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Jeffrey Tuomala, *Liberty University*



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CHRIST'S ATONEMENT AS THE MODEL FOR CIVIL JUSTICE

JEFFREY C. TUOMALA

Nothing is more influential with men than examples of justice.

Valerius Maximus¹

God presented him [Christ Jesus] 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[.]

Paul the Apostle²

The implications of the various theories of punishment for sentencing and spending policies are well known. Less familiar, though more intriguing, is the relationship these theories bear to basic criminal law doctrines of legality, *mens rea*, and defenses. Several current casebooks start with a section on punishment and develop this relationship with varying degrees of success.³ Tying resolution of substantive law issues to the basic philosophical questions involved in the theories of punishment enriches the study of criminal law,⁴ but it increases frustration and breeds cynicism when those questions remain unanswered. Neither policymaker nor jurist can confidently make decisions without justifying a theory of punishment.⁵

The critical importance of Christian theology in the development of Western criminal law is well documented.⁶ Legal doctrines are justified by, and maintain coherence as part of, a particular worldview.

1. Hugo Grotius, *A Defence of the Catholic Faith Concerning the Satisfaction of Christ, against Faustus Socinus* (Frank H. Foster, trans. 1889) (1st ed. 1617, translated from Amsterdam ed. 1679), p. 98.

2. Romans 3:25 (all quotations from New International Version).

3. See, Peter W. Low et al., *Criminal Law* (1986), pp. 1-28; Richard G. Singer and Martin R. Gardner, *Crimes and Punishment* (1989), pp. 45-211.

4. See, H.L.A. Hart, *Punishment and Responsibility* (litho. reprint 1970) (1968); C.L. Ten, *Crime, Guilt, and Punishment* (1987).

5. The problem seems no closer to a resolution today than one hundred years ago when Sir Henry Maine observed: "All theories on the subject of punishment have more or less broken down, and we are at sea as to first principles." J.M. Finnis, "Old and New in Hart's Philosophy of Punishment," 8 *The Oxford Rev.* (1968), p. 73.

6. See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983), and sources cited therein.

What happens when the positive rules of the state lose all touch with a higher law and come to be seen as nothing more than the outcomes of a power struggle? Can the ideals of autonomy and generality in law survive the demise of the religious beliefs that presided over their birth?⁷

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 principal 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.⁸

THE MEANING OF ATONEMENT

Because of the centrality of atonement in the Christian faith its meaning is as varied as theological systems are diverse. However, all views hold in common that the end of atonement is the reconciliation of God and man. Properly understood, atonement establishes the ground of justice for reconciliation between an offended party and the offender. Similarly, civil justice should establish the ground of justice for reconciliation of victim and offender and the restoration of both.

There are two paramount questions to be answered in studying the atonement. The first is whether Christ's death was necessary as the only means of salvation. The second is whether the primary purpose of Christ's death was to change God's disposition toward man or man's disposition toward God.

If Christ's death were not a necessary satisfaction of justice in the divine nature then it was merely an arbitrary product of divine will subject to change. In such a case Christ's death would be based

7. Roberto M. Unger, *Law in Modern Society* (1976), p. 83.

8. A more direct "religious" approach to justifying a theory of punishment would be to study the civil law sections of scripture, but there are three distinct advantages to approaching the issue through the atonement. The scriptures treat Christ's death much more comprehensively, as redemption is the central theme of the Bible. Secondly, the principles of justice as reflected in the atonement have received far greater attention than the civil law, so there is more to draw from. Thirdly, general principles of justice are not as clear from the biblical case law, and that case law often has the appearance of being time-bound.

simply on its suitability for accomplishing a particular end, for example, deterring sin or moving man to repentance. In a world where the archetype of justice is mutable there is little reason to expect standards of civil justice to be fixed. Justice as desert would be replaced with the utilitarian principle that justifies conduct by the test of expediency.

While the first question relates to means (atonement), the second relates to the end (reconciliation). Where sin is a personal offense against God, which elicits a personal response of judicial displeasure, God's disposition toward man must be dealt with first. God cannot simply ignore sin, but rather requires satisfaction of justice. The sinner's reconciliation to God can only follow upon God's reconciliation to man. Alternatively, if sin is merely a sickness or impersonal offense against the good order of God's government, then only man's disposition toward God need be changed to restore their relationship. The focus would be on future rather than past behavior, and justice's only demand would be personal reformation.

Where crimes are seen as offenses against individuals rather than against an impersonal state, satisfaction must be made to the victim and the demands of justice. The criminal's hatred of his victim may still exist, but the objective ground for reconciliation has been laid—he has made satisfaction to the victim, and his own guilt is removed. When the civil justice system focuses on changing the criminal's behavior or character, the victim is left with a sense of injustice and the offender with a burden of guilt. The opportunity for reconciliation and restoration is lost.

THE FOUR VIEWS OF ATONEMENT AND CIVIL JUSTICE

The satisfaction, governmental, moral influence, and mystical theories of atonement⁹ correspond to retribution, deterrence, rehabilitation, and social justice.¹⁰ The satisfaction theory teaches that justice is an immutable attribute of God's character demanding

9. There are various schemes for categorizing the theories. This particular scheme, with some variations, is found in numerous evangelical Calvinist and Arminian theologies of the past two centuries.

10. Although it is common to treat retribution, deterrence, and rehabilitation as the chief theories of criminal sanctions, it is not at all usual to list social justice as a category. I have done this for several reasons. Critical theories of criminology are a type of social justice theory and do not fall under the traditional categories. Also, Christ's atonement has an importance for civil justice that goes beyond punishment. And finally, even the issue of punishment, narrowly defined, cannot be properly addressed and understood except in a larger context.

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, thus 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 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,¹¹ while the church is entrusted the ministry of reconciliation¹² 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 Spirit¹³ necessary to transform the sin nature of wrongdoers and reconcile parties.

11. 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."

12. 2 Corinthians 5:19b-20: "And he has committed to us the message of reconciliation. We are therefore Christ's ambassadors, as though God were making his appeal through us. We implore you on Christ's behalf: Be reconciled to God."

13. Ephesians 6:17.

I. DEONTOLOGICAL THEORIES OF ATONEMENT AND CIVIL JUSTICE

A. SATISFACTION THEORY OF ATONEMENT

Anselm's (1033-1109) epic work, *Why God Became Man*,¹⁴ was the first thorough and scientific exposition of the atonement. His most significant contribution was the idea that man's salvation is conditioned on demands of justice that only Christ's death could satisfy.¹⁵ Anselm began with the premise that disobedience robs God of his due and thus dishonors him.¹⁶ To restore God's honor justice demands punishment or satisfaction.¹⁷ Since punishment would destroy man, thereby thwarting God's creation purposes, he looks to satisfaction.¹⁸

In Roman civil law, satisfaction meant paying the victim for the wrong done, or returning a stolen item, plus an extra payment for dishonoring the victim.¹⁹ For several reasons man cannot render satisfaction to God. First, he has a continuing duty of complete obedience so he has nothing to pay for past wrongs. Second, his sin incurs an infinite debt. And thirdly, his sin nature renders him impotent to do good.²⁰ Since only God could make satisfaction, and only man should, salvation necessitated the incarnation of Jesus Christ, the God-man, whose death paid our infinite debt thus restoring God's honor.²¹ His death was not a punishment for man or in man's place.²²

Anselm drew on three sources of analogy for his theory. Both Roman law and the church doctrine of penance provided models for satisfaction (payment) and for punishment. The punishment model was found in Roman public law and in the Church doctrine of penance as self-inflicted injury. The satisfaction model was found in Roman civil law and in penance as performance of some good or as

14. Anselm of Canterbury, in *A Scholastic Miscellany: Anselm to Ockham* (Eugene R. Fairweather, ed. & trans. 1956), p. 100. *The Library of Christian Classics* (John Baille et al., eds. 1953-69), vol. 10.

15. Robert S. Franks, *The Work of Christ* (1962), p. 128: "Nowhere is his theory more revolutionary."

16. *A Scholastic Miscellany: Anselm to Ockham*, bk. 1, ch. xi.

17. *Ibid.*, bk. 1, ch. xix.

18. *Ibid.*, bk. 2, ch. iv.

19. *Ibid.*, bk. 1, ch. xi.

20. *Ibid.*, bk. 1, ch. xx; bk. 2, ch. xiv; bk. 1, ch. xxiv.

21. *Ibid.*, bk. 2, ch. vi.

22. *The Work of Christ*, p. 137: "For the remarkable thing about Anselm's theory is his distinction of satisfaction from punishment, and his avoidance of the idea that Christ's satisfaction is the vicarious endurance of our punishment, whether as self-inflicted or inflicted by God."

a gift to God. Anselm based the justice of Christ's atonement not on vicarious punishment but on payment as positive performance of some good.²³ Germanic law focused on lost honor which could be restored by punishment or payment that was calculated not on the basis of moral demerit, but rather on the amount of harm done to, and status of, the victim. For Anselm it became God's honor rather than his righteousness that required satisfaction.²⁴

Anselm's reliance on the private law analogy became a vortex of criticism. It is generally recognized that private debt may be forgiven without injustice. It logically follows that Christ's death was not necessary as God could have simply forgiven man's debt without payment. To require either payment or punishment appears to negate God's mercy.

The Protestant Reformers accepted Anselm's premise that Christ's death was a necessary condition of man's salvation; however, they believed that punishment is a necessary component of atonement. Man must be punished, or Christ must vicariously endure the punishment man deserves. This view, which John Calvin (1509-1564) set out in the *Institutes of the Christian Religion*,²⁵ became the measure of Protestant orthodoxy.

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.²⁶ 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.²⁷ 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.²⁸

23. *Ibid.*, pp. 135-37; See also, *Law and Revolution: The Formation of the Western Legal Tradition*, pp. 68-72, 172-73.

24. *The Work of Christ*, pp. 138-40. See generally *Law and Revolution: The Formation of the Western Legal Tradition*, pp. 49-84 (ch. 1).

25. John Calvin, *The Institutes of the Christian Religion* (Henry Beveridge, trans. 1845, photolithoprint 1981). Modern works from the Reformed perspective include Archibald A. Hodge, *The Atonement* (reprint 1987) (1867); Benjamin B. Warfield, *The Person and Work of Christ* (Samuel G. Craig, ed. 1980); and John Murray, *Redemption Accomplished and Applied* (1955).

26. *The Institutes of the Christian Religion*, bk. 1, ch. xv; Genesis 1:27-29; 2:15-17; 3:14-24. See also Exodus 24 and Deuteronomy 28 (these events were covenant renewal ceremonies).

27. *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 *The Atonement*, ch. vii.

28. *The Institutes of the Christian Religion*, bk. 2, ch. xvi, para. 1; Psalm 51:3-4; Romans 1:18.

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 death.²⁹ Scripture characterizes Christ's death not only as a punishment but as a payment. Justice demands both.³⁰ 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.³¹ 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.³²

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.³³ In so doing he does

29. *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; 1 John 4:7-12.

30. *The Institutes of the Christian Religion*, bk. 2, ch. xii, para. 3: supra note 25, at 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 had 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." 1 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." 1 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."

31. 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.

32. *The Institutes of the Christian Religion*, bk. 2, ch. xvi, para. 5; bk. 2, ch. xvii. Reformed theologians refer to Christ's death on the cross in satisfaction of the negative demands of justice as his passive obedience while his life of sinless perfection in satisfaction of the positive demands as his active obedience. By the first he secured man's pardon; by the second he secured the reward of eternal life. Romans 5:10; 6:5-7; Galatians 4:7. See also *The Atonement*, ch. xviii.

33. *The Institutes of the Christian Religion*, bk. 2, ch. xii, para. 1; Matthew

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.³⁴

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.³⁵ As all men enter the world under the guilt of sin and wrath of 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.³⁶

Due to the moral corruption inherited from Adam no one is able to satisfy the terms of the covenant of law.³⁷ 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.³⁸ But his 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.³⁹ 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.⁴⁰ Justified by

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 C.E.B. Cranfield, *The Epistle to the Romans* (1975), Vol. 1, pp. 208-18; and John Murray, *The Epistle to the Romans* (vol. 1 1959, vol. 2 1965), Vol. 1, pp. 116-21.

34. Deuteronomy 32:4; Psalm 92:15; Matthew 5:48; Revelation 4:8. See also *The Atonement*, ch. xvi.

35. *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 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).

36. Romans 8. See also *The Atonement*, ch. xiv.

37. *The Institutes of the Christian Religion*, bk. 2, ch. iv, para. 1; Romans 6:15-23; 7:7-25.

38. All of the redemptive covenants 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.

39. *The Institutes of the Christian Religion*, bk. 2, ch. iii, para. 8; Ephesians 2:8-10.

40. Commenting on 2 Thessalonians 2:13 Calvin reminds the reader that "faith itself is produced only by the Spirit." *Ibid.*, bk. 3, ch. i, para. 4. Calvin further

faith the believer no longer stands under the sentence of death.⁴¹ 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.⁴² 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

There are several varieties of retributivism, which, despite their negative connotation, have had numerous proponents past and present.⁴³ It 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 measure of desert.⁴⁴

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.⁴⁵ The state may punish only the guilty, and punishment is limited by desert.⁴⁶ The retributive position gives the entire criminal process, from criminalization to adjudication to punishment, a coherence.

There are two basic approaches to justifying the retributive theory.

explains that "we require a transformation not only in external works but in the soul itself." *Ibid.*, bk. 3, ch. iii, para. 6. John 3:1-21; Ephesians 2:1; Titus 3:5-7.

41. Romans 8:1; *See also* Romans 1:17; 3:24; 5:1-9.

42. *The Institutes of the Christian Religion*, bk. 3, ch. ii, para. 33: "For the Spirit does not merely originate faith, but gradually increases it, until by its means he conducts us into the heavenly kingdom." Ephesians 3:16-21.

43. *See Crime, Guilt, and Punishment*, ch. 3; John Cottingham, "Varieties of Retribution," 29 *The Phil. Q.* (1979), p. 238.

44. I. Kant, *Rechtslehre*, pp. 195-97 (E. Hastie, trans. 1887), quoted in Edmund L. Pincoffs, *The Rationale of Legal Punishment* (1966), pp. 2-3.

45. *Punishment and Responsibility*, pp. 28-53.

46. *Ibid.*, pp. 1-27; Herbert L. Packer, *The Limits of the Criminal Sanction* (1968), pp. 62-70.

The first is that it is a fundamental moral postulate based in some theory of ethics, such as natural law or tradition.⁴⁷ The second approach attempts to justify retribution as a necessary correlate of some general political theory, such as social contract.⁴⁸ This approach is fairly well regarded, but it simply shifts the basic problem to that of justifying the political theory.

There are three general forms of attack on the retributive theory. The first is to portray it in pejorative terms as the unworthy sentiment of vengeance thinly disguised.⁴⁹ The second is to "expose" the underlying ethical theory as little more than intuitionism.⁵⁰ The third, and most important approach, is to level the charge that all varieties of retributivism ultimately appeal to utilitarian arguments for justification.⁵¹ C.L. Ten's summary and critique of retributive theories focus on this issue. For example, Nozick's "nonteleological version" of retribution argues that punishment reconnects offenders with moral values. Ten asks why verbal declarations of these values will not do. Nozick's answer is that only punishment ensures these values will be properly internalized. Ten argues that this is rehabilitation or deterrence concealed as retribution.⁵²

This criticism may hold against most varieties of retributivism but not all. Utilitarianism purports to justify those means which produce the greatest good for the greatest number. It benefits from the perception that it is scientific; however, empiricism is unable to justify a vision of the good (ends) and proves to be an inadequate

47. See K. G. Armstrong, "The Retributivist Hits Back," 70 *Mind* (1961), pp. 471, 476-77; Jeffrie G. Murphy, "Three Mistakes about Retributivism," 31 *Analysis* (1971), p. 166.

48. Jeffrie G. Murphy, "Marxism and Retribution," 2 *Phil & Pub. Aff.* (1973), p. 217.

49. See Igor Primorac, "Is Retributivism Analytic?" 56 *Philo.* (1981), p. 203; "The Retributivist Hits Back," p. 471. The criticism frequently refers to, and misconstrues, the principle of *lex talionis*, at least as that principle is found in the Old Testament. The *lex talionis* is a rule of proportionality, not revenge. Even a cursory reading of biblical law (e.g., Exodus 21:18-27) makes it clear that it does not sanction a simplistic tit-for-tat system of mutilation or revenge. An example of revenge that is the antithesis of biblical justice is found in Lamech's Song (Genesis 4:23-24). It is an example of deterrence through fear, with no limits of proportionality.

50. "Three Mistakes about Retributivism," p. 166; Lawrence H. Davies, "They Deserve to Suffer," 32 *Analysis* (1971-72), p. 136; H. J. McCloskey, "Utilitarian and Retributive Punishment," 64 *The J. of Phil.* (1967), p. 91.

51. This is the main thrust of Ten's entire treatment of retributive theories. *Crime, Guilt, and Punishment*, chs. 3-4. See also "They Deserve to Suffer," p. 137, critiquing S. Benn & R. Peters, *The Principles of Political Thought* (n.d.).

52. *Crime, Guilt, and Punishment*, pp. 44-46.

methodology for choosing efficient means. These issues are addressed more fully below after all the utilitarian views of civil justice have been presented. The retributivist is just as concerned with promoting the greatest good but without compromising his position. A Christian view teaches that both the end (good) and means (satisfaction of justice) are God-defined. Scripture teaches that God's glory and man's happiness (end) are the consequence of obeying God's laws (means).⁵³ The retributivist's assurance that he can know what is truly good, and that the means are sufficient to that end, is based on the belief in revealed truth and in a God-governed world.⁵⁴

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.⁵⁵

Despite this fact, there has been an increased concern for victims of crime and their role in the justice system.⁵⁶ 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.⁵⁷ Without both restitution and retribution there is no satisfaction of justice, and therefore, no objective ground for reconciliation of parties to each other, or offenders to the community.⁵⁸ 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

53. E.g., Deuteronomy 28; Romans 8:28-30; Ephesians 6:8.

54. *A Scholastic Miscellany: Anselm to Ockham*, bk. 2, ch. i.

55. *The Limits of the Criminal Sanction*, pp. 23-26; *Crime, Guilt, and Punishment*, pp. 38-41, 51-52.

56. Herbert W. Titus, "The Restitutionary Purposes of the Criminal Law," in *Crime and Punishment in Modern America* (Patrick McGuigan & Jon S. Pascale, eds. 1986), p. 273; *Offender Restitution in Theory and Action* (Burt Galaway & Joe Hudson, eds. 1978); *Considering the Victim* (Joe Hudson & Burt Galaway, eds. 1975); *Restitution in Criminal Justice* (Joe Hudson & Burt Galaway, eds. 1975); Stephen Schafer, *Compensation and Restitution to Victims of Crime* (2d ed. 1970); *Assessing the Criminal: Restitution, Retribution and the Legal Process* (Randy E. Barnett & John Hagel III, eds. 1977); Daniel Van Ness, *Crime and Its Victims* (1986).

57. See *Assessing the Criminal: Restitution, Retribution and the Legal Process*, p. 357; See also Richard A. Epstein, "Crime and Tort: Old Wine in Old Bottles," *ibid.*, p. 231.

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

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.⁵⁹ 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 toward 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;⁶⁰ 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,⁶¹ 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.⁶² Even though all crime is sin (immorality) not all sin is to be punished as crime.

59. There are other authors who argue that the focus should not be primarily on the offender. See Ronald J. Rychlak, "Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment," 65 *Tul. L. Rev.* (1990), p. 299. Rychlak focuses on the impact of punishment on law abiding society rather than the victim. See also Richard Burgh, "Guilt, Punishment, and Desert," in *Responsibility, Character, and the Emotions* (Ferdinand Schoeman, ed. 1987), p. 316.

60. "The Retributivist Hits Back," pp. 473-74; Egon Bittner & Anthony Platt, "The Right of the State to Punish," excerpted from "The Meaning of Punishment," 2 *Issues in Criminology* (1966), vol. 2, p. 82, in *Contemporary Punishment: Views, Explanations and Justifications* (Rudolph J. Gerber & Patrick D. McAnany, eds. 1972), p. 24.

61. J.D. Mabbott, "Punishment," 49 *Mind* (1939), p. 152, reprinted in *Theories of Punishment* (Stanley E. Grupp, ed. 1971), pp. 41, 43-44.

62. 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

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 of offenders or potential offenders.⁶³ 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.⁶⁴ 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.⁶⁵ 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.⁶⁶ 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.

II. UTILITARIAN THEORIES OF ATONEMENT AND CIVIL JUSTICE

A. MORAL INFLUENCE THEORY OF ATONEMENT

In his *Exposition of the Epistle to the Romans*⁶⁷ Abelard (1079-1142) portrayed Christ's death as an exemplary demonstration of God's love designed to elicit a loving response from man.⁶⁸ He

can only be proven by an appeal more generally to 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.

63. 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).

64. John 16:5-15; Romans 15:5; 2 Corinthians 5:11-21.

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

66. Psalm 133; John 17:23; Ephesians 4:1-6.

67. *A Scholastic Miscellany: Anselm to Ockham*, p. 276.

68. *Ibid.*, p. 283:

Now it seems to us that we have been justified by the blood of Christ and reconciled to God in this way: through his unique act of grace manifested to us—in that his Son has taken upon himself our nature and preserved therein in teaching us by word and example even unto death—he has more fully bound us to himself by love; with the result that our hearts should be enkindled by such a gift of divine grace, and true charity should not now shrink from enduring anything for him.

believed that God was willing and able to remit man's deserved punishment without any satisfaction to the demands of justice.⁶⁹ Although Abelard taught that forgiveness of sin and reconciliation to God are not conditioned upon Christ's satisfaction of justice, they are conditioned upon man's moral reformation and obedience of the law.⁷⁰ Man is justified by his own righteousness rather than the imputation of Christ's righteousness. Christ's life, teaching, and death were not a necessary manifestation of God's love, but they were the most efficacious means of influencing this moral change.⁷¹

Faustus Socinus (1539-1604) revived the moral influence theory in *De Jesu Christo Servatore* (1594)⁷² engaging in a virulent polemic against the satisfaction theory. His basic premise was that punitive justice is not an essential attribute of God's nature; therefore, punishment may be remitted purely at will. Like Abelard, Socinus taught that God had determined to remit punishment, not upon satisfaction of justice, but upon condition of belief in Christianity and obedience.⁷³ God pardons those who are reconciled to him in response to Christ's loving example.⁷⁴

Socinus rejected the orthodox doctrines of sin, the divinity of Christ, and the Trinity. He taught that the only effect of Adam's sin was to set a bad example. Consequently, man's moral condition was not nearly as desperate as the Reformers believed.⁷⁵ Since Christ was only a mortal man, though superior in many ways, he has no exclusive role to play in salvation. Thus, all men have the potential to exercise the same quality of saving influence over others through

69. *Ibid.*, p. 283.

70. *Ibid.*, p. 279.

71. *Ibid.*, p. 282.

72. This work [hereinafter *De Jesu*] has never been translated into English. See *The Polish Brethren* (George H. Williams, trans., ed., & interpreter 1980), p. 255. Franks' treatise on the atonement, *The Work of Christ*, pp. 362-73, contains portions of *De Jesu* in English. *The Racovian Catechism* (1605) reflects Socinus' view of the atonement and his theology in general.

73. Socinus writes that "[s]alvation proceeds from the mere will of God in pardoning sinners, but is made known by Christ, the only further condition being our faith and obedience." *De Jesu*, pt. I, ch. ii; *The Work of Christ*, p. 365. See also *Racovian Catechism*: "But when it is fitting that God remit sins and punish when he wishes, it appears that mercy and justice . . . do not exist by nature, but that it is rather the effect of his will." *The Polish Brethren*, p. 224.

74. *Racovian Catechism*: "First, nowhere does Scripture assert that God is reconciled to us by Christ but rather that by Christ or his death we are reconciled or reconciled to God Therefore, in no way from all these passages is that satisfaction to be inferred." *Ibid.*, p. 226. See also *The Work of Christ*, p. 366, commenting on *De Jesu*, pt. II, ch. vi.

75. *Racovian Catechism*, *The Polish Brethren*, p. 229.

their teaching and exemplary lives.⁷⁶ Since moral reformation is effected by purely natural means as they affect the mind, will, and affections, there is no need for the supernatural operation of the Holy Spirit in man's salvation.⁷⁷ The logical conclusion of these departures from orthodoxy is that the church, among other institutions, has no separate jurisdiction nor unique ministry of reconciliation.

Socinus posed two major criticisms of the satisfaction theory. The first dealt with the relation of God's justice and mercy; the second dealt with the justness of vicarious punishment. He argued that there is no place for forgiveness or mercy if salvation is conditioned upon a satisfaction of justice.⁷⁸ Socinus depicted God as a sovereign lord and as a private creditor and not as a judge.⁷⁹ He granted that a judge may not relax the demands of justice in civil or criminal cases. However, a sovereign lord may relax punishment without compromising justice because punishment is due to the state. Likewise, creditors may forgive debts without injustice since payment is owed to them. Therefore, as sovereign lord, God may remit punishment, and as private creditor, he may forgive debt without injustice. He said the Reformer's belief that Christ's death is a necessary satisfaction of justice was sordid and cruel, but he never explained why the unnecessary suffering of an innocent man was not sordid and cruel.

Socinus missed the mark. The Reformers did not sacrifice mercy for justice. They taught that God's love and mercy were fully operative, moving him to provide his own son as a substitutionary atonement. Socinus' view of forgiveness and salvation is in fact the greatest tyranny of conscience, and cause for despair, as it is conditioned on future habitual obedience of the law, something no one is able to do.

Socinus' second criticism is the most compelling—it is unjust to punish the innocent in the place of the guilty.⁸⁰ The Reformers answered this criticism by pointing to the absolutely unique spiritual union between Christ and believers, which Socinus was unwilling to recognize. This unique relationship renders Christ's vicarious punishment compatible with justice. The Reformers taught that man's union with Christ is parallel to man's union with Adam. Adam is

76. *The Work of Christ*, p. 363, Quoting Harnack, D.G., vol. 3, p. 791 (4th ed. n.d.).

77. See the answers to *Racovian Catechism* questions 7, 8 and 9, *The Polish Brethren*, pp. 229-30.

78. *Racovian Catechism*, *ibid.*, p. 227.

79. *The Work of Christ*, pp. 368-69, summarizing *De Jesu*, pt. I, ch. i & pt. III, ch. ii.

80. *The Work of Christ*, p. 369, summarizing *De Jesu*, pt. III, ch. iii.

the federal head of fallen men, and Christ is the head of redeemed men. Adam's sin is imputed to all men, and Christ's righteousness is imputed to all redeemed men.⁸¹ This objective union with Christ exists in eternity, was secured in history, and is experienced subjectively through the agency of the Holy Spirit.⁸²

There is a mystery involved in the union of Christ and believers that must be distinguished from the union involved in the mystical theory of atonement. Although the church (community) has a ministry of reconciliation, man is not reconciled to God through prior reconciliation to the church. Rather, personal union with Christ through the Holy Spirit is the ground for reconciliation with the community.⁸³ Because the mystical theory of atonement denies the essential duality of God and man, it holds that man's union with God is effected through his prior union with the community.⁸⁴

B. GOVERNMENTAL THEORY OF ATONEMENT

Hugo Grotius (1583-1645) formulated a mediating position between the satisfaction and moral influence theories in *A Defense of the Catholic Faith Concerning the Satisfaction of Christ Against Faustus Socinus*.⁸⁵ He portrayed Christ's death not as a satisfaction of the strict demands of justice but as an exemplary punishment designed to induce faith and obedience through fear.⁸⁶

Grotius was especially sensitive to Socinus' criticism that satisfaction leaves no room for forgiveness, yet he realized scripture clearly depicts Christ's death as penal. To resolve this tension, Grotius worked a compromise between justice and mercy by viewing Christ's death as a lesser substitute for the full satisfaction of justice. By relaxing the demands of justice God was able to exercise justice and mercy.

81. *The Atonement*, ch. xiii.

82. *The Institutes of the Christian Religion*, bk. 3, ch. i, para. 1.

83. 1 Corinthians 12:12-31; Ephesians 2:11-22; Colossians 1:21-23.

84. See *infra* at 39-46.

85. *A Defence of the Catholic Faith Concerning the Satisfaction of Christ, against Faustus Socinus*; John Miley in *The Atonement in Christ* (1880), gives perhaps the most systematic and comprehensive defense of the governmental view by a Wesleyan Arminian. Grotius identified with the theology of Jacobus Arminius, which generally attempts to be a mediating position between Calvinism and Socinianism. Although not all theologians identified as Arminian hold to the governmental view, Miley argues that it is the only view consistent with Arminian theology. Wiley provides a useful analysis of the atonement views of several Arminian theologians, some of whom attempt a mediating position between the satisfaction and governmental views. H. Orton Wiley, *Christian Theology* (1940), pp. 252-59.

86. *A Defence of the Catholic Faith Concerning the Satisfaction of Christ, against Faustus Socinus*, pp. 106-7.

Grotius believed that in matters of justice God holds the office of ruler not judge, creditor, or sovereign lord.⁸⁷ Rulers have the prerogative of exacting or remitting punishment.⁸⁸ However, it is not a personal prerogative akin to a creditor's in forgiving debt. He may exercise it only in the best interests of the community.⁸⁹ God chose Christ's death as the most efficient means of deterring lawlessness, through a demonstration of his hatred of sin and determination to punish it, without totally destroying man. Socinus and Grotius shared the critical premise that justice, being a product of God's will rather than an essential attribute of his nature, is mutable.⁹⁰

Making an analogy to, and drawing terminology from, the Roman civil law, Grotius argued that this relaxation of the law is in fact a "satisfaction."⁹¹ But he meant something very different than the Reformers meant by that term. Grotius agreed that justice would be satisfied *ipso facto* if all were consigned to eternal punishment as they deserve. But since God accepted Christ's death in place of man's eternal death, he was free to place other requirements as a condition of forgiveness. His condition for salvation is man's meritorious exercise of faith in God. The fear of punishment invoked by the specter of Christ's death restrains lawlessness and induces men to exercise saving faith.⁹² For Grotius, salvation is conditioned upon a meritorious act of man and is not a free gift of God.

Grotius adhered to Arminian theology which teaches that man's nature is not so corrupted by Adam's sin that he is unable to exercise

87. *Ibid.*, p. 51.

88. *Ibid.*, pp. 55-64.

89. *Ibid.*, p. 64:

[B]ut the right of punishing does not exist for the sake of him who punishes, but for the sake of the community. For all punishment has as its object the common good, viz. the preservation of order, and giving an example; so that desirable punishment has no justification except this cause, while the right of property and debt are desirable in themselves.

90. *Ibid.*, p. 75:

It is a great error to be afraid, as some are, lest in making such a concession we do injury to God, as if we made him mutable. The law is not something internal within God, or the will of God itself, but only an effect of that will. It is perfectly certain that the effects of the divine will are mutable.

But Grotius makes the same application of principle to Christ's death, quoting approvingly several of the Church Fathers that Christ's death was not necessary. *Ibid.*, p. 103.

91. *Ibid.*, pp. 121-27.

92. *Ibid.*, pp. 127-28.

some positive spiritual good.⁹³ All men have the present natural ability to repent and exercise saving faith without the immediate supernatural work of the Holy Spirit.⁹⁴ Repentance and faith actually precede regeneration in this view.⁹⁵ Man's meritorious acts are decisive in effecting his salvation, though he can be powerfully influenced by the example of Christ's suffering and death. In such a system, the primary effect of Christ's death is to change man's disposition toward God and not God's toward man.

In order to answer Socinus' second criticism, that it is unjust to punish an innocent Christ in the place of guilty man, Grotius did not appeal to the mystery of a special spiritual union of Christ and his elect. Quite surprisingly, he argued that there is nothing in the law of nature or customs of nations that prohibits such a practice.⁹⁶ Scriptural injunctions to the contrary were mere positive law applicable only to Israel.⁹⁷ For the community good, a ruler may punish an innocent man who bears a special relationship to the offender, such as father and son, for the purpose of deterring others.⁹⁸

While Grotius ostensibly sought to defend the satisfaction theory, he actually embraced the principles of the moral influence theory. Grotius and Socinus concurred that punitive justice is merely a matter of God's will remissible without satisfaction. In Arminian and Socinian theology, Christ's death is unnecessary for man's salvation, but repentance and faith are a meritorious condition of forgiveness and remission of punishment.⁹⁹ Both the governmental and moral influence theories of atonement are essentially utilitarian in nature. Christ's death was chosen as the most efficient means of inducing a change

93. A.A. Hodge, *Outlines of Theology* (reprint 1972) (1879), p. 334. Some Arminians believe this is so because man's nature was only partially corrupted by the fall. Others believe there was a total corruption but that the effect of the atonement was to raise all men to the level of partial corruption. Arminianism attempts to be a mediating position between Pelagianism (man is unaffected by Adam's sin) and Augustinianism (man is totally corrupted by Adam's sin).

94. John Miley, *Systematic Theology* (reprint 1989), vol. 2, p. 244; See also *ibid.*, vol. 1, p. 522.

95. *Ibid.*, vol. 2, pp. 251-52.

96. *A Defence of the Catholic Faith Concerning the Satisfaction of Christ, against Faustus Socinus*, pp. 81-101.

97. *Ibid.*, pp. 83-84.

98. *Ibid.*, p. 86.

99. Although Grotius charged Socinus with improperly applying the Roman private law doctrine of *acceptilatio* to the atonement, Grotius in principle does the same thing. See *The Polish Brethren*, pp. 256, 282-83 n.25, 285 n.80. See also *The Work of Christ*, pp. 401, 417. In effect, Arminianism and Socinianism both reject the chief cornerstone of the Reformation that "salvation is by grace rather than

in man through natural means of moral example rather than by the supernatural work of the Holy Spirit.

C. DETERRENCE

Rehabilitation parallels the moral influence theory and deterrence the governmental theory. Although rehabilitation has been the favored utilitarian theory of criminologists, deterrence has enjoyed a certain preeminence in philosophical discussions. For this reason deterrence is discussed first, and then rehabilitation. This is a reversal of the order in which their corresponding theories of atonement were presented. The deterrence theory holds that persons should be punished, on the occasion of their conviction, to deter them (special deterrence) or others (general deterrence) from future crimes through fear of punishment.¹⁰⁰ Change of behavior, not change of character, is the focus.

The deterrence theory finds its modern roots in Jeremy Bentham's (1849-1832) classic formulation of utilitarianism. Actions are justified which produce the greatest pleasure for the greatest number. As man possesses rationality and free will, he seeks to maximize his pleasure and minimize his pain. The state can alter behavior of the populace by raising the risk and pain of exemplary punishment to the point it outweighs the pleasure of some forbidden act.¹⁰¹ Since punishment is always seen as evil, even when imposed on the guilty, it is justified only when it prevents a greater evil.

The chief practical criticism of deterrence is that it has never proven effective. Of the few scientific studies conducted, most deal with capital punishment, many are methodologically flawed, and they draw contradictory conclusions.¹⁰² Andenaes, perhaps the leading proponent of deterrence, acknowledges that there is no evidence of special deterrence. However, he appeals to common sense and experience claiming that punishment works as a general deterrent even though he admits there is no way the claim can be proven.¹⁰³

100. Johs Andenaes, "General Prevention—Illusion or Reality?" 43 *J. Crim. L., C & P.S.* (1952), pp. 176, 179-80. Andenaes responds to the charge that deterrence is a shallow theory of punishment based only on fear.

101. J. Bentham, *The Rationale of Punishment* (1830), pp. 19-41, quoted in *Criminal Law*, pp. 8-9.

102. *Crime, Guilt, and Punishment*, pp. 8-12. Ten and others rely heavily on *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Alfred Blumstein et al., eds. 1978).

103. Johannes Andenaes, "The General Preventive Effects of Punishment," 114 *U. Pa. L. Rev.* (1966), p. 949.

The primary theoretical criticism of deterrence is that it justifies punishing the innocent and places no inherent limit on the amount of punishment, thus violating the principles of blameworthiness and proportionality.¹⁰⁴ Since all punishment is evil, whether imposed on the innocent or guilty, it is justified only if it results in a net maximization of pleasure or minimization of pain. The evil of punishing an innocent person could be outweighed by the evil prevented in deterring crime. Similarly, severely punishing a petty offender is justified if that evil is outweighed by the cumulative effect of deterring many petty offenders.

One response to this criticism is that inflicting suffering on the innocent is not punishment. This leaves the basic moral issues unresolved. What justifies inflicting suffering on the innocent?¹⁰⁵ The second response is to claim that there is never a utilitarian advantage in punishing the innocent as less obvious evils will result. The debate takes the form of posing hypotheticals and counter-hypotheticals designed to show that the greater good will, or will not, be promoted by punishing the innocent. The hypotheticals that present seemingly clear situations in which it is beneficial to punish the innocent are extremely unlikely to occur. This leads to a third response that it is only in fantastic situations that it is beneficial to punish the innocent. Ten's analysis of the debate is rather convincing in its conclusion that the use of fantastic examples plays a legitimate role.¹⁰⁶

In an attempt to resolve the problems of blameworthiness and proportionality, several writers have offered compromise theories incorporating retributive principles. H.L.A. Hart's theory, distinguishing punishment as a general justifying aim based on utility from distribution of punishment based on retributive principles, is the best known.¹⁰⁷ He believes that the utility of deterrence is the only rational justification for punishment in general. However, distribution of punishment in individual cases is limited by blameworthiness and proportionality. The state may punish only the guilty, and only so much as they deserve, regardless of the social gain of exceeding those limits. At the cost of theoretical inconsistency

104. *Crime, Guilt, and Punishment*, pp. 13-14, 141; *Punishment and Responsibility*, pp. 24-25, 233-37.

105. *Crime, Guilt, and Punishment*, pp. 14-17.

106. *Ibid.*, pp. 17-18.

107. *Punishment and Responsibility*, pp. 1-27. For other compromise theories see *Crime, Guilt, and Punishment*, pp. 78-81; John Rawls, "Two Concepts of Rules," *Philosophical Review* (1955), p. 4, reprinted in *The Philosophy of Punishment* (H.B. Acton, ed. 1969), p. 105.

Hart disposes of one problem only to acquire the retributivist's main problem of determining how much punishment is "deserved" as an upper limit.

These criticisms avoid the most fundamental weakness of deterrence and all utilitarian approaches—the unsuitability of empiricism as a viable methodology for social study and prediction.¹⁰⁸

D. REHABILITATION

For nearly a century (1870-1970) the rehabilitation theory held sway as the "enlightened" rationale for corrections. Crime is viewed as pathological, requiring treatment based on a medical model of diagnosis and prescription.¹⁰⁹ A sentence is designed to "effect changes in the characters, attitudes, and behavior of convicted offenders, so as to strengthen the social defense against unwanted behavior, but also to contribute to the welfare and satisfactions of offenders."¹¹⁰ Rehabilitation is generally premised on a deterministic view of behavior found in the positivist school of criminology. Theories of crime causation vary from individualistic factors of biology and psychology to social forces.¹¹¹

Despite a deterministic view of human nature, professionals engaged in the healing process have acquired the free will necessary to remold others by means of education, counseling, psychotherapy, and vocational training.¹¹² More radical treatment includes electroshock, drug therapy, and psychosurgery (lobotomies).¹¹³ Although socioeconomic factors are generally considered the major cause of crime, the approach is not to change society so much as to enable individuals to cope successfully within the established order.¹¹⁴ However, because society is at fault it has a corresponding duty to provide programmatic cures. Those treatment programs which promote the greatest reduction in crime at the least cost are justified.

108. *Infra* at 47-50.

109. George B. Vold & Thomas J. Bernard, *Theoretical Criminology* (3d ed. 1986), pp. 350-51.

110. Francis A. Allen, *The Decline of the Rehabilitative Ideal* (1981), p. 2.

111. *Theoretical Criminology*, chs. 1, 3-14. Vold deals with biological causes in chs. 3-6, psychological in ch. 7, and social in chs. 8-14. See *The Decline of the Rehabilitative Ideal*, pp. 40-42.

112. *Ibid.*, pp. 11-16, 43; *Crime and Its Victims*, pp. 74-80; *Theoretical Criminology*, pp. 350-51.

113. *The Decline of the Rehabilitative Ideal*, p. 25; Fred Cohen, *The Law of Deprivation of Liberty* (1980), pp. 540-47.

114. See Robert K. Merton, *Social Theory and Social Structure* (1957).

The demise of the rehabilitation theory is due to a loss of faith in the ability to rehabilitate¹¹⁵ and ideological attacks by critical criminologists of the extreme left.¹¹⁶ Perhaps the single greatest blow to the theory was Robert Martinson's research and conclusions that nothing works.¹¹⁷

While the layman's perception of rehabilitation is that it is too soft on criminals, most scholarly criticism focuses on the fact that in practice it is cruel and arbitrary.¹¹⁸ Because diagnosis and treatment is necessarily an ongoing process based on a cumulation of knowledge about the inmate, sentences must be indeterminate. The inmate's cooperation in mandatory programs designed to change his character is the condition of release. Because sentencing decisions are not based on culpability there is great disparity in prison terms, thus violating the principle of proportionality. Convicts especially hate the process because they deem it unfair.

A consistent application of the rehabilitative premise that criminals are not morally responsible would work a drastic change in criminal law and procedure. Every offense would be strict liability as attention shifts from *mens rea* to the question of whether a defendant did certain acts or caused a particular harm.¹¹⁹ Mental state, if relevant at all, would be determined by mental health experts as part of a treatment program. Writers have expended much effort to make the basic doctrines of *mens rea* and defenses compatible with the utilitarian ethics of deterrence and rehabilitation.¹²⁰

Likewise, procedural safeguards such as proof beyond a reasonable doubt and the privilege against self incrimination, which make it more difficult to identify the sick, make little sense. Nor would it make sense to initiate proceedings only after a crime is committed if

115. See *The Decline of the Rehabilitative Ideal*, pp. 26-31.

116. *Ibid.*, pp. 34-40, 64-65; *Theoretical Criminology*, chs. 15 & 16; William Chambliss, "Toward a Radical Criminology," in *The Politics of Law* (David Kairys, ed. 1982), p. 230.

117. Robert Martinson, "What Works? Questions and Answers About Prison Reform," 35 *Pub. Int.* (Spring 1974), p. 22. His views were modified in "New Findings, New Views: A Note of Caution Regarding Sentencing Reform," 7 *Hofstra L. Rev.* (1979), p. 243.

118. *The Decline of the Rehabilitative Ideal*, pp. 47-54; C.S. Lewis, "The Humanitarian Theory of Punishment," 3 *20th Century* (Autumn 1948-49), p. 5, reprinted in *Theories of Punishment*, p. 301.

119. Barbara Wootton, *Crime and the Criminal Law* (1963). This approach is critiqued in *Punishment and Responsibility*, pp. 195-209 and *Crime, Guilt, and Punishment*, pp. 110-22.

120. *Crime, Guilt, and Punishment*, pp. 86-122; *Punishment and Responsibility*, pp. 28-53, 113-57.

there is reason to believe a person will commit a crime. Logically, a comprehensive system of civil commitment would divest criminal law and procedure.¹²¹

Deterrists have criticized rehabilitation because its effect is limited to convicts and has no impact on potential offenders. The rehabilitationist might respond that a rational policy would include a preventive program of social hygiene that encompasses all potential offenders. It is plausibly argued that this makes more sense than trying to control the entire population through fear.

The radical left attacks these "mainline" liberals for betraying those it claims to champion. Rehabilitationists maintain a system designed to inculcate middle class values and belief in the neutrality of law.¹²² Worse yet they do it to protect their own vested personal and economic interests in the government bureaucracy. Radicals believe crime is not a matter of individual pathology, but rather the ability of dominant groups to define the conduct of dominated groups as criminal.¹²³ The entire social structure must be altered, replacing domination with solidarity.

Utilitarian criminal sanctions, just like utilitarian theories of atonement, are primarily designed to effect a change in the offender rather than to satisfy justice. Justice and reconciliation become nearly synonymous with social order, and law is the immediate instrument to that end. Both deterrence and rehabilitation sever law from morality, though in different ways. Deterrence views man as a free and rational decision-maker who acts on a hedonistic principle of maximizing pleasure rather than the rationality of ethical discernment of right and wrong. The state is therefore able to alter social behavior by manipulating pain and pleasure through the instrumentality of law. The rehabilitationist views man as a product of deterministic forces, or as sick rather than morally blameworthy. Treatment is then little more than behavioral conditioning designed to enforce social conformity through the instrumentality of law. The logic of both is perfectly compatible with the positivist view that law has no necessary moral content.

Both Grotius and Socinus believed that Christ's death was an unnecessary, but highly expedient, means to change man and preserve order. Utilitarian civil sanctions, like Christ's death, are selected for

121. N. Kittrie, "The Divestment of Criminal Law and the Coming of the Therapeutic State," 1 *Suffolk U. L. Rev.* (1967), pp. 43, 44.

122. See *Theoretical Criminology*, p. 13; See also Chambliss, "Toward a Radical Criminology."

123. E.g., Vold & Bernard, *supra* note 109, at 15.

their expediency to a particular end. These utilitarian views of atonement were quite compatible with, and perhaps smoothed the way for, an emerging view of the state which was becoming less concerned with exaction of perfect justice in individual cases, and more concerned with law as an instrument for advancing a particular vision of the common good.¹²⁴

Just as Arminian and Socinian theology confuse the work of Christ and the Holy Spirit, utilitarian views of civil justice confuse the roles of state and church. In neither is the immediate supernatural work of the Holy Spirit crucial for reconciliation, but rather the exemplary impact of Christ's death by means of fear and moral suasion is decisive. Both of these are essentially natural means of reformation, equally available to the state, undermining the church's institutional distinctiveness. As the church compromises its ministry of reconciliation, the state assumes it to the eventual neglect of its ministry of justice.

III. COMMUNITARIAN THEORIES OF ATONEMENT AND CIVIL JUSTICE

A. MYSTICAL THEORY OF ATONEMENT

The mystical theory is like the moral influence in that Christ's death plays no essential role in man's salvation, and atonement is exclusively a subjective change in man. The crucial difference is that in the mystical theory this change occurs because the incarnation effects a mystical union between God and man that imparts a new principle of life. The mystical theory has been a recurring one in Church history;¹²⁵ however, until the nineteenth century it found neither widespread allegiance nor comprehensive development. This changed dramatically when the "father of modern theology," Friedrich Schleiermacher (1768-1834), articulated a mystical view of Christ's person and work in *The Christian Faith*.¹²⁶

Schleiermacher rejected the natural theology of Enlightenment rationalism and Protestant orthodoxy. He defined true religion as the sense of absolute dependence (God-consciousness), which is known immediately through feeling and contemplation. This feeling of absolute dependence is the veritable and essential existence of God

124. *The Words of Christ*, pp. 404-09.

125. See Charles Hodge, *Systematic Theology*, (photolithoprint 1979) (1892) vol. 2, pp. 581-89; *The Institutes of the Christian Religion*, bk. 2, ch xii, paras. 5-7; *The Work of Christ*, pp. 327-33; 361n.9; 541n.3.

126. F. Schleiermacher, *The Christian Faith* (D. Baille et al., trans. 1928) (1st ed. 1821, 2d ed. 1831).

in man.¹²⁷ Sin is the failure to hold a conscious awareness of one's unity with God and absolute dependence on him. According to Schleiermacher, man is both spirit which is inherently God-conscious, and flesh which lacks God-consciousness.¹²⁸ Because flesh develops earlier than spirit it retards the development of God-consciousness.¹²⁹ When spirit becomes aware that flesh is retarding its determinative power, man experiences guilt and suffering.¹³⁰

This condition is man's created nature and is not the penal consequence of Adam's sin.¹³¹ Adam's sin, like everyone's, was trivial, but it has a social impact that further encumbers the individual's struggle for God-consciousness. Schleiermacher believed that sin "is best represented as the corporate act and the corporate guilt of the human race."¹³² To deny corporate guilt would throw man upon his individual resources for salvation.¹³³

Schleiermacher believed that all men are conscious of their need for a Redeemer. Christ the Redeemer differs from other men "by the constant potency of his God-consciousness."¹³⁴ By the incarnation Christ entered into the common life of humanity, participating in it and communicating his God-consciousness to it. He assumes man into the power of his God-consciousness (redemption)¹³⁵ and into his

127. *Ibid.*, p. 17.

128. Schleiermacher believed that there are three grades of consciousness. The lowest is that of animals and children. Although this state is unknown to us, it is generally agreed that while there is consciousness, it is not the kind that is objective or introspective, or that makes a distinction between self and others. The second stage involves a genuine self-consciousness. At this stage self-consciousness experiences a conflict between feelings of dependence and freedom. Schleiermacher's flesh-spirit dichotomy is not a Manichean dualism of material and non-material, nor the orthodox Christian view of conflict between the remaining sin nature and new life in the Spirit. Rather, it is the inability of the feeling of absolute dependence or God-consciousness to control. *Ibid.*, pp. 18-20. The third grade is absolute dependence or God-consciousness.

129. *Ibid.*, p. 274.

130. *Ibid.*, pp. 355-61.

131. *Ibid.*, p. 291.

132. *Ibid.*, p. 285. See also *Ibid.*, pp. 287-88:

Now if the sinfulness which is prior to all action operates in every individual through the sin and sinfulness of others, and if, again, it is transmitted by the voluntary actions of every individual to others and implanted within them, it must be something genuinely common to all. . . . This solidarity means an interdependence of all places and all times in the respect we have in view. . . . [A]nd the aggregate power of the flesh in its conflict with the spirit . . . is intelligible only by reference to the totality of those sharing a common life, and never fully in any one part. . . .

133. *Ibid.*, p. 289.

134. *Ibid.*, p. 385.

135. *Ibid.*, p. 425.

blessedness, alleviating the suffering of guilt (reconciliation).¹³⁶ Christ continues to exert a saving influence by an immediate communication of God-consciousness through the church. Therefore, it is now through union with the community that individuals are assumed into Christ's God-consciousness and experience union with God.¹³⁷

Because Schleiermacher's salvation is a purely subjective work in man, accomplished by Christ alone, there is no place for the distinctive person and work of the Holy Spirit. He uses standard theological terms such as "regeneration," "justification," and "sanctification" to refer to nothing more than Christ's redeeming activities.¹³⁸ There is real doubt as to whether even Christ and the church play an essential role in man's salvation since every individual and community has the potential to develop, and assume others into, God-consciousness.¹³⁹ It may be fair to say that man is already reconciled to God and he need only become consciously aware of that reality.

Since Schleiermacher, modernism has taken many theological forms including liberalism¹⁴⁰ and neo-orthodoxy.¹⁴¹ They have in common a purely subjective effect of the work of Christ. Although no single school dominates the theological landscape today, the Latin American form of process theology, known as liberation theology, is of special interest because of its influence and explicit relation to civil justice. It teaches that salvation comes in siding with the oppressed in their struggle for liberation. Most criticism focuses on its attendant Marxist social, economic, and political ideology without doing full justice to its underlying theology. Leonardo Boff's *Jesus Christ Liberator*,¹⁴² is the most comprehensive articulation of a liberation Christology.

136. *Ibid.*, p. 431.

137. *Ibid.*, p. 363:

[T]he recognition of the sinless perfection in Jesus Christ, definitely constraining us to the new corporate life, must in the same way be still His work. But there is given to us instead of His personal influence, only that of His fellowship, in so far as even the picture of Him which is found in the Bible also originated in the community and is perpetuated in it.

138. *Ibid.*, p. 477.

139. *Ibid.*, p. 563:

The unity of the Spirit is to be understood in the same sense as the unity which everyone attributes to the characteristic form taken by human nature in a nation; even those who ascribe being only to the separate individual may still say that each man's personality is the national character modified by the original basis of his own nature.

See also *Ibid.*, pp. 34-39, 62-76.

140. See generally James C. Livingston, *Modern Christian Thought: From the Enlightenment to Vatican II*, (1971), pp. 251-57, 262-68.

141. Cornelius Van Til, *Barth's Christology* (1977) (assessment of Karl Barth's Christology as mystical).

142. Leonardo Boff, *Jesus Christ Liberator* (trans., 1978).

Boff says that the world is growing in complexity, unity and consciousness as it proceeds through a series of stages culminating in the divinization of man and the humanization of God.¹⁴³ Sin is viewed as a lack of unity, or alienation of one from another, resulting in the domination of some groups by others. Although oppressive social structures may reinforce alienation, the root cause of sin is the fact that mankind has not progressed past the stage of anthropogenesis to Christogenesis. There is an animating principle of harmony in the cosmos which has always worked unconsciously but apparently teleologically. It is now working with a growing sense of self-consciousness in man that enables him to direct the course of progress toward universal solidarity, and thus, sinlessness.¹⁴⁴ Jesus acts as something of a catalyst permeating mankind with a sense of community that increases man's self-conscious directing powers.¹⁴⁵

Christ is sinless by virtue of the fact that he lived with a conscious awareness of the harmony of the world, and he works to liberate victims of sin by establishing a classless solidarity.¹⁴⁶ He is the ultimate human being that all will become.¹⁴⁷ Having penetrated the world, Jesus mystically entered the unconsciousness of mankind and is now present in all reality "acting and fermenting the goodness, humanity, brotherhood, communion, and love in all human beings."¹⁴⁸ His death was unnecessary and certainly had no penal significance, yet it displayed his solidarity with the poor and love for their oppressors. Because the poor are especially close to God, and he lies "hidden and anonymous" in them, the most direct access to God is through union with them.¹⁴⁹ Active participation in the cause of the poor is the way of salvation, and Christ is present in those who further their cause.¹⁵⁰ The commitment of one's life to the oppressed results in

143. *Ibid.*, pp. 185, 197.

144. *Ibid.*, pp. 234-35:

Cosmogenesis gave rise to biogenesis, anthropogenesis emerged from biogenesis, and from anthropogenesis there emerged Christogenesis. . . . The reality that surrounds us is not a chaos but a cosmos, a harmony. The more it progresses the more complex it becomes; the more complex it becomes the more it is unified, the more it is unified the more it becomes conscious of itself. . . . In this perspective, the human being does not emerge as an error in calculation . . . but as the point where the global process becomes conscious of itself and begins to direct itself.

145. *Ibid.*, p. 24.

146. *Ibid.*, p. 202.

147. *Ibid.*, p. 241.

148. *Ibid.*, p. 218.

149. *Ibid.*, pp. 284-85.

150. *Ibid.*, p. 219.

the formation of "a planetary, ecumenical, and communal consciousness among people in search of a new humanism."¹⁵¹

Boff gives no specific description of this new order except that it will be free of domination and alienation, and man will hold membership in a universal rather than a particular family.¹⁵² Such a world will not be governed by law but only a love "that bind[s] human beings with more liberating ties than those of the law."¹⁵³ God does not speak to man revealing a plan for society or in propositional truths. Only when we insert ourselves into Christ's life and the cause of the oppressed can we begin to comprehend the meaning and unity of the new order of existence.¹⁵⁴

B. SOCIAL JUSTICE

Social justice is an ambiguous term invoked for its emotional appeal in promoting a vast array of programs designed to make society just.¹⁵⁵ It differs from the other theories in that it uses state coercion, usually to redistribute property or impair liberty, without any adjudication of wrongdoing. This multiplies the rehabilitationist's techniques of social control and applies them to the entire populace.¹⁵⁶ Rather than using the adjudication of wrongs as an occasion to promote some vision of the good, the state engages in an increasingly comprehensive, continuous, and purposive intervention in all social affairs. Regardless of the source of a problem, social justice demands that the state take corrective action.¹⁵⁷

The first large-scale social justice program was compulsory schooling with its now flickering hope of curing most social ills.¹⁵⁸ In this century, regulation of the economy gave rise to the administrative state, redistribution of property gave rise to the welfare state and institutional care gave rise to the therapeutic state. The focus of

151. *Ibid.*, p. 236.

152. *Ibid.*, p. 77.

153. *Ibid.*, p. 195.

154. *Ibid.*, p. 182.

155. "The absence of a dominant theorist or a single commanding system of thought endorsing the welfare state has been documented again and again." Sidney Hook, "'Welfare State'—a Debate that Isn't," in *The Welfare State* (E.I. Schottland, ed. 1967), p. 167, quoted in Ronald H. Nash, *Social Justice and the Christian Church* (1983), p. 59.

156. Kittrie, "The Divestment of Criminal Law and the Coming of the Therapeutic State," pp. 54-55.

157. F.A. Hayek, *New Studies* (1978), p. 110.

158. See E.I.F. Williams, *Horace Mann: Educational Statesman* (1937), pp. 248-49, quoting from "Introduction," 3 *The Common Sch. J.* (Jan. 1, 1841), p. 15.

justice has shifted from equality of opportunity to equality of position.¹⁵⁹ At the same time, criminologists shifted attention to social causes of crime. Since society is at fault it must redress the problems of illiteracy, poverty, housing, unemployment, malnutrition, substance abuse, and broken homes. The state usurps the role of families,¹⁶⁰ church, and voluntary associations, which in turn default on their responsibilities with the ready excuse that only the state has adequate professional skills and resources to deal with the problems.¹⁶¹

There are two types of attack on social justice theories, the first being that by every standard of measurement nothing works. The second type of attack is ideological in nature. Pervasive state intervention, guided only by the utilitarian goal of maximizing net social gains, threatens individual liberty.¹⁶² John Rawls' celebrated treatise, *A Theory of Justice*,¹⁶³ attempts to resolve the conflict between individual liberty and the redistributive ethic of utilitarianism.

Rawls distinguishes activities governed by the principle of liberty which can never be compromised, from economic rights which may be sacrificed for the common good.¹⁶⁴ He develops these two principles from an imaginary social contract which everyone could agree to. The institution of compulsory education, potentially the greatest threat to liberty, will presumably play the indispensable role of ensuring allegiance to the two principles. The extreme political left is also critical of state-imposed values, however, their complaint is not so much against imposed values as it is with the content of the values being imposed.

Utilitarian theories of justice have not worked, and they conflict with certain shared notions of fairness, yet they enjoy the continuing

159. See Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (1974), pp. 229-36.

160. See *The Decline of the Rehabilitative Ideal*, pp. 15, 20-21.

161. "The Divestment of Criminal Law and the Coming of the Therapeutic State," p. 56; A. A. Stone, *Mental Health and Law: A System in Transition* (1975), pp. 1-6, excerpted in *The Law of Deprivation of Liberty*, pp. 214ff.

162. The tension that exists between individual liberty and social justice notions of the common good is addressed in *Jurisprudence: The Philosophy and Method of the Law*, pp. 240-45.

163. John Rawls, *A Theory of Justice* (1971).

164. Rawls' two principles are:

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all. *Ibid.*, p. 60.

perception of being empirically verifiable, and therefore, scientific.¹⁶⁵ This is based on the pretension 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 variables, most of which cannot be controlled for purposes of experimentation, making it impossible to trace cause-effect relations of social phenomena. Therefore, it is impossible to empirically predict the effect of social policy decisions. Without proving a theory of causation, policy-makers set out to treat the entire populace by prescription. The fact that the entire enterprise is based on empirically unproven and unprovable assumptions is usually ignored.

Not only is the utilitarian unable to select an efficient means to the desired end, he is unable to justify a particular end as good. Even if there is a shared vision of the good, there is no assurance that it is "good" indeed and would not be more painful than pleasurable. This problem becomes especially critical as social consensus regarding "the good" breaks down.¹⁶⁶ Although utilitarian theories have enjoyed relative immunity to criticism at these fundamental points, Roberto Unger attests the desperate predicament of the prevailing methodology:

If he [the historicist] 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 is 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.¹⁶⁷

Unger also rejects rationalism and individual subjectivism,¹⁶⁸ and in his search for a suitable methodology for social study, concludes

165. See, e.g., *Theoretical Criminology*, pp. 36, 340-363; "The Divestment of Criminal Law and the Coming of the Therapeutic State," pp. 58-60.

166. *The Decline of the Rehabilitative Ideals*, pp. 36-37.

167. *Law in Modern Society*, pp. 12-13.

168. *Ibid.*, pp. 1-23.

Knowledge and Politics with a petition for divine revelation.¹⁶⁹ One possible solution to the problem of knowing anything truly without knowing everything is that God, the omniscient Creator, has revealed truth to man, his creation. It does not appear that Unger's prayer is directed to the God of orthodox Christianity. Unger believes that in order to solve the knowledge problem we must resolve the problem of social order, which is the reconciliation of man.

Perhaps the fundamental problem to be resolved in all thought is the relationship of universals and particulars. In political and social discourse it takes the form of the relationship of the individual to the group. How can you have community without destroying individual freedom? The problem appears rooted in the nature of things. Consciousness is a person's awareness that he (subject) is separate from others (object). "Otherness" creates two problems. First, another's freedom places limits on our own freedom. Secondly, there is no assurance that object and subject share the same perspective or attribute the same meaning to events. Alienation is a product of this basic reality of "separateness." Resolving these problems and working toward "the ideal of a universal community, is the great political task of modern societies,"¹⁷⁰ but "[a]ll moves toward such a community may be compromised by the separateness of persons."¹⁷¹

Unger writes that the ideology of nineteenth-century liberal society was one in which men were "governed by self-interest" and used the "most efficient means to achieve privately chosen aims."¹⁷² According to Unger, social cohesion was supposedly based on impersonal respect, rather than solidarity and a shared vision of good. The role of law was to ensure individual rights as a protection against the state, to mediate private disputes, and to influence private decisions by sanctions. The rule of law is based on the belief that law is mutually beneficial, neutral and objective. In such a society there is no true community, and law merely accentuates and reinforces

169. Roberto M. Unger, *Knowledge and Politics* (1984), p. 295:

Desirous of faith, touched by hope, and moved by love, men look unceasingly for God. Their search for Him continues where thinking must stop and action fail. And in their vision of Him they find the beginning and the end of their knowledge of the world and of their sympathy for others. So is man's meditation on God a final union of thought and love—love which is thought disembodied from language and restored to its source.

But our days pass, and still we do not know you fully. Why then do you remain silent? Speak, God.

170. *Law in Modern Society*, p. 266.

171. *Ibid.*, p. 258.

172. *Ibid.*, p. 24.

separateness. The role of law in the post-liberal welfare-corporate state has changed. A social order based on private interest is no longer viewed as natural, and the belief that law is neutral and objective is questioned. With the rise of policy-oriented legal reasoning and substantive justice, rights are less a protection of individuals and more of a justification for the state's purposive reordering of the social order. Property and contract rights are no longer seen as neutral, but rather as political instruments of the established powers.¹⁷³

Unger believes that this changing perception of law reflects a change in social consciousness that is giving expression to a desire for community. There can be no return to a rule of law because it is based on an individualistic conception of society. However, Unger warns that a continuation of the trends of the welfare-corporate state will be a loss of individual freedom "to a bureaucratic welfare tyranny that treats all social arrangements as subjects for governmental manipulation through regulatory law."¹⁷⁴ Although there is a desire for community, current social organization and methodologies are not able to give expression to it.

Unger ties the resolution of the problem of social order to the problem of methodology. The creation of true community, based on solidarity, requires a methodology we do not possess. Yet the development of a new methodology for social study and predication depends on development of community. A new methodology must reflect the interrelatedness of social life, eliminate determinism, and resolve the problem of objectivity-subjectivity. So we return to the question—who is the God that Unger asks to speak?

What philosophy states as the union of the universal and the particular, religion knows as immanence. What philosophy describes as the separation of the universal and the particular, religion calls transcendence.¹⁷⁵

The idea of a union of immanence and transcendence or of a universal being who knows and determines all particulars without destroying their particularity is the idea of God.¹⁷⁶

Unger assumes that the resolution of the problems of social order and methodology lies in the human consciousness. It appears that it is not a subjective individual consciousness, but rather a universal interpersonal collective consciousness that is God. The problem of

173. *Ibid.*, pp. 192-220.

174. *Ibid.*, p. 129; see also *ibid.*, pp. 216-23.

175. *Knowledge and Politics*, p. 290.

176. *Ibid.*, p. 291.

legitimizing a social order, and the resolution of the problem of meaning, is resolved because object and subject are one. This new order is governed by solidarity, which Unger calls the social analogue of love, rather than a rule of law which is predicated on a lack of community.¹⁷⁷ Solidarity means treating someone as a person and not just a "bearer of formally equal rights and duties."¹⁷⁸

Unger trusts that there is an existing unity of all things to which we must be open. He also believes that there is a correspondence in human nature between being and goodness that cannot manifest itself in a context of domination. Man must act in faith upon this belief, and this faith is expressed through politics.¹⁷⁹ Politics is key to altering social structure through "transformative praxis" and altering the consciousness through the "imaginative powers of the mind." Community then advances through a spiral of increasing solidarity and decreasing domination.¹⁸⁰ However, awareness of unity cannot develop absent face-to-face relationships with other members of the same group across the whole spectrum of life's activities.¹⁸¹ In such a setting, "[t]hough the law may be framed to teach men sympathy, all that may be hoped for in the short run is to force them, within wider or narrower bounds, to act as if they were sympathetic."¹⁸² It is not immediately obvious that this is preferable to a "bureaucratic welfare tyranny." It is also difficult to see how this resolves the problems of causation and objectivity-subjectivity without destroying freedom and the individual.

Unger's prayer makes it clear that he recognizes the limitation of thought and action in effecting man's salvation. What then is to take place in the context of these compulsory comprehensive face-to-face relationships? He must reject a view of reconciliation paralleling the moral influence theory of atonement that would establish reconciliation through rationalistic devices of teaching and exemplary love. Instead, Unger's methodology is akin to Schleiermacher's and Boff's, requiring a setting in which there is an immediate mystical impartation of the higher consciousness from the spiritual haves to the have-nots.

177. *Law in Modern Society*, pp. 206-07.

178. *Ibid.*, p. 206. The family is a great inspiration for this vision of community because in it members relate on the basis of love. In true community all members would relate in a similar manner. Yet Unger says the family is a foe that must be transformed because it competes with the universal community for the allegiance of its members. *Knowledge and Politics*, p. 264.

179. *Law in Modern Society*, pp. 247-48.

180. *Knowledge and Politics*, p. 239.

181. *Ibid.*, pp. 262-67.

182. *Law in Modern Society*, p. 215.

In both the mystical and social justice views, issues of individual sin, and guilt as moral wrongs, are minimized or eliminated. The focus is on establishing a particular order, or effecting a change of relationship, without a satisfaction of justice. In effect, it is reconciliation without atonement and community without satisfaction of justice. The mystical view of atonement eliminates the duality between God and man, and in so doing, eliminates the separateness of individuals. Social justice, to overcome the problems of the welfare-corporate state, eliminates the separateness of individuals, and in so doing creates a new god. In both the mystical and social justice theories, corporate man and god are one. This would resolve the legitimacy problem that arises when some individuals or groups try to impose a particular order on others. However, if all are one, the problem of maintaining true individuality and freedom reasserts itself. Neither of the theories offers a convincing answer to this dilemma.

Both assume that there is a basic unity, either of God and man, or of all men, and that the alienation they experience is not so much a moral problem as it is a metaphysical problem. It seems that the problem of alienation will be resolved when man becomes fully conscious of this metaphysical unity, and his oneness, with God and others. While Schleiermacher focuses on contemplation as the key to the higher consciousness, others focus on political activity as the key.

The mystical views of atonement not only limit the importance of Christ's death, they are usually accompanied by a denial of the existence of the Holy Spirit as a distinct person in the Trinity. This is paralleled in the social justice theories in which the state becomes preeminent, consigning other institutions to irrelevance. In Unger's view, the logical conclusion would be that state and society are one. Although Unger suggests that in his new society there would be multiple organic groups, they appear to be nothing more than particular expressions of the universal community.¹⁸³ There is no need for a church since the state plays a redemptive rather than judicial role. In fact, the church would have to be eliminated as it contends there are two communities of men—saved and unsaved. Additionally, orthodox Christianity, which believes there is a duality between the Creator and creation, would be eliminated because it provides the theoretical basis for the rule of law notion that there is an objective and neutral standard.¹⁸⁴

183. *Knowledge and Politics*, pp. 236-77.

184. *See Law in Modern Society*, pp. 76-83.

CONCLUSION

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 he who will not believe will not gain experience, and he who has not had experience will not know.¹⁸⁵

185. Anselm, "Letter of Anselm to Pope Urban II," in *A Scholastic Miscellany: Anselm to Ockham*, pp. 97, 97-98.