

1-1-1991

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Recommended Citation

Smolin, David M. (1991) "The Enforcement of Natural Law by the State: A Response to Professor Calhoun," *University of Dayton Law Review*. Vol. 16: No. 2, Article 5.
Available at: <https://ecommons.udayton.edu/udlr/vol16/iss2/5>

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Cover Page Footnote

The author wishes to thank Scott Houser, Executive Director, Southern Center for Law and Ethics, Peter Leithart, and George Wright for their review of and comments on drafts of this article. The author also wishes to thank Todd Carlisle for his research assistance.

THE ENFORCEMENT OF NATURAL LAW BY THE STATE: A RESPONSE TO PROFESSOR CALHOUN

David M. Smolin*

I. INTRODUCTION

A renewal of scholarly interest in natural law has been evident in recent years.¹ This renewal arguably results, at least in part, from the collapse of the modernist liberal premise that law and politics should be morally neutral. The intellectual collapse of liberal neutrality theory stems from its acknowledged inability to demonstrate the moral necessity and practical possibility of neutrality, in combination with the pointed critiques of critical legal studies and radical feminist scholars, who rightly question the very possibility of morally neutral law and politics. The tenor of the age, it could be said, has shifted from the stifling uniformity of modernism to the liberated Babel of postmodernism.² Among the voices crying out for attention is the ancient tradition of natural law. If law must implicate morality, then serious discussion of law and morality is in order. If all voices can be heard, then the ancient voice of natural law can seek an audience.

Legal scholars often recoil from natural law with a strange combination of contempt and fear. This reaction is intensified when a religiously-derived natural law system is at issue. These negative emotional reactions partly explain the virtual absence of serious legal academic discussion of religiously-derived natural law theory. Thus, James Boyd White suggests that "[o]ur fears of religious oppression, and perhaps our fears of religious truth, lead us to maintain a false ideology" and a

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1. See, e.g., Halligan, *The Environmental Policy of Saint Thomas Aquinas*, 19 ENVTL. L. 767, 785 (1989).

2. See M. PERRY, *MORALITY, POLITICS, AND LAW* 57-73 (1988); M. PERRY, *LOVE AND POWER, THE PROPER ROLE OF RELIGION AND MORALITY IN AMERICA* 8-28 (1991) (both analyzing the failure of liberal neutrality theory); cf. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1330, 1392-1407 (1991) (associating postmodernism with critiques of neutrality and objectivity by feminists, critical legal scholars, and others and arguing for a radically pluralistic America of many voices).

"peculiar division between academic and religious thought in our culture."³

In order to challenge this "peculiar division," I recently authored a lengthy article arguing two related points.⁴ First, I argued that the Judeo-Christian tradition is an appropriate authority in American legal discourse. Second, I argued that both believer and nonbeliever are required to assume the authoritative nature of the Judeo-Christian tradition in American legal discourse.⁵ I specifically put aside the issue of which parts of God's law should be enforced by the state, arguing only that this issue should be addressed from within the Judeo-Christian tradition, rather than by "the imposition of some foreign methodology" onto the materials of the Judeo-Christian tradition.⁶

Professor Calhoun's response to my article⁷ creates an appropriate occasion to address the important question of which aspects of God's law should be enforced by the state. Professor Calhoun's central claim is that I have misread Christian teaching on this important question. Although I had reserved comment on the question, Professor Calhoun chose to draw certain implications regarding my position on the enforcement of God's law by the state. Thus, Professor Calhoun assumes that my views are "to a substantial degree, theocratic."⁸ Professor Calhoun moreover appears to imply that my views are associated with the "Christian Reconstructionist" movement.⁹ Professor Calhoun's flawed analysis of both Christian teaching and my own views provides an opportunity to clarify the Christian position on state enforcement of God's law.

The primary purpose of this article is to briefly but seriously address, from a Christian theological perspective, the questions of whether and when God's law should be enforced by the state. I use the terminology "natural law" interchangeably with "God's law" in this context, because I think this usage is appropriate within the Christian tradition from which I speak. In addition, I think it is helpful to use the term natural law because the question of state enforcement of natural law arises in all natural law systems. Although volumes have been written on the sources, possibility, and substance of natural law, unfortunately very little has been written on the critical question of state en-

3. White, *Response to Roger Cramton's Article*, 37 J. LEGAL EDUC. 533, 533 (1987).

4. Smolin, *The Judeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. DAYTON L. REV. 345 (1988).

5. *Id.* at 347.

6. *Id.* at 367.

7. Calhoun, *Misreading the Judeo-Christian Tradition and the Law: A Response to Professor Smolin*, 15 U. DAYTON L. REV. 383 (1990).

8. *Id.* at 385. See also *id.* at 397 n.109.

9. *Id.* at 386-87.

forcement of natural law. Obviously, natural law theory ultimately is of no practical utility to legal scholars until the question of state enforcement is addressed. It may be of assistance to other natural law theorists, regardless of their definition of natural law, to see the question of state enforcement seriously addressed from within a particular tradition. In addition, it is the specter of state enforcement of natural law that is most responsible for the fear that natural law theory generates. This topic therefore may also be of interest to those who oppose natural law theory.¹⁰

II. PROFESSOR CALHOUN'S NON-IMPOSITION PRINCIPLE

Professor Calhoun stated:

I believe that inherent in Christianity is the principle that the faith should not be imposed upon others by force of law. This non-imposition principle extends not only to belief, but also to conduct. Human coercion can play no role in another's decision to become a Christian because that change can occur only through the work of the Holy Spirit. Similarly, with respect to conduct, it is only God's power that can achieve 'what God principally seeks—a people who freely love him and demonstrate their love through obedience.' Using force to compel compliance with God's standards is harmful in that it promotes other sin, creates hostility to the faith and perpetuates the 'cruel delusion,' at odds with the Christian Gospel, that righteous conduct is the road to a restored relationship with God.¹¹

Professor Calhoun stated that political activity by Christians is improper where the "principal goal is to compel others to live according to Biblical standards."¹² He continued: "If the Christian can in good faith base his desire for a particular law on independent, secular grounds, he does not violate the non-imposition principle. This is true even if the law will at the same time implement a Christian precept."¹³ Professor Calhoun suggested, by way of example, that Dr. King's political actions were proper because he was motivated both by God's law and American democratic traditions.¹⁴ Professor Calhoun thus seems to argue

10. This article is designed to be useful to those interested in the question of state enforcement of natural law, regardless of whether they have read my prior article or Professor Calhoun's response. Subsidiary points understandable only to those familiar with these prior articles will be relegated to the footnotes.

11. Calhoun, *supra* note 7, at 397-98 (footnotes omitted) (quoting Calhoun, *Conviction Without Imposition: A Response to Professor Geenawalt*, J. L. & RELIGION (accepted for publication, 1991)).

12. *Id.* at 398.

13. *Id.*

14. *Id.* at 396-98. Professor Calhoun's discussion of Dr. King is initially in response to my own. I had merely cited Dr. King's leadership of the civil rights movement to rebut the proposition

that Dr. King's political activity would only be improper if his *sole* motivation was to see God's laws followed.¹⁵ Professor Calhoun stressed that it is not enough that the Christian present a secular motivation; rather, the Christian must genuinely believe "that secular considerations provide independent justification for the law."¹⁶

Professor Calhoun argued for the legitimacy of America's democratic form of government,¹⁷ and yet urged Christians to refrain from enacting Christian standards into law through these processes.¹⁸ Professor Calhoun thus, somewhat paradoxically, applied a secular criterion in justifying the legitimacy of the American system, but imposed a greater religious test for evaluating the legitimacy of the actions of Christians in that system. It would appear that Christians are specially disabled from full political participation, at least by way of their religiously-motivated self-restraint, under Professor Calhoun's analysis. Other individuals and groups are entitled to argue for laws based on their view of true morality, while the Christian is restricted to arguments that are intrinsically foreign to his or her beliefs. This paradox is a natural product of Professor Calhoun's adoption of a theologically-based "non-imposition" position. Ironically, although Professor Calhoun argued that the Christian requires a secular purpose to engage in political action, he ultimately requires the Christian to refrain from what, in secular terms, would be normal citizenship participation, by virtue of a theological principle. It thus becomes clear that even under Professor Calhoun's analysis, theology, or God's will, is the ultimate criterion of all actions, even political actions.¹⁹ The disagreement between Professor Calhoun and myself is therefore primarily theological in nature.

At the outset, I should make it clear that I agree with many of Professor Calhoun's premises. Thus, I agree that "faith should not be imposed on others by force of law."²⁰ I agree that one can become a

that American society has become completely secularized. Smolin, *supra* note 4, at 385-86. Professor Calhoun's response admits the centrality of Dr. King's religious motivations. Calhoun, *supra* note 7, at 396. He then attempts to reconcile Dr. King's religiously motivated public activities with his own non-imposition principle. *Id.* at 397-98.

15. Calhoun, *supra* note 7, at 398.

16. *See id.* at 399 n.114.

17. *Id.* at 390-91.

18. *Id.* at 392 n.76.

19. Professor Calhoun stated: "Christians may refrain from seeking to implement their faith through law because they view such an effort as inconsistent with Christianity. I am such a Christian." *Id.* at 397. Professor Calhoun's forthcoming article on his non-imposition principle similarly states that the primary roots of the principle are theological. Calhoun, *Conviction Without Imposition: A Response to Professor Greenawalt*, J. L. & RELIGION (1991).

Christian "only through the work of the Holy Spirit."²¹ I agree that God seeks "a people who freely love him and demonstrate their love through obedience,"²² and that such a people is created only by the Holy Spirit acting in the human heart. I would consequently fully support America's historical protections of freedom of belief and freedom of speech. I strongly disagree, however, that the above shared theological premises extend a non-imposition principle "to conduct."²³ Professor Calhoun claims to be a Christian in the Reformed tradition;²⁴ yet, there is little or no support within that tradition for the extension of the non-imposition principle to all conduct.²⁵

A sufficient response to Professor Calhoun's position requires a theological examination of natural law, God's law, and the State. This examination will reveal that Professor Calhoun's reliance on a "secular purpose" is inconsistent with a Christian world view, and particularly with a Reformed Christian world view. In addition, Professor Calhoun has apparently failed to account for the richness of Christian teaching on the multiple functions of God's law.

The following therefore represents my position on state enforce-

21. *Id.*

22. *Id.* at 398 (quoting Calhoun, *supra* note 19).

23. *Id.* at 397.

24. *Id.* at 386.

25. Professor Calhoun's position is more consonant with Anabaptist, than with Reformed, tradition. Many Anabaptists have believed that it is sinful for a Christian to be a magistrate, or otherwise participate in political or military affairs, because a Christian is not permitted to use force. Anabaptists have agreed that government is necessary to restrain those outside of the church, but still believed that Christians are forbidden from performing this function. *E.g.*, The Schleithem Confession, art. 6 (1527), reprinted in J. LEITH, CREEDS OF THE CHURCHES 282, 287-89 (3d ed. 1982). Calvin clearly rejected the Anabaptist position. 2 J. CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION bk. IV, ch. XX, §§ 2, 5, 7, 10-12 & nn.7, 18, 30 (J. McNeill ed. 1960). Professor Calhoun, like the Anabaptists, believes that the use of force and the Christian faith are incompatible. Professor Calhoun, however, allows the Christian to participate in the coercion and force of the state so long as the purity of the faith is preserved through the existence of a "secular" motivation. The Anabaptists would correctly disavow this position. It is certainly possible that God would command that Christians not use force, either generally or in specific situations. It is logically absurd, however, that the God portrayed in scripture would command that Christians use "secular" justifications for actions. God does not command that we not obey or not follow God; rather, God commands that all we do and think be in response to Him. There simply is no such thing, in Christian terms, as an introspectively "secular" reason to use force. The Anabaptist therefore concludes, given his premise about the incompatibility of Christianity and force, that the Christian cannot participate in force. Professor Calhoun must choose between the Anabaptist and Reformed positions; his marriage of the two positions, however much weighted toward the Anabaptist, cannot work.

Professor Calhoun may mean that God permits the Christian to use force only in certain circumstances, such as when the person or property of another is threatened. If so, the term *secular* is vague and inaccurate, because the motivation of protecting the person and property of others is commanded by God and therefore cannot be described as "secular." The term *secular* avoids the fundamental and difficult question: When does God command or approve the use of

ment of God's law. The differences and similarities between my position and that of Professor Calhoun will be apparent. The issue, of course, is not one of personalities, but rather of conformance to the criterion that Professor Calhoun and I jointly embrace: God Himself, as He has revealed Himself to us, in particular through his inerrant scriptures and also through the generally reliable (but fallible) teachings of His church. The text will therefore be liberally supported by citations to the sources which Professor Calhoun and I jointly acknowledge as authoritative.²⁶

III. DEFINING NATURAL LAW

The requisite and defining elements of natural law are its objectivity and its binding character. The statement that natural law is objective and binding means essentially that natural law applies to all human subjects regardless of whether they accept or acknowledge natural law. Objectivity suggests that natural law is not merely the subjective creation of individual human persons, but instead equally binds all

26. My use of sources reflects my view that scripture is the preeminent authority and that church tradition is a very significant tool in the proper interpretation of scripture. We all tend to be blinded by the prejudices and concerns of our own time and culture. Christianity, however, is a worldwide religion of great age. It is therefore extremely useful to examine the views of the great Christian thinkers of other ages and places. A conflict between contemporary thinking and the great weight of church tradition usually reflects a flaw in contemporary thought. Certainly, I would reject the view that there is something unique about the modern or postmodern world that justifies a large-scale rejection of prior Christian teaching. This sort of arrogance is simply a kind of narrow parochialism.

My use of sources therefore reflects an attempt to gain wisdom from the best of Christian thought, without succumbing to the unmanageability of a complete survey of Christian thought. I rely heavily on the work of Augustine, Aquinas, and Calvin because these theologians are generally acknowledged as the best, or at least most important, Christian theologians, and because each represents an important era or movement in Christian teaching. Augustine is generally considered the greatest of the Church Fathers and is highly respected by both Roman Catholic and Protestant theologians. Thomas Aquinas is generally considered the most important theologian of the medieval church, as well as the most influential theologian within Roman Catholicism. John Calvin is generally acknowledged as the greatest theologian of the Reformation. Although Martin Luther is certainly a central figure of the Reformation, Luther never produced a systematic theology comparable in influence to Calvin's *Institutes of the Christian Religion*. In addition, I often rely on other sources reflective of the Reformed tradition shared by Professor Calhoun and me. My frequent citations of the *Westminster Confession of Faith* reflect its preeminence both as a classic statement of the Reformed Faith, and as "the most influential doctrinal symbol in American Protestant history." 1 S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 177 (1975). In addition, I cite a number of twentieth century Reformed theologians.

The Anabaptist tradition generally teaches that Christians should have little or no involvement with the state. I certainly respect the Anabaptists as brother Christians, but believe their theology of the state to be contrary to scripture, as well as contrary to the great weight of Christian tradition. This article makes no effort to explicitly refute or address the Anabaptist position. I have, however, noted that Professor Calhoun's non-imposition principle is an unsuccessful combination of Reformed and Anabaptist views that generally would be rejected by both Reformed and

human persons. Objectivity also suggests that the binding character of natural law does not stem from human will or human power, but rather from a source with the moral authority to demand obedience. Natural law, then, is morally compelling law, which does not depend upon human will, human consent, or human enactment for its legitimacy. The claim that natural law is morally compelling requires natural law systems to make an ontological or metaphysical claim that links the good and the true, the realm of values and the realm of being. Natural law, in other words, implicitly rejects the fact-value distinction through its claim that moral statements can be evaluated as true or false. The standards of natural law must ultimately emanate from the realm of being in order to maintain their objective and binding character.²⁷

Natural law theory has traditionally included two possible ontological sources. As the name indicates, "nature," and in particular "human nature," has often been cited as the source of natural law. In order to infer an "ought" from an "is," a moral principle from a factual statement, natural law theories have stated that human nature is inherently purposeful or moral. Given the premise that human nature has an inherent telos or purpose, it becomes possible to reason that acts which further this telos or purpose are lawful, and acts that denigrate this telos or purpose are unlawful. The concept of lawfulness and unlawfulness merges with the concepts of morality and immorality, once human nature is acknowledged to be inherently goal-oriented.²⁸

27. I certainly recognize that others would give contrary definitions of natural law. Nonetheless, my definition of natural law as that which morally binds all human beings, regardless of human will, is common. Thus one text describes the "central assertion" of most natural law theories as "the belief that there exists in nature and/or human nature a rational order which can provide intelligible value-statements independently of human will, that are universal in application, unchangeable in their ultimate content, and morally obligatory on mankind." P. SIGMUND, *NATURAL LAW IN POLITICAL THOUGHT* viii (1971). The view that God's law, or natural law, is present within the human heart and morally binds all human beings is common within Christianity. See, e.g., *Romans* 2:14-15; T. AQUINAS, *SUMMA THEOLOGICA*, pt. 1 of pt. 2, Q. 91, art. 2 at 996-97; Q. 94, art. 4-6 at 1010-13; Q. 96, art. 4 at 1019-20 (Benzinger ed. 1947); ST. AUGUSTINE, *CONFESSIONS*, bk. II, § 4, at 47 (R. Pine-Coffin trans. 1961) (God's law is written in men's hearts and cannot be erased by sin); I J. CALVIN, *supra* note 25, bk. II, ch. VIII, § 1 & n.5 (Calvin employs traditional view of Ten Commandments as expressing and clarifying the natural law engraved on all hearts); *Westminster Confession of Faith*, ch. XIX, §§ II, V, *reprinted in* 3 P. SCHAFF, *THE CREEDS OF CHRISTENDOM* 640-41 (4th ed. 1919) (God's moral law binds all human beings).

The rejection of the fact-value distinction, or the existence of meaningless "brute" fact, is necessary to the integrity of the Christian faith. This latter point has been particularly emphasized in presuppositional apologetics. See C. VAN TIL, *THE DEFENSE OF THE FAITH* 96-150 (3d ed. 1967).

28. See, e.g., A. MACINTYRE, *AFTER VIRTUE* 57-59, 83-84 (2d ed. 1984) (arguing that fact-value distinction disappears in the context of a teleological description of human life); P. SIGMUND, *supra* note 27, at ix (search for purposive order in nature and man represents common

Along with the acknowledgment of a human telos, natural law theories usually presume a relatively complex human nature with a relatively inflexible method of functioning. Thus, acting against natural law violates both the built-in telos of human nature and the built-in functioning of human nature. Charles Rice explains natural law theory by comparing a human being to a car:

Suppose you saw your friend, Freddy, with the hood of his car up, holding a can of oil in one hand and a can of molasses in the other, and you asked, "What are you doing?" Freddy answers, "Trying to make up my mind, which one to put in my car, oil or molasses." If you were a real friend of Freddy, what would you say? Would you say, "Freddy, how do you *feel* about it?" No, what you would say is, "Freddy, you should do good by your car. And the good is that which is in accord with the nature of the thing. Oil is good for cars. Molasses isn't." "Yeah, but this is a Chevy." "Freddy, it doesn't make any difference. Cars are all the same." "Is that right? Well, who are you to tell me what to do with my car?" "If you don't believe me, Freddy, look in the glove compartment at the manufacturer's directions." . . . So Freddy looks at the owner's manual and sees, on page 10, "Use oil—Do not use molasses." Freddy says, "That's what it says, alright. But wait a minute. Whose car is this? It's my car. (It's my body, etc.) They can't push me around. I'll do what I want with my own car." So Freddy puts in the molasses. He is sincere. He is liberated. He is pro-choice. And he is a pedestrian. Why? Because, whether we are talking about automobiles, human beings, or society, the natural law is the story of how things work.²⁹

The mere fact that human beings, like cars, function most efficiently in certain ways would not really make natural law binding without an accompanying telos, which at minimum is the morally binding commandment to act for the good and in accordance with nature. Absent this telos, it could be legitimately asked why human beings were morally bound to act in accordance with their most efficient functioning. To put the matter most starkly, one can ask why a human being should not be morally permitted to commit suicide, despite the fact that such act destroys all functioning (at least on a temporal level). Why should a human person be bound to function at all, let alone efficiently, merely because they have been given a certain nature? It is therefore apparent that a mere claim that human nature intrinsically functions most effectively under a certain regime of practices is in itself an incomplete basis for natural law.³⁰

29. Rice, *Some Reasons For a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 563 (1989).

30. See Wright, *Legal Obligation and the Natural Law*, 23 GA. L. REV. 997, 1011-12 (1989) (many natural law theories cannot successfully create an obligation to obey nature).
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A common answer to this question of telos, or binding commitment to act in accord with nature, is to find the fulfillment of nature and telos in a source that transcends nature. Thus, even the Roman Cicero found the ultimate source of nature in God.³¹ It has been argued that a theistic God is the only possible source of a binding moral obligation to obey nature, because only the attributes of a theistic God make obedience truly obligatory.³² Presuppositional Christian Apologetics asserts that the point of contact between the Christian and non-Christian is the inherent (but suppressed) knowledge of every human being "that he *is* the creature of God and responsible to God."³³ Christianity asserts that God is both the original Creator of nature and that He also continually sustains, guides, and controls that nature.³⁴ Christianity views humankind as specially related to, and responsible to, God, in that humankind was created in the image of God.³⁵ Christianity teaches that the telos of humankind and human nature is found in God.³⁶ Therefore, to the extent that God has written His law into human nature, humankind is bound to act in accordance with nature.³⁷ Obedience to nature constitutes obedience to God. The moral necessity of obedience to God, moreover, has multiple and compelling justifications, so long as the following Christian presuppositions are accepted:

- (1) God created humankind and all of creation.³⁸
- (2) God sustains the very existence of humankind, and of all of creation, from moment to moment.³⁹
- (3) God rules over His creation, including humankind, from moment to moment.⁴⁰
- (4) God is omnipotent,⁴¹ omniscient,⁴² entirely true,⁴³ and completely good.⁴⁴

31. CICERO, *THE REPUBLIC*, bk. III, ch. XXII (C. Keyes trans. 1928); CICERO, *LAWS*, bk. I, chs. V-X, bk. II, ch. IV (C. Keyes trans. 1928).

32. Wright, *supra* note 30, at 1013-16.

33. C. VAN TIL, *supra* note 27, at 94.

34. E.g., *Genesis* 1:1; *Acts* 17:24-28; *Hebrews* 1:3; *Westminster Confession of Faith*, chs. IV-V, reprinted in 3 P. SCHAFF, *supra* note 27, at 611-14.

35. *Genesis* 1:27; 9:6.

36. See, e.g., ST. AUGUSTINE, *supra* note 27, bk. I, ch. 1, at 21 ("[Y]ou made us for yourself and our hearts find no peace until they rest in you.").

37. See, e.g., *Romans* 2:14-15.

38. *Genesis* 1-2.

39. *Acts* 17:28; *Hebrews* 1:3; ST. AUGUSTINE, *THE CITY OF GOD*, bk. XII, ch. 2, at 248-49 (Fathers of the Church ed. 1962); *id.* ch. 5, at 252-53.

40. *Psalms* 135:6; *Daniel* 4:34-35; *Acts* 17:25-26; ST. AUGUSTINE, *supra* note 39, bk. V, preface & chs. 1-11, at 241-266; I J. CALVIN, *supra* note 25, bk. I, ch. XVI, at 197-210.

41. *Psalms* 135:6.

42. *Job* 37:16; *Psalms* 94:9-11; *Isaiah* 40:27-28.

43. *John* 14:6; 1 *John* 5:20-21.

(5) God created humankind "in the image of God,"⁴⁵ therefore specially making humankind accountable to God.

(6) The law of God is perfect, trustworthy, right, radiant, holy, righteous, and good.⁴⁶

God therefore is the ontological basis for natural law, insofar as God is both truth and goodness in being. There can be no point of reference from which human beings, with their limited knowledge and intellect, can legitimately question the wisdom or goodness of God's law once the traditional attributes of God are accepted.⁴⁷ In addition, an important aspect of humankind being made in the image of God is that humankind is inescapably bound to God. Though all of creation is created by and for God, the making of humankind in God's image suggests that God is the ultimate telos of humankind in a particularly compelling way. Thus, each human person belongs to, and is answerable to, the God whose image he bears. Human beings, in other words, are in no sense autonomous: human beings lack the attributes of being self-creating, self-sustaining, or self-defining. Human beings are created for God, rather than being created for themselves or for purposes they devise for themselves.⁴⁸

Although Christianity affords a clear basis by which humans are bound to obey God's law, it can be legitimately asked whether God's law can be discovered in nature. The very term "natural law" has sometimes been used to refer exclusively to objectively binding norms that are discoverable by human beings through nature, intuition, or reason, without regard to revelation. This kind of neat dichotomy between revelation and nature, or revelation and reason, is foreign to a fully Christian perspective. Christianity teaches that all of creation reveals the God who made and sustains it. Nature is therefore itself a part of God's revelation by which He communicates with human beings.⁴⁹ Moreover, all revelation, whether it be the physical creation, human nature, or a divinely-inspired scripture, is specially crafted by the author of humankind to be understandable by humankind. The human senses, emotions, and intellect are themselves creations of God,

45. *Genesis* 1:26-27, 9:6; *James* 3:9.

46. *Psalms* 19:7-10; *Romans* 7:12.

47. Isaiah declares: "You turn things upside down, as if the potter were thought to be like the clay! Shall what is formed say to him who formed it, 'He did not make me'? Can the pot say of the potter, 'He knows nothing'?" *Isaiah* 29:16 (New International Version (NIV)).

48. Augustine thus condemns the prideful act of the soul in seeking to become "an end to itself" rather than cleaving in obedient submission to "the very Source to which it should keep close." ST. AUGUSTINE, *supra* note 39, bk. XIV, ch. 13, at 380. Augustine similarly suggests that Adam and Eve fell because they "by pride, imagined that they were themselves the source of their being." *Id.* at 383.

49. *Romans* 1:19-20, 1 J. CALVIN, *supra* note 25, bk. I, ch. XIV, § 20, at 179.

and therefore are themselves both revelatory of God and divinely-crafted means for us to apprehend God and his commandments. From a Christian perspective there ultimately can be no neat separation between either revelation and nature, or revelation and reason.⁵⁰

The Christian scriptures, moreover, particularly teach that humankind has been given a conscience by which it is able to know the law of God, even without access to the scriptures. The key scripture in this regard is *Romans* 2:14-15:

Indeed, when Gentiles, who do not have the law, do by nature things required by the law, they are a law for themselves, even though they do not have the law, since they show that the requirements of the law are written on their hearts, their consciences also bearing witness, and their thoughts now accusing, now even defending them.⁵¹

Christianity has generally taught that this ability to know God's law is a manifestation of humankind being made in the image of God. Thus, initially Christianity appears to suggest a multiplicity of means by which humankind can know God's law, including creation, human nature, the human heart, and scripture. The complicating issue for Christian theology, however, has been the impact of the doctrine of the Fall of Man on the various means of knowing God's will. Christian theology has generally suggested that sin distorts all aspects of human nature, and even of the creation itself. At the same time, Christian theology has generally maintained that the image of God is still present in humankind after the Fall, despite the distorting of human nature by sin. Thus, *Romans* 2:14-15 speaks to the ability of human beings *after the Fall* to know the law of God. This remaining ability to know the will of God, however, is clearly subject to the distortions of sin in several ways. First, human beings choose to suppress their innate knowledge of God and of his law. This tendency to suppress the innate knowledge of God's law is a product of humankind's fallen nature, which is in rebellion against God, and which pridefully seeks self-sufficiency. Second, to varying degrees Christian theology has emphasized that even our intellectual capacities have been distorted by the effects of sin.⁵² The pervasive effects of sin suggest that creation, human na-

50. See J. FRAME, *THE DOCTRINE OF THE KNOWLEDGE OF GOD* 62-100 (1987); Frame, *The Problem of Theological Paradox*, in *FOUNDATIONS OF CHRISTIAN SCHOLARSHIP* 295, 310-20 (1976); Van Til, *Nature and Scripture*, in *THE INFALLIBLE WORD* 263 (1980).

51. *Romans* 2:14-15 (NIV).

52. See, e.g., *Genesis* 3 (the Fall of man), 9:6 (image of God surviving the Fall); *Romans* 1:18-23 (suppression of the knowledge of God and the distortion of thought due to sin); *Romans* 8:19-22 (creation in bondage to sin); *James* 3:9 (image of God surviving the Fall); ST. AUGUSTINE, *supra* note 27, bk. II, § 4, at 47; J. FRAME, *supra* note 50, at 41, 49-61; *Westminster Confession of Faith*, ch. I, art. 1; *id.* ch. IV art. 2; *id.* ch. VI reprinted in 3 P. SCHAFF, *supra* note 27, at

ture, and human reason are often unreliable means for knowing the law of God. By contrast, Christian theology, both Protestant and Roman Catholic, has generally maintained the view that the scriptures are divinely-inspired in such a way as to keep these scriptures free of error.⁵³ The Roman Catholic Church has also maintained that certain pronouncements of the Church are guided by the Holy Spirit and therefore are also free of error.⁵⁴ Protestants generally would deny infallibility to church teaching, but nonetheless would view Christian tradition, the collective mind of the whole church over the ages, as a highly reliable source.⁵⁵ Thus, scripture and Christian tradition have come to have a priority among the sources of knowledge of God's will. Indeed, these sources of revelation are considered a means of measuring and testing claims made on behalf of reason, nature, or creation, in order to purify these now-subsidary means of the distortive effect of sin.⁵⁶

The resultant controversy within Christian theology has been the precise degree to which it is possible for human beings to know the law of God, absent the scriptures and/or church teaching. At times, the term "natural law" has been reserved for those aspects of God's law that are knowable without access to either scripture or church teaching. This controversy, however, is of little practical moment for the issue of state enforcement of natural law within the United States. First, historically most Christian theologians have agreed that the Ten Commandments represent a statement of the moral law, and that this moral law is a part of the natural law in the sense that it is sufficiently knowable by human beings to be considered binding upon all human beings. The disagreement among theologians pertains primarily to the degree that sin distorts innate and reasoned knowledge of God's law. Regardless of this disagreement, however, it is generally agreed that sufficient knowl-

600, 611, 615-16; McNeill, *Natural Law in the Thought of Luther*, 10 CHURCH HIST. 211 (1941) [hereinafter McNeill, *Thought of Luther*] (discussing consistencies and inconsistencies of natural law thought from Augustine to Reformation); McNeill, *Natural Law in the Teaching of the Reformers*, 26 J. RELIGION 168 (1946) [hereinafter McNeill, *Teaching of the Reformers*].

53. See, e.g., *Westminster Confession of Faith*, ch. I, reprinted in 3 P. SCHAFF, *supra* note 27, at 600-606; *Dogmatic Constitution on Divine Revelation*, ch. III, reprinted in DOCUMENTS OF VATICAN II 118-21 (1966).

54. E.g., *Dogmatic Constitution on Divine Revelation*, reprinted in DOCUMENTS OF VATICAN II, *supra* note 53, at 111-28 (explaining Roman Catholic position regarding the relationship of tradition, scripture, and the teaching authority of the church); *The Dogmatic Decrees of the Vatican Council Concerning the Catholic Faith and the Church of Christ, First Dogmatic Constitution on the Church of Christ*, ch. IV, reprinted in 2 P. SCHAFF, *supra* note 27, at 266-71 (limited Papal infallibility).

55. E.g., TEACHING AUTHORITY & INFALLIBILITY IN THE CHURCH (1980) (Lutheran-Roman Catholic dialogue regarding the teaching authority of the church in general, and the Pope in particular).

56. E.g., I J. CALVIN, *supra* note 25, bk. I, ch. VI, § 1, at 69-70, *id.*, ch. XIV, § 1, at 160-61 (scriptures compared to spectacles).

edge of God's basic moral law exists to hold human beings morally bound to obey that law.⁵⁷ Second, in the United States, knowledge of scriptural and church standards of conduct are so widespread that discussions of finding God's law purely through conscience or reason are largely academic. Therefore, this article will use the term "natural law" in a broader sense to include all aspects of God's law that are binding upon all human beings, regardless of whether they confess a belief in God, natural law, or fixed moral standards.

IV. HUMAN ENFORCEMENT OF GOD'S BINDING LAW

The primary significance of natural law, then, is that it is binding on all human beings, regardless of their subjective and individual beliefs. These binding and universal attributes have obvious significance for the issue of state enforcement of natural law. Initially, from a Christian perspective, it must be conceded that natural law, or God's moral law, is legitimately enforceable upon all human beings. Once this fundamental point is granted, it is clear that the real issue is not *whether* natural law is enforceable, but rather *who* is charged with its enforcement, and *what* means of enforcement are employed.

Obviously, God is the preeminent enforcer of God's law. Theologically, the issue is whether God has given authority to human persons, offices, or institutions to enforce some or all of his law, and the means that God has authorized. Christian teaching throughout the ages has been virtually unanimous in declaring that the magistrate has been empowered by God with the authority to use force to enforce at least some parts of God's law. Scripturally, this teaching is often anchored in *Romans* 13:1-6:

Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, he who rebels against the authorities is rebelling against what God has instituted, and those who do so will bring judgment on themselves. For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you. For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer.

57. See generally T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 91, arts. 1-3 at 996-997, QQ. 94, 100, arts. 1-5 at 1010-1020; ST. AUGUSTINE, *supra* note 27, bk. II, § 4, at 47; I J. CALVIN, *supra* note 25, bk. II, ch. VIII, § 1, at 367-68 & n.5 (noting that Calvin's position is the "traditional one"); J. FRAME, *supra* note 50, at 41, 49-64; *Westminster Confession of Faith*, ch. I, art. 1; *id.* ch. XIX, reprinted in 3 P. SCHAFF, *supra* note 27, at 600, 640-43; McNeill, *Teaching of the Reformers*, *supra* note 52, at 290; McNeill, *Thought of Luther*, *supra* note 52.

Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience.

This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing.⁵⁸

It is important to note that the state is not the only institution given authority to enforce God's law. Thus, scripture and Christian tradition clearly teach that the church has authority to enforce God's law. The New Testament church, however, is clearly more limited in its scope of authority and its means of enforcement. First, the New Testament church has no authority, as an institution, to enforce God's law upon those who are outside of the church. Thus, the Apostle Paul declared in a passage devoted to the subject of *church* discipline: "What business is it of mine to judge those outside of the church? Are you not to judge those inside? God will judge those outside."⁵⁹ Second, the New Testament church lacks the capacity to use force, except insofar as it might be necessary to expel an individual from the church. The ultimate sanction available to the New Testament church is excommunication. Excommunication from the church is the equivalent of the death penalties of Old Testament Israel, thereby underscoring both its seriousness and the distinction between the New Testament church and the theocratic state of Israel.⁶⁰

Scripture and Christian tradition also teach that the family is ordained by God to have limited enforcement powers; thus, parents possess the responsibility and authority to discipline and teach their minor children.⁶¹ Some theologians would go beyond this initial triumvirate of state, church, and family and define additional institutions with particular spheres of authority over certain activities or persons.⁶² Such extensions may be somewhat controversial. It is striking, however, the degree to which Christian tradition has agreed that the state, the church, and the family all possess particular mandates to enforce God's law. It is important to understand that when state, church, or family enforces God's law, the human actors are agents of God and therefore means by

58. *Romans* 13:1-6 (NIV).

59. *1 Corinthians* 5:12-13 (NIV).

60. See *Acts* 3:22-23 (quoting *Deuteronomy* 18:15, 18, 19); *1 Corinthians* 5:13 (quoting *Deuteronomy* 17:7); Longman, *God's Law and Mosaic Punishments Today*, in *THEONOMY: A REFORMED CRITIQUE* 41, 47-49 (1990); McCartney, *The New Testament Use of the Pentateuch: Implications for the Theonomic Movement*, in *THEONOMY: A REFORMED CRITIQUE* 129, 140-41 (1990).

61. See *Genesis* 1:28, 2:24; *Deuteronomy* 5:16, 6:4-7; *Proverbs* 13:24; *Ephesians* 6:1-4.

62. E.g., A. KUYPER, LECTURES ON CALVINISM 90, 96 (1931) (based on lectures originally given in 1899 at Princeton University) (asserting independent spheres, such as business, science, art, and labor, exercised by institutions such as a university, an academy of fine arts, or a labor

which God Himself enforces His law.⁶³ Thus, the issue is not whether God or someone else will enforce God's law, but rather it is the means that God has appointed for the enforcement of His law. This does not mean that such human agents cannot err; indeed, magistrates, church authorities, and parents are directly accountable to God for their awesome responsibility of properly enforcing His law.⁶⁴ Moreover, scripture and Christian tradition clearly legitimate disobedience of these human agents, through a direct appeal to God Himself and His holy law.⁶⁵ Nor does this mean that God cannot enforce His law directly, without human means, either in time or on the judgment day. God clearly can and does enforce his law without human intermediaries. Scripture and Christian tradition clearly teach, however, that God has chosen to enforce his law both directly and through human means. The establishment of these human institutions for enforcement of God's law, moreover, is not a mere option, for God has given to these human institutions and offices the *responsibility* of enforcing, by given means, at least a portion of God's law. Thus, it would be *contrary to God's will* for the state, church, and family to refuse to enforce, within their legitimate authority, God's law.

It must be underscored that God is the ruler of heaven and earth, and, therefore, is the only legitimate source of authority. Authority of *any kind* is completely illegitimate, absent a grant of authority by the ruler of all creation. In addition, it must be underscored that these theological principles apply regardless of the subjective beliefs of the magistrates, nations, or families in question. The Biblical principles of state authority apply to both a pagan Roman empire and European Christendom.⁶⁶ Paul's broad statements about state authority were written in the context of a nascent Christianity facing state persecution, whose Messiah had been executed by state decree.

Thus, it is theologically incorrect to speak of a state as being "secular" or "neutral," because the state possesses all of its legitimate authority from God, and its officers are directly accountable to God. The overwhelming reality of God's rule over His creation removes the possibility of a secular or neutral domain of life. The very act of attempting to be separate from God, or autonomous from God, in the sense of

63. 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 10, at 1497 ("the magistrate in administering punishments does nothing by himself, but carries out the very judgments of God").

64. 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 6, at 1491.

65. *Exodus* 1:15-2:10; *Joshua* 2:1-15; *Esther* 4:1-5:2; *Daniel* 3, 6; *Acts* 4:1-22, 5:17-29; *Hebrews* 11:23; ST. AUGUSTINE, ON FREE CHOICE OF THE WILL, bk. I, ch. V, at 11 (A. Benjamin & L. Hackstaff trans. 1964); T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 96, art. 4, at 1019-20; 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 32, at 1520-21.

66. ST. AUGUSTINE, *supra* note 39, bk. V, ch. 21, at 291-92; 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 20, at 1499-16.

being a law unto oneself, or self-defining, constitutes the very core of human sinfulness. Adam and Eve sought this same autonomy in the serpent's promise that they would be "like God, knowing good and evil."⁶⁷ There are only two possible reactions to the rule of God: obedient submission or sinful disobedience. Neutrality or secularity are simply not possibilities within the Christian world view.

At the same time, however, the terms "secularity" and "neutrality" can be used in a technical sense to refer to the relationship between church and state, and in particular to refer to the limitations of the state's authority. These terms, however, should be viewed as technical legal terms that translate certain conclusions about church-state relations into non-theological language. The *theological* issue, however, is the scope of the state's authority to enforce God's law, given a context of God's absolute rule over all creation, God's morally binding law, and the existence of other divinely-appointed means of enforcing God's law. What is required is nothing less than a *Christian theology of the state*.

V. NOTES TOWARD A CHRISTIAN THEOLOGY OF THE STATE

Christian tradition has long taught that certain parts of God's law should not be enforced by the State. Thus, Augustine, in one of his early Christian writings stated: "The law of the people deals with acts it must punish in order to keep peace among ignorant men, insofar as deeds can be governed by man; these other sins have other suitable punishments, from which, I think, only wisdom can free us."⁶⁸

Augustine's writings only hint at the criteria to determine which aspects of God's law should be enforced by the state. Initially, one might infer from his emphasis on keeping "peace among ignorant men" that the law should only concern itself with serious physical harms to property or person. Indeed, Augustine's appeal to the non-Christian in *City of God* appears surprisingly tolerant: "[The church] has no hesitation about keeping in step with the civil law which governs matters pertaining to our existence here below. For, as mortal life is the same for all, there ought to be common cause between the two cities in what concerns our purely human living."⁶⁹

67. *Genesis* 3:1-7; see also ST. AUGUSTINE, *supra* note 39, bk. I, preface, at 18; *id.* bk. XII, ch. 6, at 253; *id.* bk. XIII, ch. 21, at 331-32; *id.* bk. XIV, ch. 4, at 353-54; *id.* ch. 9, at 372-73; *id.* ch. 11-14, at 375-84; *id.* ch. 27, at 409-10.

68. ST. AUGUSTINE, *supra* note 65, bk. I, ch. V, at 12; see *id.* at 13. Augustine's example of a "sin" that would be unpunished by the state is the killing of another person in defense of one's own life or chastity. *Id.* at 10-13. Augustine's conclusion that this act of self-defense would be punished by God as sinful is, I think, incorrect, and apparently reflects the strong influence of stoicism upon Augustine, particularly at this early period of his Christian life.

69. ST. AUGUSTINE, *supra* note 39, bk. XIX, ch. 17, at 227. Augustine also states:

https://ecommons.udayton.edu/udlr/vol16/iss2/5
 "common sense requires us to deal with the diversity of customs, laws, and traditions whereby

Augustine, however, is sometimes labeled the first theorist of the Inquisition for his overt justification of state force to crush the schismatic Donatist movement.⁷⁰ Augustine justified the use of state power to unify the church and settle doctrinal and schismatic controversies.⁷¹ It is therefore clear that his concept of "keeping peace among ignorant men" needs further definition before it can serve as a useful criteria.

Aquinas quoted Augustine to support the proposition that "human law" need not "repress all vices."⁷² Aquinas discussed a number of principles relevant to state enforcement of natural law. First, Aquinas, like Augustine before him and Calvin after him, stated that a principal function of state enforcement is to prevent those harms to others that are so serious as to threaten the maintenance of human society.⁷³ Aquinas therefore concluded that murder and theft should be punished.⁷⁴ Aquinas went beyond this easy beginning point to suggest several other criteria. Thus, Aquinas stated that law must be proportionate to its subject; thus, human law can only forbid those vices from which the majority are capable of abstaining.⁷⁵ Similarly, "[t]he purpose of human law is to lead men to virtue, not suddenly, but gradually."⁷⁶ Aquinas stated that laws that overtax the moral capacities of the people will result in greater evils being committed.⁷⁷ This latter comment suggests a process of weighing the practical good versus the practical evil of both state enforcement and nonenforcement.

Reflection on Augustine's and Aquinas' comments on state enforcement of natural law, in combination with reflection on scripture and later tradition, suggests the following principles:

(1) The primary purpose of state enforcement is to make human society possible; therefore punishment of serious harms to others, such as crimes against the person and property of others, is a primary function of the state.⁷⁸ In particular, scripture especially gives to the state

human peace is sought and maintained. Instead of nullifying or tearing down, she preserves and appropriates whatever in the diversities of divers races is aimed at one and the same objective of human peace, provided only that they do not stand in the way of the faith and worship of the one supreme and true God.

Id. at 228.

70. See P. BROWN, *AUGUSTINE OF HIPPO* 240 (1967); J. NOONAN, *THE BELIEVER AND THE POWERS THAT ARE* 19 (1987).

71. P. BROWN, *supra* note 70, at 233-43, 330-39; J. NOONAN, *supra* note 70, at 19-20.

72. T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 96, art. 2, at 1018.

73. T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 96, art. 2, at 1018; ST. AUGUSTINE, *supra* note 65, bk. I, ch. V, at 12; 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 3, at 1488.

74. T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 96, art. 2, at 1018.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 199. . . forbid . . . chiefly those [vices] that are to the hurt of others,

the responsibility for protecting innocent human life.⁷⁹ These duties of the state are not discretionary; therefore, the refusal to enact into positive law proscriptions of direct harms to the person and property of others is a direct violation by the state of God's law.

(2) The correct blend or balance of justice and mercy requires the application of Christian prudence, as both excessive harshness and excessive leniency can be harmful.⁸⁰ "Mercy" is usually a reason to refrain from applying the full measure of the enacted law to a specific person or situation, rather than a reason to refrain from enacting a portion of God's law into human law. The concept of "mercy" reminds us of the need to apply individualized discretion in applying positive law.

(3) The state's jurisdiction extends beyond crimes directly against the person and property of others. Aquinas carefully stated that the *chief* function of state enforcement is the punishment of these harms.⁸¹ This clearly implies a subsidiary role for the state beyond this narrow but necessary function. In addition, statements relating to the maintenance of the public peace or common good by writers such as Augustine,⁸² Aquinas,⁸³ and Calvin⁸⁴ are easily mistranslated by moderns into some version of liberalism's harm standard. The views of these three

without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft, and such-like."); ST. AUGUSTINE, *supra* note 65, at 12; 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 3, at 1488 (civil government provides "that humanity be maintained among men," and protects "the public peace" and "property"). Calvin, however, gave government an equal (or more important) role in establishing religion, and therefore would have rejected the view that the "primary" role of civil government is to make human society possible. *See id.* bk. IV, ch. XX, § 9, at 1495.

79. *See Genesis* 9:6. The context of this scripture is God's instructions to Noah and his family after they have survived the flood. God stated: "Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man." *Id.* (NIV). This passage is traditionally viewed as the original institution by God of civil government, because it is assumed that this act of the death penalty must be governmental in nature, requiring the creation of governmental offices. *See, e.g.,* 1 K. KEIL & F. DELITZSCH, *BIBLICAL COMMENTARIES ON THE OLD TESTAMENT* 153 (1951) (citing Luther). It is therefore particularly significant that the original creation of the state is occasioned by the need to punish homicide.

In addition, Scripture makes it particularly clear that it is a serious sin to fail to punish homicide; the only excuse for such failure is ignorance of the identity of the perpetrator. *See Deuteronomy* 21:1-9. It should be noted that though the state has a primary and nondiscretionary duty to protect innocent human life, this duty also extends to individuals. *See, e.g., Proverbs* 24:11-12.

80. ST. AUGUSTINE, *supra* note 39, bk. V, ch. XXIV, at 296-97; 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 10, at 1498-99.

81. T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 96, art. 2, at 1018.

82. ST. AUGUSTINE, *supra* note 39, bk. XIX, ch. XVII, at 226-28.

83. T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 90, art. 2, at 994 ("every law is ordained to the common good").

84. 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 3, at 1488 (civil government protects public peace).

theologians on state support of religion, and state suppression of threats to religion, suggest that they believed that the protection of the public peace and the common good require the maintenance of religion and community values.⁸⁵ We may not agree with this position, but we should at least understand the weight of tradition supporting it. It is certainly possible to take a position between the modern liberal harm standard, and the endorsement of state power to establish religion and punish irreligion and false religion. Thus, there is wisdom in the traditional position that the public peace can be significantly disturbed through conduct that is gravely immoral. This position is maintained through the traditional American doctrine, which remains black letter law, that the state's police power, or general welfare power, extends to protection of public morals.⁸⁶ Given the theological premise that the organic welfare of the people depends in part on their virtue, and the practical knowledge that conduct destructive of that virtue can occur without, in the contemporary liberal sense, "directly harming" an unwilling participant, it is logical to include within the state's power the ability to punish *conduct* that is gravely immoral. This power can be granted without giving the state the power to forcibly require religious practices.

(4) The law must take account of human capabilities. Thus, merely evil thoughts are not punishable by the state; first, because human beings cannot read minds, and second, because all human beings have such thoughts, and the state cannot punish everyone. In addition, the law cannot set its standards above the capacity of the people for virtuous conduct. Laws can only demand a level of virtuous conduct which the majority of its subjects are capable of reaching.⁸⁷

(5) Human, or positive law, although always based upon natural law,⁸⁸ must vary from nation to nation. Since human capacities vary from people to people and across time, state enforcement and positive law must vary from nation to nation, in order to lead each people grad-

85. T. AQUINAS, *SUMMA THEOLOGICA*, pt. 2 of pt. 2, Q. 11, arts. 3-4, 153-58 (Fathers of the English Dominican Province trans. 1952) (arguing some heretics should be executed by the state); ST. AUGUSTINE, *supra* note 39, bk. V, ch. 24, at 296 (Christian princes should use their sovereignty to spread true religion); 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 3, at 1488; *id.* § 9, at 1495; *see also supra* notes 70-71 and accompanying text (Augustine and state suppression of Schism and heresy).

86. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 (1987); *Lawton v. Steele*, 152 U.S. 133, 136 (1894); *Tennessee v. Davis*, 100 U.S. 257, 301 (1880); *Railroad Co. v. Husen*, 95 U.S. 465, 470-71 (1878).

87. T. AQUINAS, pt. 1 of pt. 2, Q. 96, art. 2, at 1018; *cf. Matthew* 19:3-9 (NIV) (Moses permitted divorce, despite its immorality, because "your hearts were hard").

88. T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 96, art. 4, at 1019-20 (binding nature of law always derives from God and his law); ST. AUGUSTINE, *supra* note 65, bk. I, ch. VI, at 14 ("in
Published by Commons, 1990 just and lawful which men have not derived from eternal law").

ually to virtuous conduct according to their peculiar strengths and weaknesses. Thus, God Himself acted as giver of the civil code for the Israelites, adapting that Code to the peculiarities and culture of that people. Although each nation is accountable to God, God has not chosen to play the same role as lawgiver in other nations and other times. Therefore, those entrusted with the enactment of positive law must use prudence, basing those decisions upon the fixed, but general, principles of the moral law as reflected in the Ten Commandments, and their summary, the two great commandments to love God and love neighbor. These positive laws cannot merely copy the civil code of Israel, both because certain parts of that Code are (for Christians) fulfilled in the sacrifice of Jesus Christ, and also because other parts of that law are not suitable to other peoples and other times.⁸⁹

(6) Positive law is not evil merely because it does not enact some parts of natural law; on the other hand, positive law that is contrary to the natural law is illegitimate.⁹⁰ Thus, all legitimate human or positive law must find its source in natural law.⁹¹ The distinction between a proper failure to enact a part of natural law into positive law, and an improper contradiction between natural law and human law, cannot be merely found in the distinction between act and omission. Thus, the failure to punish certain acts, such as murder, would render the laws of such a state contrary to natural law. This mere omission to punish actually contradicts natural law, both because the state is required to enforce certain parts of God's law, and also because improper failures to enforce certain laws ultimately produce a distortion in existing positive laws. For example, if one assumes that an unborn child is an individual human life, the failure to prohibit abortion is violative of natural law

89. ST. AUGUSTINE, *supra* note 39, bk. XIX, ch. 17, at 228 (diversity of customs, laws, and traditions appropriate); 2 J. CALVIN, *supra* note 25, at bk. IV, ch. XX, §§ 14-16, at 1502-05; *Westminster Confession of Faith*, ch. XIX, reprinted in 3 P. SHCAFF, *supra* note 27, at 640-42. I therefore adopt the predominate Christian and Reformed position that the civil laws of Israel should not be automatically applied to contemporary nations. The position that the civil laws of Israel are still binding is taken by certain contemporary theologians who are sometimes labeled "Reconstructionists" or "Theonomists." See, e.g., G. BAHNSEN, *THEONOMY IN CHRISTIAN ETHICS* (1977); R. RUSHDOONY, *INSTITUTES OF BIBLICAL LAW* (1973). I am certainly respectful of the positive contribution that the Reconstructionists have made, despite my disagreement with some of their basic premises. For a helpful and constructive critique of the reconstructionist position, see *THEONOMY, A REFORMED CRITIQUE* (1990). Professor Calhoun has implied that I might be a Reconstructionist. Calhoun, *supra* note 7, at 384. Hopefully this misunderstanding is now clarified.

90. Augustine stated: "The law which is made to govern states seems to you to make many concessions and to leave unpunished things which are avenged nonetheless by divine providence—and rightly so. But because it does not do all things, it does not thereby follow that what it does do is to be condemned." ST. AUGUSTINE, *supra* note 65, bk. I, ch. V, at 13. Aquinas cited this passage with approval. T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 96, art. 2, at 1018.

because the protection of human life is at the core of the responsibilities of the state. Moreover, the allowance of abortion becomes evident in positive law. Thus, when individuals seek to protect the unborn from death through abortion, the state's positive law permitting defense of third persons excludes the unborn from the class of persons that can be defended, thereby positively permitting the punishment of these "rescuers." The trespass or other law by which rescuers of the unborn are arrested are in themselves just laws; the definitional exclusion of the unborn from the state's necessity defense, however, is an illegitimate positive law consequent to the failure to criminalize abortion.⁹² Thus, one cannot determine this critical distinction between legitimate and illegitimate failures to enforce natural law based on the simple distinction between omissions to punish, and laws contrary to natural law. Instead, it is necessary to have a complete theology of the responsibilities and purposes of the state.

(7) Decisions regarding state enforcement must take account of the practical good versus practical evil that would result from either state enforcement or state nonenforcement. This criterion is implied by Aquinas' statement that the law must not demand too much from the people, lest the sternness of the law provoke them to greater evil.⁹³ It must be noted, however, that the practical "good" and "evil" to be weighed are not subjectively defined, but rather relate both to God's moral law, and to the functions of the state. For example, although scripture teaches that all laws produce sin because the sinful nature further rebels when confronted with the limitations of law,⁹⁴ this increase of evil, if it be merely mental, is not relevant to the present comparison of *practical* good and evil. The state, after all, has no jurisdiction over purely mental evil, however much God may condemn it. God, moreover, has reasons for bringing to the surface the inherent sinfulness of humanity through the imposition of law.⁹⁵ Rather, the good and evil to be weighed relate to those areas within the jurisdiction

92. Strictly speaking, the absence of a law punishing abortion does not necessarily exclude the unborn from those persons who can be protected under the necessity doctrine. Indeed, it is entirely possible that *Roe v. Wade*, 410 U.S. 113 (1973), to the extent that it still governs this area, precludes criminal prohibitions of abortion but does not preclude consideration of the humanity of the fetus within the necessity defense. *Cf. Webster v. Reproductive Health Servs.*, 492 U.S. 490, 499 (1989) (states permitted to afford some protections to the unborn). Nonetheless, the tendency of many courts to refuse to consider the necessity defense in the context of physical obstruction of access to abortion facilities indicates the tendency of an omission to cause a distortion in positive law.

93. T. AQUINAS, *supra* note 27, pt. 1 of pt. 2., Q. 96, art. 2, at 1018.

94. See, e.g., *Romans* 7:7-12.

95. See, e.g., *id.* 7:13; see also *infra* note 100 and accompanying text (discussing the first

of the state, with the greatest weight being given to the primary state functions of protecting human life and punishing direct attacks upon the person and property of others.

(8) The prevention of a sinful act is good, both for the society at large and for the individual who refrains, even if such restraint is merely external, having been produced by the fear of punishment, and produces no change in the human heart. The benefits to society of such restraint are obvious; society itself would be impossible if the depravity of the human heart was not forcibly restrained.⁹⁶ It is often overlooked, however, that such restraint is also in the interests of the individual. The punishment for sin is to be subject to more and greater sin, as each sinful act leads one deeper and deeper into depravity.⁹⁷ It is a benefit, rather than a burden, that one was spared from slipping further and further into this pit of depravity. This benefit is particularly great for those who later repent and become Christians, because one's prior sins weigh particularly heavy upon the repentant and tender heart of a believer. Sinful behavior, moreover, forms destructive habits that require great effort and pain to alter, even for those whose hearts have been regenerated by the Holy Spirit.⁹⁸ Even those who never inwardly repent are benefitted by being spared of an even greater participation in evil and depravity than otherwise would have occurred.

(9) Priority of harms must be honored by human law. God's law condemns all sin, yet requires that certain harms be considered greater than others. Thus, the taking of human life is the greatest harm, and serious harm to a person is more serious than serious harm to property. These priorities of harm are pervasive, applying to issues such as proportionate punishment and the allowance of a lesser harm (such as trespassing) to prevent a greater harm (such as loss of human life).⁹⁹

VI. THE MULTIPLE FUNCTIONS OF GOD'S LAW APPLIED TO THE THEOLOGY OF THE STATE

The above considerations constitute the seeds of a theology of the state. The purposes of the state, however, cannot be fully understood without an understanding of the functions of God's law.

Reformed theology has traditionally emphasized three functions of

96. 1 J. CALVIN, *supra* note 25, bk. II, ch. VII, § 10, at 358-59; 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 2, at 1487-88.

97. See, e.g., *Romans* 1:18-32; ST. AUGUSTINE, *supra* cote 39, bk. XIV, ch. 15, at 384-86.

98. 1 J. CALVIN, *supra* note 25, bk. II, ch. VII, §§ 10-11, at 358-60.

99. J. FRAME, *MEDICAL ETHICS* 10 (1988). Reformed thought rejects the view that one must choose the "lesser of two evils." Rather, there is always a way to act in any human situation without sinning. Therefore, the prioritization of harms is not a way to choose the "lesser of two evils" but rather is a way of obeying God, who has given a priority to his commandments. *Id.* at 8-

God's law. First, God's law is a standard to which we are accountable, and by which we become aware of our sinfulness. God's law condemns us, and drives us to Christ, by whom we may be saved from ourselves. This first function of the law therefore relates primarily to salvation.¹⁰⁰

Second, the law serves as a restraint on those who are unregenerate.¹⁰¹ This restraint is necessitated by the Fall, for humankind is so evil that human society would be virtually impossible if certain evils were not forcibly suppressed.¹⁰² This function of the law relates primarily to mortal life, and is one manifestation of God's care for all human beings, regardless of their beliefs or conduct. Thus, Jesus, when urging love of one's enemies, noted: "[Y]our Father in heaven. . . . causes his sun to rise on the evil and the good, and sends rain on the righteous and the unrighteous. . . . Be perfect, therefore, as your heavenly Father is perfect."¹⁰³ Calvin implicitly compared government to God's gifts of sun and rain when he stated that civil government's function "is no less than that of bread, water, sun, and air."¹⁰⁴ It is apparent that the state is an important means by which this second function of the law, that of restraining evil, is accomplished. The state, then, is a gift of God to all human beings which is as necessary to mortal life as are God's gifts of sun, rain, and food.

The function of restraining evil conduct, it must be emphasized, is helpful both to society generally, and to those restrained. Sinful acts are self-destructive acts. It is generally a benefit to be restrained from committing evil acts, even by force or fear of punishment, because evil acts have serious temporal consequences for the actor. The ultimate punishment for sin is to be led deeper into sin and depravity.¹⁰⁵ Those who are restrained from sin are therefore slowed in their descent into depravity and spared the temporal consequences that would otherwise have followed from their actions.

The third function of the law is to serve as a guide for Christians. This third use does not involve force, because it pertains to those who

100. 1 J. CALVIN, *supra* note 25, bk. II, ch. VII, §§ 1-9, at 348-58 & n.14 (quoting Augustine).

101. *Id.* §§ 10-11, at 358-60.

102. Regarding the necessity of the magistracy, Calvin stated: "For since the insolence of evil men is so great, their wickedness so stubborn, that it can scarcely be restrained by extremely severe laws, what do we expect them to do if they see that their depravity can go scot-free—when no power can force them to cease from doing evil?" 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 2, at 1487-88.

103. *Matthew* 5:45, 48 (NIV).

104. 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 3, at 1488.

105. ST. AUGUSTINE, *supra* note 39, bk. XIV, ch. 15, at 386 (punishment for humankind's original disobedience was "more disobedience"); see also *Romans* 1:18-32.

voluntarily desire to live in accordance with God's will.¹⁰⁶ Although this use of the law pertains to mortal life, it can be largely accomplished by the family and church, without the assistance of the state. However, it should be noted that the laws enacted by the state can play an educative function, and, in this way, the state may contribute to this third function of the law.

This review of the three functions of God's law indicates that the primary function of the state is to fulfill the second function of the law: that of forcibly restraining evil and thereby making human society possible. Reformed theology has long characterized the state, in its fulfillment of this function, as a means of "common grace:" a gift of God given to all human beings.¹⁰⁷ The implications of this view, however, have not been fully explored. If government is to fulfill Christ's admonition to "be perfect" by benefiting the just and unjust alike, the implication is that government cannot discriminate based on religious belief. God sends benefits even to his enemies; government is a benefit, like the air, sun, and rain, which God gives to both his servants and his enemies.

Calvin, in company with virtually the entire tradition of the church since Augustine, had given to the state both the task of benefiting the just and unjust through the maintenance of social order, and also the task of establishing religion by punishing open opposition to Christ and His church.¹⁰⁸ It is possible, however, that these two functions are contradictory. For example, the admonition to treat the believer and nonbeliever alike suggests that religious tests for governmental office are improper; the state's duty to rightly establish religion, by contrast, seems to require that the magistrate be a mature Christian.

I therefore would break with Calvin and earlier writers by emphasizing the duty of the state, wherever possible, to be a means of common grace by treating alike the believer and nonbeliever. If the rain and sun are given equally to the just and the unjust, then the benefits of the state also should fall equally upon the godly and the ungodly.

The principle of equal treatment, however, in no way requires a disconnection of positive law from God's law. God's law applies equally to the believer and nonbeliever, and remains the only source of *legiti-*

106. I J. CALVIN, *supra* note 25, bk. II, ch. VII. §§ 12-17, at 360-66. The Christian, of course, still retains a sinful nature during this mortal life, and therefore may benefit from the forceful restraint and fear basic to the second purpose of the law. Ultimately, however, the desire of the regenerate nature to love and obey God should be the overriding motivation in the life of the Christian.

107. See, e.g., L. BERKHOF, *SYSTEMATIC THEOLOGY* 441 (1941) (quoting Belgic Confession).

108. *Id.* 445. XX, § 3, at 1488; *id.* § 9, at 1495.

mate law. The state does not become theologically "secular" or "neutral" when it strives to benefit all, but rather remains an instrument of God's grace and God's justice. Equal treatment certainly does *not* mean that the sinful human drive toward self-definition of morality is made the foundation of state policy. It is good for both the just and the unjust that they be under God's law; it is necessary for both that destructive acts be punished so that human society may flourish.

It would certainly be possible to argue that basing the legitimacy of human or positive law upon conformity with God's law improperly favors Christians, who accept God's law as true and good. The flaw in this argument is that it repudiates God's law based on a vain attempt to equalize human beings separate and apart from God. True human equality, as both Augustine and our Declaration of Independence declare, is grounded in God.¹⁰⁹ Apart from God, who is the only source of true and binding norms, the enforcement of any law represents the raw imposition of one will upon another—the very antithesis of equality. Apart from God, there is no ontological basis to bind any human being to obey any law.¹¹⁰ In the absence of a morally binding commitment to obey the law, human law becomes a part of the battle of wills that characterizes all amoral struggle for power. There arguably is a kind of "equality" in all power struggles, but it is certainly not a kind of equality that moral persons would seek. The weak are "equally" entitled to engage in power struggles, but generally lose. Breaking the link between God's law and human law is therefore akin to throwing the weak and helpless to the sharks, because it allows power, rather than justice, to rule in the realm of mortal life. It is therefore necessary to base human law upon God's law, even if this appears in some sense to favor those who love and accept God's law over those who reject and despise it.

VII. FURTHER IMPLICATIONS OF THE CHURCH-STATE-FAMILY TRIUMVIRATE

The existence of at least three divinely-established institutions with the authority to enforce God's law suggests limitations on the jurisdiction of each. The jurisdiction of the state is necessarily limited by the need to refrain from interfering with the functioning and jurisdic-

109. Augustine stated: "Sinful man hates the equality of all men under God and, as though he were God, loves to impose his sovereignty on his fellow man." ST. AUGUSTINE, *supra* note 39, bk. XIX, ch. 12, at 215. The *Declaration of Independence* states: "We hold these truths to be self-evident, that all men are *created* equal, that they are endowed by their *Creator* with certain unalienable Rights. . . ." (emphasis supplied).

110. Smolin, *supra* note 4, at 347-60 (laws not based on objective norms are inherently unstable). *Origins*, 900 (theistic God as only possible source of binding norms).

tion of the church and family.¹¹¹ Thus, it would be improper for the state to appoint church officials, or otherwise attempt to exercise authority over the church. Similarly, it would be improper for the church, as an *institution*, to appoint governmental officials, or otherwise exercise authority over the state. These limitations refer to church and state as institutions, and church officials and state officials as officers. These limitations in no way, however, prevent individual Christians from becoming magistrates and seeking, consistent with the limitations of that office, to enforce God's law. The separation of church and state is theologically mandated; the separation of government and religion is theologically impossible, because the rule of God permeates every aspect of life.

My position on the institutional separation of church and state is at odds with many historical practices and positions, from Augustine's reliance on state power to settle church disputes, to the Western medieval attempts to elevate the church over the state, to European Christendom's state churches. These historical practices apparently occasioned many abuses of power and contributed to the secularization of contemporary Europe. The separate spheres of state, church, and family exist in part to check the human propensity to seek absolute power. Human implementation of God's law will always be imperfect and marred by sin; the existence of separate spheres of authority operate as a system of checks and balances limiting the damage that can be done by any one human office.¹¹²

111. A. KUYPER, *supra* note 62, at 78-109.

112. Professor Calhoun noted that enforcement of God's law by human means will always be imperfect, and indeed can often be seriously unjust. Calhoun, *supra* note 7, at 392. Professor Calhoun acknowledged my apparent awareness of this difficulty, but chided me for failing to appreciate its significance. *Id.* at 393-94. Professor Calhoun concluded from this difficulty that the state's laws should be based on "secular" considerations. Professor Calhoun's reliance on the flaws of human implementation to justify this position suggests a radical conclusion: since human implementation is so often flawed, humans should never enforce God's law against other humans, even within the church and family. This conclusion is implicit in Professor Calhoun's mandate that "the consequences of our failures [be] confined to the spheres of our own lives." *Id.* at 393 n.78. Despite this rhetoric, I believe that Professor Calhoun would acknowledge the legitimacy of enforcing God's law within the family and church. Thus, he would acknowledge the necessity of church officers and parents enforcing discipline over church members and children, despite the flaws and risks of human implementation. Why, then, should the state be any different?

The point of comparing human implementation by the state, to human implementation by the family and church, is to demonstrate that Professor Calhoun's premise regarding the flaws of human implementation cannot in itself support his conclusion regarding state enforcement of God's law. Indeed, government by its very nature is subject to the inherent risks and flaws of human implementation, regardless of the source of the principles it enforces. These inherent flaws of human action and human government therefore cannot logically be used to malign any particular principle or source of law, whether it be God, democracy, consent, or marxism. Professor Calhoun himself provides an example. Although he relies on consent to legitimate American gov-

Scripture and Christian tradition teach that the family is a "natural" institution created by God prior to the Fall. The church, or at least the function the church performs of gathering individuals together into collective worship and service, also predates the Fall. The family and church are profoundly affected by the Fall, yet carry on functions that would have been useful, necessary, and good even if the Fall had never occurred. By contrast, the state, or magistracy, is necessitated only by the Fall and the consequent necessity of forcible human means to restrain evil. If there had not been any Fall, there would not have been any need for the magistracy or state as we know it; rather, the family and church would have been sufficient means to fulfill God's purposes for humankind. Human sinfulness therefore creates the occasion and context for the creation of the state. The state is not thereby itself sinful, but rather is a remedy to make human society and mortal life possible within a world tainted by human depravity. There is a sense in which the state, because it is necessitated by the Fall, is an "unnatural" institution, particularly as compared to the family and the church. The state involves a kind of human authority that unnaturally requires human obedience to human authority; by contrast, the obedience required within the family and church is a more "natural" obedience. Our obedience to the magistrate is commanded by God and therefore constitutes obedience to God Himself; at the same time, the fact that we must obey other human mortals unrelated to us by the bounds of family or church is itself an unfortunate consequence of sin.¹¹³

cided *Roe v. Wade*, 410 U.S. 113 (1973). Calhoun, *supra* note 7, at 391 n. 73. Since Professor Calhoun espouses the pro-life position, he must admit that the abuse of the principle of consent in *Roe v. Wade* has led to the legal killing of millions of innocent, defenseless human persons. This admission demonstrates that the principle of consent is just as subject to the flaws and risks of human implementation as is the principle that human law be based on God's law. Thus, the ultimate legitimacy of authority must be found in its governing principle, whether it be God, consent, or some concept of justice, rather than in the best possible implementation of that governing principle. Certainly an effective implementation of the principle that a despot's will is to rule does not legitimize that despot's authority.

Ultimately, the only legitimate source of authority for a Christian is God. Human beings cannot secure legitimacy merely by consensus or consent. Even Professor Calhoun, who relies on consent to legitimate government, acknowledges that "a decision, even if based upon consensus, is true or correct in the absolute sense only to the extent that it conforms to God's will." *Id.* at 392 n.74. Professor Calhoun, therefore, cannot rely on the flaws of human implementation to bar the state from enforcing God's law. Rather, he must describe, in theological terms, the extent and limits of the authority that God has given to the magistrate. Unfortunately, Professor Calhoun's reliance on a "secular" purpose to validate governmental action is an inherently nonsensical and vague way of discussing this underlying theological question.

113. ST. AUGUSTINE, *supra* note 39, bk. XIX, chs. 14-15, at 222-24; A. KUYPER, *supra* note 62, at 80. St. Augustine stated:

This family arrangement is what nature prescribes, and what God intended in creating man: "let them have dominion over the fish of the sea, the birds of the air, the cattle, over all the wild animals, and every creature that crawls on the earth." *Genesis* 1:26. God

The relative "unnaturalness" of the state helps us to understand the appeal of anarchy, and of theories that attempt to justify state power through various theories of consent. Anarchy as a philosophy constitutes a vain attempt to return us to the Garden of Eden, when human society was possible without human government. It appeals to our intuitive repulsion at being commanded by the distant and cold power of the state. Consent theories try to allay this repulsion by a pretense that authority can be legitimated by consent. As I have indicated elsewhere, theories of consent cannot really legitimate governmental authority.¹¹⁴ It is important to distinguish the argument, made even by Augustine, that a virtuous people deserve the right to representative government,¹¹⁵ from the vain attempt to base the legitimacy of all governmental power on the supposed consent of every person. Even if relatively representative and consensual forms of government are superior to alternative forms of government, the consent of all persons can never legitimate a law that is fundamentally unjust.¹¹⁶ Ultimately, the legitimacy of law and government can only derive from God and cannot be produced by humankind alone.¹¹⁷ In addition, in our fallen world there is no way to fully attain the consent of all citizens; inevitably, there will be those who believe that they did not consent, whether it be to a particular part of a political system, or to the system as a whole. Even when people consent, moreover, they do so in light of the alternatives. Given the choice of being fair game for every wandering murderer, thief, and rapist, or consenting to be governed by a magistrate, it is not surprising that people consent, and yet retain some sense of resentment at being forced to obey. Therefore, consent theories in practice fail to remove the indignity of being commanded by the necessarily distant and cold arm of state power.

Understanding the unnaturalness of state power, and the pervasive human resentment of such power, is important to evaluating its limitations. Given that the family and church are more natural institutions

wanted rational man, made to His image, to have no dominion except over irrational nature. He meant no man, therefore, to have dominion over man, but only man over beast. So it fell out that those were holy in primitive times became shepherds over sheep rather than monarchs over men, because God wishes in this way to teach us that the normal hierarchy of creatures is different from that which punishment for sin has made imperative.

ST. AUGUSTINE, *supra* note 39, bk. XIX, ch. 15, at 223.

114. Smolin, *supra* note 4, at 353-60.

115. ST. AUGUSTINE, *supra* note 65, bk. I, ch. V, at 13-14.

116. T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 96, art. 4, at 1020 (quoting St. Augustine with approval); ST. AUGUSTINE, *supra* note 65, bk. I, ch. V, at 11 ("a law that is not just is not a law").

117. T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 96, art. 4, at 1019 ((citing *Proverbs* 8:15)

than the state, such institutions should retain a priority of authority, within their respective jurisdictions, against state power. The state can protect the family and church; it is vital that the state not interfere with these primary human institutions. The exact line of demarcation between "protecting" the family and church, and improperly interfering with them, is not always clear. Nonetheless, it will often be clear when that line is crossed, and state power has illegitimately interfered with these more basic and more natural human institutions.

The danger of state power is that it will cease to be a remedy for human sinfulness, and instead will become primarily an instrument of human sinfulness. The remedy does at times become worse than the disease. One of the surest signs that this has occurred is when the state clearly interferes with the proper and natural functioning of the family and church. The remedy for such clear abuse, as delineated by scripture and church tradition, is civil disobedience, and even revolution.¹¹⁸

VIII. CONCLUSION

There are a multiplicity of factors to consider in determining which part of God's law should be enforced by the state. Most prominent among the factors are the primary function of the state as a restraint upon evil that would be destructive of human society; the need to make law proportionate and suitable to its subjects; the requirement that the state generally treat the believer and nonbeliever equally; and the existence of the family and church as separate human institutions authorized to enforce God's law. Despite the multiplicity of factors, some applications are clear: the state, for example, *must* protect innocent human life. Given the multiplicity of factors, and the necessity of evaluating the capacities of the particular subjects of a law, it is clear that much depends on the application of prudence and wisdom. The task of a legislator, governor, or judge, like that of a pastor or parent, cannot be *reduced* to a rule book or manual of procedures, even though there may be applicable rules and procedures.

This conclusion is both humbling and liberating. Acknowledging the need for prudence and wisdom is humbling, because we recognize our own lack of these precious commodities, and also recognize our need to ask God, the source of wisdom, to bestow this gift upon us. The conclusion is liberating because it allows the Christian to act Chris-

118. For scriptures concerning civil disobedience, see *supra* note 65. Regarding Christian tradition, see T. AQUINAS, *supra* note 27, pt. 1 of pt. 2, Q. 96, art. 4, at 1020 (unjust laws often not binding in conscience); ST. AUGUSTINE, *supra* note 65, bk. I, ch. V, at 11 (unjust law is not a law); 2 J. CALVIN, *supra* note 25, bk. IV, ch. XX, § 31, at 1518-19 (lesser magistrates have duty to defend the freedom of the people against licentiousness of kings); *id.* § 32, at 1520-21 (civil

tianly as a citizen, or governmental official, rather than attempting the impossible and even sinful task of dividing oneself into "Christian" and "secular" components. We can think *Christianly* about whether to enforce God's law, and the decision *not* to enforce God's law in a particular instance can be as much of a Christian act as the decision in another instance to enforce God's law.

Professor Calhoun's approach is similar insofar as he gives Christians a theological reason to refrain from enforcing God's law. Professor Calhoun's non-imposition principle, however, has two fundamental errors. First, it fails to recognize the multiple functions of God's law and, particularly, the necessity and good, to society and the restrained individual, of using force to restrain evil conduct. Second, it assumes the existence of a "secular" realm of life and thought, which is surely wholly inconsistent with the scriptures and Reformed Christian tradition which Professor Calhoun claims to represent. The search for "secular" justifications for religiously-motivated acts, as a matter of theological and introspective justification, is misguided because it suggests that God's rule be displaced and that the Christian justify behavior without reference to God, the judge of every human act and thought.

Yet, as a practical matter, the Christian must often translate his theological convictions regarding the limits of state power into non-theological language. The Christian is free to use technical legal terminology such as "secular purpose" and to translate religiously-derived standards into "secular" purposes. Such translations are not dishonest or disingenuous. Indeed, these translations of theological concepts into secular concepts are laudable and necessary. Many writers have urged religious persons participating in the public square to speak in a language that is accessible and understandable to those of other faiths and beliefs. The translation of religious concepts into "secular" or "mediating" language is an attempt to live at peace and in dialogue in this mortal life with those of differing faiths and philosophies. The Christian's *introspective* processes can never be "secular," because the Christian is required to "take captive every thought to make it obedient to Christ"¹¹⁹ and live entirely under and for God. The Christian may, however, translate these introspections into publicly accessible language as a way of facilitating what Augustine called "common cause . . . in what concerns our purely human living."¹²⁰

These "secular" translations, however necessary and useful, can never replace the richer theological introspection and intra-Christian dialogue that truly guides the Christian. The secular translations,

119. 2 Corinthians 10:5 (NIV).

moreover, are often inferior, intellectually and aesthetically. Secular language is not necessarily distortive or unstable, but is open to these vices when its speakers treat as autonomous and self-sustaining that which is contingent and dependent. Nonetheless, given a world filled with fallen humanity, in which the wheat and the chaff are mixed, the risks of misunderstanding and abuse of secular language are unavoidable.

