

DO WE BELIEVE IN PENAL SUBSTITUTION?

David Lewis
Princeton University

Imagine that an offender has a devoted and innocent friend. The offender has been justly sentenced to be punished for his offence. But the friend volunteers to be punished in his place.¹ If the friend undergoes the punishment that the offender deserved, does that render it permissible (or even obligatory) to leave the offender unpunished? Is that any reason at all in favour of sparing the offender?

Mostly we think not. It is unheard of that a burglar's devoted friend serves the burglar's prison sentence while the burglar himself goes free; or that a murderer's still-more-devoted friend serves the murderer's death sentence. Yet if ever such a thing happened, we surely would hear of it – for what a newsworthy story it would be! Such things do not happen. And not, I think, because a burglar or a murderer never has a sufficiently devoted friend. Rather, because the friend will know full well that, whatever he might wish, it would be futile to offer himself as a substitute for punishment. The offer would strike the authorities as senseless, and they would decline it out of hand.

Even if the friend managed to substitute himself by stealth, and arranged for it to be found out afterward that he had been punished in place of the offender, the scheme would fail. Once the authorities learned that the offender had gone unpunished, they would get on with the job. However much they might regret their mistake in punishing the innocent friend, they could not undo that mistake by failing to punish the guilty offender. That would merely add a second mistake to the first.

We can say, if we like, that the offender ‘owes a debt of punishment’. But the metaphor is misleading. As we mostly conceive of them, the condition of owing a debt and the condition of deserving to be punished are not alike. In the case of debt, what is required is that the creditor *shall not* suffer a loss of the money he lent; what happens to the debtor is beside the point. Whereas in the case of a ‘debt of punishment’, what is required is that the debtor *shall* suffer a loss; there is no creditor. (Society? – Not really. The creditor is supposed to be the one who suffers a loss if the debt is not paid. But sometimes, what with the cost of prisons, society will suffer more of a loss if the debt *is* paid.) This is common ground between alternative conceptions of the function of punishment. Perhaps the guilty ought to suffer a loss simply because it is better that the wicked not prosper; or as an expression of our abhorrence of their offences; or as a means to the end of reforming their characters; or as a means to the end of depriving them of the resources – life and liberty – to repeat their offences; or as a means of deterring others from similar offences. Punishment of innocent substitutes would serve none of these functions. (Not even deterrence, since the deception that would be required to make deterrence effective could not be relied upon.)

What function would we have to ascribe to punishment in order to make it make sense to punish an innocent substitute? – A compensatory function. Suppose that the offender’s punishment were seen mainly as a benefit to the victim, a benefit sufficient to undo whatever loss the offender had inflicted upon him. Then the source of the benefit wouldn’t matter. If the offender’s innocent friend provided the benefit, the compensatory function would be served, no less than if the offender himself provided it.

But our actual institutions of punishment are not designed to serve a compensatory function. A murderer’s victim cannot be compensated at all, yet we punish murderers just the same. A burglar’s victim can be compensated (so long as the victim is still alive), and may indeed be compensated, but not by the punishment of the burglar. How does it benefit the victim if the burglar serves a prison sentence? The victim, like anyone else, may be pleased to know that wrongdoing has met with its just reward; but this ‘compensation’, if such it be, could not (without deception) be provided by the punishment of the burglar’s innocent friend.

We can imagine a world in which the punishment of burglars really is

designed to serve a compensatory function, and in such a way as to make sense of substitution. But when we do, the differences from actuality are immense. Suppose, for instance, that the burglar was required to serve a sentence of penal servitude as the victim's personal slave. Then a compensatory function would indeed be served; and punishing an innocent substitute could serve that function equally well. Or suppose the burglar was to be hanged before the victim's eyes. If the victim took sufficient pleasure in watching a hanging, that might compensate him for the loss of his gold; and if he enjoyed hangings of the innocent no less than hangings of the guilty, then again punishment of a substitute could serve a compensatory function.

A one-sided diet of mundane examples might convince us that we do not believe in penal substitution; we agree, in other words, that the substitutionary punishment of the innocent friend is never any reason to leave the offender unpunished. But of course we do not all agree to this. For many among us are Christians; and many among the Christians explain the Atonement as a case of penal substitution. They say that when Christ died for our sins, He paid the debt of punishment that the sinners owed; and thereby He rendered it permissible, and thereby He brought it about, that the sinners (those of them that accepted His gift) were spared the punishment of damnation that they deserved.

Although these Christians do believe in penal substitution in the context of theology, they do not seem to believe anything out of the ordinary in the context of mundane criminal justice. We do not hear of them arguing that just as Christ paid the debt of punishment owed by all the sinners, so likewise other innocent volunteers can pay the lesser debts of punishment owed by burglars and murderers. ('Innocent' not in the sense that they are without sin, but only in the sense that they are not guilty of burglary or murder.) Why not? I think we must conclude that these Christians are of two minds about penal substitution. Their principles alter from one case to another, for no apparent reason.

My point is not new (though neither is it heard as much as we might expect). Here is a recent statement of the point by Philip Quinn:

In [medieval legal] codes, the debt of punishment for even such serious crimes as killing was literally pecuniary; one paid the debt by paying monetary compensation. What was important for such purposes as avoiding blood feud was that the debt be paid; who paid it was not crucial. . . . But our intuitions about the proper relations of crime and

punishment are tutored by a very different legal picture. Though a parent can pay her child's pecuniary debts, a murderer's mother cannot pay his debt of punishment by serving his prison termSo to the extent that we think of serious sins as analogous to crimes and respect the practices embedded in our system of criminal law, we should expect the very idea of vicarious satisfaction for sin to seem alien and morally problematic.²

However, the heart of the rebuke against those Christians who explain the Atonement as a case of penal substitution is not that they are out of date and disagree with our 'intuitions'. Rather, it is that they disagree with what they themselves think the rest of the time.

An impatient doubter might say that it is pointless to rebuke these Christians for their on-again-off-again belief in penal substitution. The prior problem lies elsewhere. Even if their (sometime) principle of penal substitution were right, and even if they themselves accepted it single-mindedly, still they would be misapplying it. For in the case of the Atonement, the supposed substitution is far from equal. Evil though it is to be put to death by crucifixion, even if the death is temporary and foreseen to be temporary, still the eternal damnation of even one sinner, let alone all of them, is a far worse evil. How can the former be a fair exchange for the latter, even if we grant in general that such exchanges make sense?

But to this question the Christians have an answer. They may say, with scriptural support, that what happened to Christ on the cross was something very much worse than crucifixion. He 'bore our sins', whatever that means, and He found Himself foresaken by God.³ Perhaps these evils, if not the crucifixion itself, were an equal substitute for the deserved damnation that the sinners escaped in return.

An alternative answer is on offer. Perhaps Christ paid only some small part of the debt of punishment that the sinners owed; only just enough so that, if they had paid it for themselves, it would have been the penance required as a constitutive element of sincere repentance. Thereby He made it possible for them to repent, and when they repented the rest of their debt was forgiven outright.⁴

So we can see, at least dimly, how our doubter's inequality objection might be fended off. And if it is, we are back where we were before: the real problem is with the very idea that someone else can pay the sinners' debt of punishment.

Those Christians who explain the Atonement as a case of penal substitution, yet do not in general believe in the principle they invoke, really are in a bad way. Yet the rest of us should not be over-bold in rebuking them. For we live in the proverbial glass house. *All* of us – atheists and agnostics, believers of other persuasions, the lot – are likewise of two minds about penal substitution.

We do not believe that the offender's friend can serve the offender's prison sentence, or his death sentence. Neither can the friend serve the offender's sentence of flogging, transportation, or hard labour. But we do believe – do we not? – that the friend can pay the offender's fine. (At least, if the offender consents.) Yet this is just as much a case of penal substitution as the others.

Or is it? You might think that the proper lesson is just that the classification of fines as punishments is not to be taken seriously. Consider a parking space with a one-hour limit. If you want to park there for an hour, you pay a fee by putting a coin in the meter. If you want to park there for two hours, you pay a fee at a higher hourly rate; the fee is collected by a more cumbersome method; and the fee is called a 'fine'. But what's in a name? The function served is the same in either case. The fee helps pay the cost of providing the parking place; and, in a rough and ready way, it allocates the space to those who want it more in preference to those who want it less. Since those who want it more include some who want to make a gift of it instead of using it themselves, and since some of these may want to make a gift of two-hour rather than one-hour use, the payment of others' 'fines' fits right in. Paying someone else's 'fine' for two-hour parking is no more problematic than buying someone else a pot of beer. It has little in common with the penal substitution we mostly do not believe in.

Agreed. But set aside these little 'fines' that are really fees. Some fines are altogether more serious. They are as much of a burden as some prison sentences. (If given the choice 'pay the fine or serve the time', some would choose to serve the time.) They convey opprobrium. They serve the same functions that other punishments serve. They do not serve a compensatory function, since the fine is not handed over to the victim. Yet if the offender is sentenced to pay a fine of this serious sort, and his friend pays it for him, we who do not otherwise believe in penal substitution will find that not amiss – or anyway, not very much amiss.

You might think that in the case of fines, but not in other cases, we accept penal substitution because we have no practical way to prevent it.

Suppose we had a law saying that a cheque drawn on someone else's bank account would not be accepted in payment of a fine. Anyone sentenced to pay a fine would either have to write a cheque on his own bank account or else hand over the cash in person. What difference would that make? – None.

If the friend gives the offender a gift sufficient to pay the fine, we have a *de facto* case of penal substitution. Whoever may sign the cheque, it is the friend who mainly suffers the loss that was meant to be the offender's punishment. What happens to the offender? – His debt of punishment is replaced by a debt of gratitude, which may or may not be any burden to him; he gets the opprobrium; if the friend has taken the precaution of withholding his gift until the fine has actually been paid, he may need a short-term loan; and there his burden is at an end. Whereas what happens to the friend, according to our stipulation of the case, is that he suffers a monetary loss which is as much of a burden as some prison sentences. The transfer of burden from the offender to the friend may not be quite complete, but plainly the friend is getting much the worst of it.

How to prevent *de facto* penal substitution by means of gifts? Shall we have a law that those who are sentenced to pay fines may not receive gifts? (Forever? For a year and a day? Even if the gift was given before the case came to trial? Before the offence was committed? If the recipient of a generous gift afterward commits an offence and uses the gift to pay his fine, could that make the giver an accomplice before the fact?) Such a law would be well-nigh impossible to get right; to enforce; or to square with our customary encouragement of generosity even toward the undeserving. We well might judge that what it would take to prevent *de facto* penal substitution in the payment of fines would be a cure worse than the disease.

Here we have the makings of an explanation of why we sometimes waver in our rejection of penal substitution. It would go like this. In the first place, we tolerate penal substitution in the case of fines because it is obviously impractical to prevent it. Since, in the case of punishment by fines, the condition of being sentenced to punishment is the condition of owing a debt – literally – the metaphor of a 'debt of punishment' gets a grip on us. Then some of us persist in applying this metaphor, even when it is out of place because the 'debt of punishment' is nothing like a debt in the literal sense. That is how we fall for such nonsense as a penal substitution theory of the Atonement.

Well – that might be right. But I doubt it: the hypothesis posits too much sloppy thinking to be credible. The worst problem comes right at the start. If we were single-mindedly against penal substitution, and yet we saw that preventing it in the case of fines was impractical, we should not on that account abandon our objections to penal substitution. Rather we ought to conclude that fines are an unsatisfactory form of punishment. (Serious fines, not the little ‘fines’ that are really fees.) We might not abandon fines, because the alternatives might have their own drawbacks.⁵ But our dissatisfaction ought to show. Yet it does not show. The risk of *de facto* penal substitution ought to be a frequently mentioned drawback of punishment by fines. It is not. And that is why I maintain that all of us, not just some Christians, are of two minds about penal substitution.

If the rest of us were to make so bold as to rebuke the Christians for their two-mindedness, they would have a good *tu quoque* against us. A *tu quoque* is not a rejoinder on behalf of penal substitution. Yet neither is it intellectually weightless. It indicates that both sides agree that penal substitution sometimes makes sense after all, even if none can say how it makes sense. And if both sides agree to that, that is some evidence that somehow they might both be right.⁶

NOTES

1. A.M. Quinton once argued, in ‘On Punishment’, *Analysis* 14 (1954), pp. 133-142, that punishment of the innocent is logically impossible, simply a contradiction in terms. Maybe so. Nevertheless, since abuse of language makes for easier communication than circumlocution or neologism, I shall speak of the innocent volunteer being punished. I trust that the reader will understand: I mean that the volunteer undergoes something that would have constituted punishment if it had happened instead to the guilty offender.

2. Philip Quinn, ‘Aquinas on Atonement’. *Trinity, Incarnation and Atonement*, ed. R. Feenstra and C. Plantinga (University of Notre Dame Press, 1989), pp. 171-72. See also Eleonore Stump, ‘Atonement According to Aquinas’, *Philosophy and the Christian Faith*, ed. T. Morris (University of Notre Dame Press, 1988), pp. 61-63.

3. How could Christ have been forsaken by God when He *was* God? – perhaps God the Son found Himself forsaken by the other persons of the Trinity.

4. See Richard Swinburne, ‘The Christian Scheme of Salvation’, *Philosophy and the Christian Faith*, ed. T. Morris (University of Notre Dame Press, 1988), pp. 15-30. Although Swinburne’s theory of the Atonement is not the standard penal substitution theory – it is rather a theory of *penitential* substitution – Swinburne by no means abandons the idea of substitution. ‘God . . . can help us atone for our sins by making available to us an offering which we may offer as *our* reparation and penance . . .’ (p. 27, my emphasis).

5. Might we console ourselves with the thought that, although penal substitution has not been prevented, cases of it are at least not frequent? – That might not be much of a consolation. For if cases are rare, those few cases that do occur will seem all the more outrageous.

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