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The Three Uses of the Law: A Protestant Source of Purposes of Criminal Punishment?

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Abstract

The Protestant theological doctrine of the uses of the moral law had a striking analogue in the classic Anglo-American doctrine of the purposes of criminal law and punishment. Protestant theologians have long argued that God's moral law was not a pathway to salvation, but it still had "uses" in this life: (1) a civil use that restrains person 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. Protestant jurists, in turn, developed an analogous theory of three purposes of why a state needs criminal law and punishment: (1) deterrence of individuals and groups through the threat of criminal punishment; (2) retribution, the necessary punishment needed to restore a convicted criminal within the community; and (3) rehabilitation, teaching a person the good works that become proper citizenship. This Article analyzes the close conceptual connections between these theological and legal doctrines and the historical evidence that each influenced the development of the other. The Article also calls for a proper balancing of the three uses of moral law and the three purposes of criminal law.

Keywords: Protestantism; Moral Law; Criminal Law; Criminal Punishment; Anglo-American Common Law; American Legal History; Retribution; Deterrence; Rehabilitation; Martin Luther; John Calvin; Samuel Willard; Thomas Becon; Oliver Wendell Holmes, Jr.

Introduction

Over the past three decades, a small cottage industry of scholarship has emerged dedicated to the study of various types of interaction between the spheres and sciences of law and religion. Law and religion interact conceptually. They embrace overlapping concepts of sin and crime, covenant and contract,

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righteousness and justice. Law and religion interact formally. They both have interlocking patterns of liturgy and ritual, common habits of tradition and precedent, shared sources of authority and power. Law and religion interact methodologically. They maintain analogous hermeneutical methods of interpreting texts, casuistic and rhetorical methods of argument and instruction, systematic methods of organizing their doctrines. Law and religion relate professionally. They both have officials charged with the formulation, implementation, and demonstration of the norms and habits of their respective fields. Law and religion interact institutionally, through the multiple relations between political and ecclesiastical officials and institutions.

The "binocular of law and religion"[1] provides a closer view of many familiar subjects and institutions that have hitherto been studied only through the monocular of law or the monocular of religion. In this essay, I focus on the role of a distinctive Protestant theological doctrine in the evolution of English and American criminal law, namely the doctrine of the "uses of the law." I argue (1) that the sixteenth-century Protestant theological doctrine of the three uses of moral law provided a critical analogue, if not antecedent, to the classic Anglo-American doctrine of the three purposes of criminal law and punishment; and (2) that this theological doctrine provides important signposts to the development of a more integrated moral theory of criminal law and punishment still today.

The first part of this chapter sets out the theological doctrine of the "civil," "theological," and "educational" uses of the moral law, as formulated by sixteenth century Lutherans and Calvinists, and elaborated by later Protestant writers on both sides of the Atlantic. The second part analyzes the analogous "deterrent," "retributive," and "rehabilitative" purposes of criminal law, as articulated by early modern Anglo-American jurists and moralists, and explores the historical cross-fertilization between these theological and legal doctrines. Part Three reflects on contemporary American criminal law developments in light of this three uses doctrine.

The Theological Doctrine of the Uses of Moral Law

The theological doctrine of the uses of law was forged in the Protestant Reformation.[2] It was a popular doctrine, particularly among Lutheran and

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[1] The phrase is from Jaroslav Pelikan, "Foreword," to *The Weightier Matters of the Law,* ed. John Witte, Jr. and Frank S. Alexander (Atlanta, 1988), xii.

[2] Patristic and scholastic theologians had, of course, recognized the idea that the natural or moral law has different functions in the life of the individual and community. The Protestant reformers, however, were the first to develop a systematic theological doctrine of the "uses of the law" (*usus legis*). Luther was the first to give prominence to the doctrine. In his 1522 Commentary on Galatians 3, Luther 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

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Calvinist reformers. Martin Luther (1483-1546), Philip Melanchthon (1497-1560), John Calvin (1509-1564), and other Protestant reformers gave the doctrine a considerable place in their monographs and sermons,[3] as well as in their catechisms and confessional writings.[4] It was also a pivotal doctrine, for it provided the reformers with something of 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 natural or moral law--that compendium of moral rights and duties 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 reason and conscience and, more completely, through the commandments of Scripture and the Spirit.[5] Though a person can be saved if he obeys the moral law perfectly, his inherently sinful nature renders him incapable of such perfect obedience. This human incapacity does not render the moral law useless. The moral law retains three important uses or functions in a person's life, which the reformers variously called: (1) a civil or political use; (2) a theological or spiritual use; and (3) an educational or didactic use.

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."[6] 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."[7] Threatened by divine sanctions, persons obey the basic commandments of the moral law--to obey authorities, to respect their neighbor's person and property, to remain sexually continent, to speak truthfully of themselves and their neighbors.

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* 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.

[3] For Luther, WA 10/1:454ff.; 16:363ff., 40:481ff. For Melanchthon, CR1:706ff.; 11:66ff.; 21:405ff., 716ff.; 22:248ff.. For Calvin, Institutes (1559), bk. 2, chap. 7; CO 24:725-727.

[4] 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.

[5] See further chapter 2 herein.

[6] Institutes (1559), 2.7.10.

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

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Although "such public morality does not merit forgiveness of sin,"[8] 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.[9] 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."[10]

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. 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."[11] "In short," Calvin writes, "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."[12] 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."[13]

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."[14] Even the most devout saints, Calvin wrote, still need the law "to learn more thoroughly ... the Lord's will [and] to be aroused to obedience."[15] 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

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[8] CR 22:151, 250.
[9] CO 39:66.
[10] Institutes (1559), 2.7.10.
[11] WA 40:481-486.
[12] CO 50:535.
[13] Institutes (1559), 2.7.6.
[14] CR 21:406.
[15] Institutes (1559), 2.7.12

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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.[16] Through the exercise of this private morality, the saints glorify God, exemplify God's law, and impel other sinners to seek God's grace.

This theological doctrine of the three uses of the moral law was rooted in the Protestant theology of salvation. Following St. Paul, the reformers recognized various dimensions (if not stages) of the spiritual life (if not formation) of the Christian -- from predestination to justification to sanctification.[17] The moral law, they believed, plays a part in all three steps of the soteriological process. It coerces sinners so that they can be preserved. It condemns them so that they can be justified. It counsels them so that they can be sanctified. The doctrine was also rooted in the Protestant theology of the person. Following Luther, the reformers emphasized that a person is *simul iustus et peccatur*, at once saint and sinner, spirit and flesh.[18] 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.

Although rooted in the intricacies of Protestant theology, the uses doctrine had broad appeal among sixteenth-century Protestants. The doctrine found its way into a number of popular pamphlets, diaries, and handbooks. It is an instructive anecdote that one of the most popular formulations of the uses doctrine was provided by a German jurist, Christoph Hegendorf (1500-1540), who was a friend of Luther and Melanchthon. Hegendorf, who is known to legal historians as a legal humanist and civilian,[19] was, seemingly, best known in his day for his *Domestic or Household Sermons for a Godly Householder to his Children and Family*. Hegendorf's sermons, written in Latin, and quickly translated into German, English, and French,[20] set out the uses doctrine in clear, accessible terms. He describes the moral law as "those precepts divinely engraven on our minds," and "comprehended in a compendious summary ... in the Ten Commandments." "[A]lthough there are many things contained in those precepts and commandments which are impossible to be done in our carnal nature," Hegendorf wrote, "the law is still good, whole, and useful." It ensures

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

[17] 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).

[18] WA 7:50.

[19] Roderich von Stintzing, *Geschichte der deutschen Rechtswissenschaft,* Erste Abteilung (München: R. Oldenbourg, 1880), 249-50.

[20] See Christoph Hegendorf, *Die zehen Gepot der Glaub, und das Vater unser, fuer die Kinder ausgelegt* (1527). An expanded version of this tract, which I have not been able to locate, was published in Latin in the early 1530s, and translated as *Domestycal or housholde Sermons, for a godly housholder, to his children and famyly, compiled by the godlye learned man Christopher Hegendorffyne, doctor*, trans. Henry Reiginalde (Ippiswich: J. Oswen, 1548).

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"that our untrained lusts shall be bridled ... not so that we are justified, but so that we should escape temporal punishment." It reminds us "oftentimes of [our] imbecility and the weakness of [our] nature ... so that we should flee unto Christ our Savior, who was the only one to observe and to keep all his Father's commandments." It exists so that "we shall be instructed to lead an honest life and perform [good] works."[21]

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.[22] 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 the Bible, particularly the Geneva Bible, set out the uses doctrine in its marginal glosses on the relevant texts of 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.[23] 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. For our purposes of discovering an intellectual analogue or antecedent to Anglo-American theories of criminal punishment, however, we need cite only a few texts to illustrate the wide acceptance of the uses doctrine among Anglican, Calvinist, and Free Church groups in England and America.

Leading Anglican divines of the later Tudor Reformation embraced the uses doctrine. John Hooper (d. 1555), for example, offered a brisk rendition of the doctrine before launching into his famous exposition on the Decalogue:

> Seeing that the works of the law cannot deserve remission of sin, nor save man, and yet God requireth our diligence and obedience unto the law, it is

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[21] Hegendorf, *Die zehen Gepot der Glaub*, Sermon 1, “Prooemium.”

[22] 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.

[23] See, e.g., Dietrich Bonhoeffer, *Ethics*, ed. Eberhard Bethge, trans. Neville H. Smith (New York: Macmillan, 1955), 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. For other modern accounts, see, e.g., Ebeling, *Word and Faith*, pp. 74ff; 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.

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> necessary to know the use of the law, and why it is given us. The first use is civil and external, forbidding and punishing the trangression of politic and civil ordinance....The second use of the law is to inform and instruct man aright, what sin is, to accuse us, to fear us, and damn us....These two uses of the law appertain as well unto infideles, as to the fideles....The third use of the law is to shew unto the Christians what works God requireth of them.[24]

Thomas Becon (1512-1567), chaplain to Archbishop Cranmer and a scholar well-steeped in Lutheran theology, offered a powerful description of the uses doctrine, parts of which found their way into Anglican sermons for centuries thereafter:

> [First,] Christ calleth the law of God "a light." For as the light doth shew to him that walketh in darkness the way perfectly, and how he may safely walk, and without jeopardy; so likewise the law of God sheweth a christian man how he ought to direct his ways....St. James compareth the law of God to a glass. For as in a glass we see what is fair and foul in our face, so likewise when we look in the law of God, we easily see and perceive what is well or evil in our doings; so that through the benefit of this glass, I mean that law of God, we are provoked to amend those things that are amiss, which otherwise should remain and continue in us unto our damnation.
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> Second, forasmuch as man of himself is nothing else than a very lump of pride, and soon forgetteth his vileness, nakedness, corrupt and sinful nature ... God, willing to paint, shew, and set forth man to himself as it were in his native colours, gave unto himself his law, that by the consideration thereof he might learn to know himself, his misery, weakness, impiety, sin, and his unableness to fulfill the law of God, seeing that law is spiritual, and we are carnal....[W]ithout this knowledge, we esteem of ourselves, of our strengths, of our own free will, might, and power, more than becometh us; yet we think ourselves through our own good works and merits worthy of the favour of God, remission of sins, the gift of the Holy Ghost, and everlasting life, when we be least of all worthy of those things. But the law uttereth and sheweth us

[24] *Early Writings of John Hooper, D.D* (Cambridge: University Press, 1843), 281-282.

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> unto ourselves, and maketh evident, plain, and open before our eyes, our own wickedness, misery, and wretchedness [and] accuseth, condemneth, killeth, and casteth us down headlong into hell-fire....
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> Thirdly, God hath given us his law unto this end that, after we have perfectly learned of the law our corruption, our wicked nature, our impiety, our pronity unto sin, our slackness unto all goodness, and finally our feebleness ... [the law] should be unto us a schoolmaster to point and lead us unto Christ, which is the "the end and perfect fulfilling of the law to make righteous so many as believe on him;" that we, apprehending and laying hand through strong faith on his perfection and fulfilling of the law, might be counted righteous before God, and so become heirs of everlasting glory.[25]

Heinrich Bullinger's (1504-1575) formulations of the uses doctrine enjoyed wide authority among Anglican and Anglo-Puritan divines. Like Luther, Bullinger viewed 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" that becomes Christians.[26] By the end of the sixteenth century, Bullinger's printed sermon on the topic became a standard classroom text for budding Anglican clergy.[27] Comparable sentiments on the uses doctrine are peppered throughout Richard Hooker's (ca. 1553-1600) classic eight-volume *Laws of Ecclesiastical Polity*.[28]

The uses doctrine did not remain confined to the Anglican academy. An early liturgical handbook from Waldegrave, for example, put a crisp distillation of the doctrine in the hands of the parishioner. The "godly order and discipline" born of adherence to the moral law, the handbook reads, "is, as it were, sinews in the body, which knit and join the members together with decent order and comeliness. It is a bridle to stay the wicked from their mischiefs; it is a spur to prick forward such as be slow and negligent: yea, and for all men it is the

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[25] John Ayre, ed., *The Catechism of Thomas Becon, S.T.P.* (Cambridge: University Press, 1844).
[26] *The Decades of Henry Bullinger*, 4 vols. (Cambridge: University Press, 1849-1852), 2:235-245.
[27] See H.A. Wilson, *Episcopacy and Unity* (London: Longmans, Green, 1912), 39; Vidler, *Christ's Strange Work*, 34, noting that, in 1586, Convocation and Archbishop Whitgift directed the lower clergy in England to procure and study Bullinger's tract.
[28] See references in Vidler, *Christ's Strange Work*. 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.

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Father's rod, ever in a readiness to chastise gently the faults committed, and to cause them afterward to live in more godly fear and reverence."[29] The famous prayers of Chaplain Becon, which enjoyed broad circulation in the English and American Anglican churches, are filled with invocations that God allow His commandments to work their three uses in the lives of individuals and the community.[30] Anglican sermons and catechisms of the seventeenth and eighteenth centuries, in England and America, also propounded the doctrine, both in their exegesis of Moses and St. Paul and in their elaborations of the cryptic statements on law in the Thirty-Nine Articles.[31]

Calvinist groups in England and America--Puritans, Pilgrims, Huguenots, Presbyterians, Congregationalists, Independents, Brownists, and others--embraced the uses doctrine, both in its classic form, and with a distinctive covenantal cast. Classic formulations of the uses doctrine recur repeatedly in Calvinist sermons, catechisms, and theological handbooks from the early seventeenth century onward. A short catechism, prepared by the Westminster Divine, Samuel Rutherford (ca. 1600-1661), for example, has typical language on the theological and educational uses of the moral law:

> 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.[32]

An American catechism, prepared a century later, has a similar entry on the use of law:

> Q. Of what use, then, is the law unto men, since righteousness and life cannot be attained by it? A. It is of manifold use....[T]o unregenerate sinners, it is of use to discover to them their utter impotence and inability to attain justification and salvation by the

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[29] Quoted by Horton Davies, *The Worship of the English Puritans* (Oxford: Oxford University Press, 1948), 232-233.

[30] See, e.g., *Prayers and other Pieces of Thomas Becon, S.T.P.*, 56-63, a series of prayers against idolatry, swearing, pride, whoredom, covetousness, gluttony, idleness, slandering, and other general offenses arising out of the Decalogue.

[31] See, e.g., John Smalley, *The Perfection of the Divine Law; and its Usefulness for the Conversion of Souls: A Sermon Delivered in the College Chapel in New-Haven ... in 1787* (New Haven, CT: Josiah Meigs, 1787), 16-28; C.E. De Coetlogon, *The Harmony Between Religion and Policy, or Divine and Human Legislation* (London: J.F. Riverton, 1790), 24ff.; Ezekial Hopkins, *An Exposition of the Ten Commandments* (London: G. Whitfield, 1799).

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

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> works thereof....[T]o believers, it is of use to excite them to express their gratitude and thankfulness to Christ.[33]

Both catechisms also devoted several pages to exegesis of the Decalogue, which included ample discussion of the civil use of the moral law.

Puritan Calvinists in England and New England cast the uses doctrine in a distinctive covenantal mode. The broad contours of Puritan covenant theology are well known.[34] Like other Protestants, the Puritans recognized a divine covenant or agreement between God and humanity. They recognized two distinct Biblical covenants: the Old Testament covenant of works whereby the chosen people of Israel, through obedience to God's law, are promised eternal salvation and blessings; and the New Testament covenant of grace, whereby the elect through faith in Christ's incarnation and atonement are promised eternal salvation and beatitude. Unlike other Protestants, however, a number of Puritans conceived these covenants largely in legalistic terms--viewing the moral law as a summary of the provisions of the covenant which God made binding on man. These Puritans further conceived that both the covenant of works and the covenant of grace have continued to operate since biblical times. The covenant of works binds the unregenerate--all those who are without faith, and beyond the realm of salvation. The covenant of grace binds the redeemed-- all those who are with faith and are fully justified. Both covenants bind the predestined--those who are elected to salvation but still without faith; their compliance with the covenant of works ultimately leads them to enter the covenant of grace.[35]

This doctrine of the covenant informed the Calvinist doctrine of the three uses of the law.[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

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[33] James Fisher and Ebenezer Erskine, *The Westminster Assembly's Shorter Catechism Explained, By Way of Question and Answer, Part II* (Philadelphia: J. Towar and D.M. Hogan, 1831), Q. 40.25, 28 (citations and question numbers omitted).

[34] See sources in John Witte, Jr., “Blest be the Ties That Bind: Covenant and Community in Puritan Thought,” *Emory Law Journal* 36 (1987):579-601, and chapters 6 and 13 herein.

[35] See, e.g., Thomas Hooker, *The Faithful Covenanter* (London: Christopher Meredith, 1644); Peter Bulkeley, *The Gospel-Covenant; Or the Covenant of Grace Opened* (London: Matthew Simmons, 1651); John Cotton, *The Covenant of God's Free Grace* (London: Matthew Simmons, 1645).

[36] See especially E. Brooks Holifield, *The Era of Persuasion: American Thought and Culture, 1521-1680* (Boston: Twayne Publishers, 1989), 98-99, arguing that the Puritan description of man's positions under the covenant of works and covenant of grace simply restated Calvin's three uses doctrine.

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> 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 with 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]

Half a century later, Samuel Willard (1604-1707), the grand systematizer of American Puritan theology, linked explicitly the three states of covenantal existence and the three uses of the moral law. Effectively, both the covenant and the moral law which it embraces have distinctive uses, which Willard spelled out in some detail:

> As for natural men that are without the Gospel, the [moral] law is serviceable to them on such accounts as these. (1) to keep them in awe and prompt them to duty....(2) for the maintenance and preservation of civil societies from ruin....(3) to direct in the ordering of the civil government of mankind....[and] (4) to dispose them to entertain the Gospel, when it should be offered to them. With respect to natural men that are under the Gospel dispensations, [b]esides what they have in common with others in the forecired benefits, ... it serves, (1) to convince men of sin, which is the first step to conversion....(2) to discover in them their woeful misery by sin....(3) to slay them as to any expectation of help by any righteousness or strength of their own....(4) to awaken in them, an apprehension of their absolute need of help from abroad....(5) to make the glad tidings of Christ and salvation by him welcome. As to those that are under grace, the law is no more a covenant of works to them ... [nor] a covenant of life to them, having life secured to their personal obedience, yet it is a rule according to which God expect that they should order their life

[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.

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> and conversation. This is denied by some, practically abused by others, and not rightly understood by many. And may therefore be made clear and evident in the following conclusions, (1) that God's people have a life and conversation to lead in this world....(2) that it is not at the liberty of God's people to live as they list, nor ought they to live as other men....(3) there must therefore be a rule for their direction in leading such a [redeemed] life....(4) the children of God and therefore sanctified, that they may be fitted for compliance with this rule....(6) this rule is not made known to everyone, by immediate inspiration, but is laid down in the Gospel....(7) it is the moral law which is reinforced in the Gospel, as a rule for the children of God to order their lives by.[38]

Willard's formulations of the civil, theological, and educational uses of the law, and of the covenants, became the prevailing Puritan understanding of the uses doctrine, which was repeated among American Calvinists until well into the nineteenth century.[39]

The Free Churches, especially those born of the Great Awakening in America (1720-1780), occasionally included their uses doctrine in their literature and sermons as well.[40] Among their leaders, John Wesley (1703-1791), the father of Methodism, devoted ample attention to the uses doctrine, both in his writings on law, and in his sermons on salvation and sanctification.[41] His formulations resonate rather closely with those of Melanchthon and Luther. In his ca. 1749 sermon, *The Original, Nature, Property, and Use of the Law*, for example, Wesley declared:

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[38] Samuel Willard, "Sermon 149, Question 40 (January 14, 1700)," in Samuel Willard, *A Compleat Body of Divinity [of 1726]* (New York: Johnson Reprint Company, 1968), 568-572 (spelling modernized and citations and numbering omitted). Similar sentiments on Question 40 appear in Thomas Watson's weighty seventeenth-century volume *A Body of Divinity*, reprinted several times in England and in America. See, for example, a later American edition published in Philadelphia, Thomas Watson, *A Body of Practical Divinity* (Philadelphia: T. Wardle, 1833), and a London version, Thomas Watson, *A Body of Divinity Contained in Sermons upon the Assembly's Catechism* (London: Passmore, 1881).

[39] See, for example, Thomas Ridgeley, *A Body of Divinity: Wherein the Doctrines of Christian Religion are Explained and Defended*, vol. 2, ed., John M. Wilson (New York: R. Carter, 1855), 300-307.

[40] The adherence of the American Free Churches to the uses doctrine is consistent with the teachings of one of their earliest leaders, Menno Simons, who embraced at least the civil and theological uses of the law. See *The Complete Writings of Menno Simons* (Scottdale, PA: Herald Press, 1956), 718: "This is the real function and end of law: To reveal unto us the will of God, to discover sin unto us, to threaten with the wrath and punishment of the Lord, to announce death and to point us from it to Christ, so that we, crushed in spirit, may before the eyes of God die unto sin, and seek and find the only eternal medicine, and remedy for our souls, Jesus Christ."

[41] See discussion in Harold Lindström, *Wesley and Sanctification* (Grand Rapids: Francis Asbury Press, 1980), 75-83.

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> 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 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.[42]

Similar statements appear occasionally in Methodist sermons and handbooks of the nineteenth and twentieth centuries.[43]

The uses doctrine was thus well known in English and American Protestant circles, both academic and lay. To be sure, the doctrine was no centerpiece of Protestant dogma: it never won universal assent or uniform articulation, and it always remained in the shadow of the grand Protestant doctrines of man and God, sin and salvation, law and Gospel. Yet the doctrine had ample enough coherence and adherence to provide a common theological touchstone for members of fiercely competing sects. It also provided a common intellectual framework in which to situate a distinctive understanding of the purposes of criminal law and punishment, to which we now turn.

The Legal Doctrine of the Purposes of Criminal Law

The theological doctrine of the uses of moral law that emerged out of the Reformation had a close conceptual cousin in the legal doctrine of the purposes of criminal law that came to prevail in early modern England and America. The early Protestant reformers themselves occasionally touched on this legal doctrine in their discussions of ecclesiastical discipline[44] and in their asides on criminal law.[45] Philip Melanchthon, for example, whose writings inspired European jurists

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[42] Reprinted in Edward H. Sugden, ed., *Wesley's Standard Sermons*, 2 vols. (London: Epworth Press, 1964), 2:52-53.

[43] See, e.g., Adam Clarke, “Life, the Gift of the Gospel; Law, the Ministration of Death [Sermon on Galatians 3],” in Adam Clarke, *Discourses on Various Subjects Relative to the Being and Attributes of God*, 2 vols. (New York: M'Elrath and Bangs, 1830), 1:156-72.

[44] See LP, chap. 5; Bohatec, CLSK; Köhler; John Witte, Jr. and Robert M. Kingdon, *Sex, Marriage and Family Life in John Calvin’s Geneva*, 3 vols. (Grand Rapids, MI: Wm. B. Eerdmans, 2005-).

[45] See, e.g., WA 6:267ff; 19:626ff; 32:394ff; CR 22:224ff., 615ff. and discussion in H. Mayer, “Die strafrechtstheorie bei Luther und Melanchthon,” in *Rechtsidee und Staatsgedanke: Beiträge zur Rechtsphilosophie und zur politischen Ideengeschichte : Festgabe für Julius Binder* (Berlin: Junker and Dünnhaupt, 1930), 77l; Wolfgang Naucke, “Christliche, aufklärerische, und wissenschaftstheoretische Begründung des Strafrechts (Luther-Beccaria-Kant), in *Christentum, Säkularisation und modernes Recht*, 2 vols., ed. Luigi L. Vallauri and Gerhard Dilcher (Baden-

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for more than two centuries thereafter, explicitly linked the uses of moral law and divine punishment with the purposes of criminal law and punishment. "All punishments by the state and others should remind us of God's wrath against our sin, and should warn us to reform and better ourselves," he writes. God has ordained "four very important reasons for criminal punishment":

> (1) God is a wise and righteous being, who out of his great and proper goodness created rational creatures to be like him. Therefore, if they strive against him the order of justice [requires that] he destroy them. The first reason for punishment then is the order of justice in God. (2) The need of other peaceful persons. If murderers, adulterers, robbers, and thieves, were not removed, nobody would be safe. (3) [To set an e]xample. When some are punished, others are reminded to take account of God's wrath and to fear his punishment and thus to reduce the causes of punishment. (4) The importance of divine judgment and external punishment, in which all remain who in this life are not converted to God. As God in these temporal punishments shows that he distinguishes between virtue and vice, and that he is a righteous judge, we are reminded more of this example that also after this life all sinners who are not converted to God will be punished.[46]

The Strasbourg reformer Martin Bucer (1491-1551), in his *De Regno Christi* prepared for King Edward VI, wrote similarly of the functions of criminal law and punishment: "For the nature of all men is so corrupt from birth and has such a propensity for crimes and wickedness that it has to be called away and deterred from vices, and invited and forced to virtues, not only by teaching and exhortation, admonition and reprimand, which are accomplished by words, but also by the learning and correction that accompany force and authority and the imposition of punishments."[47]

A long tradition of Anglo-American jurists and moralists, from the early seventeenth century onward, expounded and expanded the legal doctrine of the

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Baden: Nomos Verlagsgesellschaft, 1981), 2:1201. See further Institutes (1559), 4.12.4-6, 20.3,9 and discussion in E. William Monter, “Crime and Punishment in Calvin's Geneva, 1562,” *Archiv für Reformationsgeschichte* 64 (1973): 281; Robert M. Kingdon, *Adultery and Divorce in John Calvin’s Geneva* (Cambridge, Mass.: Harvard University Press, 1995),

[46] CR 22:224.

[47] Martin Bucer, “De Regno Christi (1550),” translated in William Pauck, ed., *Melanchthon and Bucer* (Philadelphia: Westminster Press, 1969), 383.

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purposes of criminal law in an array of treatises,[48] pamphlets, and sermons[49]—in some instances, writing under the direct inspiration of Protestant theologians.[50]

The legal doctrine of the purposes of criminal law was similarly formulated but differently focused than its theological cousin. Like the theologians, early modern jurists accepted a general moral theory of government and criminal law. God has created a moral or natural law. He has vested in this moral law three distinctive uses. He imposes divine punishments to ensure that each use is

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[48] Among the numerous relevant treatises in the seventeenth and eighteenth centuries that had influence on the criminal law of England and America, see, e.g., William Blackstone, *Commentaries on the Laws of England (1765)*, ed., Robert M. Kerr (Boston: Beacon Press, 1962), bk. 4, chap. 1; Hugo Grotius, *On the Law of War and Peace (1625)*, trans., Francis W. Kelsey (Indianapolis, IN: Bobbs-Merrill, 1962), bk. 2, chaps. 20, 21; Thomas Hobbes, *De Cive (1642)*, ed., Sterling P. Lamprecht (New York: Appleton-Century Crofts, 1949), chap. 14; Thomas Hobbes, *Leviathan (1651)*, ed., C.B. McPherson (Baltimore: Penguin, 1968), chap. 28; Samuel von Pufendorf, *The Law of Nature and Nations (1688)*, ed., W.A. Oldfather (New York: Oceana, 1964), bk. 8, chap. 3; Thomas Rutherforth, *Institutes of Natural Law, Being the Substance of a Course of Lectures on Grotius De Jure Belli et Pacis* (Whitehead: William Young, 1799), bk. 1, chap. 18; Robert Sanderson, *Bishop Sanderson's Lectures on Conscience and Human Law (1647)* (Lincoln: Williamson, 1877), Lect 8.10-25; John Selden, *De Jure Naturali et Gentium juxta disciplinam Ebraeorum libri septem* (Lipsiae et Francofurti : Apud Jeremiam Schrey, 1695), bk. 1, chap. 4; bk. 4, chap. 11; James Wilson, "Lectures on Law (1790-1792)," in *The Works of James Wilson*, 2 vols., ed., James D. Andrews (Chicago: Callaghan, 1896), 2:337-482. Excerpts from these and many other early modern sources are included in Basil Montagu, *The Opinions of Different Authors Upon the Punishment of Death* (Buffalo, NY: W.S. Hein, 1984).

Among the writings of the later eighteenth and nineteenth centuries most critical for the development of Anglo-American criminal law are those by Beccaria, Voltaire, Bentham, Romilly, Eden, and others excerpted in Gertrude Ezorsky, ed., *Philosophical Perspectives on Punishment* (Albany, NY: State University of New York Press, 1973) and discussed in J.M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton, NJ: Princeton University Press, 1986); Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (New York:, MacMillan Co., 1948-1986). For discussion of contemporaneous American writers and developments, see, for example, Edwin Powers, *Crime and Punishment in Early Massachusetts, 1620-1692* (Boston: Beacon Press, 1966); William E. Nelson, "Emerging Notions of Criminal Law in the Revolutionary Era," *New York University Law Review* 42 (1967):450-483.

[49] The most valuable such sermons were the so-called "execution sermons" delivered by eminent ministers and/or jurists on the occasion of public executions. 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); Richard W. Hamilton, *A Sermon Preached at Leeds ... on Occasion of the Execution of Mr. Joseph Blackburn, Attorney at Law, for Forgery* (London: Longman, Hurst, Rees, Orme, and Brown, 1815); Increase Mather, *The Wicked Mans Portion, or A Sermon Preached at the Lecture in Boston in New England ... 1674* (Boston: John Foster, 1675); Increase Mather, *A Sermon Occasioned by the Execution of a Man Found Guilty of Murder* (Boston: J. Brunning, 1687); Nathan Strong, *A Sermon Preached in Hartford ... At the Execution of Richard Doane* (Hartford: Elisha Babcock, 1797).

[50] Not only the writings of sixteenth century Protestant jurists, but even those of later civilian and common law writers on criminal law draw on the magisterial reformers. A standard mid-eighteenth century handbook on crimes by Antonius Matthaeus, for example, includes several citations to Melanchthon, Calvin, and the English Protestants William Ames, Peter Martyr, and William Perkins. See Antonius Matthaeus, *On Crimes: A Commentary on Books XLVII and XLVIII of the Digest (1761)*, ed. and trans., M.L. Hewett (Cape Town: Juta, 1987), 61-64.

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fulfilled. State magistrates are God's vicegerents in the world. They must represent and reflect God's authority and majesty on earth. The laws which they promulgate must encapsulate and elaborate the principles of God's moral law, particularly as it is set out in the Ten Commandments. The provisions of the criminal law, therefore, must perforce parallel the provisions of the moral law.[51] The purposes of criminal punishment must perforce parallel the purposes of divine punishment.[52] As William Blackstone (1723-1780) put it, "the state's criminal law plays the same role in man's social life that God's moral law plays in man's spiritual life."[53]

From these premises, the English and American jurists argued that the criminal law serves three uses or purposes in the lives of the criminal and the community. These they variously called: (1) deterrence or prevention; (2) retribution or restitution; and (3) rehabilitation or reformation--the classic purposes of criminal law and punishment that every law student learns still today. The precise definition of these three purposes, and the relative priority and propriety of them, were subjects of endless debate among jurists and judges. Individual jurists, particularly those inspired by later Enlightenment and utilitarian sentiments, championed deterrence theories alone. But all three purposes were widely accepted at English and American criminal law until the end of the nineteenth century. The definition of the deterrent, retributive, and rehabilitative purposes of criminal law bears a striking resemblance to the definition of the civil, theological, and educational uses of the moral law.

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[51] It was common, particularly in colonial America, to draw criminal law provisions directly from the Bible, and to classify criminal laws in accordance with the commandments in the Decalogue. See, for example, the section of capital crimes in *The Book of the General Lauues and Libertyes Concerning the Inhabitants of the Massachusets* (Cambridge: Hezekiah Usher, 1648) and the extensive commentary on crime and sin against the Ten Commandments in Willard, *A Compleat Body of Divinity*, 563-784. See further David Flaherty, “Law and the Enforcement of Morals in Early America,” in Donald Fleming and Bernard Bailyn, eds., *Law in American History* (Boston: Little, Brown, 1971), 203-253; Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), 1-58.

[52] See, e.g., Mather, *1687 Execution Sermon*, 13: "[The Magistrate] is a minister of God, a Revenger to execute wrath upon him that does Evil. Rom. 13.4. Private Reveng[e] is evil; but publick Revenge on those that violate Laws of God, is good. The Magistrate is God's Vice-gerent. As none can give life but God; so none may take it away but God, and such as He has appointed." (italics deleted); Thomas Hancock, *He is the Minister of God to Thee for Good* (Maidstone: T. Edlin, 1735), 12: "The magistrate ... must exercise this power [of punishment], in imitation of God, for the good of man."; George Stonestreet, *The Especial Importance of Religious Principles in the Judges and the Advocates of the Courts of Law* (London: J. Rowden, 1822), 28-29: "The justice men seek at an earthly tribunal is, when impartially and mercifully administered, both an emblem and an emanation of that essential attribute which we adore in the Almighty....the punishments, which at your hands await the workers of iniquity, while they preserve the order of society, serve also to vindicate the moral government of God over His creatures, and to warn men of that heavier vengeance which must hereafter await the impenitent sinner.” See summary in Willard, *A Compleat Body of Divinity*, 617-42.

[53] Quoted by Adolf Bodenheimer, *Recht und Rechtfertigung* (Tübingen: Mohr, 1907), 118.

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First, the jurists believed, criminal law has a *deterrent* function. The criminal law prohibits a variety of harmful and immoral acts--murder, rape, battery, and other violations of the person; arson, theft, burglary, and other violations of property; riot, tumult, nuisance, and other violations of public peace and order. A person who violates these prohibitions must be punished.

Criminal punishment is designed to deter both the individual defendant (special deterrence) and other members of the community (general deterrence) from committing such violations. The punishment imposed must be sufficiently onerous and automatic to deter the individual defendant from 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.[54] This accounts in part for the traditional publicity of the criminal justice system-- with its public trials, public confessions, public pillories, public brandings, and public executions. Criminal punishments, particularly executions, Samuel Johnson (1709-1784) quipped, "are intended to draw spectators; if they do not, they don't answer their purpose."[55] Most jurists and moralists had little compunction about using the punishment of one individual to serve the ends of both the criminal and the community.[56] "When a man has been proved to have committed a crime," the American moralist 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."[57]

Through these prohibitions and punishments, the jurists believed, the criminal law coerces persons to adopt what they called, an external, public, or civic morality--the very same terms the theologians had used. This, to be sure, is only what Justice Joseph Story (1779-1845) once called a "minimal morality," and what Lon Fuller later called "a morality of duty," rather than a "morality of aspiration."[58] It consists only of "thou shalt not" commands, not "thou shouldst do" commands. 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 inherent depravity of all persons and given the inevitable

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[54] See, for example, Pufendorf, *The Law of Nature and Nations*, bk. 8, chap. 3.9, 11, 12; Grotius, *On the Law of War and Peace*, bk. 2, chap. 20.7-9.

[55] 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.

[56] But cf. 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."

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

[58] Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964), 3-9.

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presence of some persons who yield to their depravity, such a deterrent function of criminal law is indispensable.

The deterrent function of criminal law runs closely parallel to the civil use of the moral law. The theologians stressed the "wrath of God against all unrighteousness" to coerce persons against following their natural inclination to sin, and adduced ample biblical examples of the ill plight of the sinner to bring home their point.[59] The jurists stressed the "severity of the magistrate against all uncivil conduct" and used examples of the law's harsh public sanctions against to deter persons from all such "uncivil" conduct.[60]

Second, many jurists believed, criminal law has a *retributive* function.[61] Retribution, like deterrence, has both a communal and an individual dimension. On the one hand, the criminal law provides a formal procedure for the community to avenge a defendant's violation of both its morality and its security. Criminal conduct, Henry Fielding (1707-1754) put it, "tears both the moral fiber and the social fabric of the community; criminal punishment serves to mend that tear."[62] If punishment is not imposed, both the moral fiber and the social fabric of the community will eventually unravel—and, in the view of some early moralists, God's vengeance will be visited on the whole community.[63] This is a second reason for the publicity of the prosecution and punishment of criminals—not only so that others may be deterred from crime, but also so that the community can avenge the violation of itself and its law. In James Fitzjames Stephen's (1829-1884) famous words:

> [T]he sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment....[T]he infliction of punishment by law gives definite

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[59] See particularly Strong, *A Sermon Preached in Hartford*, 66ff.

[60] 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.

[61] A number of early modern jurists spurned retribution as a purpose of punishment on the argument that this was the function of moral law and divine punishment. See, e.g., Grotius, *On the Law of War and Peace*, bk. 2, chap. 20.4.2; Blackstone, *Commentaries*, bk. 4, chap. 1.2; Beccaria, *On Crimes and Punishments*, 28; Hobbes, *De Cive*, chap. 3.11; Francis Bacon, “On Revenge (1597),” in Francis Bacon, *Essays or Counsels Civil or Moral* (New York: Dutton, 1906), 11.

[62] Henry Fielding, quoted by Bodenheimer, *Recht und Rechtfertigung*, 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."

[63] See, for example, Mather, *1687 Execution Sermon*, 10-13, and discussions in Powers, *Crime and Punishment in Early Massachusetts*, 517. Likewise, Kant argues that a criminal must be punished so that "the bloodguiltiness may not remain upon the people." Quoted by Graeme R. Newman, *The Punishment Response* (Philadelphia: Lippincott, 1978), 193.

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> expression and a solemn ratification and justification of the hatred which is excited by the commission of the offence, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law.[64]

On the other hand, criminal punishment induces the individual criminal to reconcile himself or herself to God. Though the state itself cannot forgive the sinner, it can induce the sinner to repent from his evil, confess his sin, and seek God's forgiveness.[65] This was one of the principal early rationales for the establishment of “penitentiaries” in England and America--to give prisoners the solitude and serenity necessary to reflect on their crime and seek forgiveness for it, in brief to be “penitent.”[66] This was one of the principal rationales for infliction of hard labor and harsh suffering on criminals in workhouses and labor gangs--"to soften the hardened soul the way fire softens hardened steel."[67] This was one of the principal rationales for delaying the execution of a criminal for a time after he is convicted for a capital crime, and furnishing him with chaplain services and execution sermons--to give him the opportunity to reconcile himself to God before he meets his end.[68]

This retributive function of the criminal law runs closely parallel to the theological use of the moral law, though the emphases are different. The theologians emphasized the need to avenge violations of the moral law and to impel a sinner to seek grace. The jurists emphasized the need for the community to participate in such avenging of its law and emphasized the responsibility of the state to induce the sinner to seek God's grace.

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[64] James Fitzjames Stephen, *A History of the Criminal Law of England*, 3 vols. (London: Macmillan, 1883), 2:81. See also A.L. Goodhart, *English Law and the Moral Law* (London: Stevens, 1953), 93: "[I]f this retribution is not given recognition, then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end up condoning the crime."

[65] See, e.g., Selden, *De Jure Naturali*, bk. 1, chap. 4: in addition to the purposes of deterrence and reformation "we should set another called the end of satisfaction, or purgation, or expiation, as though a deviation from law were made up, as it were, and the consequent inequality of action corrected." This agitation for confession was a constant refrain of the execution sermons. See examples in Sharpe, *Last Dying Speeches*; Bosco, “Lectures at the Pillory.”

[66] See Montagu, *The Opinions of Different Authors Upon the Punishment of Death*, vols. 2 and 3. On the history of the penitentiary in England and America, see Beattie, *Crime and the Courts in England, 1660-1800*, 520ff; Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, 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).

[67] 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.

[68] See Sharpe, *Last Dying Speeches*; Bosco, “Lectures at the Pillory.”

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Third, criminal law has the function of *rehabilitation* or reformation. This function, like retribution and deterrence, has both a communal and an individual dimension. On the one hand, criminal law serves to restore in the community a knowledge and respect for the requirements of moral law. In the view of many early modern jurists, the criminal law must not only teach citizens a minimal "public" morality of avoiding harm and threats to others. It must also teach them a more expansive "private" morality of avoiding fault and evil. Thus, historically, the criminal law established one Christian religion and punished heresy, blasphemy, idolatry, false swearing, and violations of the Sabbath. It prescribed various acts of charity and good samaritanism and punished sharp dealing, unfair bargaining, and ignorance of the poor and needy. It prescribed sexual propriety and restraint and punished sodomy, homosexuality, bestiality, buggery, pornography, prostitution, concubinage, and other types of sexual misconduct.[69]

On the other hand, the criminal law serves to reform and reeducate criminals who have violated the moral law. Criminals are punished not only to induce them to seek God's grace, but also to instruct them on godly virtue. This was the second principal rationale for the penitentiary and the workhouse. They served, in the words of an early English statute of penitentiaries, "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."[70]

There are striking analogies between this rehabilitative function of criminal law and the educational use of moral law, though here, too, the emphases are different. The theologians emphasized the moral reeducation of justified sinners alone; the jurists emphasized the moral reeducation of all persons, including convicted criminals. The theologians recognized that the moral education and rehabilitation, even of Christians, would remain incomplete until the life hereafter. The jurists recognized that the criminal law was inherently limited in its ability to educate and rehabilitate morally the recalcitrant. In Alexis de Tocqueville's (1805-1859) words:

> The moral reformation of ... a depraved person is only an accidental instead of being a natural consequence

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[69] See Blackstone, *Commentaries*, bk. 4, chaps. 4-17, which begins with "Offenses Against God and Religion," a scheme followed by the many English and American writers on criminal law, who modeled their analysis on Blackstone's. In the seventeenth and eighteenth centuries, a number of English and American societies for the reformation of manners and morals emerged, both to promote legislation against various forms of public and private immorality and to catalyze judicial enforcement of these provisions. Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, 2:1-15;. Friedman, *Crime and Punishment in American History*, 31-48; David Flaherty, *Privacy in Colonial New England* (Charlottesville, VA: University Press of Virginia, 1972).

[70] 18 Geo 3, c. 17. Similar sentiments were part of American theories of the penitentiary. See, for example, “Report of the Board of Inspectors of the Prison for the City and County of Philadelphia (1791),” in Montagu, *The Opinions of Different Authors Upon the Punishment of Death*, 3:284-285.

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> of the penitentiary system[;] it is nevertheless true that there is another kind of reformation, less thorough than the former, but yet useful for society, and which the system we treat of seems to produce in a natural way. We have no doubt, but that the habits of order to which the prisoner is subjected for several years, influence very considerably his moral conduct after his return to society. The necessity of labor which overcomes his disposition to idleness; the obligation of silence which makes him reflect; the isolation which places him alone in presence of his crime and suffering; the religious instruction which enlightens and comforts him....Without loving virtue, he may detest the crime of which he has suffered the cruel consequences; and if he is not more virtuous he has become at least more judicious; his morality is not honour, but interest. His religious faith is perhaps neither lively nor deep; but even supposing that religion has not touched his heart, his mind has contracted habits of order, and he possesses rules for his conduct in life; without having a powerful religious conviction, he has acquired a taste for moral principles which religion affords.[71]

The theological doctrine of the uses of moral law and the legal doctrine of the purposes of criminal law are closely analogous not only in their formulation, but also in their foundation. Like the theologians, the jurists believed that persons and societies are at once sinful and saintly. They thus tailored the criminal law as a whole to both types of persons and the criminal punishment of any individual to both dimensions of his or her character. Also like the theologians, the jurists subsumed and integrated their "uses" doctrine in a more general theory. The theologians subsumed their uses doctrine in a more general theology of salvation. For them, the moral law played an indispensable role in the process from predestination to justification to sanctification. The jurists subsumed their uses doctrine in a moral theory of government. For them, the criminal law played an indispensable role in discharging the divinely ordained tasks of the state to coerce, discipline, and nurture its citizens.

It would be too strong, of course, to say that the Protestant theological doctrine of the three uses of moral law was *the* source of the modern Anglo-

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[71] Gustave de Beaumont and Alexis de Tocqueville, *On the Penitentiary System in the United States and its Application in France (1833)*, trans., Francis Lieber (New York: Augustus M. Kelley Publishers, 1970), 58-59. See also Zephaniah Swift, *A Digest of the Laws of the State of Connecticut* (New Haven, CT: S. Converse, 1823), pp. 260-61: "[I]t is vain to attempt to reform those who have committed crimes which evidence a total destitution of those moral principles that are the basis of reformation."

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American legal doctrine of the purposes of criminal law. Western writers since Plato have reflected on the purposes of criminal law,[72] and early modern Anglo-American jurists certainly drew on these writings as much as those of Protestant theology. Yet the Protestant theological "uses" doctrine seems to have provided an important source of integration and instruction for the jurists. The uses doctrine was a commonplace of Protestant theology and ethics from the sixteenth century onward--well known to both learned theologians and lay parishioners. Several sixteenth century Protestant writers explicitly linked the theological and legal "uses" doctrines, and their writings were constantly reprinted and studied by later Protestants in England and America. Protestant jurists and Protestant theologians thereafter regularly collaborated in formulating criminal doctrines, and inflicting criminal punishment. The archives we have consulted harbor no "smoking gun"--no classic legal monograph that systematically pours the theological "uses" doctrine into the theory of criminal law though there may well be such evidence in the proceedings and opinions of lay ecclesiastical, marriage and consistory courts that we have yet to explore. But the close analogies between the structure and content of these theological and legal doctrines reflect ample doctrinal cross-fertilization between them.

The Uses Doctrine in Contemporary American Law

Even today, vestiges of this traditional understanding of the three purposes of criminal law and punishment remain evident. Consistent with traditional formulations, modern American criminal law still includes deterrence, retribution, and rehabilitation 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.[73] The 1984 Federal Sentencing Act, for example, indicates 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."[74] A few modern jurists, like Johannes Andenaes, Lon Fuller, and Joel Feinberg, retain a rather traditional Protestant tone and terminology in describing these functions--arguing that criminal law and punishment must induce respect for formal law and social norms, confirm moral

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[72] M. McKenzie, *Plato on Punishment* (Berkeley: University of California Press, 1981).

[73] Earlier in the twentieth century, retribution had fallen into disfavor—as "a disguised form of vengeance" and a "vestige of man's instinctual past." Jerome Hall, “Justice in the 20th Century,” *California Law Review* 59 (1971):753-54; Jerome Hall, *Studies in Jurisprudence and Criminal Theory* (New York: Oceana Publications, 1958), pp. 242ff. Today it has recurred. See, e.g., George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978), 416-418. See also Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, CA: Stanford University Press, 1968), 38ff.

[74] 18 USCA § 3553(a) (2) (1988).

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inhibitions and habits of citizens, and "shape the framework of moral education."[75] Most contemporary jurists, however, define these three purposes in less moralistic, and more utilitarian terms. They define deterrence as making the crime too costly to risk, retribution as making the criminal pay what he owes, rehabilitation as returning the criminal to an acceptable level of social conformity and functionality.

Also consistent with traditional formulations, contemporary criminal law continues to inculcate various "levels of morality" in citizens.[76] The criminal law still proscribes conduct that harms others. Homicide, rape, battery, and other personal offenses, arson, theft, trespass, and other property offenses, tumult, riot, nuisance and other public offenses are still prohibited and punished. Through such prohibitions and punishments, the criminal law supports a basic "public" or "civic" morality. The criminal law also continues to outlaw attempts, polygamy, obscenity, bestiality, and similar actions, that, though not directly harmful to other persons, are nonetheless considered morally and socially unacceptable. Through such punishment, the criminal law supports at least a "quasi-private" form of morality. Certain specialized bodies of criminal law, notably juvenile law, go even further and seek to inculcate in certain citizens charity, piety, sobriety, and other purely private virtues. Whether accidental or deliberate, modern criminal law perforce still defines and enforces moral values in American society.

Most contemporary jurists, however, seem to have abandoned at least three of the cardinal premises upon which the traditional Protestant understanding of the purposes of criminal law and punishment was founded. They have thus lost a vital source of unity and integration inherent in the traditional doctrine.

First, most contemporary jurists have abandoned the theory of natural or moral law, which traditionally inspired both the form and the content of criminal law. Arguments from moral relativism, cultural pluralism, separation of church and state, and the rights of privacy have all contributed to this change. The Supreme Court has reified this erosion through its broad interpretation of various constitutional freedoms. Traditional criminal laws against blasphemy or false swearing, for example, though once widely enforced, have today been eclipsed

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[75] See Johannes Andenaes, *Punishment and Deterrence* (Ann Arbor, MI: University of Michigan Press, 1974), 110ff.; Fuller, *The Morality of Law*; Joel Feinberg, “The Expressive Function of Punishment,” *The Monist* 49 (1965):397-423; see also Moberly, *The Ethics of Punishment* (Hamden, CT: Archon, 1968), 78ff.; Walter Moberly, *Legal Responsibility and Moral Responsibility* (Philadelphia: Fortress Press, 1965).

[76] Morris R. Cohen, “Moral Aspects of the Criminal Law,” *Yale Law Journal* 49 (1940): 987-1026; Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965); Joel Feinberg, *The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1984); Thomas C. Grey, *The Legal Enforcement of Morality* (New York: Knopf, 1983); Basil Mitchell, *Law, Morality and Religion in a Secular Society* (London: Oxford University Press, 1970); Lloyd L. Weinreb, *Natural Law and Justice* (Cambridge: Harvard University Press, 1987).

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by the expansion of free speech protections of the First Amendment. Traditional laws against Sabbath-breaking, heresy, idolatry, or religious non-conformity have been eclipsed by the expansion of the free exercise and establishment clause protections of the First Amendment. Traditional laws that restricted sexual exercise and relationships have been eclipsed by a new privacy right imputed to the due process and equal protection clauses of the federal and state constitutions.

Second, most contemporary writers have abandoned the traditional anthropological assumption that human beings and human communities are at once saintly and sinful, *simul iustus et peccator*. Some stress the inherent goodness of the person and consider crime as aberrational and correctable. They have, accordingly, emphasized the rehabilitative purpose of criminal law and have deprecated particularly its retributive purpose. Others stress the inherent depravity of the person and consider crime inevitable. They have, accordingly, stressed the deterrent and retributive functions of criminal law, and have deprecated the rehabilitative function.

Third, most contemporary writers have abandoned the traditional moral theory of government which helped to integrate the three purposes of criminal law and punishment. Today the state is seen solely as a representative of the people, not a vice-regent of God. Its laws must effectuate the will of the majority, not appropriate the will of God.[77] The notion that the three functions of criminal law can thus be integrated into the divinely-ordained tasks of the state to coerce, discipline, and nurture its citizens is foreign to our modern understanding.

This modern understanding is derived from liberal individualism, the regnant political philosophy of our age. The cardinal teaching of liberalism, whether the social welfare version of John Rawls[78] or the libertarian variety of Robert Nozick,[79] is that government should be morally neutral, showing no preference among competing concepts of the good. Government has no higher role to play than to mediate among the conflicting private desires and selfish interests of its citizens. It has no legitimate role in shaping those desires.[80] In Justice Frankfurter's words, "Law is concerned with external behavior and not with the inner life of man."[81] Even as to that, the only justification for government control of individual behavior, in John Stuart Mill's (1712-1805) famous words, "is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.... Over himself, over his own body and mind, the individual is sovereign."[82] These attitudes are expressed less elegantly in the contemporary

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[77] See further introduction herein.
[78] John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971).
[79] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
[80] See, e.g., Arnold Brecht, *Political Theory: The Foundations of Twentieth-Century Political Thought* (Princeton, NJ: Princeton University Press, 1959), 117-170, 231-260, 302-366.
[81] West Virginia State Board of Education. v Barnette, 319 U.S. 624, 655 (1943) (Frankfurter, J., dissenting).
[82] John Stuart Mill, *On Liberty (1859)* (New York: Norton, 1975), 11.

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nostrums that private morality cannot be legislated and, indeed, cannot even be criticized, lest we be "judgmental."

Liberalism, of course, has many great virtues, which are evident when liberal societies like ours are compared to those which reject its core values of tolerance, liberty, and equality. But liberalism also has its vices for which we have paid dearly. On the one hand, we have become, in the words of Leonard Levy, "not only a free society, but a numb society. We are beyond outrage."[83] On the other hand, we are beset by appalling levels of violence, crime, drug addiction, illegitimacy, and the like, all products at least in part of a moral climate in which the satisfaction of private desires is the highest good.[84] The moral relativism underlying liberalism's neutrality tends to corrode all values, even liberalism's own values of individual dignity and rights.

This moral relativism especially erodes the criminal law. Traditionally, criminal law and punishment were sharply distinguished from private law and legal and equitable remedies. Criminal law expressed a society's collective moral vision and values; criminal punishment expressed a society's moral condemnation of the criminal act.[85] Citizens felt morally bound to obey the criminal law because they identified its commands with those of morality. Such a moral duty is lacking when laws prohibit conduct that they do not deem immoral. Yet without a feeling of moral compulsion to obey on behalf of citizens, the criminal law cannot succeed.

This crucial point is missed by theories which view criminal punishment as just another form of deterrence, with criminal penalties differing from civil penalties only in their severity, in order to prevent especially harmful behavior that monetary compensation cannot remedy.[86] These theories rest on a view of human conduct as solely motivated by the selfish calculation of personal advantage. In this view, all persons act like Holmes' famous "bad man" who "cares nothing for an ethical rule" but is "likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can."[87] These theories are not just flawed, they are impractical. Deterrence alone clearly cannot compel obedience, as the historic example of prohibition and the current failures of the war on drugs or of the fifty-five mile per hour speed limit demonstrate. Deterrence only works as a reinforcement of the voluntary

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[83] Leonard W. Levy, *Blasphemy: Verbal Offenses Against the Sacred From Moses to Salman Rushdie* (New York: Knopf, 1993), 568-579.
[84] See further chapters 11 and 15 herein.
[85] Feinberg, “The Expressive Function of Punishment,”; Henry M. Hart, “The Aims of the Criminal Law,” *Law and Contemporary Problems* 23 (1958): 404-405. For a good early American expression of this point, see James Wilson, “Lectures on Law (1790-1792),” 341ff.
[86] See, e.g., Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1992), 217-247; Robert Cooter and Thomas Ulen, *Law and Economics* (Glenview, IL: Scott, Forseman, 1988), 507-584.
[87] Oliver Wendell Holmes, Jr., “The Path of the Law (1890),” in Harold J. Laski, ed., *Collected Legal Papers* (New York: Harcourt, Brace and Co., 1920), 170.

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inclination of the mass of society to obey laws that they could successfully evade to their profit. Holmes himself understood the importance of morality to law. In the same essay in which his "bad man" appears, Holmes also asserted that the "law is the witness and external deposit of our moral life" which "tends to make good citizens and good men."[88]

Thus, if criminal law is to succeed, ordinary citizens must voluntarily avoid criminal activity as morally abhorrent. As both the Protestant reformers and classical jurists understood, the retributive function of criminal punishment underscores and reinforces the societal condemnation of morally abhorrent behavior, especially when the punishment fits the crime, when serious offenses are met with serious punishments. Conversely, the failure to impose suitable punishments for serious violations undermines and corrodes the moral beliefs of citizens by suggesting that their moral beliefs are wrong, that this conduct must not be so bad after all.[89] By permitting wrongdoers to profit by their wrongs, the failure to punish demoralizes the law-abiding.

To bring to light a Protestant source of modern Anglo-American theories of criminal law and punishment is not to offer a panacea. One cannot readily transpose the moral concepts and criminal institutions of the sixteenth century into contemporary culture. But the Protestant tradition offers important insights even for our day. Protestant writers recognized that a system of criminal law depends upon a transcendent moral source for its structure, content, and efficacy, that any measure of criminal punishment must balance the values of deterrence, retribution, and rehabilitation, and that through punishment the state serves at once as disciplinarian, counselor, and teacher of its citizens. Protestant writers also recognized that criminal law is inherently limited in its capacities, and cannot operate alone. Other social institutions alongside the state, like the family, the school, the church, and other voluntary associations must play complementary roles.[90] Each of these social institutions, too, bears the responsibility of encapsulating and elaborating moral principles. Each of these social institutions, too, must participate in the deterrence and retribution of crime, and the rehabilitation and reformation of the criminal and the community. These time-tested insights provide important signposts along the way to the development of a more integrated understanding of criminal law and punishment.

[88] Holmes, “The Path of the Law (1890),” 170.
[89] See generally Feinberg, “The Expressive Function of Punishment.”
[90] See further chapter 2 herein.

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