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A Common Enterprise: Law and the Connection Between Civil and Heavenly Realms in the Writings of John Calvin

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A COMMON ENTERPRISE: LAW AND THE CONNECTION BETWEEN CIVIL AND
HEAVENLY REALMS IN THE WRITINGS OF JOHN CALVIN

*Kenneth L. Townsend**

Removed as they are from John Calvin's day in time and metaphysical assumptions, the modern and post-modern worlds have experienced an inversion of ultimate values. The common ends that once united spiritual and civil realms have been privatized as those ends have come to be seen as controversial and plural, rather than unifying and common. Acknowledging the diversity of ends resulted in increased attention to uniform rules. Since there was no longer agreement about what teloi mattered for society, law gradually lost its aspirational features and became simply a way to limit and punish uncivil and criminal behavior.

The formal separation, but ultimate unity, of civil and heavenly spheres, of norm with vision, articulated by Calvin, allowed him to be both idealistic and realistic about law's capacity. Calvin the realist, more so than any prominent theologian, recognized the pervasiveness of human sinfulness and chastens any legal or political system that assumes the perfectibility of humankind. Calvin the idealist, however, reminds us of law's potential to educate individuals in God's will and to cultivate virtuous action in the process.

The development of Western legal and political institutions in the modern and contemporary eras likely benefited from Calvin's recognition of the law's limits as well as its capacities. If there is anything that the contemporary world should draw from Calvin's writing on the law, it is that law is a richer resource than we often realize. At its best, it performs multiple functions. Law limits and enables; it punishes but also educates.

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INTRODUCTION

One of the chief accomplishments of the modern world has been to base legal rights in universal principles of justice rather than on any particular history, status, or faith. This secularization of law has been revealed and animated by the legal and political theory of liberalism, including liberal theory's commitment to reason, its aspirations for universality, and its public/private distinction, among other things.

There are, of course, many good reasons the secular, procedural law of liberal theory has risen to prominence in the West. It often does a better job acknowledging pluralism and accommodating diversity than conceptions of law deeply rooted in particular communities or conceptions of "the good." Rights, once the product of divine favor or royal caprice, have found new grounding in rational principles of justice rather than through common history or shared narratives, meaning that systemic injustice and entrenched inequality face an increasingly higher burden of proof to justify their existence.

Intellectual historian Mark Lilla has described a process by which the unity of the pre-modern world has come to be

replaced by a new approach to politics focused exclusively on human nature and human needs. A Great Separation took place, severing Western political philosophy decisively from

cosmology and theology. It remains the most distinctive feature of the modern West to this day.¹

Lilla largely credits Hobbes for ushering in this Separation that applied reason rather than theology and addressed material rather than spiritual concerns,² although theologians like Luther likely played an important role in helping create an autonomous, secular, public sphere that viewed law's role as one concerned with social control, rather than one that creates meaning. As Lilla notes, the secularization of the West led to greater acceptance of diversity and put an end to religious warfare, and, in turn, the irrational exuberance created by religious devotion has given way to a calmer, more reasonable public realm.³ The rise of reason has helped establish liberal values such as impersonal justice and equality before the law.⁴ Indeed, according to Lilla, one of the greatest threats to liberal democracy (as manifested in various forms of religious fundamentalism) is the desire to connect meaning with law or politics.⁵ At best, such efforts make political

¹ MARK LILLA, *THE STILLBORN GOD: RELIGION, POLITICS, AND THE MODERN WEST* 58 (2007).

² See Mark Lilla, *The End of Identity Liberalism*, N.Y. TIMES (Nov. 18, 2016), https://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html?_r=0.

³ LILLA, *supra* note 1, at 300–01. Lilla goes on to state:

One of Hobbes's fundamental insights, which lies at the foundation of the liberal-democratic tradition, was that the scope of political thought, and therefore political life, could be self-limited by focusing on the problem of the passions. For him, politics was a dangerous business, a smoking battlefield where the modest goods of life—peace of mind, prosperity, simple decency—were constantly under threat by those who sought higher goods under divine inspiration and imposed their convictions on others. Politics was not about achieving the highest good; it was a *problem* that could be solved only if its proper limits were observed, the passions were held in check, and mad dreams of turning men into angels or building divine cities remained just that—dreams.

Id.

⁴ *Id.* at 93.

⁵ *Id.* at 308–09. Lilla states:

[W]e have chosen to limit our politics to protecting individuals from the worst harms they can inflict on one another, to securing fundamental liberties and providing for their basic welfare, while leaving their spiritual destinies in their own hands. We have wagered that it is wiser to beware the forces unleashed by the Bible's messianic promise than to try exploiting them for the public good. We have chosen to keep our politics

discourse and legal practice messy; at worst, such attempts produce regimes like that of Nazi Germany.⁶

As a conceptual matter, it seems unlikely for any political community to ensure its ongoing existence without engaging in any discussions of meaning. Democracy requires, at a minimum, the participation of its citizens, and that participation is typically tethered to some substantive conception of “the good” or an identity marker that citizens either bring with them from the non-public sphere or which originates in the public sphere itself. The values Lilla proclaims are thus mixed; while no doubt commendable, they have come at a cost. Bracketing considerations of “the good” and questions of meaning from the public realm has contributed to what critics of liberalism have called the “naked public square.”⁷

I. AN INCOMPLETE SEPARATION?

Even though Lilla is certainly right to emphasize the Great Separation (the separation between law and meaning) in the realm of theory, it is less clear that the separation is as thorough as Lilla suggests or that the separation has occurred at the level of lived experience. In various respects, liberalism

unilluminated by the light of revelation. If our experiment is to work, we must rely on our own lucidity.

Id.

⁶ *Id.* at 279–84. Perhaps unsurprisingly Lilla has also criticized contemporary identity politics in the West, especially in the United States, on the grounds that it gets in the way of finding common ground with fellow citizens and instead allows them to focus on the thick, substantive, and controversial values that are best left in the private sphere. In his 2016 election postmortem in the *New York Times*, Lilla insisted:

We need a post-identity liberalism, and it should draw from the past successes of pre-identity liberalism. Such a liberalism would concentrate on widening its base by appealing to Americans as Americans and emphasizing the issues that affect a vast majority of them. It would speak to the nation as a nation of citizens who are in this together and must help one another. As for narrower issues that are highly charged symbolically and can drive potential allies away, especially those touching on sexuality and religion, such a liberalism would work quietly, sensitively and with a proper sense of scale.

Lilla, *supra* note 2. (Given the fact that Lilla’s ONCE AND FUTURE LIBERAL is now out and covers many of these issues, I feel like I have to at least acknowledge its existence in some way. Not to do so, I fear, makes me seem like I’m not paying attention.)

⁷ See, e.g., RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (2nd ed. 1988).

and secularism represent both a break from, and a successor to, previous worldviews.

This Article focuses particular attention on Reformation-era theologian and jurist John Calvin, considering the richness and complexity of Calvin's conception of the nature and function of law. More so than most thinkers, Calvin offers a detailed account of the law's aspirational and punitive qualities; he explains law's role in structuring liberty and establishing civil order; and he uses law to connect civil and heavenly realms.⁸ While talk of what Calvin called the "heavenly kingdom"⁹ might seem to have little resonance with, or relevance for, twenty-first century audiences, we stand to benefit from examining the ways in which the norms and practices of contemporary secular societies are simultaneously continuous and discontinuous with previous worldviews. We could further benefit from considering ways that Calvin's thought has shaped the development of certain contemporary beliefs and practices. In so doing, we begin to appreciate that Calvin's heavenly realm represents other substantive, value-laden, thick conceptions of "the good" that vie for recognition in the civil realm.

Paul Kahn has written at length on the continuity between pre-liberal and liberal political communities, and he locates this continuity precisely in the tension between liberal *theory* and liberal *practice*, offering an incisive analysis regarding the gap between what liberal theory *claims* and what liberal practice *does*.¹⁰ According to Kahn:

⁸ See JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* (Henry Beveridge trans., Christian Classics Ethereal Library 1845) (1536); accord Jesse Couenhoven, *Law and Gospel, or the Law of the Gospel? Karl Barth's Political Theology Compared with Luther and Calvin*, 30 J. RELIGIOUS ETHICS 181 (2002); John T. McNeill, *The Democratic Element in Calvin's Thought*, 18 CHURCH HIST. 153 (1949).

⁹ CALVIN, *supra* note 8, at bk. IV, ch. 20, § 2.

¹⁰ See PAUL KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 25 (2011). "If we view politics through the lens of contemporary, liberal theory, we will misapprehend the nature of political experience and the meanings that citizens realize in and through their political identities. Elements of political experience grounded in faith and sacrifice will be ignored." *Id.*; see also PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* 9 (2nd prtg. 2008) [hereinafter *LIBERALISM*]. Paul Kahn states the following:

[L]iberalism fails to see the way in which citizens committed to American political culture occupy a meaningful world. It fails to see what I will describe as the erotic foundations of modern political life. We cannot understand the character of the relationship between self and polity

Failure to recognize the quasi-religious character of the modern nation-state as the context within which liberalism operates is the single largest failure of liberal political theorists. Reading them, one would never know that the modern nation-state has been the site of endless passion and of sacrifice for ultimate meanings. For them, the people appear only as a decision-making device—majority rule—in a world stripped of ultimate meanings. To the liberal theorists, the passion of politics appears always as a dangerous outbreak of archaic forms of belief and practice.¹¹

In what seems to be a direct rebuttal to Lilla,¹² Kahn insists that we cannot make sense of values like patriotism or practices like sacrifice except through something like what Robert Cover (discussed *infra*) termed a *nomos*. Kahn insists that society cannot make sense of values like patriotism or practices like sacrifice except through something termed *nomos*,¹³ a term used by

without first understanding love. To understand love, however, we need to explore the character of the will in dimensions that are beyond the imagination of liberal thought. This linking of will to love, and both to meaning, expresses the Christian inheritance of our political tradition. This is Christianity not as a source of religious doctrine but as a form of understanding of self and community. Much of this study is an effort to explore the way in which our political life draws as much upon the Christian tradition of love and will as on the Enlightenment tradition of reason. Modern American political practices and beliefs have achieved a kind of stable synthesis of these two sources. That stability, I will argue in the conclusion, is under considerable stress today as the erotic conception of the citizen's body is displaced by a more plastic and disembodied conception of a subject who locates the self in a variety of networked relationships: economic, information, and communicative.

Id.

¹¹ LIBERALISM, *supra* note 10, at 93.

¹² While this particular quotation is not, in fact, a rebuttal to Lilla, Kahn's POLITICAL THEOLOGY (2011), in many respects, represents an extended refutation of Lilla's argument that contemporary liberal societies have fully broken from their pre-modern roots.

¹³ KAHN, *supra* note 10, at 155. Kahn states:

There can be no nation of Israel as a community sustaining itself through history until families are willing to sacrifice their children for the sake of the existence of the state. They do so not because of a promise of their own well-being, as in Hobbes's idea of the social contract, but because they have faith that the state holds forth an ultimate meaning. Sacrifice is the appearance of the sacred as a historical phenomenon. Its domain is silent faith, not reasoned discourse.

Id.

Robert Cover in his analysis.¹⁴ If law is simply a tool for maintaining social control, it will not arouse feelings of patriotism; if law does not implicate questions of meaning, it will not inspire sacrifice. The law's latent supports are doing work for the liberal state, whether or not liberal theory still leaves a place for such work.

Kahn, who has for many years directed the Orville H. Schell, Jr. Center for International Human Rights at Yale Law School,¹⁵ cites human rights discourse as one of the most revealing examples of the gap that separates liberal theory and liberal practice, pointing in particular to the limits of liberal theory to justify the practice of human rights. Kahn states:

The development of human rights law is, in substantial part, the application of reason to the negative economy of pain. That is why human rights law is simultaneously so thin and so all-encompassing. Its primary end is the avoidance of pain and of that which pain mimics, death itself. In an inverse reflection of a politics that has become merely an alternative form of the market, the discourse of human rights is too easily stripped of the autonomy of political meanings, focusing instead on the negative task of preventing pain. . . . The human rights movement claims to be a new form of global politics—the liberal politics of reason—but at its heart [it] has virtually nothing to say. . . . There is no point to political deliberation; there is simply the reciprocal identification of pain and a claim of right.¹⁶

Absent considerations of meaning, the discourse of human rights rings hollow and “has virtually nothing to say,” according to Kahn.¹⁷ While preventing pain is, of course, an important task, it hardly seems to be a robust basis for inspiring commitment to general principles or to particular legal and political systems.

Few legal theorists have appreciated the diverse basis and manifestations of law better than Robert Cover. In his well-known article *Nomos and Narrative*, from the Harvard Law Review in 1983, Cover

¹⁴ See Cover, *infra* note 18.

¹⁵ Paul W. Kahn, YALE LAW SCHOOL (May 15, 2017), https://law.yale.edu/sites/default/files/documents/faculty/kahn_updated_cv.pdf.

¹⁶ LIBERALISM, *supra* note 10, at 135–36 (emphasis added).

¹⁷ *Id.* As Kahn's life attests, however, one need not let liberal theory's inability to account fully for liberal practice compromise the sorts of practices often associated with such a theory.

addressed the law's role in creating and maintaining a "normative universe," or *nomos*, as Cover termed it, pointing to the connection between law and narrative.¹⁸ The opening paragraph of his article states:

For every constitution there is an epic, for each [D]ecalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live. In this normative world, law and narrative are inseparably related.¹⁹

Cover goes on to emphasize that it is narrative that connects norms and law with aspirations and vision. In doing so, narrative links past, present, and future, thereby integrating vision with decisions and actions of the present and situating all in the context of a shared history. He states:

The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative. . . . To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be." Narrative so integrates these domains.²⁰

Narrative, of course, can only develop in the context of a community. Cover is able to integrate law and vision because of the distinction he draws between "law as meaning" and "law as social control and power." "[T]here is a radical dichotomy between the social organization of law as power and the organization of law as meaning."²¹ "Law as meaning" is world-creating; whereas, "law as social control" is "world-maintaining."²² Cover neither

¹⁸ Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). Cover is not alone in emphasizing the connection between law, narrative, and community identity. In his contribution to the Blackwell Companion to the Hebrew Bible, Bruce Birch writes that in the Old Testament, "lawcodes would not have survived to help shape subsequent generations in Israel except that they became part of a story that carried the memory of Israel as a covenant people and the law as an expression of that identity shaping relationship between God and Israel." Bruce C. Birch, *Old Testament Ethics*, in THE BLACKWELL COMPANION TO THE HEBREW BIBLE 293, 300 (Leo G. Perdue ed. 2001).

¹⁹ Cover, *supra* note 18, at 4–5.

²⁰ *Id.* at 10.

²¹ *Id.* at 18.

²² *Id.* at 13.

dismisses nor criticizes “law as social control;” rather, he emphasizes that law does not simply maintain a community by enforcing norms; it also creates norms and gives meanings to those norms.²³ In other words, the public realm of “law as social control” is supplemented and complemented by background supports and norms.²⁴ Actions only take on meaning when done in reference to a norm. Cover states:

There is a difference between sleeping late on Sunday and refusing the sacraments, between having a snack and desecrating the fast of Yom Kippur . . . In each case an act signifies something new and powerful when we understand that the act is in reference to a norm. It is this characteristic of certain lawbreaking that gives rise to special claims for civil disobedience. But the capacity of law to imbue action with significance is not limited to resistance or disobedience. Law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify.²⁵

For Cover, then, law enables a wide range of meanings and emotions to be given expression. Law restricts and maintains, but it also creates and enables.

According to Cover, these different manifestations of law—paideic and imperial—are rooted in “two corresponding ideal-typical patterns for combining corpus, discourse, and interpersonal commitment to form a *nomos*.”²⁶ The paideic, or world-creating, ideal-typical pattern aims to educate citizens *into* a normative system and involves “a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.”²⁷ The discourse that emerges from the paideic

²³ *Id.* at 12.

The universalist virtues that we have come to identify with modern liberalism, the broad principles of our law, are essentially system-maintaining “weak” forces. They are virtues that are justified by the need to ensure the *coexistence* of worlds of strong normative meaning. The systems of normative life that they maintain are the products of “strong” forces: culture-specific designs of particularist meaning. These “strong” forces . . . *create* the normative worlds in which law is predominantly a system of meaning rather than an imposition of force.

Id.

²⁴ *Id.* at 8.

²⁵ *Id.*

²⁶ *Id.* at 12–13.

²⁷ *Id.* at 13.

model is “initiatory, celebratory, expressive, and performative, rather than critical and analytic.”²⁸ In contrast, the imperial, or world-maintaining, ideal-typical pattern, involves educating citizens *about* different values and systems, and in this model “norms are universal and *enforced* by institutions.”²⁹ The discourse of this system is “premised upon objectivity,” and “[i]nterpersonal commitments are weak, premised upon only a minimalist obligation to refrain from coercion and violence.”³⁰

In the contemporary West, particularly as manifested in liberal political theory, the law’s imperial elements overshadow law’s paedeic elements. Secularized law is chiefly conceived as a tool for maintaining social control, not for creating meaning. Law has become increasingly pervasive, through its regulative functions, even as it has simultaneously been stripped of its normative (world-creating) force. While it is not the primary concern of this Article, it is worth noting that it is precisely this perception of pervasive regulation combined with denials of national distinctiveness that have, in recent years, proved most irksome to populist critics of legal and political systems in the West. To survive the populist assault, liberalism’s legal and political institutions must do a better job of engaging the particular histories and conceptions of the good that have helped create and sustain those institutions.

II. WHY CALVIN?

Why study Calvin? The formal separation, but ultimate unity, of the civil and heavenly spheres, of norm with vision, articulated by Calvin allowed him to be both idealistic and realistic about the law’s capacity. Calvin the realist (perhaps more so than any prominent theologian) recognized the pervasiveness of human sinfulness³¹ and chastened any legal or political system that assumed the perfectibility of humankind. Calvin the idealist,

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ CALVIN, *supra* note 8, at bk. II, ch. 1, § 8. Calvin stated:

For our nature is not only utterly devoid of goodness, but so prolific in all kinds of evil, that it can never be idle. . . . [E]verything which is in man, from the intellect to the will, from the soul even to the flesh, is defiled and pervaded with this concupiscence; or, to express it more briefly, that the whole man is in himself nothing else than concupiscence.

Id.

however, reminds us of the potential for law to educate individuals in God's will and to cultivate virtuous action in the process.³² The development of Western legal and political institutions in the modern and contemporary eras very likely benefited from Calvin's recognition of the law's limits as well as its capacities.³³ To be sure, however, even as instructive as Calvin might be,

³² *Id.* at bk. II, ch. 7, § 12. Calvin further stated:

For [law] is the best instrument for enabling [believers] daily to learn with greater truth and certainty what that will of the Lord is which they aspire to follow, and to confirm them in this knowledge; just as a servant who desires with all his soul to approve himself to his master, must still observe, and be careful to ascertain his master's dispositions, that he may comport himself in accommodation to them. Let none of us deem ourselves exempt from this necessity, for none have as yet attained to such a degree of wisdom, as that they may not, by the daily instruction of the Law, advance to a purer knowledge of the Divine will. Then, because we need not doctrine merely, but exhortation also, the servant of God will derive this further advantage from the Law: by frequently meditating upon it, he will be excited to obedience, and confirmed in it, and so drawn away from the slippery paths of sin.

Id.

³³ See, e.g., Sheldon S. Wolin, *Calvin and the Reformation: The Political Education of Protestantism*, 51 AM. POL. SCI. REV. 428, 429, 434 (1957). Wolin summarizes a statement made by Calvin:

The individual was to be reintegrated into a double order, religious and political, and the orders themselves were to be linked in a common unity. The discontinuity between religious obligations and restraints and their political counterparts was to be repaired; Christian virtue and political virtue were to move closer together. The order that emerged was not a "theocracy," but a corporate community that was neither purely religious nor purely secular, but a compound of both.

Id. Wolin continues:

Calvin's distinction between the two powers was intended to preserve the power of each and to refute the notion that spiritual power was merely a form of insubstantial persuasion. Moreover, when Calvin defined the spiritual government as the means whereby "the conscience is formed to piety and the service of God" and the civil government as that order which "instructs in the duties of humanity and civility," he did not mean that the spiritual government alone was concerned with conscience while the political government alone regulated "external" conduct. . . . [T]he civil government was concerned with conscience, but of a different kind. It had a positive duty to promote and shape a "civic conscience," or what the ancients had called "civic virtue." Conversely, the spiritual government, in discharging its functions of preaching and instruction, was also expected to help form civil manners, to correct "incivility," in short, to influence "external" conduct.

there are limits to what contemporary theorists can draw from his work given the vastly different context between his time and our own. Calvin's relevance (as well as his limitations) are discussed in the pages that follow.

Calvin was trained in the law,³⁴ and from his first published writings on Seneca's *De Clementia* until his death, Calvin expressed a deep interest in and respect for law and civil government.³⁵ This Article considers the richness and complexity of Calvin's conception of the law, paying particular attention to the law's relationship to the civil realm. More so than most thinkers, Calvin offers a detailed account of the law's aspirational and punitive qualities;³⁶ he explains the law's role in structuring liberty and establishing civil order;³⁷ and he reveals the close relationship between civil and heavenly realms through his discussions of the law.³⁸

This Article examines Calvin's three-part division of the uses of the law, considering in particular the differences between Calvin's schematization compared to that of Seneca and Luther. It then looks at the law's role in structuring liberty and in establishing civil government. It further explores the relationship between revelation and natural law before concluding that Calvin's civil and heavenly realms are even more closely related than Calvin acknowledges. Finally, it considers the distinctiveness of Calvin's view of the law and then assesses the status of Calvin's legacy in law and politics in the modern and contemporary Western world.

Like Calvin, this Article takes a broad view of the law. In general, law is a synecdoche for the civil realm. Looking at Calvin's handling of the law reveals the connections (indeed, the underlying unity) between civil and heavenly realms. If there is anything that the contemporary world should

Id. at 434.

³⁴ See, e.g., Bruce Gordon, *CALVIN* 18–22 (Yale U. Press ed, 2009).

³⁵ John T. McNeill, *John Calvin on Civil Government*, 42 *J. PRESBYTERIAN HIST.* 71, 72 (1964). John McNeill has shown the pervasiveness and depth of Calvin's interest in law and civil government. In *John Calvin on Civil Government*, McNeill outlines the many contexts in which Calvin indicated his interest in law and civil government: his correspondence, his commentaries, and in the institutes. *Id.* Concerning the depth of Calvin's commitment, McNeill writes, "Few theologians have shown an equally positive attitude to government or a similar attention to political affairs. [Calvin] asserts a divine sanction of the state, inculcates a positive attitude to politics and law, and persistently urges the principle of obedience to rulers." John T. McNeill, *The Democratic Element in Calvin's Thought*, 18 *CHURCH HIST.* 153, 155 (1949) [hereinafter *Democratic*].

³⁶ *CALVIN*, *supra* note 8, at bk. II, ch. 7, § 12.

³⁷ *Id.* at bk. IV, ch. 20, § 3.

³⁸ *Id.* at bk. IV, ch. 20, § 2.

draw from Calvin's writing on the law, it is that the law is a richer resource than is often realized. At its best it performs multiple functions. The law can both limit and enable; it can punish but also educate.

In *The Three Uses of the Law*, John Witte and Thomas Arthur trace the parallels between Protestant and secular uses of the law.³⁹ They argue that modern secular understandings of the uses of law (retributivism, deterrence, and rehabilitation) are simply the heirs of sixteenth century doctrines regarding the three uses of the law: theological, civil, and educational.⁴⁰ Law was designed, as Witte and Arthur note, to "coerce, discipline, and nurture . . ." ⁴¹ In Calvin's world, the difference between criminal and sinful activity was minimal.⁴² Thus, as a result, justice and mercy were complementary values.

Furthermore, according to Witte and Arthur, following the example of the Reformers, early modern secular "jurists subsumed and integrated their 'uses' doctrine in a more general theory."⁴³ They further state:

[T]heologians 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.⁴⁴

Early modern Reformed theology and criminal law both assumed a unity between particular uses of law and general theories of "the good." Law, in other words, was an important locus that gave content to the Christian community's vision of the good life.

³⁹ See John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433 (1993).

⁴⁰ See *id.* Witte and Arthur likely paint with too broad of brush strokes when they speak of "Protestant" uses of the law. There were significant differences between Calvin and Luther concerning the unity of law and gospel and the uses of the law. Even if too general at points, Witte and Arthur raise interesting and relevant arguments.

⁴¹ *Id.* at 458.

⁴² *Id.* at 433. In their piece, which focuses on Luther and Calvin, Witte and Arthur claim, "[l]aw and religion are conceptually related. They embrace closely analogous concepts of sin and crime . . ." *Id.*

⁴³ *Id.* at 458.

⁴⁴ *Id.*

It does not take much effort to connect what Witte and Arthur describe as a “general theology of salvation” and the “moral theory of government.”⁴⁵ Liberal citizenship entails a process similar to salvation. Predestination represents our being born into a particular political community; justification represents citizens’ free and equal status before the law; and sanctification represents the cultivation of virtues of citizenship. Accepting a secular analogue of predestination would compromise the cosmopolitan and universal aims of contemporary liberal political theory and would inevitably implicate questions of history in which liberal theory would prefer not to engage. Talk of secular sanctification would necessarily involve leaving the domain of the *right* to engage controversial conceptions of the *good*.⁴⁶

III. DUTY AND ASPIRATION: THREE USES OF THE LAW

Calvin outlined three uses of the moral law in his work, *INSTITUTES OF THE CHRISTIAN RELIGION*. In this section, this Article first considers Calvin’s three-part classification before turning to Seneca and Luther’s views of the law.⁴⁷ Calvin describes the three uses of the law in Book II of the *INSTITUTES*: “First, by exhibiting the righteousness of God . . . it [the law] admonishes every one of his own unrighteousness, certiorates, convicts, and finally condemns him.”⁴⁸ This first pedagogical use of “the Law is a kind of mirror. As in a mirror we discover any stains upon our face, so in the Law we behold, first, our impotence; then, in consequence of it, our iniquity; and, finally, the curse, as the consequence of both.”⁴⁹

According to Calvin, “[t]he second office of the Law is, by means of its fearful denunciations and the consequent dread of punishment, to curb those who, unless forced, have no regard for rectitude and justice.”⁵⁰ As

⁴⁵ *Id.*

⁴⁶ See, e.g., John Rawls, *Lecture V: The Priority of Right and the Ideas of Good*, in *POLITICAL LIBERALISM* 67 (Expanded ed. 2005). A liberal state, according to Rawls, is designed to implement fair procedures of justice; it is not designed to promote any particular conception of the good. *Id.* If a law’s justifications arise from reasons contingent upon a particular conception of the good, then the resulting law will lack legitimacy for anyone who does not share the same conception of the good. *Id.* Different conceptions of the good should be accepted, and perhaps even celebrated, but they should remain in the private sphere. *Id.*

⁴⁷ This Article borrows the insight that Calvin’s three uses of the moral law produce two types of morality—duty and aspiration. See generally JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* (2007).

⁴⁸ CALVIN, *supra* note 8, at bk. II, ch. 7, § 6.

⁴⁹ *Id.* at bk. II, ch. 7, § 7.

⁵⁰ *Id.* at bk. II, ch. 7, § 10.

Calvin makes clear, this second use of the law aims to improve the behavior of individual people and to benefit all of society in the process. “[T]his forced and extorted righteousness is necessary for the good of society, its peace being secured by a provision but for which all things would be thrown into tumult and confusion.”⁵¹ This second use of the law acts as a “restraint on unruly lusts that would otherwise burst all bonds” and applies to Christians as well as to those “destitute of the Spirit of holiness. . . .”⁵²

Finally, “[t]he third use of the Law (being also the principal use, and more closely connected with its proper end) has respect to believers in whose hearts the Spirit of God already flourishes and reigns.”⁵³ This third use of the law allows Christians “daily to learn with greater truth and certainty what that will of the Lord is which they aspire to follow, and to confirm them in this knowledge”⁵⁴ Calvin continues, “[J]ust as a servant who desires with all his soul to approve himself to his master, must still observe, and be careful to ascertain his master’s dispositions, that he may comport himself in accommodation to them.”⁵⁵ In sum, the third use of the law is designed to bring about a change in what the individual desires: the individual’s desires become conformed to God’s desires.

While Calvin’s three-part division was not novel, his particular emphases reveal differences between himself and the thinkers that potentially influenced him. Seneca, the focus of Calvin’s first published work, also outlined three uses of the law:

Let us, pass now to the injuries done to others, in the punishment of which these three aims, which the law has had in view, should be kept in view also by the prince: either to reform the man that is punished, or by punishing him to make the rest better, or by removing bad men to let the rest live in greater security.⁵⁶

In his discussion of Seneca’s three-part division of law in the COMMENTARY ON SENECA’S DE CLEMENTIA, Calvin primarily focuses on showing that Seneca’s three uses of the law were consistent with much of ancient Greek

⁵¹ *Id.* at bk. II, ch. 7, § 10.

⁵² *Id.*

⁵³ *Id.* at bk. II, ch. 7, § 12.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 1 LUCIUS ANNASUS SENECA, *On Mercy*, in MORAL ESSAYS 357, 419 (John W. Basore trans., 1928).

and Roman thinking.⁵⁷ Calvin reveals his knowledge of classical sources, but he does not indicate whether or not he actually approves of Seneca's classification.⁵⁸ Ford Lewis Battles claimed that "Calvin was later to adapt this three-fold scheme to his own uses of the law . . . and to the triple use of church discipline."⁵⁹ While Battles is right to point to the parallels between Seneca's three uses of the law and Calvin's three uses of church discipline, Irena Backus likely has the better argument when she observes that the only similarities between Calvin's and Seneca's three uses of civil law are "superficial" and "structural."⁶⁰ Backus rightly notes that Seneca's civil law functions as "*animaduersio, exemplum*, and protection of society . . ."⁶¹ This contrasts with Calvin's more aspirational adaptation, which involves "revealing God's justice, coercing Christians into good behavior, and improving their knowledge of God."⁶²

For Calvin, law does not simply warn, punish, and protect. It ought also to lead to right knowledge and genuine understanding regarding the connection between what one does and what one ought to do—between what one desires and what one ought to desire.⁶³ Seneca's three uses of the law are

⁵⁷ JOHN CALVIN, COMMENTARY ON SENECA'S DE CLEMENTIA 206–07 (Ages Software 1998) (1532).

⁵⁸ *Id.*

⁵⁹ CALVIN'S COMMENTARIES ON SENECA'S DE CLEMENTIA at 137 (Ford Lewis Battles and Andre Malan Hugo, eds. 1969).

⁶⁰ Irena Backus, *Calvin's Concept of Natural and Roman Law*, 38 CALVIN THEOLOGICAL J. 7, 21 (2003).

⁶¹ *Id.* at 21.

⁶² *Id.*

⁶³ CALVIN, *supra* note 8, at bk. II, ch. 7, § 12. Calvin states:

For [law] is the best instrument for enabling [believers] daily to learn with greater truth and certainty what that will of the Lord is which they aspire to follow, and to confirm them in this knowledge; just as a servant who desires with all his soul to approve himself to his master, must still observe, and be careful to ascertain his master's dispositions, that he may comport himself in accommodation to them. Let none of us deem ourselves exempt from this necessity, for none have as yet attained to such a degree of wisdom, as that they may not, by the daily instruction of the Law, advance to a purer knowledge of the Divine will. Then, because we need not doctrine merely, but exhortation also, the servant of God will derive this further advantage from the Law: by frequently meditating upon it, he will be excited to obedience, and confirmed in it, and so drawn away from the slippery paths of sin.

Id.

also more self-consciously concerned with punishment than Calvin's.⁶⁴ Calvin is certainly concerned with the law's role in punishing those who harm others, but his first and third uses of the law deal with education as much as with punishment. Battles is therefore likely too quick to assume that Calvin relied directly on Seneca's three-part division.

Consider Luther also. At first blush, the three Lutheran uses of the law closely resemble Calvin's division. The Lutheran Formula of Concord states:

[F]irst, that thereby outward discipline might be maintained against wild, disobedient men [and that wild and intractable men might be restrained, as though by certain bars]; secondly, that men thereby may be led to the knowledge of their sins; thirdly, that after they are regenerate . . . they might . . . have a fixed rule according to which they are to regulate and direct their whole life⁶⁵

Except for inverting the first and second uses of the law, Calvin's classification appears very much in line with the Lutheran Formula of Concord. This different ordering is not insignificant. Calvin suggests that law begins and ends with understanding, not punishment, by first beginning with the theological and pedagogical use of the law, and then by finishing with the guiding features of the law. The civil use of the law is, for Calvin, faced on either side by its pedagogical and aspirational use.

Furthermore, there is some doubt as to whether Luther himself even accepted a third use of the law, or if it was simply added by later followers, especially Philipp Melancton. William Lazareth has summarized these doubts:

Luther explicitly summarized his support for only "two uses" of the Law, civilly and theologically, in both his magisterial Lectures on Galatians (1535) and his "theological last will and testament" the Smalcald Articles (1537). . . .

The international scholarly consensus on Luther and the Law was summarized in 1965 by Wilhelm Maurer. In contrasting Luther's approach with the title and parts of the later Formula of Concord (1577), Maurer judged: "In Article VI, however, the Gospel is actually subordinated to the

⁶⁴ See *SENECA*, *supra* note 56, for discussion of Seneca's three uses of the law.

⁶⁵ *Formula of Concord, Epitome VI.1*, in *TRIGLOT CONCORDIA: THE SYMBOLICAL BOOKS OF THE EVANGELICAL LUTHERAN CHURCH: GERMAN-LATIN-ENGLISH* 14 (1921).

Law...Recent Luther research has adduced the evidence that the doctrine of the third use is foreign to Luther; nor is it set forth In the Augsburg Confession [1530] or the Apology [1531].” . . .

Then at the end of the twentieth century, this preponderant academic viewpoint was once again corroborated by Karl-Heinz zur Mühlen as follows: “This understanding of the distinction between Law and Gospel led Luther to the doctrine of the duplex *usus legis* (the twofold use of the Law),” the civil use to promote temporal peace and justice, the theological use to accuse and torment spiritual sin and unrighteousness.⁶⁶

It is not this Article’s intention to argue that Luther refused to recognize the third use of the law. It is sufficient for present purposes to note that the inclusion of the third use of the law in the Formula of Concord suggests that (regardless of Luther’s ideas or intentions) subsequent Lutherans have largely accepted the third use of the law. In any event, the uncertainty surrounding Luther’s sentiments regarding the third use of the law reveals that Luther was not as enthusiastic about the doctrine as to Calvin.⁶⁷

Luther’s lower valuation of the third use of the law should not be surprising. Luther generally had lower esteem for law than Calvin.⁶⁸ The law, according to Luther, structured a secular realm that was quite distinct from the spiritual realm.⁶⁹ Law applied to the civil realm, gospel to the spiritual realm.⁷⁰ As Jesse Couenhoven notes, Luther’s sharp distinction between law and gospel

⁶⁶ William Lazareth, *Antinomians: Then and Now*, 5 J. LUTHERAN ETHICS 1, 18–19 (2002).

⁶⁷ CALVIN, *supra* note 8, at bk. II, ch. 7, § 12 (“The third use of the Law (being also the principal use, and more closely connected with its proper end) has respect to believers in whose hearts the Spirit of God already flourishes and reigns.”).

⁶⁸ Jesse Couenhoven, *Law and Gospel, or the Law of the Gospel? Karl Barth’s Political Theory Compared with Luther and Calvin*, 30 J. RELIGIOUS ETHICS 181, 182–86 (2002).

⁶⁹ Martin Luther, TEMPORAL AUTHORITY: TO WHAT EXTENT IT SHOULD BE OBEYED (1523), *reprinted in* LUTHER: SELECTED POLITICAL WRITINGS 51, 55–56 (J.M. Porter ed., 2003) (“God has ordained two governments: the spiritual, by which the Holy Spirit produces Christians and righteous people under Christ; and the temporal, which restrains the un-Christian and wicked so that—no thanks to them—they are obliged to keep still and to maintain an outward peace.”) And further, “[O]ne must carefully distinguish between these two governments. Both must be permitted to remain; the one to produce righteousness, the other to bring about external peace and prevent evil deeds.” *Id.* at 56–57.

⁷⁰ *Id.* at 60–62.

[H]as the tendency to result in a dualism between a worldly state and the Christ-based church, as well as a split in the lives of individual believers, who live in both spheres but find it hard to unite them. Since the law, as Luther usually understands it, contains nothing positive, it does not point the state towards the fullness of life found in the gospel. The state has to do with justice and human reason, not a revelation of perfect love.⁷¹

Calvin's vision of law, including the relationship between law and gospel, is quite distinct from Luther's. According to Calvin, law applies to and bridges both realms. Law convicts, punishes, and nurtures. The first, theological use of the law convicts us of our sin;⁷² the second, civil use of the law punishes that sin.⁷³ It is the third use, however, that connects the theological and the civil uses.⁷⁴ The third, aspirational, use of the law, in Couenhoven's words, "point[s] the state towards the fullness of life found in the gospel."⁷⁵

IV. LAW, LIBERTY, AND GOVERNMENT

Calvin had an abiding interest in law and government.⁷⁶ And law's reach, according to Calvin, is thoroughgoing, applying not merely in outward decency but in inward spiritual righteousness.⁷⁷ It structures liberty and makes order possible in general, as well as the government in particular.⁷⁸ This section examines the relationship between law, liberty, and government in Calvin's work.

⁷¹ Couenhoven, *supra* note 68, at 184.

⁷² CALVIN, *supra* note 8, at bk. II, ch. 7, § 6.

⁷³ *See generally id.* at bk. II, ch. 7, § 10.

⁷⁴ *See generally id.* at bk. II, ch. 7, § 12, 14. The law's third use connects the theological and civil uses by helping to conform action to belief.

⁷⁵ Couenhoven, *supra* note 68, at 184.

⁷⁶ *John Calvin on Civil Government*, in CALVINISM AND POLITICAL ORDER 23–24 (George L. Hunt & John T. McNeil eds., 1965). Commenting on Calvin's writings:

It need not surprise us to find that from his Commentary on Seneca's *Treatise on Clemency* of 1532 until that hour in 1564 when from his deathbed he urged the magistrates of Geneva so to rule as to "preserve this republic in its happy condition," his writings are strewn with penetrating comments on the policies of rulers and illuminating passages on the principles of government.

Id.

⁷⁷ *See generally* CALVIN, *supra* note 8, at bk. II, ch. 8, § 6.

⁷⁸ *See generally id.*

In the parlance of contemporary political theory, Calvin conceived of liberty in positive rather than negative terms.⁷⁹ Freedom for Calvin was not found simply by removing constraints.⁸⁰ True freedom was directed towards particular ends and involved connecting the empirical self with what one, objectively, ought to want (i.e., God's will).⁸¹ This sort of freedom required the active cultivation of particular virtues and values, but these would not arise *ex nihilo* given the reality of human sinfulness. Order, restraint, and moderation were conditions as well as products of true freedom.⁸²

Since law is not simply a mechanism for punishment, but also a device for moral improvement,⁸³ it plays an invaluable role in revealing to humans what they ought to desire. Sin taints the will and the reason of the empirical self so badly that individuals without God's help will inevitably be confused about what will truly make them free.⁸⁴ The law not only convicts and punishes, but it also helps people conform themselves to what God wants. It is only through emptying one's self of the desires of the flesh and embracing God's will that freedom can be found.⁸⁵

Unrestrained freedom might seem appealing on its face, but it presents numerous dangers. Without this structured liberty humans would be no better than animals:

⁷⁹ Isaiah Berlin is typically credited with making famous this positive liberty/negative liberty schematization. See Isaiah Berlin, *Two Concepts of Liberty*, in LIBERTY 166, 177–78 (Henry Hardy ed., 2nd ed. 2002).

⁸⁰ Hobbes is likely the most well-known proponent of conceiving liberty in negative terms, i.e., as the absence of constraint. See THOMAS HOBBS, LEVIATHAN 107–10 (J. C. A. Gaskin, ed., Oxford University Press 1996).

⁸¹ Calvin provides outlines of the components of Christian liberty: (1) “the conscience of believers”; (2) “that consciences obey law, not as if compelled by legal necessity; but being free from the yoke of the law itself, voluntarily obey the will of God”; and (3) “that we are not bound before God to any observance of external things which are in themselves indifferent (adiaphora) but that we are now at full liberty either to use or omit them.” CALVIN, *supra* note 8, at bk. III, ch. 19, § 2–7.

⁸² *Id.* at bk. IV, ch. 20, § 8 (“And as I willingly admit that there is no kind of government happier than where liberty is framed with becoming moderation, and duly constituted so as to be durable.”).

⁸³ See *supra* Section III.

⁸⁴ See generally CALVIN, *supra* note 8, at bk. II, ch. 4, § 1.

⁸⁵ See *id.* at bk. II, ch. 5 (arguing that freedom looks very little like contemporary conceptions of the principle). Calvin refutes the very idea of free will by which he means unconstrained, undirected human agency. See *id.* Humans are either under the control of sin or of God, and by being under God's control enables true freedom to develop. See *id.*

It would, indeed, be better for us to be wild beasts, and to wander in the forests, than to live without government and laws; for we know how furious are the passions of men. Unless, therefore, there be some restraint, the condition of wild beasts would be better and more desirable than ours. Liberty, then, would ever bring ruin with it, were it not bridled and connected with regular government.⁸⁶

Indeed, without laws, life would be much like the lawless and “nasty, brutish, and short”⁸⁷ state of nature that Thomas Hobbes would famously describe one hundred years later. As Calvin writes, “all would end in prey and plunder, and in the mere license of fraud and murder, and all the passions of mankind would have full and unbridled sway.”⁸⁸

John McNeill has rightly suggested that Calvin’s concerns about disorder animate his skepticism about resistance to political authority.⁸⁹ After citing numerous positive references to liberty in Calvin’s works, McNeil concludes “[t]here is no doubt about Calvin’s espousal of liberty; but it is always a liberty limited by law and duty, and is never interpreted in revolutionary terms.”⁹⁰ Similarly, Derek Jeffreys has noted that Calvin’s high valuation of order meant he even preferred tyranny to anarchy, if forced to choose.⁹¹ Clear support for this position can be found in Calvin’s

⁸⁶ JOHN CALVIN, CALVIN’S BIBLE COMMENTARIES: JEREMIAH AND LAMENTATIONS, 8 (Forgotten Books, Part IV, 2007).

⁸⁷ Hobbes, *supra* note 80, at 97.

⁸⁸ 1 JOHN CALVIN, COMMENTARIES ON THE BOOK OF THE PROPHET DANIEL 256 (Baker Book House, Volume First, 2005) [hereinafter COMMENTARIES ON DANIEL].

⁸⁹ *Democratic*, *supra* note 35, at 166. McNeill argues:

It is not Calvin’s subjection of the ruler to God that makes him cautious on the side of democracy. It is rather his fear of disorderly excesses. . . . Calvin’s letters show a good deal of adjustment of his advice to conditions. But in general he stood firmly on the ground that liberty should not be permitted to subvert an established public order. The principle of order is divine: it was imparted to man at creation and is possessed in common by mankind. If it were otherwise, government and society would be impossible. Thus Calvin forbids the individual to resist oppression and lays the task of such resistance upon the constituted magistracy.

Id.

⁹⁰ *Id.* at 166–67.

⁹¹ Derek Jeffreys, “*It’s a Miracle of God That There Is Any Common Weal among Us*”: *Unfaithfulness and Disorder in John Calvin’s Political Thought*, 62 REV. POLITICS 107, 125 (2000). Paraphrasing Calvin’s disdain for disorder, Jeffreys writes:

Commentary on Daniel. “[I]t is better to live under the most cruel tyrant than without any government at all. . . . [T]yranny is better than anarchy . . . because where there is no supreme governor there is none to preside and keep the rest in check.”⁹² The practical benefits of civil government are many:

[I]n every human society some kind of government is necessary to insure the common peace and maintain concord But seeing there is such diversity in the manners of men, such variety in their minds, such repugnance in their judgments and dispositions, no policy is sufficiently firm unless fortified by certain laws So far, therefore, are we from condemning the laws which conduce to this, that we hold that the removal of them would unnerve the Church, deface and dissipate it entirely.⁹³

Laws provide uniformity amidst diversity of minds, manners, and judgments and also secure the sort of stability needed by the political community and the church. Furthermore, the ends and benefits of civil government pertain to both material and spiritual goods.⁹⁴ The “state originates as a device to restrain sinners,” but the function of the state and its laws ultimately reach well beyond such negative functions.⁹⁵ Calvin details the material and spiritual ends of the state’s laws:

[I]t is perfect barbarism to think of exterminating [civil government], its use among men being not less than that of bread and water, light and air, while its dignity is much more excellent. Its object is not merely, like those things, to enable men to breathe, eat, drink, and be warmed (though it certainly includes all these, while it enables them to live together); this, I say, is not its only object, but it is, that no idolatry, no blasphemy against the name of God, no calumnies against his

Facing [extreme disorder], most human beings will choose tyranny over anarchy. No matter how bad tyranny is, a minimal goodness remains in the institution of government (Daniel 4:10-16). In fact, even tyranny supports social life to some extent (Romans 13:3). However, we cannot say the same about anarchy; without government, human beings “hardly differ from beasts” (Isaiah 34:12).

Id.

⁹² COMMENTARIES ON DANIEL, *supra* note 88, at 216.

⁹³ CALVIN, *supra* note 8, at bk. IV, ch. 10, § 27.

⁹⁴ *Id.* at bk. IV, ch. 20, § 2–3.

⁹⁵ *Democratic*, *supra* note 35, at 156.

truth, nor other offenses to religion, break out and be disseminated among the people; that the public quiet be not disturbed, that every man's property be kept secure, that men may carry on innocent commerce with each other, that honesty and modesty be cultivated; in short, that a public form of religion may exist among Christians⁹⁶

It is clear, then, that Calvin looked to the law to perform a variety of tasks. Calvin understood better than some of the other early Reformers that law and civil government had noble functions. Chief among the responsibilities of the civil realm was to guard against disorder and to protect property, but the civil realm, as noted in the above excerpt, was also supposed to prevent spiritual ills. Calvin understood that order was both practically useful and morally necessary.⁹⁷ To recognize the moral value of order, it is important to recall Calvin's high valuation of law. Contrasting Calvin's views with those of Luther, Sheldon Wolin has insightfully noted:

[Luther's] government aimed not at virtue, but at keeping men from each other's throats; mankind had never really given up the Hobbesian state of nature. In this view, an extreme tension persisted between the nature of man and the requirements of order. . . . Yet it is a picture with a striking incongruity between the Christian cosmology and the Christian sociology, the one positing an omnipotent God ordering all of creation towards harmony, the other painting society as a dark, disordered mass trembling on the brink of anarchy and seemingly outside the beneficent order of God. . . . The task Calvin undertook was. . . . to resolve the conflict between the Christian cosmology and its sociology; he had to re-establish the moral status of the political order, but without making it appear as a substitute for religious society The over-all method Calvin employed for bringing the two societies into some kind of congruence was to treat them both as subject to the general principle of order.⁹⁸

Law, liberty, order, civil government, and religious virtue were all intimately connected. Law structures liberty and makes possible the order of civil government. Civil government, in turn, produces material as well as spiritual

⁹⁶ CALVIN, *supra* note 8, at bk. IV, ch. 20, § 3.

⁹⁷*Id.* at bk. IV, ch. 20, § 3.

⁹⁸ SHELDON S. WOLIN, *POLITICS AND VISION* 161–62 (Princeton Univ. Press, Expanded Edition, 2004).

benefits. In the following section, this Article continues exploring the close relationship between civil and heavenly realms.

V. REVELATION, NATURAL LAW, AND THE UNITY OF CIVIL AND HEAVENLY REALMS

Although Calvin maintained a formal distinction between civil and spiritual realms,⁹⁹ the two ultimately were united in their common ends (i.e., nurturing people toward righteousness). This section looks at the contested place of natural law in Calvin's theology as an entry point for assessing the ultimate unity between civil and heavenly realms.¹⁰⁰

The compatibility of Calvin's theology with natural law is a longstanding matter of dispute.¹⁰¹ Some have argued that natural law serves little purpose in Calvin's work given Calvin's high valuation of Scripture and his rather pessimistic view of what humans can accomplish without the direct aid of God's revelation.¹⁰² Others, however, have insisted that natural law plays an essential role in Calvin's thought.¹⁰³

One seemingly reasonable solution to the conflicting views concerning Calvin's use of natural law is to propose a robust distinction between Calvin's two kingdoms. David Vandrunen has argued that Calvin both accepted and rejected natural law. Calvin embraced natural law reasoning in the civil sphere but rejected it in the spiritual realm.¹⁰⁴

⁹⁹ CALVIN, *supra* note 8, at bk. II, ch. 2, § 13 (“[W]e have one kind of intelligence of earthly things, and another of heavenly things.”).

¹⁰⁰ It is not the purpose of this Section to resolve this debate, or even to outline its parameters in full detail, but rather to acknowledge the tension and to consider what the debate suggests regarding the relationship between civil and heavenly realms.

¹⁰¹ See *supra* notes 2–4; see also 20 GUENTHER H. HAAS, *THE CONCEPT OF EQUITY IN CALVIN'S ETHICS* (1997); I. JOHN HESSELINK, *CALVIN'S CONCEPT OF THE LAW* (1992); William Klempa, *John Calvin on Natural Law*, in JOHN CALVIN AND THE CHURCH: A PRISM OF REFORM 72 (Timothy George ed., 1990); SUSAN E. SCHREINER, *THE THEATER OF HIS GLORY: NATURE & THE NATURAL ORDER IN THE THOUGHT OF JOHN CALVIN* (2001); David Vandrunen, *The Context of Natural Law: John Calvin's Doctrine of the Two Kingdoms*, 46 J. CHURCH AND ST. 503, 505 (2004).

¹⁰² See generally Karl Barth, *No!*, in NATURAL THEOLOGY (Peter Fraenkel trans., 2002) (1934); August Lang, *The Reformation and Natural Law*, in CALVIN AND THE REFORMATION (William P. Armstrong ed., Wipf and Stock Publishers 2004) (1909); and MICHAEL WALZER, *THE REVOLUTION OF THE SAINTS: A STUDY IN THE ORIGINS OF RADICAL POLITICS* (1965).

¹⁰³ See generally Susan E. Schreiner, *Calvin's Use of Natural Law*, in A PRESERVING GRACE: PROTESTANTS, CATHOLICS, AND NATURAL LAW, 54, 55, 73 (Michael Cromartie ed., 1997). John T. McNeill, *Natural Law in The Teaching of the Reformers*, 26 J. RELIGION 168 (1946).

¹⁰⁴ Vandrunen, *supra* note 101, at 521. This argument has both logical appeal and textual support from the Institutes. See also CALVIN, *supra* note 8, at bk. II, ch. 2, § 13.

Vandrunen argues that natural law reasoning performs important functions, even though reason itself is tainted by human imperfection:

For Calvin, the sinful human person, by use of reason and natural knowledge, can attain to great things in the domain of earthly things, that is, of the civil kingdom. By use of reason and natural knowledge, however, the sinful person cannot even begin to make the slightest approach to knowledge of God's being or salvation, that is, of the heavenly kingdom of Christ. Natural law, therefore, has a positive function to play in the life of the earthly, civil kingdom, according to Calvin. . . . He denied that natural law could ever give knowledge of salvation in the heavenly kingdom, even while he affirmed that it provided true and useful knowledge of mundane things in the civil kingdom.¹⁰⁵

If this is all Vandrunen argued, one might be inclined to accept his effort to solve the tension. However, Vandrunen's argument goes a bit further. He not only argues that natural law is inapplicable to the spiritual realm, but he also claims that Calvin offered an "explicit identification of natural law as the standard for civil law."¹⁰⁶ Vandrunen correctly notes that these passages from Book II of the *INSTITUTES* suggest (a) a clear distinction between civil and spiritual realms and (b) the applicability of natural law reasoning to the civil realm. Calvin writes:

[W]e have one kind of intelligence of earthly things, and another of heavenly things. By earthly things, I mean those which relate not to God and his kingdom, to true righteousness and future blessedness, but have some connection with the present life, and are in a manner confined within its boundaries.¹⁰⁷

Vandrunen's thesis helps answer one question about the role of natural law in Calvin's thought, but, in so doing, he creates another problem. Vandrunen runs the risk of putting the civil and spiritual realms in tension with each other, if not in outright conflict. By emphasizing the distinction between Calvin's two kingdoms, Vandrunen overlooks the complementary role that civil and spiritual realms play in Calvin's thought and also neglects some of

¹⁰⁵ Vandrunen, *supra* note 101, at 521.

¹⁰⁶ *Id.* To be fair, Vandrunen acknowledges in passing at the end of his piece that Calvin "did not think Scripture irrelevant for civil law." *Id.* at 523.

¹⁰⁷ CALVIN, *supra* note 8, at bk. II, ch. 2, § 13.

what distinguishes Calvin from earlier Reformers like Luther. Vandrunen makes this mistake, in part, by largely overlooking Book IV of the INSTITUTES. According to Backus, there is a clear tension between Book II of the Institutes and Book IV.¹⁰⁸ Book II gestures towards the autonomy of the civil realm; Book IV discusses the connections between the civil and heavenly realms.¹⁰⁹

In Book IV, Calvin makes clear that the civil and spiritual realms, although formally distinct, are not completely separate. Contrary to appearances, according to Calvin, the civil and spiritual realms are connected:

Having shown above that there is a twofold government in man, and having fully considered the one which, placed in the soul or inward man, relates to eternal life, we are here called to say something of the other, which pertains only to civil institutions and the external regulation of manners. For although the subject seems from its nature to be unconnected with the spiritual doctrine of faith, which I have undertaken to treat, it will appear as we proceed that I have properly connected them.¹¹⁰

More importantly, the two spheres are not simply connected, but they also serve to advance the ends of the other. In perhaps his clearest statement of the interdependent relationship, Calvin writes:

[Civil] government is distinct from the spiritual and internal kingdom of Christ, so we ought to know that they are not adverse to each other. The *former, in some measure, begins the heavenly kingdom in us, even now upon earth, and in this mortal evanescent life commences immortal and incorruptible blessedness*, while to the latter it is assigned, so long as we live among men, to foster and maintain the external worship of God, to defend sound doctrine and the condition of the Church, to adapt our conduct to human society, to form our manners to civil justice, to conciliate us to each other, to cherish common peace and tranquility.¹¹¹

¹⁰⁸ Backus, *supra* note 60, at 19 (emphasizing the “connection among human, natural, and divine law”).

¹⁰⁹ *Id.*

¹¹⁰ CALVIN, *supra* note 8, at bk. IV, ch. 20, § 1.

¹¹¹ *Id.* at bk. IV, ch. 20, § 2 (emphasis added).

There are practical implications to the argument that the civil realm is deeply shaped and sustained by both natural law reasoning, which ostensibly is available to all, and divine revelation, which is available only to those whose hearts and intellect have been aligned with the will of God. Consider the possibility of mercy or equity in the civil realm, for example. Following Aristotle, Calvin distinguished between *summum ius* (“law applied to the letter”) and *aequitas* (“application of law taking into account extenuating circumstances”) and suggested the two can conflict.¹¹² Calvin defines *aequitas* broadly and insists that it is not only God’s guiding principle but also that it should guide the natural law reasoning of magistrates in their exercise of civil functions.¹¹³

If one takes seriously both Book II and Book IV of Calvin’s Institutes, it seems that Calvin wants for *aequitas* to be, on the one hand, the result of divine revelation or insight, in other words, an *exception*, and on the other hand to be the standard, or *norm*, for justice in the civil realm. *Aequitas* embodies Calvin’s conviction that God impinges upon the world of everyday experience in ways that cannot always be determined in advance.

In this respect, Calvin can help modern Western societies make sense of some of the implicit values that have grounded our legal norms and practices. Even as the modern world has been secularized and disenchanted, norms continue to be subject to exceptions—although Western, secular societies seem to have fewer and fewer ways to explain or justify exceptional grants of mercy.¹¹⁴ Contemporary philosophers and legal theorists, for example, have made much of the so-called “mercy dilemma,”¹¹⁵ which asks whether mercy can exist without compromising, or being subsumed by,

¹¹² See SENECA, *supra* note 56, at 181; see generally Martha Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993).

¹¹³ See CALVIN, *supra* note 8, at bk. IV, ch. 20, § 9. For a comprehensive discussion of the importance of *aequitas* to Calvin’s overall theology, see 20 GUENTHER H. HAAS, THE CONCEPT OF EQUITY IN CALVIN’S ETHICS (1997).

¹¹⁴ In the world of political experience, executives issue pardons, legislatures grant amnesty, and juries nullify verdicts. This experience shows that abstract principles of justice do not always account for concrete expressions of mercy.

¹¹⁵ See generally Jeffrie Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY 162 (First Paperback ed. 1990); H. Scott Hestevold, *Disjunctive Desert*, 20 AM. PHIL. Q. 357 (1983); H. Scott Hestevold, *Justice to Mercy*, 46 PHIL. & PHENOMENOLOGICAL RES. 281 (1985); Carla Ann Hage Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 LAW & PHIL. 109 (1991); Mary Sigler, *The Story of Justice: Retribution, Mercy, and the Role of Emotions in the Capital Sentencing Process*, 19 J.L. & PHIL. 339 (2000); Carol S. Steiker, *Murphy on Mercy: A Prudential Reconsideration*, 27 CRIM. JUST. ETHICS 45, 48 (2008).

justice. The problem goes something like this: reason establishes the principles of justice, and it ensures the fair application of those principles. Because reason's requirements are binding, reason largely avoids the pitfalls of willfulness, sentimentality, and other forms of human error by establishing what is just prior to any particular set of circumstances. By making reason's relationship to justice a formal, technical, and analytical matter, however, reason, it seems, renders moot—or at least insignificant—virtues of discernment or the possibility of divinely inspired grace. If mercy is a virtue with independent force, it would appear to compromise justice. And to harmonize mercy with justice seems likely to result in viewing mercy as merely redundant—as justice properly conceived.

Calvin's broad conception of *aequitas* is instructive, if not surprising. As discussed above, Calvin saw the law and gospel as intimately intertwined.¹¹⁶ Calvin's ambivalence about the place of natural law reflects his general desire to keep distinct civil and heavenly realms, even while ultimately pointing to the unity of the two spheres. In so doing, Calvin reminds contemporary audiences that legalistic, world-maintaining, secular theories of law cannot always account for the legal practices that emerge from those systems.

CONCLUSION

Calvin and Calvinism are frequently credited with shaping the development of modern legal and political systems.¹¹⁷ This Article briefly outlines the argument for how Calvinism's¹¹⁸ approach to law and civil life likely offered certain advantages when compared to the early modern alternatives of Catholics, Lutherans, and Anabaptists. This Article then points to reasons why, despite Calvin's role in shaping early modern legal and political systems, there are constraints to his influence in law and civil

¹¹⁶ CALVIN, *supra* note 8, at bk. IV, ch. 20, § 2.

¹¹⁷ See generally John McNeill, *THE HISTORY AND CHARACTER OF CALVINISM* (1970). For a more recent account, see John W. Sap, *Paving the Way for Revolution: Calvinism and the Struggle for a Democratic Constitutional State*, in 6 *VU STUDIES ON PROTESTANT HISTORY* (2001).

¹¹⁸ This Article has focused on Calvin, the thinker, not Calvinism. In this concluding section, this Article refers to Calvinism and Calvinists. It recognizes that later Calvinists developed their own ideas about civil government, some of which differed from those of Calvin himself, but, for the purposes of this conclusion, this Article assumes Calvinism and Calvinists to be consistent with Calvin on the relevant issues under consideration.

government in the contemporary West.¹¹⁹ This Article's comments in this section are admittedly a bit cursory. The intent is not to provide a detailed or conclusive account of Calvinism's role in early modern politics. Rather, this Article simply notes the conceptual plausibility of these claims, based on what has already been argued, and then reflects briefly on whether Calvin's legacy remains viable in the twenty-first century. The goal of this Article is to show, even if inchoately, the relevance of this Article's topic to contemporary legal and political thought so that, at the very least, legal theorists as well as practitioners take seriously what Robert Cover termed the "world-maintaining" as well as the "world-creating" functions of law.¹²⁰

Calvin and later Calvinists appear to have had good resources for holding in balance particular tensions between civil and spiritual realms. Calvin's theology provided a basis for valuing the civil realm of law without letting it overwhelm the heavenly realm of gospel. In so doing, Calvinism distinguished itself from Catholic, Lutheran, and Anabaptist alternatives. Both, early modern and modern Catholics were slower than the Reformers of Europe to separate civil and religious realms, likely resulting in the slower development of an autonomous civil sphere in Catholic countries of Europe.¹²¹ Lutherans, like Calvin, recognized a distinction between civil and heavenly realms, but were much less likely than Calvin to appreciate the ways in which each realm was linked to the other. As a result, the laws of the civil realm lacked the sense of vitality and sacredness that they did for Calvin.¹²² In contrast to Catholics, Lutherans, and Calvinists, Anabaptists largely

¹¹⁹ The focus of this final Section is more theoretical than historical, but history also suggests Calvinism is less likely to continue shaping the development of constitutional democracies in any unique way. As Philip Benedict has noted, the easy connections once drawn between Calvinism and democracy are no longer so simple. "The post-World War II extension of democratic regimes across Europe has meant that successful, stable parliamentary democracies are no longer so exceptional or disproportionately found in predominantly Protestant, especially Reformed countries as they formerly were." PHILIP BENEDICT, *CHRIST'S CHURCHES PURELY REFORMED: A SOCIAL HISTORY OF CALVINISM* 537 (2002).

¹²⁰ See Cover, *supra* note 18.

¹²¹ See, e.g., Peter Steinfels, *The failed encounter: the Catholic church and liberalism in the nineteenth century*, in *CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC POLICY* 19–44, (R. Bruce Douglass & David Hollenbach eds., 1994). Catholic resistance to separating civil and religious realms persisted through the nineteenth century and, to some extent, into the twentieth century. *Id.*

¹²² See generally CALVIN, *supra* note 8.

advocated withdrawal from the civil realm altogether.¹²³ As a result, their imprint on the development of law and politics during the early modern period was mostly indirect.

Onlookers have been particularly interested in tracing connections between Calvinism and republicanism, a connection most plausibly evidenced by observing the deep respect accorded to the legal and political institutions that developed through the influence of Calvinism.¹²⁴ We are regularly reminded, however, that Calvin's world is not our own. Republicanism of the early modern era has given way to new varieties of democratic liberal individualism, resulting in a civil realm that has largely been desacralized. Public institutions rarely make claims to represent or to promote spiritual ends or values.

In Calvin's schematization, law structured freedom by ensuring order amidst chaos. Law restrains but it also educates and enables. It is only able to do so, however, by orienting freedom towards particular ends. As these ends became plural, liberty increasingly came to be understood in negative, rather than positive terms. In other words, liberty came to be understood as the absence of constraints rather than the capacity to connect one's empirical desires with an authentic self.¹²⁵ Since law has now largely come to be defined in terms of limits, as a tool for social control and not a source of meaning, and since freedom is defined by the absence of restraint, law only has the possibility of being viewed negatively.

Removed as they are from Calvin's day in time and metaphysical assumptions, the modern and post-modern worlds have experienced an ironic inversion of ultimacy. The common ends that once united spiritual and civil realms have been privatized as those ends have come to be seen as controversial and plural, rather than unifying and common. Acknowledging the diversity of ends resulted in increased attention to uniform rules and procedures. Since there was no longer any agreement about what *teloi*

¹²³ See, e.g., Philip Hamburger, SEPARATION OF CHURCH AND STATE 26–27 (FIRST Harvard Univ. Press Paperback ed. 2004) (“The Anabaptists withdrew so far from civil government as to hold that Christian individuals ought not seek justice in courts of law. Thus, in separating from the world, Anabaptists withdrew from civic life. They conceived themselves to be separating not simply the church, but all Christians, from civil government.”).

¹²⁴ See, e.g., Hans Baron, *Calvinist Republicanism and its Historical Roots*, 8 CHURCH HIST. 30, 39–42 (1939).

¹²⁵ Berlin, *supra* note 79, at 177–78.

mattered for society, law gradually lost its aspirational features and simply became a way to limit and punish uncivil and criminal behavior.¹²⁶

Perhaps the clearest emblem of these changed attitudes towards law can be found in the legal positivism of Oliver Wendell Holmes and his familiar description of the “bad man.”

[A] bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors 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.¹²⁷

It is of course not this Article’s argument that the law’s separation from morality has been complete, either rhetorically or practically. Ronald Dworkin, as simply one prominent example, spent his career resisting the notion that law and morality could or should be separated, and instead pointed to the moral foundations and implications of law.¹²⁸ With a legal culture that reflects and perpetuates the so-called “Great Separation” between law and meaning,¹²⁹ there seems to be a clear need to (re)consider the latent supports that ensure loyalty to legal systems in liberal societies, despite what appears to be a fairly thin basis for that loyalty.

The preceding pages have offered the work of John Calvin as one resource for better understanding some of the unspoken and implicit values that shape western legal practices. The formal separation, but ultimate unity, of civil and heavenly spheres and of norm with vision, articulated by Calvin, allowed him to be both idealistic and realistic about the law’s capacity. The development of western legal and political thought in the modern and contemporary eras likely benefited from Calvin’s recognition of the law’s limits as well as its capacities. If there is anything that the contemporary

¹²⁶ See William A. Galston, *Two Concepts of Liberalism*, 105 *ETHICS* 516, 525–26 (1995). Different strands of liberalism have failed in different ways to maintain aspirational features of the law. See *id.* So-called Enlightenment liberalism kept certain aspirational features of the law but proved incapable of acknowledging or appreciating diversity. See *id.* So-called Post-Reformation liberalism acknowledged diversity and pluralism but gave up the aspirational elements of the law—since no common *telos* grounded the community. See *id.* On the differences between these two strands of liberalism. See *id.*

¹²⁷ Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 459 (1897).

¹²⁸ See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* (1986).

¹²⁹ See Lilla, *supra* note 2.

world should draw from Calvin's writing on the law, it is that law is a richer resource than is often realized. At its best, it performs multiple functions. Law limits and enables; it punishes but also educates.