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The Uses of Law for the Formation of Character: A Classic Protestant Doctrine for Late-Modern Liberal Societies?

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Abstract

This Article illustrates how religion has helped to shape and integrate modern liberal state laws of crime and punishment. Contrary to secularization theories, the Article shows how biblical laws on crime are still at the heart of state criminal law today and how classic Protestant teachings on the civil, theological, and pedagogical uses of the law still echo in the theories of deterrence, retribution, and rehabilitation used to justify criminal punishment. Through its published penal codes, its publicized criminal cases, and the publicity of its punishments, the Article argues, the state criminal law teaches and communicates some of the basic values of a basic civil morality. It affirms the dignity and rights of each person, even criminals, that deserves respect; the moral agency of each rational person, and their duties and rights of moral desert; the essential duty of all, on pain of punishment, to respect the body, property, interests, and reputation of their neighbours; and the command of all to honour the legitimate authorities of the state in their administration and enforcement of the law -- so long as these authorities, too, respect the basic rights and liberties of each defendant. State criminal law further helps form and reform the character and basic morality of duly convicted criminals – forcing them to confront and confess their guilt; making them pay for their violations of the community’s norms; rehabilitating them through teaching or reteaching the basic norms of

[1] This chapter is part and product of ongoing work on a volume tentatively titled: “The Religious Vindication of Law.” It draws, in part, on an earlier chapter in my *God’s Joust, God’s Justice: Law and Religion in the Western Tradition* (Grand Rapids, MI: Wm. B. Eerdmans, 2006), 263-94.

sociability and good citizenship that they will need to make reconciliation and re-enter society.

Keywords: Protestantism; secularization theory; moral agency; three uses of law; moral law; criminal law; theories of punishment; retribution; deterrence; rehabilitation; sentencing; just desert; teaching function of law

Introduction

This volume, like the others in this series, explores the role of sundry social systems, separately and together, in shaping individual character and collective values in late modern pluralistic societies. Here we focus on the shaping influences of "religious systems," particularly Christian churches of various denominations. Until the nineteenth century, churches led Western society in establishing values and forming character – through their worship, sacraments, and education; creeds, catechisms, and canons; sanctuaries, charities, and monasteries; and their communion, embodiment, and celebration of the cardinal commandments of love of God, neighbour, and self.

Today, by contrast, churches have more marginal influence in Western liberal societies. While some new or newly arrived religious communities are thriving, many churches in North America, Europe, Australia, and beyond have emptier pews, dwindling coffers, crumbling denominations, and waning cultural power.[2] The growing popular narrative is that churches and other organized religions are outmoded, abusive, dangerous, and discriminatory. The growing academic narrative is that religious freedom, once "taken for granted" as a cornerstone of Western constitutional order, is now very much "up for grabs," particularly when religious freedom collides with claims of sexual freedom, self-determination, and personal autonomy.[3] "Why tolerate religion?" reads the title of a recent influential text, given that religion is so irrational, unscientific, nonsensical, categorical, abstract, and impervious to empirical evidence or common sense.[4]

Social scientists call this the process of "secularization," and some scholars predict that religion will gradually wither away altogether in Western

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[2] See, e.g., Robert P. Jones, *The End of White Christian America* (New York: Simon & Schuster, 2016); and ongoing statistical analysis by the Pew Research Center – *Religion & Public Life* https://www.pewforum.org/data/.

[3] See John Witte, Jr., *Church, State, and Freedom: Protestant Teachings for a Post-Modern Society* (Cambridge University Press, forthcoming), quoting Paul Horwitz, *The* Hobby Lobby *Moment*, *Harvard Law Review* 128 (2014): 154,155.

[4] Brian Leiter, *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2013).

liberal lands.[5] But this process is not so inevitable, unilinear, or irreversible as is often assumed. Leading sociologist José Casanova has shown that modern secularization theory describes three distinct movements, which need not necessarily coincide: (1) the separation of the economic, scientific, and governmental spheres from the religious sphere of the church; (2) the privatization, spiritualization, and deinstitutionalization of religion within the religious sphere; and (3) the decline of religious belief and practice in society, often accompanied by the rise of science, technology, and markets as a more reliable standard of value and validation in our modern "secular age." Casanova warns, however, against confusing "the historical processes of *secularization proper* with the alleged and anticipated consequences which those processes were supposed to have upon religion." The differentiation and specialization of institutional spheres of religion and non-religion do not necessarily coincide with or require the decline or privatization of religion.[6]

A number of other social scientists concur in this view. They have shown how even modern purportedly secularized Western societies retain and rely on religious resources.[7] Religion is not only contained within private prayer closets and sanctuaries. Religion is also present in all kinds of spaces and specialties that would seem to be hermetically and hermeneutically closed to religion – in state schools, hospitals, and prisons, in state legislatures, courts, and tribunals, in the discourses of human rights, and public policy, and public health alike.[8] Indeed, our public life, legal discourse, and public policy debates on many matters are suffused with religious metaphors, values, beliefs, and frameworks – sometimes hidden, sometimes syncretized, sometimes masquerading under other labels, but all vitally important to communal identity, integrity, and function.[9]

Moreover, the institutionalized social sphere of churches and other organized religions might now be a weakened cultural force in the West, but it remains an important source of character formation, moral education, and the communication of values in late modern pluralistic societies. America's leading religious historian Martin E. Marty has documented some of the private and

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[5] See, e.g., Bryan S. Turner, et al. eds., *Secularization,* 4 vols. (London: Sage Publishers, 2010).
[6] José Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994), 19. See also Charles Taylor, *A Secular Age* (Cambridge, Mass: Harvard University Press, 2007), 423.
[7] See, e.g., Rosemarie van den Breemer, et al., eds., *Secular and Sacred? The Scandinavian Case of Religion in Human Rights, Law and Public Space* (Göttingen/Bristol, CT: Vandenhoeck & Ruprecht, 2013); Roger Trigg, *Religion in Public Life: Must Faith be Privatized?* (Oxford: Oxford University Press, 2008); Christian Smith, *The Secular Revolution: Power, Interests, and Conflict in the Secularization of American Life* (Berkeley, CA: University of California Press, 2003).
[8] See, e.g., Kim Knott, *The Location of Religion: A Spatial Analysis* (London: Equinox, 2005).
[9] John Witte, Jr., "Law, Religion, and Metaphor," in Günter Thomas and Heike Springhart, eds., *Risiko und Vertrauen / Risk and Trust: Festschrift für Michael Welker zum 70. Geburtstag* (Leipzig: Evangeliche Verlagsanhalt, 2017), 177-95.

public goods that these overt and hidden forms and norms of religion still contribute. Religions, he shows, deal uniquely with the deepest elements of individual and social life. Religions catalyze social, intellectual, and material exchanges among citizens. They trigger economic, charitable, and educational impulses in citizens. They provide valuable checks and counterpoints to social and individual excess. They help diffuse social and political crises and absolutisms by relativizing everyday life and its institutions. Religions provide prophecy, criticism, and exemplars for society. They force others to examine their presuppositions. They are distinct repositories of tradition, wisdom, and perspective. They counsel against apathy. They often represent practiced and durable sources and forms of community. They provide leadership and hope, especially in times of individual and social crisis. They contribute to the theory and practice of the common good. Religions represent the unrepresented, teach stewardship and preservation, provide fresh starts for the desperate, and exalt the dignity and freedom of the individual.[10] No religion lives up to all these claims all the time. Some religions never do, and a few even work hard to destroy these goods. But these private and public goods offered by most organized religions argue strongly for the continued recognition of the sphere of religion in shaping character, values, and morality in late modern differentiated societies.

Other chapters in this volume document the shaping influences of Christianity on Western values and practices of freedom, communication, education, social organization, moral formation, political activism, land use, and cultivation of leadership. My chapter explores Christianity's historical and enduring influence on law and morality in the Western legal tradition. This is a vast topic, and another volume on law and character formation in the same series addresses the topic more fully. Here, I focus on a distinct Protestant doctrine called "the uses of the law" for creating both a basic civil morality for all members of society and higher spiritual morality that becomes the Christian life.

Protestant theologians developed this uses framework initially to describe the place and function of the moral law of God in Christian life. While the law of God is not a pathway to salvation – justification comes by faith in God's grace not by works – it still has "uses" in this life. The moral law of God has (1) a civil use that restrains persons from sinful conduct by threat of divine punishment; (2) a theological use that condemns sinful persons in their consciences and drives them to repentance; and (3) an educational use that teaches those who have already been saved the good works that please God and induce others to come to God, too. Hence the need for the church to preach on the Old Testament law, to catechize the young in the Ten Commandments, and to encourage Christians

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10 *See* Martin E. Marty & Jonathan Moore, *Politics, Religion, and the Common Good: Advancing a Distinctly American Conversation About Religion's Role in Our Shared Life* (San Francisco: Jossey-Bass, 2000).

to meditate on the law of God as the Bible instructs. "Not a jot or tittle" of the moral law of God should thus be ignored, even if the ceremonial laws of the Old Testament are no longer binding, and the juridical laws of the Bible are more illustrative than prescriptive of Christian morality.

Already in the Reformation era, Protestant theologians began to apply this same "three uses" framework to explain the purposes of other types of human law as well – particularly the internal laws of the church, which in their view had comparable civil, theological, and educational uses.[11] Protestant jurists, in turn, adopted this uses framework in their theories of state law, which in their early view built in part on the law of God.[12] They used this framework most directly to define and integrate the three purposes of the state's criminal law. A society needs criminal law and punishment for: (1) deterrence of individuals and groups through the threat of criminal punishment – much like the civil use of the moral law; (2) retribution, the necessary punishment needed to restore a convicted criminal to the community – akin to the theological use of the moral law; and (3) rehabilitation, teaching a person the good works that exemplify state citizenship – analogous to the educational use of the moral law. Just as the three uses framework provided Protestant theologians with an integrated theory of the moral law of God, this same framework helped Protestant jurists develop an integrated theory of the criminal law of the state.

The Theological Doctrine of the Uses of Moral Law

The theological doctrine of the uses of law, while rooted in patristic and scholastic teachings, emerged clearly in the sixteenth-century Protestant Reformation.[13] It was a popular doctrine, particularly among the earliest

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11 See examples in the volumes in this series on law, economics, family, and the academy.

12 See, e.g., recent overviews in Mathias Schmoeckel, *Das Recht der Reformation* (Tübingen: Mohr Siebeck, 2014), esp. 207-245; Wim DeKock, et al., eds., *Law and Religion: The Legal Teachings of the Protestant and Catholic Reformations* (Göttingen: Vandenhoeck & Ruprecht, 2014); Martin Heckel, *Martin Luthers Reformation und das Recht* (Tübingen: Mohr Siebeck, 2016). For recent studies of particular areas of law, see, e.g., Paolo Astorri, *Lutheran Theology and Contract Law in Early Modern Germany* (Leiden: Verlag Ferdinand Schöningh, 2019); Markus M. Totzek, *Die politischen Gesetze des Mose: Enstehung und Einflüsse der* politia-judaica-*Literatur in der frühen Neuzeit* (Göttingen: Vandenhoeck & Ruprecht, 2019).

13 For discussion of pre-Reformation texts on point, see Edward A. Engelbrecht, *Friends of the Law: Luther's Use of the Law for the Christian Life* (St. Louis, MO: Concordia Publishing House, 2001), 1-70. Luther was the first to give prominence to what he called "uses of the law." In his 1513-15 Lectures on the Psalms, he first used the term *usus legis.* WA 3:144. In his 1522 Commentary on Galatians 3, he spoke of "three-fold use of the law" (*drey wysse am brauch des gesetz*), though in this tract as well as his 1531 Commentary on Galatians, he focused only on the civil and theological uses of the law. WA 10/1:457. Martin Bucer, in his 1525 Latin translation of Luther's sermon, rendered Luther's German phrase as *triplex usus legis*, a Latin phrase which other reformers adopted. WA 10/1:457, note 2. Philip Melanchthon, in his 1535 *Loci communes*

Lutheran and Reformed Protestants. Martin Luther (1483-1546), Philip Melanchthon (1497-1560), Heinrich Bullinger (1504-1575), and John Calvin (1509-1564) expounded the doctrine, but so did many later Protestants of various denominations.[14] It was also a pivotal doctrine, for it provided the reformers with a middle way between radical Catholic legalism, on the one hand, and radical Anabaptist antinomianism, on the other. It allowed the reformers to reject the claims of certain Catholics that salvation can be achieved by works of the law as well as the claims of certain Anabaptists that those who are saved have no further need of the law.

The reformers focused their uses doctrine primarily on the moral law--that compendium of moral commands, duties, and rights that transcend the positive laws of the state. God, they believed, has written a moral law on the hearts of all persons, rewritten it in the pages of Scripture, and summarized it in the Ten Commandments. A person comes to know the meaning and measure of this moral law both through the counsel of conscience and reason and, more completely, through the commandments of Scripture and the Spirit.[15] Though a person can be saved if he or she obeys the moral law perfectly, their inherently sinful nature renders them incapable of such perfect obedience. This human incapacity does not render the moral law useless, however. It retains three important uses or functions.

First, the moral law has a *civil* use to restrain persons from sinful conduct by threat of divine punishment. "[T]he law is like a halter," Calvin wrote, "to check the raging and otherwise limitlessly ranging lusts of the flesh.... Hindered by fright or shame, [persons] dare neither execute what they have conceived in their minds, nor openly breathe forth the rage of their lust."[16] The law thus imposes upon saints and sinners alike what Calvin called a "constrained and forced righteousness" or what Melanchthon called "an external or public morality."[17] Threatened by divine sanctions, persons obey the basic commandments of the moral law – to honor parents and other authorities, to respect their neighbor's person, property, and household, to remain sexually continent, to speak truthfully of themselves and their neighbors.

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and Calvin, writing independently in his 1536 *Institutes*, were the first to expound systematically all three uses of the moral law. CR 21:405-406; Institutes (1536), 48-50.

[14] Philip Melanchthon, *Catechesis puerilis* (1558), in CR 23:176- 177; John Calvin, "The Geneva Catechism," in CO 6:80; "Formula of Concord (1577), part 6," in TC, 805.

[15] See numerous examples in John Witte, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002); John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007).

[16] Institutes (1559), 2.7.10.

[17] Institutes (1559), 2.7.10, 4.20.3.; CO 52:255; CR 1:706-708.

Although "such public morality does not merit forgiveness of sin,"[18] it benefits sinners and saints alike. On the one hand, it allows for a modicum of peace and stability in this sin-ridden world. "Unless there is some restraint," Calvin wrote, "the condition of wild beasts would be better and more desirable than ours. [Natural] liberty would always bring ruin with it if it were not bridled by the moderation" born of the moral law.[19] On the other hand, such public morality enables persons who later become Christians to know at least the rudiments of Christian morality and to fulfill the vocations to which God has called them. "Even the children of God before they are called and while they are destitute of the spirit of sanctification become partly broken in by bearing the yoke of coerced righteousness. Thus, when they are later called, they are not entirely untutored and uninitiated in discipline as if it were something foreign."[20]

Second, the moral law has a *theological* use to condemn sinful persons for their violations of the law. Such condemnation ensures both the integrity of the law and the humility of the sinner. On the one hand, the violation of the law is avenged, and the integrity, the balance of the law is restored by the condemnation of those who violate it. On the other hand, the violator of the law is appropriately chastened and driven to God's grace. In Luther's hard words, the law serves as a mirror "to reveal to man his sin, blindness, misery, wickedness, ignorance, hate, contempt of God.... When the law is being used correctly, it does nothing but reveal sin, work wrath, accuse, terrify, and reduce consciences to the point of despair."[21] "In short," Calvin writes more mildly, "it is as if someone's face were all marked up so that everybody who saw him might laugh at him. Yet he himself is completely unaware of his condition. But if they bring him a mirror, he will be ashamed of himself, and will hide and wash himself when he sees how filthy he is."[22] Such despair, the reformers believed, was a necessary precondition for the sinner both to seek God's help and to have faith in God's grace. "For man, blinded and drunk with self-love, must be compelled to know and confess his own feebleness and iniquity.... [A]fter he is compelled to weigh his life in the scales of the law, he is compelled to seek God's grace."[23]

Third, the moral law has an *educational* use of enhancing the spiritual development of believers, of teaching those who have already been justified "the works that please God."[24] Even the most devout saints, Calvin wrote, still need the law "to learn more thoroughly ... the Lord's will [and] to be aroused to

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[18] CR 22:151, 250.
[19] CO 39:66.
[20] Institutes (1559), 2.7.10.
[21] WA 40:481-486.
[22] CO 50:535.
[23] Institutes (1559), 2.7.6.
[24] CR 21:406.

obedience."[25] The law teaches them not only the "public" or "external" morality that is common to all persons, but also the "private" or "internal" morality that is becoming only of Christians. As a teacher, the law not only coerces them against violence and violation, but also cultivates in them charity and love. It not only punishes harmful acts of murder, theft, and fornication, but also prohibits evil thoughts of hatred, covetousness, and lust.[26] Through the exercise of this private morality, the saints glorify God, exemplify God's law, and impel other sinners to seek God's grace.

The early reformers rooted this uses doctrine in part in their theology of salvation. Following St. Paul, they recognized various steps of the Christian walk before God -- from predestination to justification to sanctification – and the relevance of the moral law of God for all three steps.[27] The moral law coerces sinners to obey through (threat of) force so that they can be preserved. It condemns them in their sin so that they can be justified. It counsels them in their works so that they can be sanctified. The doctrine was also rooted in the Protestant theology of the person. The reformers emphasized that in the life even the most devout person is *simul iustus et peccator*, in Luther's signature phrase, at once saint and sinner, spirit and flesh.[28] The moral law caters to both the spiritual and the carnal dimensions of his or her character. The person of the flesh is coerced to develop at least a minimal public or external morality; the person of the spirit is counseled to develop a more holistic private or internal morality.[29]

Later Elaborations. The theological doctrine of the three uses of the moral law was not merely an anachronism of the early Reformation that died with the magisterial reformers.[30] The doctrine remained a staple of Protestant dogma after the early Reformation. The classic texts of Luther, Melanchthon, Calvin and others, which expounded the uses doctrine, were constantly reprinted and translated and circulated widely in Protestant circles. Some Protestant editions of

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[25] Institutes (1559), 2.7.12

[26] Institutes (1559), 2.8.6; CR 1:706-708; Martin Bucer, *Deutsche Schriften,* ed. Robert Stupperich (Gütersloh: Gutersloher Verlagshaus C. Mohn, 1960-), 1:36ff.

[27] Romans 8:28-30 and Galatians 3:21-29 and the reformers' commentaries thereon in CR vol. 15:654-678; LW 25:371-378; 26:327-358. Calvin also follows this sequencing from predestination to justification to sanctification in the arrangement of Books II and III of his Institutes (1559).

[28] WA 7:50.

[29] A good modern summary is provided by Dietrich Bonhoeffer, *Ethics*, ed. Eberhard Bethge, trans. Neville H. Smith (New York: Macmillan, 1955), 303-319.

[30] This has been argued most forcefully by Karl Barth and his student Hermann Diem. See Hermann Diem, *Dogmatik: ihr Weg zwischen Historismus und Existentialismus* (Munich: Chr. Kaiser Verlag, 1955), arguing that the three uses doctrine died after the Reformation because it gives the law priority over the Gospel, suggests stages of justification, and is a sort of "Trojan horse" for smuggling natural law into theology. See further discussion in Coslett Quin, *The Ten Commandments: A Theological Exposition* (London: Lutterworth Press, 1951), 32. Even sympathetic accounts of the uses doctrine generally focus only on the early Reformation era.

the Bible set out the uses doctrine in its marginal glosses on the relevant texts of Moses and St. Paul. A steady stream of references to the doctrine can be found in Protestant monographs, sermons, catechisms, and confessional writings from the seventeenth century onward. A number of distinguished Protestant theologians in the twentieth century—Dietrich Bonhoeffer, Emil Brunner, Alec Vidler, among others—included the doctrine in their theological systems.[31] One could multiply examples to demonstrate the continuity of this uses doctrine in the Protestant tradition--a worthy exercise, given the paucity of studies available.[32] But here are just a few texts to illustrate the wide acceptance of the uses doctrine among various Protestants.

Heinrich Bullinger (1504-1575), who bridged the Anglican and Reformed world, described the theological use as "the chief and proper office of the law" -- "a certain looking-glass, wherein we behold our own corruption, frailness, imbecility, imperfection" -- and he waxed eloquently on the doctrine for several pages. He also insisted, however, that the moral law has a vital civil use to teach the unregenerate "the first principles and rudiments of righteousness" and an educational use to teach the redeemed "the very and absolute righteousness" and morality that becomes true sanctified Christians.[33] By the end of the sixteenth century, Bullinger's printed sermon on the topic became a standard classroom text for budding Anglican clergy.[34] Comparable sentiments on the uses doctrine are peppered throughout Richard Hooker's (ca. 1553-1600) classic eight-volume *Laws of Ecclesiastical Polity*.[35]

Reformed groups in England and America embraced the uses doctrine, both in its classic Reformation form and with a distinctive covenantal cast. The short catechism Scottish lawyer and theologian Samuel Rutherford (ca. 1600-1661), for example, has classical language on the theological and educational uses of the moral law:

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[31] See, e.g., Bonhoeffer, *Ethics*, 303ff.;; Emil Brunner, *Dogmatik*, 3 vols. (Zürich: Zwingli-Verlag, 1960), 2:131ff; 3:306ff; Emil Brunner, *The Mediator: A Study of the Central Doctrine of the Christian Faith*, trans. O. Wyon (London: Lutterworth Press, 1934), 441ff.; Alec R. Vidler, *Christ's Strange Work: An Exposition of the Three Uses of God's Law* (London: SCM Press, 1963); Quin, *Ten Commandments*, 31ff.

[32] For a list of books on “the modern debate on the use of the law,” see Engelbrecht, *Friends of the Law,* Appendix E, pp. 275-77.

[33] *The Decades of Henry Bullinger*, 4 vols. (Cambridge: University Press, 1849-1852), 2:235-245.

[34] See H.A. Wilson, *Episcopacy and Unity* (London: Longmans, Green, 1912), 39; Vidler, *Christ's Strange Work*, 34.

[35] For a suggestive tabular summary of the three types and offices of law set out by Hooker, see Francis Paget, *An Introduction to the Fifth Book of Hooker's Treatise on the Laws of Ecclesiastical Polity* (Oxford: Clarendon Press, 1899), 99. See further Norman Doe, “Richard Hooker,” in Mark Hill and R.H. Helmholz, eds., *Great Christian Jurists in English History* (Cambridge: Cambridge University Press, 2017), 115-37.

> Q. What is the use of the law if we can not obteane salvatione by it? A. It encloseth us under condemnation as a citie beseiged with a garrisone of souldiers that we may seek to Christ for mercie. Q. What is the use of the law after we are com to Christ? A. After Christ has made agreement betwixt us and the law, we delight to walk in it for the love of Christ.[36]

The Westminster Confession of Faith (1647) provided a classic early statement, which was often glossed in sermons and commentaries:

> Although true believers be not under the [moral] law as a covenant of works, to be thereby justified or condemned; yet is it of great use to them, as well as to others; in that, as a rule of life, informing them of the will of God and their duty, it directs them and binds them to walk accordingly; discovering also the sinful pollution of their nature, hearts, and lives; so as, examining themselves thereby, they may come to further conviction of, humiliation for, and hatred against sin; together wih a clearer insight of the need they have of Christ and the perfection of his obedience. It is likewise of use to the regenerate, to restrain their corruptions, in that it forbids sin; and the threatenings of it serve to show what even their sins deserve, and what afflictions in this life they may expect for them.[37]

Free Churches of various sorts occasionally included their uses doctrine in their literature and sermons as well. John Wesley (1703-1791), for example, preached a powerful 1749 sermon on *The Original, Nature, Property, and Use of the Law*:

> The first use of the law [is] to slay the sinner, ... to destroy the life and strength wherein he trusts, and convince him that he is dead while he liveth; not only under the sentence of death, but actually dead unto

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[36] "Ane Catachisme Conteining The Soume of Christian Religion by Mr. Samuell Rutherfurd (c. 1644)," chap. 33, in Alexander F. Mitchell, *Catechisms of the Second Reformation* (London: James Nesbit, 1886), 226 (citations and question numbers omitted).

[37] "Westminster Confession of Faith (1647)," art. 19, in Philip Schaff, *The Creeds of Christendom With a History and Critical Notes*, 3 vols. (New York: Harper and Brothers, 1882), 3:640-42 (citations and subpart designations omitted). See also "The Savoy Declaration of 1658," a classic Congregational confession which tracks the Westminster formulations closely, in Williston Walker, ed., *The Creeds and Platforms of Congregationalism* (Boston: Pilgrim Press, 1960), 387.

> God, void of all spiritual life, "dead in trespasses and sins." The second use of it is, to bring him unto life, unto Christ, that he may live.... The third use of the law is, to keep us alive. It is the grand means whereby the blessed spirit prepares the believer for larger communications of the life of God.[38]

There are plenty of other examples, but these are enough to illustrate that the uses of the law doctrine remained a staple of the Protestant tradition over the centuries. To be sure, this doctrine was no centerpiece of Protestant dogma on the order of the doctrines of God and man, or sin and salvation. Nor did this doctrine win universal assent or uniform articulation. To this day, Protestants still argue about the order of the uses of the law – some preferring to call the "theological" use (of inducing a person to salvation) to be the "first" or "primary use" of the law, and treating the other uses as secondary, even incidental.[39] Some recognize a "civil" and "theological" use of the law, in whatever order, but not a pedagogical use; after all, Galatians 3:24-25 says that "the law was our teacher to bring us unto Christ, that we might be justified by faith. But after that faith is come, we are no longer under a schoolmaster."[40] Some focus on the two-fold morality that the law produces – a basic civil morality of duty that even the state can coerce, and a more spiritual morality of aspiration that only conscience and the church can encourage. These differences are serious, and require deeper theological exposition than space permits here. But it is enough to show that the uses of law doctrine had ample enough coherence and adherence to provide a common theological touchstone for fiercely competing Protestant sects.

The Legal Doctrine of the Purposes of Criminal Law and Punishment

The theological doctrine of the three uses of God's moral law that emerged out of the Reformation had a conceptual cousin in the legal doctrine of the three purposes of criminal law and punishment that emerged in early modern Protestant lands. Protestant jurists on both sides of the Atlantic argued that the criminal law serves three purposes in the lives of the criminal and the community: (1) deterrence; (2) retribution; and (3) rehabilitation. The precise definition and priority of these three purposes of criminal law and punishment were and are subjects of endless debate, but all three are prominent in criminal law theory still today. The deterrent, retributive, and rehabilitative purposes of the criminal law

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[38] Reprinted in Edward H. Sugden, ed., *Wesley's Standard Sermons*, 2 vols. (London: Epworth Press, 1964), 2:52-53.
[39] See Bonhoeffer, *Ethics,* 303-319.
[40] Engelbrecht, *Friends of the Law.*

bear a striking resemblance to the civil, theological, and educational uses of the moral law.

First, the jurists believed, criminal law has a *deterrent* function. The criminal law prohibits a variety of harmful and immoral acts—homicide, rape and sex crimes, battery, assault, kidnapping, defamation, and other violations of the person; arson, theft, burglary, trespass, embezzlement, fraud, and other violations of property; riot, tumult, treason, racketeering, terrorism, and other violations of public peace and order. A person who violates these prohibitions must be punished, but the ideal is to deter them from committing these offenses in the first place by threat of punishment. The punishment threatened must be sufficiently onerous and automatic to parties from committing or repeating the violation. It must also be sufficiently grave and public so that others will see the defendant's plight and be deterred from similar conduct, however tempting.[41]

This helps account for the traditional publicity of the criminal justice system -- with its public trials, public confessions, public pillories, public brandings, public executions, and public records. Criminal punishments, particularly executions, Samuel Johnson (1709-1784) once quipped, "are intended to draw spectators; if they do not, they don't answer their purpose."[42] Contrary to Kant's categorical imperative that no man should be used "as a means to the end of another," the criminal justice system uses the punishment of one individual to serve the ends of both the criminal and the community.[43] "When a man has been proved to have committed a crime," Sydney Smith (1771-1845) put it, "it is expedient that society should make use of that man for the diminution of crime; he belongs to them for that purpose."[44]

Through these prohibitions and punishments, the jurists believed, the criminal law coerces all persons to adopt what they called a basic civil or public morality. This, to be sure, is only what Justice Joseph Story (1779-1845) called a

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[41] See, for example, Samuel von Pufendorf, *The Law of Nature and Nations (1688)*, ed., W.A. Oldfather (New York: Oceana, 1964), bk. 8, chap. 3.9, 11, 12; Hugo Grotius, *On the Law of War and Peace (1625)*, trans., Francis W. Kelsey (Indianapolis, IN: Bobbs-Merrill, 1962), bk. 2, chap. 20.7-9.

[42] Quoted in James Boswell, *Boswell's Life of Samuel Johnson*, vol. 2 (New York/Chicago: A.S. Barnes, 1916), 447. See also Pufendorf, *The Law of Nature and Nations*, bk. 8, chap. 3.11.

[43] Immanuel Kant, *The Metaphysical Elements of Justice (1785)*, trans. John Ladd (Indianapolis, IN: Bobbs-Merrill, 1965), 100: "Judicial punishment (*poenis forensis*) is entirely distinct from natural punishment (*poenis naturalis*). In natural punishment, vice punishes itself, and this fact is not taken into account by the legislator. Judicial punishment can never be administered merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else."

[44] Sydney Smith, *Elementary Sketches of Moral Philosophy* (New York, Harper and Bros., 1856), 252.

"coerced minimal morality," and what Lon Fuller later called "a morality of duty," rather than a "morality of aspiration."[45] It defines only the outer boundaries of propriety and civility. It provides only the barest modicum of civil order and stability. Yet the jurists believed that, given the proclivities of human nature, such a deterrent function of criminal law and punishment is indispensable to minimal social order.

This deterrent function of criminal law runs closely parallel to the civil use of the moral law. Not only are a number of moral laws of God echoed in the state's criminal law today -- homicide, theft, rape, battery, defamation, fraud, and treason are all expressly prohibited in the Bible and in every modern penal code. But the purposes served by the (threat of) enforcement of these laws are also parallel. The theologians stressed the "wrath of God against all unrighteousness" to coerce persons to resist sinful temptation, and they adduced ample biblical examples of the ill plight of the sinner, not least the threat of hell fire, to drive home their point.[46] The jurists stressed the severity of the magistrate against all criminal conduct and used examples of the law's harsh public sanctions of convicted criminals, most powerfully the threat of long imprisonment, even execution, to deter all persons from criminal conduct.[47]

Both the theologians and jurists understood that such (threat of) coercion produces only a minimal morality. It allows people to live with their neighbors, not necessarily to love them; to coexist in a society not necessarily to embrace them in covenant fellowship. But this minimal morality born of legal coercion is indispensable for any orderly human society. Aristotle noted this already at the beginning of his *Politics*: "Just as man is the best of the animals when completed, when separated from law and adjudication he is the worst of all."[48] American founder James Madison (1751-1836) had the same insight: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls … would be necessary … but experience has taught mankind the necessity of auxiliary precautions," not least a fully functioning criminal law system.[49]

Second, many Western criminal jurists believed, criminal law has a *retributive* function. Retribution, too, has both a communal and an individual

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[45] Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964), 3-9.
[46] See J.A. Sharpe, "'Last Dying Speeches': Religion, Ideology, and Public Execution in England," *Past and Present* 107 (1985):144-167; Ronald A. Bosco, "Lectures at the Pillory: The Early American Execution Sermon," *American Quarterly* 30 (1978):156-176; David Edwards, *Sermons to the Condemned* (London: R. Hawes, 1775).
[47] Cotton Mather, *The Call of the Gospel Applied Unto all Men in General, and Unto a Condemned Malefactor in Particular* (Boston: Richard Pierce, 1687), 58.
[48] Aristotle, *Politics,* bk. 1, ch. 2.
[49] Federalist Paper, No. 51.

dimension. On the one hand, it recognizes that crime is not just a civil harm to a victim, whose person, property, or reputation has been harmed by the defendant and requires compensation. Crime is also a harm to the community, to society's basic standards of moral conduct that it expects all citizens to abide. Criminal punishment provides a formal procedure for the community to avenge a defendant's violation of its standards rather than relying on private vengeance or on the blood feud. As Henry Fielding (1707-1754) once put it, criminal conduct "tears the moral fabric of the community; criminal punishment serves to mend that tear."[50] It allows the community to right the wrong, to restore the imbalance that the criminal has caused, to reset the moral order, to renew the terms of the social contract. "What distinguishes a criminal from a civil sanction," Henry Hart writes, "is the judgment of community condemnation, which accompanies and justifies its imposition…. 'It is the expression of the community's hatred, fear, or contempt for the convict' [by] … a formal and solemn pronouncement."[51]

Beyond its communal effect, retribution further works to confirm the defendant's moral agency, to impose on the defendant his moral desert, and drive him to repent and seek reconciliation. Though the state itself cannot forgive the sinner – that is for God to do – it can, through punishment, induce the criminal to repent from his evil, to confess his wrong, and to seek forgiveness – at least from the community, and sometimes from the victim or victim's family as well. This is one of the principal rationales for that fateful step in a common law trial when the judge gives the convicted criminal, before sentencing, a chance to express remorse and to seek forgiveness.[52] This was one of the early rationales for the establishment of criminal "penitentiaries" or *Zuchthausen* in the early modern West: to give prisoners the solitude and serenity needed to be "penitent," to reflect on their crime and seek forgiveness for it, aided by prison chaplains made available to them.[53] This was one of the principal rationales in earlier days

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[50] Henry Fielding, quoted by Adolf Bodenheimer, *Recht und Rechtfertigung* (Tübingen: Mohr, 1907), 177. See also J. Welland, *Difficulties Connected With Punishment as Part of the Divine System of Government* (Calcutta: R.C. LePage and Co., 1864), p. 12: "[P]unishment may be inflicted for some benefit [of] pointing out that sin is not to be regarded as a solitary act, beginning and ending in ourselves, but as an offence and injury to the supreme Law, and so to all, for the law is the life of the community."

[51] Henry M. Hart, Jr., "The Aims of the Criminal Law," *Law and Contemporary Problems* 23 (1958): 402-406, quoting in part George K. Gardner, "*Bailey v. Richardson* and the Constitution of the United States," *Boston University Law Review* 33 (1953): 176, 193.

[52] See Jeffrie G. Murphy, *Punishment and the Moral Emotions: Essays in Law, Morality and Religion* (Oxford: Oxford University Press, 2012).

[53] See Basil Montagu, *The Opinions of Different Authors Upon the Punishment of Death*, 3 vols. (London: Longman, Hurst, Rees, Orme, and Brown 1816). On the history of the penitentiary and its connections to religion, see Schmoeckel, *Das Recht der Reformation,* 207-245; Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, repr. ed. (Oxford: Clarendon Press, 1990), vol. 5; Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution* (New York: Pantheon Books, 1978); W.J. Forsythe, *The Reform of Prisoners 1830-1900* (London: Croom Helm, 1987).

for infliction of hard labor on criminals in workhouses and on labor gangs -- "to soften the hardened soul the way fire softens hardened steel."[54] This remains one of the principal rationales for delaying the execution of a capital felon for a time after conviction, and furnishing chaplain services and (in earlier days) execution sermons -- to give the defendant the opportunity if desired to seek reconciliation with God before meeting his end.[55] And this is why, to this day, those who are comatose or too mentally damaged or handicapped to understand their punishment, will not face the ultimate punishment of death by execution.

This retributive function of the criminal law runs parallel to the theological use of the moral law, though the emphases are different. Both theologians and jurists emphasize the role of law in setting moral standards, in exposing human weakness and wrongdoing, and in inducing offenders to confront and confess their guilt for their offense. Both emphasize that the law convicts a person in an effort to stop them from continuing their bad behavior and setting them on a path of restoration and reconciliation. The theologians, however, present a more benign picture of the moral law as a mirror in which a person discovers his own depravity and weakness and, in despair, is induced to accept the gracious gift of salvation made available by Jesus's sacrificial death, the substitutionary punishment for humanity's grave violations of God's moral law. The jurists present a much harsher picture of the criminal law as a spotlight in which a person is exposed for his crime and wrongdoing and compelled to accept the punishment that the crime deserves – mitigated, perhaps, by a confession of guilt, but usually not waived; a contrite criminal still goes to prison. In the end, the sinner who accepts God's grace, and the criminal who serves his time, each get a fresh start and a chance to be newly reconciled to the community. But the criminal's road is much harder since he must bear the punishment himself, rather than having Christ bear it for him.

Third, criminal law has a *rehabilitative* function. It serves to reform and reeducate criminals, to instruct them on the path of virtue. Before the twentieth century, this was the second principal rationale for the penitentiary and the workhouse, Mathias Schmoeckel has shown.[56] Those punishments served, as one early statute on penitentiaries put it, "by sobriety ... solitary confinement, ... labour, [and] due religious instruction ... to accustom [prisoners] to serious reflection and to teach them both the principles and practices of every Christian and moral duty."[57] In modern formulations, rehabilitation comes in the form of

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[54] Lance Falconer, quoted in Walter Moberly, *The Ethics of Punishment* (Hamden, CT: Archon, 1968), 124. See also the discussion of the penitentiary as "moral hospital" in Isaac Kramnick, "Eighteenth-Century Science and Radical Social Theory: the Case of Joseph Priestly's Scientific Liberalism," *Journal of British Studies* 25 (1986):1-30.
[55] See Sharpe, *Last Dying Speeches*; Bosco, "Lectures at the Pillory."
[56] Schmoeckel, *Das Recht der Reformation,* 242-43.
[57] 18 Geo 3, c. 17. See other examples in Montagu, *The Opinions of Different Authors*, 3:284-85.

therapy and education aimed to "make offenders less antisocial by altering their basic character, improving their skills, or teaching them how to control their crime-producing urges." It aims to make them welcome and productive citizens, sometimes offsetting the effects of deficient education, bad role-modeling, broken households, drug addiction, peer pressure, and other trauma they may have experienced in an abusive or misspent youth. It gives them work experience and vocational training so they can regard "legitimate employment a more attractive alternative to criminal endeavors."[58] Sometimes rehabilitative punishment comes in the form of community service -- say, serving in a soup kitchen or emergency room to see the hard plight of others, working in a "crack baby" ward whose mothers a convicted drug pin had pumped full of drugs, or helping to clean up a waste dump or build a new playground or school in a blighted neighborhood that a privileged white collar criminal has never seen.

There are striking analogies between this rehabilitative function of the criminal law and the educational use of the moral law, though here, too, the emphases are different. The theologians emphasize the moral reeducation of justified sinners alone – those who convert to the Christian faith and who now seek to live by the letter and spirit of the law of God more fully to glorify God, to grow in spiritual sanctity, and to encourage others to follow them in the faith. The jurists' emphasis in rehabilitation is lower flying. They are happy to have a criminal convert to the faith and live fully by the whole moral law of God. But that is not a necessary condition or expectation for the rehabilitation born of criminal punishment. Rehabilitation is designed to educate each criminal to live more fully by the letter of the criminal law alone, to abide more fully by the basic civil morality of the social order. It is a happy byproduct of criminal punishment if the rehabilitated defendant goes further and now pursues spiritual morality as well – not only stops killing others but actively loves them, not only stops stealing other's property but now gives charity to those in need.

It would be too strong to say that the Protestant theological doctrine of the three uses of moral law was *the* source of the modern legal doctrine of the purposes of criminal law and punishment. Western writers since Plato have reflected on the purposes of criminal law,[59] and Protestant jurists had at their disposal a long tradition of reflections on this subject from patristic and scholastic theologians as well as from civil law and canon law scholars. Yet the Protestant "uses" doctrine seems to have provided an important source of integration and instruction for Protestant jurists. The doctrine was a commonplace of Protestant theology and ethics from the sixteenth century onward – taught in Protestant seminaries, preached in Protestant churches, and catechized in each new

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[58] Kent Greenawalt, "Punishment," in Joshua Dressler, ed., *Encyclopedia of Crime and Justice,* 2d ed. (New York: Macmillan Reference, 2002), 1286-87.
[59] M. McKenzie, *Plato on Punishment* (Berkeley, CA: University of California Press, 1981).

generation. Several sixteenth-century Protestant writers – notably Philip Melanchthon and John Calvin -- explicitly linked the theological and legal discourses on the "uses" doctrines, and their writings were constantly reprinted and studied by later Protestants.[60] Protestant jurists and Protestant theologians thereafter regularly collaborated in formulating criminal doctrines, hearing criminal cases, and inflicting criminal punishment. The close analogies between the structure and content of these theological and legal doctrines suggest ample doctrinal cross-fertilization between them.

The Uses Doctrine in Contemporary Law

The foregoing little case study illustrates how religion has helped shape and integrate one type of law that still governs all late modern societies – the state's laws of crime and punishment. Contrary to modern secularization theory that teaches that religion is dying, religion lives on in late modern societies, both in its own institutional forms and through its embeddedness in other institutions, including law. Many of the Bible's basic laws on crime are still at the heart of state criminal law today. "Thou shalt not kill" remains at the foundation of our laws of homicide. "Thou shalt not commit adultery" is at the heart of modern family crimes. "Thou shalt not covet thy neighor's wife … or maidservant," is at the root of many modern sex crimes. "Thou shalt not steal" grounds our laws of theft, embezzlement, and tax fraud. "Thou shalt not bear false witness" remains the anchor of our criminal laws of perjury and defamation. The ancient laws of sanctuary still operate for fleeing felons and asylum seekers. The ancient principles of Jubilee have inspired modern laws of bankruptcy and debt relief to replace debtor's prisons. Other Mosaic laws and New Testament injunctions condemning assault, battery, mayhem, kidnapping, treason, incest, bestiality, and similar crimes all remain part of our modern penal codes. To be sure, some biblical crimes like sacrilege, blasphemy, idolatry, and Sabbath-breaking have fallen aside, or are now enforced only by the church and its internal religious laws and tribunals. And to be sure, many modern criminal laws have developed additional rationales and justifications that go well beyond their initial biblical inspiration. But basic biblical morality is at the heart of modern criminal law, whether we like it or not.

Moreover, basic Protestant teachings on the moral responsibilities of the state to balance coercion, discipline, and education in the enforcement of these laws are also embedded in modern criminal law. Emulating the theological doctrine of the civil, theological, and pedagogical uses of God's moral law, Western criminal law today still includes deterrence, retribution, and rehabilitation

[60] See sources notes _ above.

among the principal purposes of punishment. Late nineteenth- and early-twentieth-century experiments at reducing the purposes of criminal punishment to deterrence or rehabilitation alone have proved to be unpersuasive in theory and unworkable in practice.[61] The United States Federal Sentencing Act, for example, now reaffirms that criminal punishments must be imposed on criminals "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[62] Various modern jurists still argue that criminal law and punishment must induce respect for formal law and social norms, confirm moral inhibitions and habits of citizens, and "shape the framework of moral education" for the duly convicted.[63]

This little case study further illustrates how the criminal law of the state is directly involved in character formation, moral education, and the communication of values in late modern societies. Modern state criminal law enforces, by (threat of) coercion, a baseline civil morality that every liberal citizen must abide. Through its published penal codes, its publicized criminal cases, and the publicity of its punishments, the state criminal law teaches and communicates some of the basic values of this civil morality -- the dignity and rights of each person, even criminals, that deserves respect; the moral agency of each rational person, and their duties and rights of moral desert; the essential duty of all, on pain of punishment, to respect the body, property, interests, and reputation of their neighbours; the command of all to honour the legitimate authorities of the state in their administration and enforcement of the law, so long as they, too, respect the basic rights and liberties of each defendant. State criminal law further helps form and reform the character and basic morality of duly convicted criminals – forcing them to confront and confess their guilt, making them pay for their violations of the community's norms, rehabilitating them through teaching or reteaching the basic norms of sociability and good citizenship that they will need to make reconciliation and re-entrance into society.

But the state and its laws can only do so much in the moral field. Late modern societies also need broader communities and narratives to stabilize,

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[61] See critical analysis in Jerome Hall, *Studies in Jurisprudence and Criminal Theory* (New York: Oceana Publications, 1958), 242ff.; George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978), 416ff.; Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, CA: Stanford University Press, 1968), 38ff.

[62] 18 USCA § 3553(a) (2) (1988).

[63] See, e.g., Johannes Andenaes, *Punishment and Deterrence* (Ann Arbor, MI: University of Michigan Press, 1974), 110ff.; Joel Feinberg, "The Expressive Function of Punishment," *The Monist* 49 (1965):397-423; Walter Moberly, *Legal Responsibility and Moral Responsibility* (Philadelphia: Fortress Press, 1965).

deepen and exemplify the natural inclinations and rational norms of responsibility, sociability, and morality that all human beings have written on their hearts if not embedded in their genes. Even the most progressive liberal societies need models and exemplars of love and fidelity, trust and sacrifice, commitment and community to give these natural teachings further content and coherence. They need the help of stable institutions beyond the state – families, neighbourhoods, churches, schools, charities, hospitals, recreational, athletic, artistic, and creative associations, and much more – to form the rich moral characters and refined ethical outlooks of their citizens, to teach both the minimal morality of duty that keeps the sinners within all of us at bay and the morality of aspiration that brings out the angels in all of us who are devoted to love of God, neighbour, and self.