall say all manner of evil against you falsely, for my sake. Rejoice, and be exceeding glad: for great is your reward in heaven: for so persecuted they the prophets which were before you.[2]

In this passage, Jesus teaches that God responds graciously to those living in the knowledge of their need of His grace. Blessing awaits those who understand they deserve no blessing. Those blessed, in turn, become a blessing themselves, and so receive still more blessing. Understood in this way, the Christian life consists of receiving and mediating God's blessings.

Subsumed within this teaching, however, are the two doctrines that address our problem. These first words of the Sermon on the Mount presage the two central doctrines that untangle the riddle of moral luck as presented by the cases of Alexander and Alexandra. To understand one's need of God's grace, one must understand one's moral fault. For the Christian, it is moral fault that impoverishes, leaving us with no hope to attain our purpose and happiness apart from God's help. A true understanding of our moral fault, however, requires a true understanding of God's moral standards. The poor in spirit see their fault in comparison with God's design and measure for the true and full human life. They that mourn see the inestimable loss that humans experience in failing to attain to God's design and measure for human life. The meek and those who hunger and thirst for righteousness act in the knowledge of our loss and of God's eagerness to forgive, restore, and heal.[3] But all of these people must know the appropriate measure of God's will for the fullness of a human life. They must not confuse that measure with others. This appreciation for the perfection of our ordained humanness is the core of the first of the two doctrines that explain our apparent antinomy.

[2] *Matthew* 5:3-12.
[3] *See id.* at 5:5-6. Those receiving this forgiveness, restoration, and healing become pure in heart, peacemakers, and, though persecuted for righteousness' and Christ's sake, will attain the Kingdom of Heaven. See *id.* at 5:8-10.

The core of the second doctrine also is suggested in the Beatitudes. Jesus teaches that the people he describes will be blessed and will receive various graces and rewards. The poor in spirit become the truly rich; mourners receive comfort; the meek, the hungry and thirsty, the others, all receive their blessings. If true, this teaching entails a God whose will is performed without fail, a loving God whose purposes always are executed. This teaching embraces the second doctrine in the form of Divine Providence, God's loving regulation of events according to His purpose.

As the remainder of the Sermon on the Mount expands upon the themes of the Beatitudes, it is no surprise that the two doctrines--the unique stringency of God's standard for "perfect humanness," and the beneficent omnipotence of God's Divine Providence--find more complete expression in the verses that follow.

The first doctrine occupies the better part of the fifth chapter of the Gospel according to Saint Matthew:

> Think not that I am come to destroy the law, or the prophets: I am not come to destroy, but to fulfil [sic]. For verily I say unto you, Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled. Whosoever therefore shall break one of these least commandments, and shall teach men so, he shall be called the least in the kingdom of heaven: but whosoever shall do and teach them, the same shall be called great in the kingdom of heaven. For I say unto you, That except your righteousness shall exceed the righteousness of the scribes and Pharisees, ye shall in no case enter into the kingdom of heaven. Ye have heard that it was said by them of old time, Thou shalt not kill; and whosoever shall kill shall be in danger of the judgment: But I say unto you, That whosoever is angry with his brother without a cause shall be in danger of the judgment: and whosoever shall say to his brother, Raca, shall be in danger of the council: but whosoever shall say, Thou fool, shall be in danger of hell fire.[4]

Jesus continues, warning that "[y]e have heard that it was said by them of old time, Thou shalt not commit adultery: But I say unto you, That whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart."[5]

God's standard for "perfect humanness" and its strictures occupy more of the sermon:

> It hath been said, Whosoever shall put away his wife, let him give her a writing of divorcement: But I say unto you, That whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery: and whosoever shall marry her that is divorced committeth adultery.
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> Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all; neither by heaven; for it is God's throne: Nor by the earth; for it is his footstool: neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head,

[4] *Id*. at 5:17-22.
[5] *Id*. at 5:27-28.

because thou canst not make one hair white or black. But let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil.

Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also. And if any man will sue thee at the law, and take away thy coat, let him have thy cloke also. And whosoever shall compel thee to go a mile, go with him twain. Give to him that asketh thee, and from him that would borrow of thee turn not thou away.

Ye have heard that it hath been said, Thou shalt love thy neighbour, and hate thine enemy. But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you; That ye may be the children of your Father which is in heaven: for he maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust. For if ye love them which love you, what reward have ye? do not even the publicans the same? And if ye salute your brethren only, what do ye more than others? do not even the publicans so? Be ye therefore perfect, even as your Father which is in heaven is perfect.[6]

The import of these verses is to demonstrate the gap between the civil law and the moral law for humankind. Jesus does not criticize the law of the Torah, much less replace it. Everything he teaches was implicit in the Torah, as his listeners must have realized. What is especially striking in the passage, however, is the repeated and insistent call not to find moral justification in adherence to a civil law standard of behavior. One may not be committing murder, and yet hate; one may not be committing the act of adultery, and yet commit adultery in one's heart. Again, it is not that the civil law itself is defective--God himself ordained the civil law in this case.[7] Rather, Jesus warns of the confusion of the types of law, and of the appropriate forum--the judgment of goodness before men and the judgment of goodness before God.[8] Even God's rules for social governance do not establish perfect rules for human behavior, though, of course, they do plainly suggest them.

[The first fundamental Christian doctrine involved, then, is a jurisdictional principle. Professor Stern discusses the second doctrine, divine providence, at length. He then continues, drawing "the connection between the two doctrines found in the Sermon on the Mount and our cases the murdering of Alexander and the bicycle-denting Alexandra."]

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[6] *Id*. at 5:31-48.

[7] It may be that God Himself adheres to something like a lex talionis even in meting out his own justice. See Abraham Cronbach, *Manner for Manner in* DANTE, 35 HEBREW UNION C. ANN. 193, 193 (1964) (discussing the notion that divine punishments and rewards are shaped according to the corresponding human acts).

[8] Dean Herbert W. Titus has explained regarding the Sermon on the Mount that "[t]he mistake that the scribes and Pharisees had made was that if man was right before Israel's rulers, he was then right before God. It was a mistake of jurisdiction." HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES 71 (1994). Much of this Article was inspired by the work of Dean Titus.

* * * *

First, the most just and perfect law for social use--for example, civil or church law--does not prescribe the total justice and perfection of ideal human behavior. Recognition of this principle does not necessarily entail the notion of inner-morality versus outer-legality, or the idea that law for society is instrumental and consequentialist while private morality is deontological, or some other such dichotomy. Rather, the principle may entail the Christian view that all authority comes from God, and that human authorities have various roles or ministries in recognizing, adopting, and applying law. The nature and purpose of law may not change from forum to forum, but the authority of a forum does. Justice remains a universal standard of law, no matter the forum, but no sublunary forum has commission to do total, absolute justice. That power is God's alone.

So the moral luck that seems to damn Alexander's act more than Alexandra's because the wind shapes the trajectory of bullets is not really moral luck at all. If, before God, their hearts, acts, or characters are equally guilty, He will judge. But our human response, including the response of our laws, may with justice treat them as guilty of different offenses to be punished differently. Leaving absolute justice to God, a Christian approach understands that the human role in responding to these acts is limited. The luck is not moral, but "jurisdictional."

The Christian approach also, however, would not recognize moral luck as luck. If it were only luck that assigned the deadly aspect of Alexander's act both to God and to a jurisdiction ready to send him to death for it, and the deadly aspect of Alexandra's act to God alone, the justice of the jurisdictional rule might be questioned. After all, as far as human law is concerned, we are treating possibly equally evil acts unequally. The jurisdictional understanding of moral luck proves too much if the jurisdictional rules are themselves arbitrary. Then God's justice becomes a human justice slush fund, licensing human authorities to do sporadic, partial justice, unjustly.

One factor that prevents this degeneration of a jurisdictional principle into a prescription for human injustice is the principled nature of the jurisdictional rule, a rule that itself is just. The other, and perhaps even more important factor when it comes to specific cases, is Divine Providence. That the possibly equally evil acts of Alexander and Alexandra deserve such unequal human responses is due to the wind that itself is under God's providential power. A Christian worldview understands that how the wind moves, in fact, how the world holds together at all, depends upon God's will. (It also understands, however, that Alexander, not God, murdered Carl.) God arrays the platform upon which human acts are performed. It is not luck, therefore, but Providence, that assigns cases to various fora, where God's justice may be administered in part according to jurisdictional rules that are themselves expressions of God's justice.

It appears, then, that a Christian view typified by the Sermon on the Mount may make sense of the moral luck conundrum. This view explains how we see Alexander and Alexandra as perhaps equally guilty in one sense, and yet not equally guilty in another, without compromising on standards of justice in either estimation. Before God and His

absolute and complete standards of human moral perfection, Alexandra may be as guilty as Alexander. Before fellow humans in state, church, and other social contexts, and the limited authority they possess to accomplish limited justice as cases providentially come before them, Alexander may be guiltier than Alexandra.

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A fundamental tenet of the Christian faith holds that in God reposes all authority.[9] Humans exercise authority only derivatively and within limits. Humans exercising the authority of civil government exercise only the authority that God allots to that ministry.

The biblical locus classicus on the authority of civil government explains the principle:

> [R]ulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same: For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil. Wherefore ye must needs be subject, not only for wrath, but also for conscience sake. For for [sic] this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing. Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour.[10]

Civil rulers, as ministers of God, are to punish evil acts. There is no mention here of judging character, thought, or pure will. God Himself does that,[11] although humans do this to some degree, when disciplining children, or members of a church, or in selecting persons for tasks or roles. The civil government, however, though it may ascertain character in filling its offices, may not punish faulty character. Its role is to punish wicked acts.[12]

But not all sinful acts are civil crimes, even in God's civil law for Israel.[13] Some sinful

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[9] *See Romans* 13:1-2 ("Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.").

[10] *Id*. at 13:3-7; see also 1 *Peter* 2:13-14 (commanding Christians to "[s] ubmit [themselves] to every ordinance of man for the Lord's sake: whether it be to the king, as supreme; Or unto governors, as unto them that are sent by him for the punishment of evildoers, and for the praise of them that do well.").

[11] See 1 *Samuel* 16:7 (teaching that "the Lord said unto Samuel, Look not on his countenance, or on the height of his stature: because I have refused him: for the Lord seeth not as man seeth; for man looketh on the outward apperance, but the Lord looketh on the heart").

[12] See 1 *Peter* 2:14 (admonishing Christians to obey civil governments sent by God "for the punishment of evildoers, and for the praise of them that do well").

[13] See Roger Bern, *A Biblical Model for Analysis of Issues of Law and Public Policy: With Illustrative Application to Contracts, Antitrust, Remedies and Public Policy Issues*, 6 REGENT U. L. REV. 103, 116-24 (1995) (discussing jurisdictional considerations applicable in applying biblical principles: "[N]ot every sin is within the jurisdiction of Civil Government."). One should note that the instant Article draws upon the whole of the Bible to explore the teaching of the Sermon on the Mount pertinent to cases like Alexander's and Alexandra's. Like the Sermon itself, the entire Bible has profoundly influenced our morals and

acts, even harmful sinful acts, were for God alone to judge and punish.[14] Similarly, not every criminal act within the cognizance of civil government was to be punished. Some criminal acts would escape detection. Furthermore, unless two or three witnesses could rise to testify in court, the crime was to go unpunished by civil government.[15] All evil acts were to come before God, however, either before God Himself or before God and His ministers of justice in civil government. The touchstone of civil authority does not seem to be the heinousness, harmfulness, or any other measure of the moment of the offense; rather, some other distinction is at work. Sometimes, it is obvious. The requirement of two or three witnesses seems designed to foster the reliability of civil judgments. Other distinctions are less perspicuous, like that between the civilly punishable and unpunishable offenses in Leviticus 20,[16] indicating that even the theocracy of Israel was to be modest in its jurisdiction. As seen in Scripture, God designed a disjunction between Israel's jurisdiction and His, between civil law and the total law of human behavior.[17]

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jurisprudence. For many, it remains a source of truth in these areas. To be sure, the Bible deserves careful exegesis. But this author vehemently disagrees with the claim that "[a]ny attempts to apply the principles of the Torah to the American legal system are incoherent and unjustified." Daniel A. Rudolph, *The Misguided Reliance in American Jurisprudence on Jewish Law to Support the Moral Legitimacy of Capital Punishment*, 33 AM. CRIM. L. REV. 437, 462 (1996).

[14] See Craig A. Stern, *Things Not Nice: An Essay on Civil Government*, 8 REGENT U. L. REV. 1, 6-9 (1997) (relying especially upon *Leviticus* 18 and 20 to explain the limits of civil authority). [Excerpted herein].

[15] See *Numbers* 35:30 (imposing the requirement of more than one witness to impose a death sentence); *Deuteronomy* 17:6 (same), 19:15 (same, except apparently extended beyond capital cases).

[16] *See Leviticus* 20:1-27 (setting forth the punishment for the moral offenses listed in *Leviticus* 18). Some punishments were for Israel to exact, some for God alone. The rabbis, however, did not understand this chapter to preclude Israel also from punishing the offenses to be punished by God Himself. Rather, the rabbis read Deuteronomy 25:1-3, a passage regarding judicial beating for "the wicked man ... worthy to be beaten ... according to his fault," as authorizing beatings for such offenses. *See* 11 THE JEWISH ENCYCLOPEDIA 569 (Isidore Singer ed., 1905) (noting this use of beatings, and referencing *Deuteronomy* 25:2-3 as authority). This rabbinic understanding does not entail that these offenses are to be punished by a civil government other than Israel. Beating may be more in the nature of fatherly discipline entrusted to judges in Israel than in the nature of the punishment entrusted to the state in such passages as *Romans* 13:1-6 (describing the civil government's power as derived from God). *See, e.g., Proverbs* 13:24 ("He that spareth the rod hateth his son: but he that loveth him chasteneth him betimes."); 19:29 ("Judgments are prepared for scorners, and stripes for the back of fools."); 20:30 ("The blueness of a wound cleanseth away evil: so do stripes the inward parts of the belly."); 22:15 ("Foolishness is bound in the heart of a child; but the rod of correction shall drive it far from him."); 23:13-14 ("Withhold not correction from the child: for if thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shalt deliver his soul from hell."). For a study that explores the distinction between penal and educational contexts for common beliefs on the significance of harmful results, see Yoram Shachar, *The Fortuitous Gap in Law and Morality*, CRIM. JUST. ETHICS, Summer/Fall 1987, at 12.

[17] *See* Bernard S. Jackson, *Liability for Mere Intention in Early Jewish Law, in* ESSAYS IN JEWISH AND COMPARATIVE LEGAL HISTORY 202 (1975). Jackson stated:

> [I]t is valid to draw two conclusions from the biblical [i.e., Old Testament] texts. First, there is no evidence that liability for mere intention was ever applied in a human court. Second, and equally significant, the idea did exist that merely to intend a wrong was itself wrong. It was a principle employed in God's justice, but not, at this period, in the jurisprudence of man.

Id.

While not answering our question regarding results, the Sermon on the Mount does teach that the law for civil government is not to be confused with the law of human behavior generally. The law of human behavior generally is stricter and more complete.[18] And the penalties for breach of that law are also more severe, including consignment to hell itself.[19] Rather than a statement of morality pure and simple, civil law instead is a statement of morality committed to the civil authority that administers only a portion of God's righteous wrath. Civil law, then, reflects both morality and jurisdictional concerns, even in a system of retributive criminal law. For the civil law to be just, both the morality and the jurisdictional principle must be just. What is not necessary, however, is that the jurisdictional principles themselves reflect absolute desert.

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[A] second principle supports the significance of results for civil penal jurisdiction. Though biblical criminal law requires human judges--or at least the "congregations" of the Cities of Refuge--to discern mens rea (e.g., the difference between a "smite" with "enmity" and a "thrust" "without enmity"),[20] the Bible also cautions that our abilities to perceive and act upon truth are limited. Presumably, the limited nature of civil jurisdiction itself reflects this fact.[21] God calls us to do justice in small measure--justice to be sure, but only in part. Results are significant for the civil jurisdiction because they clarify and help prove the evil of the intention and the act, not only for judge and jury, but also for criminal and community. Just as canonists and theologians value external acts not purely in themselves so much as for revelation of intentions, so results certify the deadliness of intent and act for us.

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The Sermon on the Mount emphasizes the difference between God's absolute justice and the more limited justice to be administered by human beings, including ministers in civil government. Christ does not teach that the two forms of justice are of a different nature, nor does he teach that humanly administered justice is to be despised in favor of the divinely administered.[22] Both realms of justice are truly just and express the same nature

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[18] *See Matthew* 5:28 (stating that one commits adultery under God's law merely by "lust" in his heart, as opposed to human law, which requires the overt act).

[19] *See id*. at 5:27-30.

[20] *See Numbers* 35:14-25 (elaborating the law of homicide).

[21] See Bern, *supra* . . ., at 161-65 (arguing that biblical principles put unmeasurable damages--those for physical or emotional pain and suffering-- beyond the scope of civil government); *cf*. Nathaniel Hawthorne, *The Birth-mark in*, THE CENTENARY EDITION OF THE WORKS OF NATHANIEL HAWTHORNE 36-56 (Ohio State Univ. Press 1974) (1843) (telling a tale of the fatal consequences of one man's attempt to perfect his beloved).

[22] *See Matthew* 5:17-20. Jesus explained:

> Think not that I am come to destroy the law, or the prophets: I am not come to destroy, but to fulfil. For verily I say unto you, Till heaven and earth pass, one jot or one tittle shall in no wise pass from the law, till all be fulfilled. Whosoever therefore shall break one of these least commandments, and shall teach men so, he shall be called the least in the kingdom of heaven: but whosoever shall do and teach them, the same shall be called great in the kingdom of heaven. For I say unto you, That except your righteousness shall exceed the righteousness of the scribes and Pharisees, ye shall in no case enter into the kingdom of heaven.

of justice. Civil rulers are ministers of the wrath of God Himself and their judgment must reflect His.[23] It is the scope of the justice, not its essence, that separates God's own from that share to be administered by civil government.[24]

If Alexander deserves more punishment from the civil government than does Alexandra, this will be because the wind has worked not "moral luck," but rather "jurisdictional luck," if it is luck at all. Results signal what share of God's justice is to be administered by humans, not the demands of total and absolute justice.

Id.

[23] *See* Witte & Arthur, *supra* . . . , at 451. The authors assert the following:

> Like the theologians, early modern jurists accepted a general moral theory of government and criminal law. God has created a moral or natural law.... State magistrates are God's vice-regents in the world. They must represent and reflect God's authority and majesty on earth. The laws which they promulgate must encapsulate and elaborate the principles of God's moral law, particularly as it is set out in the Ten Commandments. The provisions of the criminal law, therefore, must perforce parallel the provisions of the moral law. The purposes of criminal punishment must perforce parallel the purposes of divine punishment. As William Blackstone put it, "the state's criminal law plays the same role in man's social life that God's moral law plays in man's spiritual life."

Id. (footnotes omitted).

[24] There appears to be a tension between the jurisdictional understanding of criminal law and the classic understanding of retributive civil justice. The latter holds that

> people should be punished because of (and only in proportion to) their moral deserts. This means that legal doctrines (such as that requiring a voluntary act or that requiring punishable acts to be instances of wrongful act-types, like killings) are best interpreted so as to get at the moral deserts of offenders ....

Michael S. Moore, *More on Act and Crime*, 142 U. PA. L. REV. 1749, 1751 (1994). But jurisdictional concerns act in derogation of morality on the merits. Unless the civil jurisdiction is tantamount to God's, it is not simply to "get at the moral deserts of offenders." The most to be expected of it is to punish justly according to the component of desert assigned to its judgment.

B. LIMITED JURISDICTION II

Both Stern and Tuomala have argued that civil government may punish only wrongdoers, and only some wrongdoers, at that. If the civil magistrate does indeed have limited authority, we should be very careful in discerning the nature and the extent of that authority. In the following excerpt, Stern demonstrates how a careful examination of scripture will give guidance on how to address this difficult issue.

Craig A. Stern, Things Not Nice: An Essay on Civil Government, 8 Regent U. L. Rev. 1 (1998).

The precise question to be answered is what, biblically, is the scope of civil authority. The question is not whether certain deeds are evil, or harmful, or even harmful to society, unless the answer to these questions in turn answers the question of authority. Most orthodox Christians would agree that the Bible plainly condemns [, for example, drug abuse, pornography sales, and sodomy]. Most would agree the three harm the actors and probably their fellows as well. In this they find the plain warrant of Scripture and the traditional understanding of the Church. For most, these premises suffice to argue their illegality under civil law. It is in this last conclusion that Not-Niceism[*] may overshadow the Bible.

The heritage of the West, as God's providence has worked it, is an amalgam of the classical and the biblical. This amalgam is often a happy mixture, with the classical fleshing out, or supplying tools to mine and apply, the fundamental biblical deposit. Done carefully, the classical is a subservient handmaiden to the authoritative Word of God that is the Holy Bible.

Sometimes, however, things go awry. One such instance is the issue of the authority of civil government. The classical tradition held the polity supreme and total. The state, no mere agent of retributive justice, was family, cult, and school. It took Christian martyrs to affirm Jesus as Lord, before Caesars would acknowledge that they were lords only as Jesus' ministers and only as the Lord Jesus allowed.

While individuals, and especially the Church, claimed warrant from God Himself to obey Him and perform the acts due Him, civil authorities continued to exercise whatever power they could, focusing eventually on civil justice as the core of their mission. The Bible casts kings as wreaking God's vengeance on evildoers for the peace and order of the realm,[1] and so they did. But the classical heritage, even in the context of feudal and covenantal civil authorities, seems to have supplied a general fount of authority. And so to America, the English experience (including Henry VIII's nationalization of the Church

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[*] Stern, citing a friend a colleague, refers to current "mainstream constitutional jurisprudence" that takes the Constitution "to prohibit any state or federal action that is not nice." Craig A. Stern, *Things Not Nice: An Essay on Civil Government*, 8 REGENT U. L. REV. 1, 2 (Spring 1997). He continues: "The Constitution is not the only text to receive such ministrations. The Bible has long been irresistible." *Id.*

[1] *See Romans* 13:3, 4; 1 *Peter* 2:13, 14; 1 *Timothy* 2:2.

of England, with its considerable devolution of authority upon civil government) bequeathed a tradition of civil government as problem solver, ready to exercise power whenever in the public interest. Roads, schools, libraries, churches, and charity generally were all grist for the state mill as long as constitutional process stamped its approval. Politics and procedure counted for all, limits of state authority, in principle, for little or nothing.

A more thoroughgoing biblical approach would seem quite to the contrary. Instead of a state invested with whatever authority a polity may give it as it wills, the state, like any human authority, is ultimately to hold its warrant from God Himself. It is He alone Who must grant civil government whatever authority it has.

Ultimately, God--Jesus Christ to be specific--holds all authority.[2] Humans hold authority "of God," to use convenient feudal parlance. Individuals, families, covenantal bodies, schools, all exist and have authority as prescribed by God. A biblical doctrine of the state equally should affirm that the existence and authority of the state are prescribed by God. Civil government is no general repository of residual authority, unless He has made it so.

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Few would hold that the Bible permits a state to punish whatever sin its citizens agree it ought to punish. An evil thought is a sin. Unbelief is a sin. Every failure to meet the standard of Christ Himself is a sin.[3] Sin, however, is not necessarily civil crime. To tag some sins as matters of religion only is to beg the question of civil authority. Why is failure to attend services of the True Church considered a matter of religion--a duty owed to God, punishable by Him and subject to family and church discipline--while abusing drugs is considered a matter within the authority of the state to punish?

Abusing drugs harms the abusers, and others as well. It breeds other wrongs within the authority of civil government to punish and, presumably thereby, to deter. These are evils, and the sword of the state is for evildoers, to subject them to God's vengeance.

But are we willing to assert that failure to attend services of the True Church, or, even worse, failure to trust God, receive redemption in Christ and sanctification by the Holy Spirit, does not harm the actor and others? And would not mass sanctification tend to reduce the incidence of crime? Irreligion breeds evil of all kinds. Should the state, therefore, fine absence from divine service where the Gospel is preached and the Bible taught? If none can force conversion, should the state nevertheless force exposure to the truth? Should it punish irreligion and blasphemy? Should it punish failure to teach children God's truth? Is freedom of religion merely an enlightenment bar to biblical civil government?

No, it is not. The Bible itself teaches that civil government lacks authority to punish every sin. If the state, like all human authorities, needs a warrant for all it does, and if the

[2] *See Matthew* 28:18.
[3] *See Romans* 3:23; *Hebrews* 4:15.

biblical warrant to civil government to punish some sins and not others is to be taken as meaningful, then the absence of biblical warrant to punish must also be taken as meaningful. The silence of Scripture, the absence of authorization, is not the indication of indifference, but rather of prohibition. In matters of authority, of a grant of power, silence means no authority is given. And on the subject of the authority of civil government, the Bible does have its silences.

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One of the strongest sets of passages from the Bible on this subject comprises the somewhat parallel chapters 18 and 20 of Leviticus. Take chapter 20 first. It, like 18, lies within the Holiness Code, the law prescribed to Israel by its God and covenant Lord, Who thereby sets it apart as His own people and possession. Chapter 20 begins with the Lord speaking to Moses, commanding the death penalty for Israelites and sojourners that give seed to Molech. The Lord also declares that He will cut off from the people any who do such. He specifies that if anyone who has offered his seed to Molech escapes capital punishment, then the Lord Himself will cut him off from among the people of Israel. After declaring also that He will cut off any that turn after spiritists, the Lord commands the Israelites to sanctify themselves and to keep the statutes of the Lord Who sanctifies them. Near the end of the chapter, the Lord again explains that He has separated Israel from other peoples, mentioning the dietary laws in this context, and again commanding that Israel be holy as is its God Who possesses it. The major central passage within the chapter, with its penalties for diverse offenses, is framed by these holiness statements and commands.

Beyond placing the central passage of the chapter between two "holiness" passages, the text explicitly ties the holiness concept to the central passage. At the beginning:

> Sanctify yourselves therefore, and be ye holy: for I am the Lord your God. And ye shall keep my statutes, and do them: I am the Lord which sanctify you. For every one that curseth his father or his mother shall be surely put to death: he hath cursed his father or his mother; his blood shall be upon him.[4]

Likewise, at the end:

> And if a man shall take his brother'swife, it is an unclean thing: he hath uncovered his brother's nakedness; they shall be childless. Ye shall therefore keep all my statutes, and all my judgments, and do them: that the land, whither I bring you to dwell therein, spue you not out. And ye shall not walk in the manners of the nation, which I cast out before you: for they committed all these things, and therefore I abhorred them. But I have said unto you, Ye shall inherit their land, and I will give it unto you to possess it, a land that floweth with milk and honey: I am the Lord your God, which have separated you from other people. Ye shall therefore put difference between clean beasts and unclean, and between unclean fowls and clean: and ye shall not make your souls abominable by beast, or by fowl, or by any manner of living thing that creepeth on the ground, which I have separated from you as unclean. And ye shall be holy unto me: for I the Lord am

[4] *Leviticus* 20:7-9.

holy, and have severed you from other people, that ye should be mine.[5]

The central passage with its penalties God has placed firmly in the context of Israel's holiness, its being **unlike** other nations and a special possession of God Himself.

And so the first lesson of Leviticus 20 for us regarding the reach of civil authority is that this chapter does not specifically determine the reach of civil authority at all. Rather, it delimits the reach of Israel's authority, that of God's unique holy nation. Distinguishing between Israel as holy nation and Israel as nation like all others, identifying what that peculiar state was authorized to do beyond what other states are authorized to do, is no easy task. For example, the death penalties commanded for Israel in this passage are likely **not** commanded, or perhaps even allowed, to other nations. Rather, the passage emphasizes that Israel is different from other nations, holy and separated by God for Himself. In fact, therefore, Leviticus 20 lends no support to the proposition that the garden-variety civil government may punish these offenses at all.

Unlike the first, the second lesson from Chapter 20 does speak directly to the reach of civil authority. In Chapter 20, God declares that, for committing all the offenses condemned in the chapter, He abhorred Israel's predecessors in the Holy Land. On this point Chapter 18 is clear as well. Chapter 18 commands apodictically[6] that Israelites shall not commit the various sexual and idolatry offenses for which Chapter 20 supplies the penalties. While God commands Israel to obey His ordinances, nowhere is holiness mentioned. Instead, the emphasis is on the universal moral law, the law under which Canaanites as well as Israelites must live. To commit these offenses is to commit abominations, abominations that defile nations and the land in which they live, so as to provoke the land itself--or at least the land of Israel--to spue out the nations doing such things. The offenses condemned in Chapters 18 and 20 are offenses against a universal moral law and not just against a Holiness Code peculiar to Israel.

What then is remarkable in Chapter 20 is that Israel is to punish some offenses with a capital penalty, while others appear to be left to God alone to punish. Just as He declares that He will cut off those that offer their seed to Molech and yet escape capital punishment, so other offenders shall be cut off (or bear iniquity, or die childless) without Israel being told to exact the death penalty for these offenses at all. For example, compare verse 6 with verse 27 (a verse falling after the second holiness passage of the chapter, but otherwise indistinguishable from the rest of the penalty provisions):

> And the soul that turneth after such as have familiar spirits, and after wizards, to go a-whoring after them, I will even set my face against that soul, and will cut him off from among his people.[7]
>
> A man also or woman that hath a familiar spirit, or that is a wizard, shall surely be put to death: they shall stone them with stones: their blood shall be upon them.[8]

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[5] *Leviticus* 20:21-26.
[6] Apodictic law is that of the form "Thou shalt ..." or "Thou shalt not ...."
[7] *Leviticus* 20:6.
[8] *Leviticus* 20:27.

Israel must stone spiritists, but those seeking to consult spiritists God Himself will cut off. Together, these verses teach that Israel may not stone those seeking to consult spiritists. Some of the listed sexual offenses likewise merit the death penalty, while others God Himself will punish and no human punishment is commanded. All these sexual offenses are condemned in Chapter 18, and God there pronounces the cutting off of those who defile themselves in such abominations. What Chapter 20 primarily adds to Chapter 18 is the command to Israel to punish with death some, but not all, of these offenses by virtue of its holiness. If all authority derives from God, and the chapter is to be read as significant at all, God's authorizing Israel to punish just some of these offenses entails the absence of that authority with respect to the others. Those God Himself alone will punish.

In this point lies the chief lesson regarding civil authority. Israel, even as holy nation, lacked authority to punish every offense against the universal moral law. Since it appears that Israel was authorized to do more, not less, than other nations by virtue of its holiness, it would seem all the more that other nations may not punish immoral acts, acts against God's universal law, simply by virtue of their being immoral. Some other indicium for civil authority must exist.

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So far, the traditional understanding of the limits of civil government fits well with the lessons of Chapter 20. Not every sin is a civil crime. God Himself punishes a broader range of evil acts than those He allows to be punished by civil authorities as ministers of His wrath upon evildoers.

So how to distinguish that subset of evil acts to be punished by civil government as well as by God? Here steps up the Not-Nice School. It asserts that the state may punish to preserve good order. Evil acts that harm the doers of them, and especially those that harm society, are within the reach of civil authority to punish. Social harm, or perhaps harm to the family or some other social institution or good, becomes the test. Arguments to criminalize drug abuse, pornography distribution, and all other manner of evil, are made to rest upon demonstrations of their harmfulness. Those acts are wrong, and they are harmful; therefore, the state may outlaw them.

But this logic is the very logic Leviticus 20 prohibits. God Himself declares all the acts listed there to be abominations, heinous violations of the universal law. God also declares that these acts will cause the land to spue out Israel as it would spue out the Canaanites. The Canaanites, their families, all their social institutions, were to be destroyed for having violated these laws. Israel was warned against a similar fate for like violations. **Nevertheless, God did not permit Israel to punish all these offenses**. The punishment of some God reserved to Himself. The chapter teaches not only that the immorality of an act fails to supply reason enough for civil punishment, but also that social harm, or harm to individuals, or families, or economy, or whatever, fails as the additional indicium for civil punishment. If God granted Israel no civil authority over every harmful wicked act, it is arrogant to claim that authority for civil government generally. The Not-Nice School is itself not nice.

But the argument for civil authority from harmful evil is more than not nice. It is blasphemous. It is seizing God's authority where He has granted us none. It is attempting to preserve our place pragmatically, following our own way to suppress evil and harm, letting ends justify means. And for the Church to insist that the state indiscriminately prohibit evil harmful acts is to dump its ministry of evangelism and discipleship upon civil government (as it is has done with schooling, moral rehabilitation of criminals, charity, etc.), and replace the Sword of the Spirit with the sword of man. It is to reject God's way for man's.

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The Church must know the Scriptures to know the power of God. If we were more faithful to the Bible, especially in the face of promptings from the Not-Nice School, how much more effective would be our witness? Our witness would be to God and His truth, not to our own political predilections. We would decline to use civil power, not for pragmatic, but for principled reasons. We would affirm God's sovereignty and His ability to work His will according to His own decrees without uninvited assistance from us. Perhaps others would take our position more seriously, at least recognizing our dedication to a truly biblical view of civil law instead of to a self- sanctified program of pragmatic power politics.

And apart from our witness, God Himself promises to reward our seeking to do His will according to His truth. We shall learn the true limits of civil authority if we are dedicated to applying them obediently. Perhaps Genesis 9:6 and related passages from the Sinaitic Covenant will supply the key. Perhaps New Testament passages explaining the duties of a holy people may help distinguish within Old Testament law the parts that pertain to Israel qua holy people and the parts that pertain to Israel qua civil society. (The author tends to use both of these guides and believes the civil government is to punish the taking of biblically recognized rights in such acts as homicide, theft, rape, battery, trespass, and the like.) Much work remains. Of course, the work already done within the Church is not to be despised. The ancient general distinction between Israelite laws moral, ceremonial, and judicial, is useful. But our times require a more careful distinction. The biblical principle of the institutional separation of Church and state entails a truly biblical boundary for civil government. All God's truth is true. The Church, and her members, called to be the Body of Truth Himself, must not sacrifice truth to their own prejudices. Why supplant God's eternal Word Written with what is instead Not Nice?

FOR FURTHER THOUGHT AND DISCUSSION

1. Does your state have the God-delegated authority to punish:

    a. Murder?
    b. Blasphemy?
    c. Sabbath-Breaking?
    d. Hate?

e. Racial Discrimination?
f. Sodomy?
g. Assualt?

2. Can you think of any area where the civil authority today has over-stepped its authority to "do good?" What are the consequences of these "good" acts?

3. What might be some reasons that the civil ruler should be "modest" in asserting its authority to punish or otherwise exercise its power?

4. Evaluate Blackstone's famous statement:

"It is better that ten guilty persons escape, than that one innocent should suffer."

PART IV – BIBLICAL PRINCIPLES OF PUNISHMENT

Given that Christ's atonement should be the model for civil justice, how should the state punish criminals? What are the legitimate ends of the criminal law? In the first excerpt below, Professor Tuomala provides a biblical justification for punishing criminals and argues that the ultimate purpose of punishment is not rehabilitation of the wrongdoer. In the final selection, Dean Herbert W. Titus discusses the revealed principles by which to evaluate particular sanctions against wrongful conduct.

A. THE VALUE OF PUNISHMENT

Jeffrey C. Tuomala, The Value of Punishment: A Response to Judge Richard L. Nygaard, 5 Regent U. L. Rev. 13 (1995).

AN ANALYSIS OF JUDGE NYGAARD'S THESIS*

A. Punishment Doesn't Work

Judge Nygaard is correct in observing that American penology, both practical and theoretical, is in shambles. Evidence of this includes ever-increasing crime, a high rate of criminal recidivism and the failure of criminologists to reach consensus on a basic theory of penology. Judge Nygaard believes that the crime problem will not be solved as long as Americans are wed to the myth that punishment reduces crime. Unfortunately, as he observes, politicians acting in their own self-interest exploit this myth by running "get tough on crime" campaigns. Since tougher sentencing policy, when implemented, results in more crime, our government breaches its most important trust which is to secure the public safety.

To convince Americans that they should consider alternatives to punishment, Judge Nygaard appeals to public self-interest. Citizens must consider the evidence and recognize that the myth of punishment threatens everyone's safety. Instead of punishing criminals, Judge Nygaard calls for a return to rehabilitation and attempts to bolster the hope that criminologists can discover the causes and cures for crime. Apparently this would entail the application of the empirical method of medical science to cure social problems.

For nearly a century (1870-1970) the rehabilitation ideal held sway as the "enlightened" rationale for corrections.[1] Theories of crime causation varied from individualistic factors of biology and psychology to social factors. Crime was viewed as pathological, requiring treatment based on a medical model of diagnosis and prescription. The demise of the rehabilitation ideal was due in large measure to a loss of faith in the ability to change the character or behavior of criminals. Judge Nygaard explains the failure of social scientists to find the causes of, and cures for, crime as due to a lack of public commitment and

* This article is a response to Richard L. Nygaard, *The Myth of Punishment: Is American Penology Ready for the 21st Century?* 5 REGENT U. L. REV. 1 (1995).

[1] FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 1 (1981).

funding.

But the problem with the rehabilitation theory is far deeper than a lack of funds and commitment. Although utilitarian theories of justice have not worked, they enjoy the continuing perception of being empirically verifiable, and therefore, scientific. This perception is based on the supposition that given time the "social sciences" will make the same types of evaluations and predictions as the natural sciences. In reality, there are a seemingly infinite number of social variables, most of which cannot be controlled for purposes of experimentation, making it impossible to trace cause-effect relations of social phenomena.[2] The empiricist is in the untenable position of having to know everything in order to know anything for certain.[3] Since causal relations can't be proven, it is impossible to empirically predict the effect of social policy decisions. Yet in the past, without ever proving a theory of causation, policy-makers have set out to treat not only criminals, but even the population generally. That this entire enterprise is based on empirically unproven and unprovable assumptions is usually ignored.

B. Punishment Isn't Right

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Judge Nygaard appears to believe that punishment, or at least corporal and capital punishment, is basically wrong as a fundamental moral postulate . . . . [As a result,] Judge Nygaard is left with the problem of proving that punishment is an improper value. But value judgments are not subject to empirical proof. . . .

Utilitarian philosophy has been the handmaiden of legal positivism and enjoys the perception that morally neutral policy decisions can be made solely on the basis of empirical studies. Law is then viewed simply as an instrument to implement policy decisions. The utilitarian approach gives the illusion that law is separate from moral

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[2] Roberto M. Unger's assessment of the empirical/historicist method as chief theoretician of the Critical Legal Studies movement is strikingly similar to that of Christian philosophers who follow Cornelius Van Til.

> If [the historicist-empiricist] wants to maintain clear lines of causality, in which cause and effect are neatly matched in one-to-one sequences, he has to tear certain events out of the "seamless web" of history, in which everything seems to bear on everything else. But in so doing he willfully disfigures the truth of history, which it was his aim to establish. . . .
>
> Suppose the historicist refuses to sacrifice complex historical truth on the altar of one-way causation . . . . Having discovered that all things cause each other in social life, as in the world at large, he wants to find a way to represent this insight in what he says about society. Alas, his eagerness is self-defeating. The more causes he takes into account, the less he is able to distinguish discrete relationships of cause and effect. In the end, the very notion of causality flounders in ambiguity.

ROBERT M. UNGER, LAW IN MODERN SOCIETY 12-13 (1976).

[3] If we consistently followed an empirical approach to knowledge, we would have to abandon many claims to knowledge that otherwise we would make without hesitation. (i) Empiricism cannot justify a general proposition, such as "all men are mortal". . . . Such general propositions always go beyond anything we can observe, because they encompass the whole universe. . . . (ii) Empiricism cannot justify any statements about the future, for no one has known the future by sense-experience . . . . (iii) As Hume pointed out, empiricism cannot justify any statements about ethical values. Statements about sensible facts do not imply anything about ethical goodness or badness, right or wrong, or obligation or prohibition.

FRAME, *supra*, at 117-186.

values. With utilitarianism something is "good" if it works in achieving a particular end. But how does one prove that the end is good? The perception of moral neutrality belies the fact that utilitarian approaches entail fundamental moral choices that cannot be empirically legitimized or proven to be good.

In Judge Nygaard's case the end to be achieved is the moral value of public safety. Not only is the empirical method unable to prove an efficient means for achieving that end, but it is also unable to legitimize the end because the end is a moral value. Certainly everyone would agree that public safety is a legitimate end or good. However, it is not an absolute good or even the highest good. For instance, no one would give up all liberty to secure safety. The relation that safety will bear to other values calls for moral judgment.

Whether a person takes a utilitarian or moral postulate approach one must justify basic values. Empiricism is simply incapable of justifying values. Therefore, appeal must be made to some other methodology.

III. PUNISHMENT AS A LEGITIMATE VALUE

A. The Value of Punishment

Let me suggest that the desire to see criminals punished is a legitimate value, just as the desire for public safety is a legitimate value. As values they cannot be scientifically "proven" to be right or wrong. However, this does not mean that they are simply matters of preference or that they cannot be validated and supported in a satisfactory manner. It is important to remember that just because values may be misconstrued does not mean they have been invalidated. For example, punishment is often excessive or imposed with improper motives or for improper ends, but that does not mean punishment is not a legitimate value. Likewise, the desire for public safety may improperly lead to a loss of freedom or be used to summarily rid society of undesirables, but that does not mean public safety is not a legitimate value.

If punishment is a legitimate value, and if it is applied fairly, then we should expect it to promote public safety. However, punishment is not legitimized just because it promotes safety. Nor is punishment necessarily a subordinate value which we promote as a means to the greater value and end of public safety. Instead we should expect that all values are interrelated and foster one another. We should also expect in a society where proper values are applied, to find supportive evidence of their effectiveness, although not necessarily in the nature of "empirical proof."

The problem then is to establish the legitimacy of particular values. Few people are willing, and none are able, to live consistently with the relativistic view that all values are equally legitimate. At the same time, few people, if any, are willing to accept the views of the most powerful, or the brightest and best, or even the majority as necessarily right. However, people inevitably founder on the rocks and shoals of relativism if they are unwilling to recognize that it is God who reveals truth and establishes legitimate values. In fact, the surest guide to securing genuine public and self-interest is to value what God

values and to act accordingly. Because God knows everything and reveals some things to man, man can know some truths without knowing everything.[4] He is spared the empiricist's dilemma of having to know everything in order to know anything.

The critical importance of Christian theology in the development of Western criminal law is well-documented.[5] Legal doctrines are justified by, and maintain coherence as part of, a particular worldview. In Christian theology, the supreme demonstration of the principles of justice is found in the doctrine of atonement.[6] The Christian doctrine of atonement is of singular importance for theories of punishment, as it is the judicial archetype of the way in which God deals with sin and crime.[7] The civil magistrate, as God's agent and minister of justice, should deal with crime and civil wrongs according to the same principles by which God deals with sin through the atonement.[8]

Christian Scripture teaches that all men have sinned and are therefore deserving of death.[9] Sin is a personal offense against God, and his disposition toward sin is one of wrath and determination to exact justice.[10] Because punishment is a necessary component of atonement, men must be punished, or Christ must vicariously suffer the punishment that they deserve.[11] The essence of the atonement doctrine is that Christ died a substitutionary death as both a punishment and a payment for man's sins. God could not simply remit man's punishment nor accept less than full satisfaction without himself acting unjustly.[12] The reason for this is that God's very character is just. Consequently,

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[4] *See* JOHN M. FRAME, THE DOCTRINE OF THE KNOWLEDGE OF GOD 115 (1987); *Job* 28:20:
"Where then does wisdom come from? Where does understanding dwell? It is hidden from the eyes of every living thing, concealed even from the birds of the air. Destruction and Death say, 'Only a rumor of it has reached our ears.' God understands the way to it and he alone knows where it dwells, for he views the ends of the earth and sees everything under the heavens."

[5] *See* HAROLD J. BERMAN, LAW AND REVOLUTION (1983), and sources cited therein.

[6] God presented him as a sacrifice of atonement, through faith in his blood, He did this to demonstrate his justice, because in his forbearance he had left the sins committed beforehand unpunished--he did it to demonstrate his justice at the present time, so as to be just and the one who justifies the man who has faith in Jesus.
Romans 3:25-26. Hugo Grotius notes that "[n]othing is more influential with men than examples of justice." Quoting Valerius Maximus in A DEFENSE OF THE CATHOLIC FAITH CONCERNING THE SATISFACTION OF CHRIST AGAINST FAUSTUS SOCINUS 98 (Frank Foster trans., 1889). Conversely, few things are so demoralizing as demonstrations of injustice. 2 *Corinthians* 2:13.

[7]. Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice,* 38 AM. J. JURIS. 221, 221-24 (1993).

[8] *Id.*

[9] *Romans* 1:32.

[10] *Psalm* 51:3-4; *Romans* 1:18.

[11] *Romans* 5:9-11; *Ephesians* 2:4-5; *Colossians* 1:21; I *John* 4:7-12.

[12] Christ's death as a punishment is reflected in the following passages: *Isaiah* 53:5 ("But he was pierced for our transgressions, he was crushed for our iniquities; the punishment that brought us peace was upon him, and by his wounds we are healed."). I *Peter* 2:24 ("He himself bore our sins in his body on the tree, so that we might die to sins and live for righteousness; by his wounds have you been healed."). Similarly Christ's death was a payment for our debts. *Psalm* 49:7-9 ("No man can redeem the life of another or give to God a ransom for him--the ransom for a life is costly, no payment is ever enough--that he should live on forever and not see decay."); I *Peter* 1:18-19 ("For you know that it was not with perishable things such as silver or gold that you were redeemed from the empty way of life handed down to you from your forefathers, but with the precious blood of Christ, a lamb without blemish or defect.").

all his laws and ways reflect his just character. Justice is therefore not the product simply of God's will, but rather of his unchanging nature.[13]

The primary effect of Christ's death was to change God's judicial disposition toward man, not man's disposition toward God. But Christ's death also establishes an objective basis for man's reconciliation to God.[14] However, it is the peculiar work of the Holy Spirit which makes reconciliation a reality by revealing the truth to men and thereby transforming their lives.[15]

God has established civil authority; it does not come into existence simply as a matter of social contract.[16] He has called judges to serve as his "agent[s] of wrath to bring punishment on the wrongdoer."[17] As an agent exercising delegated authority, the judge must administer civil justice according to the same principles by which God dealt with all sin through Christ's atonement. Our justice system should reflect two key principles: that an offender deserves to be punished (retribution), and that he owes payment (restitution) to the offended party.[18] It is true that vengeance is the Lord's, but vengeance also belongs to God's human agents of wrath and ministers of justice.[19] The desire to see criminals punished need not be irrational or vindictive. In fact, we should be reluctant to call a man good who does not respond with indignation toward the wickedness he sees in the world. We should respond with satisfaction in seeing wickedness punished,[20] not out of vengeance, but out of respect for justice.

Punishment of sin is a necessary condition of Christian salvation. If that requirement is rooted in the very nature of a righteous, just and holy God, punishment should be viewed as a positive moral value.

B. Punishment is Valuable

Judge Nygaard finds a system of justice that focuses on punishment to be faulty because it is backward-looking. Instead, he believes our focus should be on rehabilitation because it is valuable in securing our future safety.[21] However, I believe the biblical atonement model teaches that we should focus on satisfying the demands of justice. Restitution

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[13] *Deuteronomy* 32:4; *Psalm* 92:15; *Matthew* 5:48; *Revelation* 4:8.
[14] *Romans* 3:25; *Hebrews* 2:17; I *John* 2:1-2, 4:10.
[15] *John* 3:1-21; *Romans* 8; *Ephesians* 2:1, *Titus* 3:5-7.
[16] *Romans* 13:1.
[17] *Romans* 13:4.
[18] Tuomala, [*Christ's Atonement, supra*], at 229-33
[19] *Romans* 13:4 ("For he [the civil magistrate] is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer.").
[20] *Psalm* 45:7 ("You love righteousness and hate wickedness; therefore God, your God, has set you above your companions by anointing you with the oil of joy.").
[21] While it is generally considered positive to be forward-looking rather than backward-looking it is not a virtue in courts of law. It is a court's duty to ascertain what happened in the past and apply a rule of law to determine culpability or liability. Sanctions are then applied to restore the status quo ante. For a court to focus on the prospective effect of its ruling is to confuse law with politics. When a court designs a sentence for deterrence or rehabilitation it makes a decision which is inherently political rather than legal in nature.

restores victims, and retribution expiates the guilt of offenders, thereby establishing a sound basis for reconciliation of the offender to his victim, the community and himself. When the system focuses on changing the criminal's behavior through deterrence, or on changing the criminal's character through rehabilitation, the victim is left with a sense of injustice and the offender is left with the burden of guilt. The opportunity for reconciliation and restoration is then lost. Just as Christ's death establishes the objective basis for reconciliation, retribution and restitution establish the basis for rehabilitation.[22]

Although the state is appointed to serve as God's agent of justice, is it similarly appointed to serve as his agent of reconciliation and rehabilitation? [If so,] it becomes the state's role to tax and spend for the purpose of finding the causes and cures for crime and administering rehabilitation programs. However, I believe on this point that Scripture gives quite a different answer. It is the Church, not the state, that has been primarily entrusted with the ministry of reconciliation.[23] While the state exercises the ministry of justice through the sword of steel,[24] the Church performs the ministry of reconciliation through the power and sword of the Holy Spirit.[25] The modern state is notorious for neglecting justice and appropriating for itself the role of the Church under the guise of "social justice." But it is a role for which the state is neither entrusted, empowered nor competent.

I believe that acceptance of a criminal justice system which focuses on state-imposed rehabilitation entails a massive threat to liberty. This is especially true if the medical model of detection and treatment forms the basis of penology. Logically, criminals could be indeterminately incarcerated until cured. Procedural protections, such as trial by jury, proof beyond a reasonable doubt, and a right to remain silent, impede detection of illness. These procedures should then be eliminated since they hamper diagnosis and treatment. Criminals and potential criminals would be dealt with on the basis of what they might do rather than what they have done.

Judge Nygaard quite properly believes that the key to rehabilitation lies within the individual. But what if social scientists "discover" that the real problem lies with unjust social and economic systems? A rational policy might then include a comprehensive preventive program of social hygiene that would encompass all potential offenders. Eventually, rehabilitation would become indistinguishable from theories of social justice which focus on a statist reordering of social structures and control of the entire population. After all, preventive medicine is always more effective than curative or remedial treatment.

Rather than using the adjudication of particular wrongs as an occasion to promote some

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[22] Tuomala, [*supra*,] at 229-233.
[23] 2 *Corinthians* 5:18-19 ("All this is from God, who reconciled us to himself through Christ and gave us the ministry of reconciliation: that God was reconciling the world to himself in Christ, not counting men's sins against them. And he has committed to us the message of reconciliation.").
[24] *Romans* 13:1-7.
[25] *Acts* 2:8 ("Take the helmet of salvation and the sword of the Spirit which is the word of God."); *Ephesians* 6:17 ("But you will receive power when the Holy Spirit comes on you; and you will be my witnesses in Jerusalem, and in all Judea and Samaria, and to the ends of the earth.").

vision of the public good by means of deterrence or rehabilitation, the state would then engage in an increasingly comprehensive, continuous and purposive intervention in all human affairs. This perspective demands that regardless of the source of a problem the state must take corrective action. If the "causes" of crime are illiteracy, poverty, inadequate housing, unemployment, malnutrition, substance abuse, or broken homes, the state must act. The state then ends up usurping the role of individuals, families, voluntary associations and churches. Individuals and other institutions in turn default on their responsibilities with the ready excuse that only the state has the adequate professional skills and resources to deal with the problems.

Rehabilitation, like punishment and public safety, is a legitimate value, but it is not the immediate goal of a justice system. Punishment establishes a basis for rehabilitation, and it may incidentally deter, but its primary purpose is to satisfy justice. The state's role should be limited to punishing criminals and requiring restitution.

Although the empirical method is unable to prove the causes of crime or to legitimatize values, certainly evidentiary considerations have a role to play in supporting a theory of penology. The facts that the penal system is such a failure and that the crime rate is so high are good indications that we are doing something wrong. Judge Nygaard does us a great service in stressing the importance of penal theory. Without a theory there is no direction to look for evidence nor a framework to order and explain the meaning of our observations.

A criminology based on scriptural principles recognizes that the causes of crime are linked to the sin nature of man.[26] Social conditions may influence people for good or for bad,[27] but the heart of the problem is the human heart.[28] Do social theorists factor this into their theories? If they do not, and if Scripture is true, they will look forever and never identify the problem. Likewise, do their theories, as they relate to cure, take into consideration the power of God's word and of the Holy Spirit to change lives? Most likely they begin with the assumption that these claims are false, or at best irrelevant. As a result, studies do not focus on these religious factors.

Scripture repeatedly links obedience to God's blessing and disobedience to his curse.[29] Part of his blessing is to live in safety.[30] This applies to nations as well as to individuals. Perhaps the number one assumption that criminologists share is that the state can and

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[26] *Mark* 7:15 ("Nothing outside a man can make him 'unclean' by going into him. Rather, it is what comes out of a man that makes him 'unclean.'").
[27] I *Corinthians* 15:33 ("Do not be misled: 'Bad company corrupts good character.'").
[28] *Mark* 7:21-22 ("For from within, out of men's hearts, come evil thoughts, sexual immorality, theft, murder, adultery, greed, malice, deceit, lewdness, envy, slander, arrogance and folly.").
[29] *Deuteronomy* 28:1-2 ("If you fully obey the LORD your God and carefully follow all his commands I give you today, the Lord your God will set you high above all the nations on earth. All these blessings will come upon you and accompany you if you obey the LORD your God."); *Deuteronomy* 28:15 ("However, if you do not obey the LORD your God and do not carefully follow all his commands and decrees I am giving you today, all these curses will come upon you and overtake you.").
[30] *Jeremiah* 32:37b-39 ("I will bring them back to this place and let them live in safety. They will be my people, and I will be their God. I will give then singleness of heart and action, so that they will always fear me for their own good and the good of their children after them.").

must go beyond punishment and compensation to rehabilitate criminals and establish vast social programs designed to control human behavior. That these programs seem to be such a failure is a good indication that they are unlawful. That we have such a crime problem should give us cause to examine how we do criminal justice and how we order ourselves socially. We must interpret events and "facts" in light of God's word, because it gives them meaning.

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Scripture makes it clear that punishment is valuable and that it contributes to rehabilitation and public safety. When law-abiding people see justice done they should rejoice, and the wicked should be terrified. Criminals realize they deserve punishment because their consciences bear witness to that fact.[31] Civil punishment reflects God's justice and expiates that burden of guilt. It also reminds men of their own sin and accountability ultimately to God and their own need to be reconciled to Him.[32] For this reason punishment, including capital punishment, has a rehabilitative effect where it counts most--for eternity.[33]

FOR FURTHER THOUGHT AND DISCUSSION

1. Tuomala suggests in the final portion of his article, not reproduced here, that corporal punishment may be a more effective and humane method of punishment than prison. Evaluate this idea in light of scripture.

2. Is rehabilitation of sinners a biblical goal? Why or why not? Should we do away with all programs that further rehabilitation? Does corporal punishment rehabilitate? Does the death penalty?

[31] *Romans* 3:3 ("For rulers hold no terror for those who do right, but for those who do wrong."); *Romans* 2:15 ("[T]hey show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts now accusing, now even defending them.").
[32] In fact, All Soul's Day was instituted to remind Christians that all men will stand before God in judgment. It is a guard against spiritual arrogance as all men reflect upon their own sin as well as the promise of forgiveness. BERMAN, *supra*, at 170-71.
[33] *See* HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES 285 (1994), in which Titus makes the case that a purpose of all punishment, including capital punishment, is restorative in nature.

B. *LEX TALIONIS* AND RESTITUTION

From HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES (1994).

A.

Lex Talionis

> And he that killeth any man shall surely be put to death. And he that killeth a beast shall make it good; beast for beast. And if a man cause a blemish in his neighbour; as he hath done, so shall it be done to him; breach for breach, eye for eye, tooth for tooth: As he hath caused a blemish in a man, so shall it be done to him.[1]

Known as *lex talionis*, or the law of retaliation, this Old Testament Scripture and its companion verses[2] are cited by many legal scholars as the foundation of the "retributive view" for capital punishment.

[Titus then discusses recent critiques of the retributive view, then continues:]

If the "retributive principle in the *lex talionis* is not revenge, retaliation, or expiation, what is it? Noah Webster in his 1824 dictionary defined *retribute*: "To pay back; to make payment, compensation, or reward in return." The question is, "Pay back whom?" "The offender," has been the classic reply. But a more careful look at the relevant scriptures reveals that the victim is more often than not the primary beneficiary of the *lex talionis*. And where the victim is not the primary beneficiary, the purpose of the *lex talionis* is to restore the offender or society. In short, the principle underlying *lex talionis* is restitution, not revenge, retaliation, or expiation:

> The principle of restitution is basic to Biblical law; it appears with especial prominence in laws under the sixth and eighth commandments, but it is basic to the whole law. The "eye for an eye, tooth for a tooth" concept is not retaliation, but restitution.[3]

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[1] *Leviticus* 24:17-21.
[2] *Exodus* 21:23-25 and *Deuteronomy* 19:21
[3] ROUSAS J. RUSHDOONY, INSTITUTES OF BIBLICAL LAW 272 (1973).

B.

Restitution and Victims

The most easily grasped restitutionary principle is the one applied to offenses against another's property or another's person not resulting in death. Chapters 21 and 22 of the book of Exodus contain several factual illustrations of this principle. The language of several of these passages is explicitly restitutionary.[4] Other passages contain the words, *restitution, restore, make it good,* and like restitutionary language. A variety of specific remedies are listed, but all are designed to provide to the injured party something that is equivalent to the loss suffered. Thus, if a person is injured personally, the wrongdoer must pay for the lost wages and medical expenses.[5] Oftentimes, however, more is required than the exact amount of the thing lost. For example, a thief who destroys or sells a stolen ox must pay with five oxen. In other instances, it appears that less is required. For example, the same remedy applies whether a master knocks out a tooth or destroys an eye of his servant.[6]

While the principle of restitution is being eroded by those who support the no-fault approach to compensating victims of minor automobile accidents, it is being revived by others as an appropriate theory of compensation for the victims of criminal acts. Recently, Charles Colson, founder and director of the Prison Fellowship, and Daniel Benson, Professor of Law at Texas Tech University, have urged restitution as an alternative to imprisonment in most criminal cases. In doing so, they have relied, in part, on Biblical law.[7]

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C.

Restitution and Offenders

> If there be a controversy between men, an they come unto judgment, that the judges may judge them; then they shall justify the righteous, and condemn the wicked. And it shall be, if the wicked man be worthy to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, according to his fault, by a certain number. Forty stripes he may give him, and not exceed: lest if he should exceed, and beat him above these with many stripes, then thy brother should seem vile unto thee.[8]

[4] *E.g., Exodus* 21:18-19.
[5] *Exodus* 21:18-19.
[6] *Exodus* 21:26-27.
[7] Charles Colson and Daniel Benson, *Restitution As an Alternative to Imprisonment*, 11 Det. C. L. Rev.[523] (1980). [This article is excerpted in the Titus book, but is not included here.]
[8] *Deut*. 25:1-3.

Punishment of certain offenders by physical beating was practiced not only during the Old Testament, but also during the time of the New Testament. Not only was Jesus crucified on the cross, He was beaten.[9] The apostles, too, were beaten for preaching Christ.[10]

Because of these obvious examples of injustice from the New Testament, most Christians today would find it unthinkable for the civil government to punish wrongdoers by physical beatings. However, this has not always been so. In colonial Massachusetts, the law provided for whipping as punishment for certain offenses, but that such punishment be limited by Biblical principles . . . .[11]

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The first Congress of the United States enacted a law requiring that persons who were convicted of certain theft offenses "be publicly whipped, not exceeding thirty-nine stripes."[12] Even as late as 1968, Delaware prescribed whipping as punishment for certain crimes.[13]

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D.

Restitution and Nations

The debate over capital punishment has continued for years. Even during the time of Blackstone there were those calling for its abolition. Blackstone defended the death penalty, both upon the law of nature and upon utilitarian considerations.*

Blackstone's citation to Numbers 35:31 and 33 is most instructive: The death penalty for murder is designed to restore "the land" from the ill effects occasioned by the taking of blood. This "law of the land" was first revealed in Genesis 4:10, after Cain had killed Abel: "And He [God] said, What hast thou done? The voice of thy brother's blood crieth unto Me from the ground."

The taking of innocent blood not only defiles the land but threatens the very existence of the nation within which the act has taken place. Thus, not only was the murderer to be put to death, according to Deuteronomy 19:10-13; but if no guilty party could be found, an animal substitute was required.[14] Because Israel failed to honor this law (as well as other land-polluting offenses), God gave His people over to other nations.[15]

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[9] *Matthew* 27:26.
[10] *Acts* 5:40; and 16:23; and *II Corinthians* 11:24.
[11] MASS. BODY OF LIBERTIES §§ 43, 46 (Dec. 10, 1641).
[12] An Act for the Punishment of Certain Crimes Against the United States § 16, 1 Stat. 116 (1790).
[13] 11 DEL. CODE ANN., tit. xx, §§ 631, 811, 3905 – 3908.
* Here Dean Titus includes excerpts from Blackstone's Commentaries. They are omitted here.
[14] *Deuteronomy* 21:1-9.
[15] *Psalm* 106:37-43.

Israel makes it very clear that this land-defiling effect is not confined to Israel:

> The earth . . . is defiled under the inhabitants thereof; because they have transgressed the laws, changed the ordinance, broken the everlasting covenant.[16]

At the same time that God covenanted with Noah that He would never destroy mankind and the earth by a flood again,[17] He also covenanted with Noah: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made He man."[18] This Noahic covenant extended to Noah's sons who, in turn, are the fathers of all the gentile nations in the world.[19] That covenant is binding on the nations today. God still brings judgment upon the nations for the habitual violations of the law of the land.[20]

[16] *Isaiah* 24:5.
[17] *Genesis* 9:11.
[18] *Genesis* 9:6.
[19] *See Genesis* 10.
[20] *Habakkuk* 2:1-17.

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[21] JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION, Editor's Introduction, at xxix, xxxiii (John T. McNeill, ed., Ford Lewis Battles, trans., Westminster Press 1960) (1559).

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