Roman Law and Equity in John Milton’s Divorce Tracts

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Abstract

Critics have often observed that Roman law plays an outsized role in Milton’s two major divorce tracts, *Doctrine and Discipline of Divorce* and *Tetrachordon*. This essay argues that Milton turns so repeatedly to Roman law because it offers a model of equitable interpretation, one that allows statutes to be read flexibly in light of their perceived intent. While canon law too prided itself on being an equitable system, the canonists’ approach to equity was crucially different from that of Roman jurists. For centuries, theologians had read the Bible’s passages on divorce through the lens of canonical equity, and the upshot was that divorce had been effectively banned. But Milton wants his readers to view these same Biblical passages as Roman jurists would and thus to bring a different understanding of equity to bear. Read in this way, he argues, the Bible allows divorce to all. Milton’s ultimate goal is to put divorce outside the cognizance of all forms of temporal law. Ironically, his argument relies upon the approach to statutory interpretation that he finds in Roman law and applies to the Christian Bible.

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Although the seventeenth-century poet and polemicist John Milton supported a number of controversial positions during his lifetime, perhaps none outraged his contemporaries as much as his impassioned arguments for the right to divorce. Marriage at the time was governed by English canon law, which allowed for separation in the event of abuse, adultery, or abandonment, but which reserved true divorce only for cases in which the marriage had never been valid in the first place, usually due to consanguinity, frigidity, or lack of consent. In his 1643 *Doctrine and Discipline of Divorce*, Milton argues that the canon law’s position perverts the divinely established goal of conjugal unity by locking people inside loveless unions. The outcry against Milton’s work was immediate and vociferous, as evidenced by one opponent who called it a “wicked booke . . . deserving to be burnt.” Undaunted, the next year Milton issued an expanded edition of *Doctrine and Discipline*, and he also published *The Judgement of Martin Bucer*, comprised of translated pro-divorce excerpts culled from the Reformer’s theological writings. In 1645, he published *Tetrachordon*, a densely reasoned discussion of the four principal places in Scripture that refer to divorce (hence the title, from “four strings”), and he wrote the brief work *Colasterion*, rebutting an anonymous pamphlet

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that had attacked his ideas. Together, these four divorce tracts display Milton’s prodigious erudition and his tenacity in the face of public hostility. Scholars have also recognized that the two major tracts—*Doctrine and Discipline of Divorce* and *Tetrachordon*—mark a turning point in his thinking. More than ever before, Milton adopts the non-Calvinist position that God’s intentions can be fathomed by human reason, and so we can trace a direct line of influence from the divorce tracts to a work such as *Paradise Lost* where he offers to “justify the ways of God to men.”

While *Doctrine and Discipline of Divorce* and *Tetrachordon* have been productively studied for Milton’s theological and marital views, they have never been explored as legal arguments. This is a striking omission in view of the sheer density of legal references in these works. The words “statute” and “law” appear more times in these two treatises than anywhere else in Milton’s writings, and while many of these references point to Mosaic Law, others refer to contemporary legal systems such as canon law and common law. Moreover, Milton often underlines the juridical nature of his argument, as when he calls it a “moot” (657), a term for the legal debates conducted at the Inns of Court, or uses a “Lawyers maxim” from Sir Francis Bacon as part of his discussion of God’s “legall justice” (291, 292). At a broad structural level, both *Doctrine and Discipline* and *Tetrachordon* are sophisticated works of comparative jurisprudence. Milton addresses each to a body of English legislators—the Long Parliament, largely made up of men who had trained at the Inns of Court—and asks them to pass a statute that would strip jurisdiction over divorce away from the ecclesiastical courts, much as Parliament had done for usury in 1571 and would do again for frauds in 1677. In the process, he makes an argument about the true nature of Mosaic Law in which he juxtaposes the failings of canon law to the higher justice of Natural Law and Roman law.

This essay argues that the legal principle of equity is foundational to Milton’s jurisprudential strategy in both works. In early modern English contexts, “equity” often means those practices specific to the equity courts; I will clarify up front that this is not the form of equity to which I refer. In Milton’s world, issues that could not be resolved at common law could, under certain circumstances, be tried instead in courts such as Chancery and the Court of Requests, and so equity in this sense means these judicatures whose operations ran in parallel to the courts of law. But jurists also used the word “equity” when they were thinking broadly about fairness, impartiality, and consistency—principles that should apply to all systems of legal justice. Given his frequent appearances in Chancery, Milton was


3 All citations of Milton’s divorce tracts come from 2 John Milton, *Complete Prose Works of John Milton* (Don Wolfe et al., eds., 1953-82) and are cited parenthetically in the text by page numbers. Maxims were accepted principles or propositions of law much like axioms in mathematics.


5 The coexistence in England of Chancery’s applied equity and the more conceptual understanding of equity as a form of fairness that figures in the writings of jurists raises the problematic question of their relationship. For example, was the equity practiced in the Chancery the same as the equity that a writer such as Cicero
undoubtedly familiar with equity as the applied justice found in a court of equitable jurisdiction. However, when he writes about equity in the divorce tracts, he is thinking at a broader jurisprudential level about equity as a juridical principle.

Milton turns repeatedly to Roman law in his divorce tracts because this body of law offers what he sees as a model of equitable interpretation, one that allows statutes to be read not in a restrictive way for the letter of the law, but rather in a more flexible way for their perceived intent. While canon law too prided itself on being a supremely equitable system, the canonists’ approach to equity was subtly but crucially different from that of Roman and Civilian jurists, a point I explore further below. For centuries, theologians had read the Bible’s passages on divorce through the lens of canonical equity, and the upshot was that divorce had been effectively banned. But Milton wants his readers to view these same Biblical passages in the way that Roman jurists would, and thus to bring a different understanding of equity to bear. Read in this way, he argues, the Bible allows divorce to all. Thus we cannot fully understand Milton’s argument without also understanding the way he navigates between different legal systems with their different core assumptions about how law should be applied to the varied field of human action.

Milton’s ultimate goal is to put divorce outside the cognizance of all courts, as when he claims that marriage should not be subject to “an external and unbefitting judicature” and instead belongs to the “domestick prerogative,” or the choice of each individual (344). Ironically, this argument would not be possible without the approach to statutory interpretation that Milton finds in Roman law and brings to bear on the Christian Bible. His attempt to limit the jurisdiction of real-world judicatures depends upon core principles taken from the same legal systems that he ultimately aims to transcend.

I. Roman Law

While critics have often remarked in passing upon the prominence of Roman law in the divorce tracts, Milton’s use of Roman law is more surprising and anomalous than these critical glances allow. This section provides an introduction to Milton’s use of Roman law in *Doctrine and Discipline* and *Tetrachordon*. It situates his use of Roman law in the context of contemporary juridical arguments, then turns to his treatment of canon law. English Puritans were often hostile to the jurisdiction of the ecclesiastical courts, and so Milton’s rejection of what he calls the “canonickall infection” is a typical Puritan response (600). However, his simultaneous effort to protect Roman law from that same “infection” is argued should lie behind all law? If, as Christopher St. German argued, English common law contained the principles of equity, then what was the point of Chancery? These questions have been the subject of widespread critical discussion. For a brief sampling of studies, see Michael R.T. Macnair, Equity and Conscience, 27 Oxford J. Legal Stud. 659 (2007); Michael R.T. Macnair, The Law of Proof in Early Modern Equity (1999) [hereinafter Macnair, Law of Proof]; Bradin Cormack, A Power to Do Justice: Jurisdiction, English Literature, and the Rise of Common Law, 1509-1625, at 85-132 (2007); Paul Brand, The Equity of the Common Law Courts, in Law and Equity: Approaches in Roman Law and Common Law 39 (Egbert Koops & Willem J. Zwalte eds., 2014); David Ibbetson, The Earl of Oxford’s Case (1615), in Landmark Cases in Equity 1 (Charles Mitchell & Paul Mitchell eds., 2012).
decidedly atypical. Legal historians today often use the consolidated term “Romano-canonical law” because by the early modern period, Roman law and canon law were affiliated legal systems that together formed the conglomerated jurisprudence of the Continent. But unlike his contemporaries who looked at Roman law and canon law and saw juridical similarity, Milton looked at them and saw juridical difference. Milton’s divorce tracts are unique from a juridical standpoint in that he tries to split these two legal systems apart. As later portions of his essay demonstrate, he does so because Roman law instantiates a form of equitable reasoning that crucially supports his argument for divorce while canonical equity threatens it.

While Milton relies heavily on Roman law throughout Doctrine and Discipline and Tetrachordon, in each treatise he adopts a somewhat different stance toward this legal source material. In Doctrine and Discipline, he most often touches on Roman law in connection with discussions of the great seventeenth-century jurist Hugo Grotius. For instance, he cites the “statutes and edicts” of the “Christian Emperors” as a way to compliment Grotius’s adherence to “those imperiallyl decrees” about marriage (238). Later, he writes that Grotius uses the “maxims of civil Law” to build out overarching ideas of legality that should be binding on all peoples (330). Grotius had used Roman law as the framework for his theories of Natural Law, so in Doctrine and Discipline, Milton is largely content to see Roman law as mediated through Grotius’s Natural Law theories, especially as exemplified in De jure belli ac pacis (1625). However, in Tetrachordon, Milton alters his approach. Grotius drifts into the background and Milton engages more directly with Roman and Civil law sources. For example, the very first non-Biblical source Milton cites is Cicero’s De Inventione: “No man observes law for laws sake, but for the good of them for whom it was made” (588). From this opening interest in classical Roman law, Milton widens his field of vision to take in Justinian’s magisterial Corpus Juris Civilis, as when he cites the “Pandects out of Modestimus” (600) and the opinions of Ulpian and Hermogenian, a reference to the early Roman jurists whose writings formed important parts of the Digest—also called the Pandects—one of the three main parts of the Corpus Juris Civilis. Justinian’s work was augmented over the centuries, and Milton also cites later jurist-commentators such as “Tuningus a famous Lawyer” and the collected learning of “the Civil lawyers” (611).

Because common law was case law, and because it said almost nothing about marriage, Milton needed to look outside his native borders to find relevant statutory support. But however necessary for his pro-divorce argument, Milton’s use of Roman law remains an odd choice for a treatise aimed at English legislators. Doctrine and Discipline of Divorce is addressed “TO THE PARLAMENT OF ENGLAND” (222), and in his opening address, Milton urges the English legislators to act on his argument. Not merely a scholarly disquisition, Doctrine and Discipline is meant to spur real change. Tetrachordon is similarly addressed “To the PARLAMENT” and aims at a similar legislative result: he asks Parliament to pass a “just Law” (585). While J.G.A. Pocock’s thesis about the insularity of the “common law

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6 On Grotius’s use of Roman law as the foundation of his Natural Law theory, see Benjamin Straumann, Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius’ Natural Law (Belinda Cooper trans., 2015).
mind” has been convincingly challenged, it remains true that Roman jurisprudence played little overt role in common law arguments. When Sir Edward Coke cites Justinian in the 1602 *Case of the Monopolies*, he does so in a perfunctory way, using Roman law as mere window-dressing to his own legal innovations. The seventeenth-century judge Roger North encourages an even more minimalist approach to Romanist learning. In his *Discourse on the Study of the Laws*, North remarks that “a man of the law would not be willing to stand mute to the question, what is the difference between the Civil and the Common Law.” At the same time, “it is not at all needful to study” the Civil law since common lawyers can get all the knowledge they need “by mere inspection of some books and perusing their introductions.”

This wariness about Roman law was echoed in Parliamentary proceedings. In his study of Stuart Parliaments, Conrad Russell observes that debates in the Commons were characterized by a “resistance to foreign parallels, and to foreign law, particularly to the civil law.” For example, in 1640 Sir Simonds D’Ewes argued against the imposition of martial law—which was essentially Romanist in nature—on the ground that it was antithetical to “our own laws.” Coke similarly rejected a legislative change that would have protected the two university courts on the ground that these Civilian courts had no standing at common law. These examples do not mean that Civilian learning had no influence on common lawyers, some of whom—including Coke himself—had read widely in Civilian sources. Rather, as Michael Macnair suggests, it was probably more acceptable “to borrow civilians’ arguments than actually to cite them directly.” Macnair’s point highlights the anomaly of *Doctrine and Discipline of Divorce* and *Tetrachordon*: Milton is not just silently borrowing Romanist reasoning. He takes the next step and cites Roman jurists directly and repeatedly, and he does so in highly laudatory terms, as when he calls the Civil law “a generous and elegant law” and writes that Civilians have “the honour . . . to stand for” this law (700). Because common law was case law and because it said almost nothing about marriage, Milton needed to look outside his native borders to find relevant statutory support.

Yet a comparison with late sixteenth-century usury debates suggests that an enthusiastic reliance on Civil law was not an inevitable rhetorical strategy. In fact, Milton’s overtly

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9 Roger North, A Discourse on the Study of the Laws 8-9 (reprint of MS in Hargrave Collection ed. 1824).
12 Russell, supra note 10, at 159.
13 Macnair, Law of Proof, supra note 5, at 293.
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Romanist arguments were hardly the best way to sway his target audience. Those MPs who wanted to legalize usury were in much the same situation as Milton: both usury and divorce rested on conflicting Biblical evidence; both were forbidden by canon law; both were allowed by the secular Civil law. However, during the heated Commons debates about usury in April 1571, the members offered only glancing references to Civil law and instead rooted their arguments primarily in English custom and the Bible. By the time Milton was writing in the 1640s, most Englishmen had grown even more strongly attached to the idea that the common law protected the Englishman’s liberty and property, and most were wary of the Civil law’s association with absolutism.

Jurisprudentially speaking, Milton’s treatises are equally surprising for the way they put Roman law and canon law at odds with one another. For instance, in Doctrine and Discipline, he writes that the “statutes and edicts” of Roman law are “easie and relenting” whereas “the Canon is inflexible” (238), and he contrasts the broad-mindedness of “the Christian Emperours, Theodosius . . . and Justinian, men of high wisdom and reputed piety” with the “letter-bound servility of the Canon Doctors” (334, 342). In Tetrachordon, he compliments the Civilians’ ability not to “count that for law, which the pontificall Canon hath enthrall’d them to” (700). Similarly, he praises the “Civilians” who have not been “blinded by the Canon [law’s]” prohibition on divorce (714). These claims run counter to prevailing juridical realities. In the twelfth-century Bolognese Renaissance, canonists discovered Justinian’s Corpus Juris Civilis and used it as the foundation for their own highly sophisticated body of canon law. Elaborated and refined over several centuries, this canon law was eventually handed back to the secular states which adapted it— and the Roman law on which it was based— into the system of Civil law. Together, both kinds of law formed the ius commune, the “common law” of the Continental tradition. The sixteenth-century French Civilian Petrus Rebuffus sums up the fusion of the two legal systems: “[C]anon law and civil law are connected to such a degree that understanding one without the other is scarcely possible.”

In England, Civil law and canon law were both juridical minorities, and perhaps even more than on the Continent, the boundaries between them often blurred to the point of near-invisibility. Men trained as Civilians regularly practiced in the ecclesiastical courts—

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14 Simonds D’Ewes, Journal of the House of Commons: April 1571, in Journals of All the Parliaments During the Reign of Queen Elizabeth 155-80 (1682).

15 Milton may have been modeling himself on Martin Luther, who had burned canon law texts and who stated that the Romans had an “excellent legal and judicial system” which Germany should imitate. Quoted and discussed in Debora Shuger, The Renaissance Bible: Scholarship, Sacrifice, and Subjectivity 61 (1994).

16 For a fuller discussion of the genealogical relationship between Roman law, canon law, and Civil law, see Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition (1985); Paul Vinogradoff, Roman Law in Medieval Europe (1909); and Peter Stein, Roman Law in European History (1999). For an argument that Milton knew this braided history of Roman law and canon law, see Martin Dzelzainsis, “In These Western Parts of the Empire”: Milton and Roman Law, in Milton and the Terms of Liberty 57 (Graham Parry & Joad Raymond eds., 2002).

as in the case of Sir Julius Caesar who sat on the bench of the Admiralty (a Civilian court)—and also argued cases in the canon courts. These men left an extensive set of reflections about pragmatic questions of law in both venues.\textsuperscript{18} In his \textit{View of the Civile and Ecclesiastical Law}, the prominent Civilian Thomas Ridley shuttles back and forth between Roman law and canon law with disorienting speed. In a single page, he moves from discussing the “commerce of Princes with Princes” (i.e., the mercantile questions that the Roman law addressed) to the proper order of worship service (i.e., the purview of the ecclesiastical courts) to last wills and testaments, a subject on which “the Civile and Ecclesiastical Law” collaborate.\textsuperscript{19} Richard H. Helmholz reflects on how unconcerned English Civilians and canonists were with the comparative value of the two kinds of law. This issue—which is “seemingly an obvious one today”—simply “did not trouble” them. In fact, “there is little sign that it occurred to them as a relevant question.” Faced with two different kinds of Romanist law, Civil and canon, “they used both.”\textsuperscript{20} From the common lawyers’ point of view, the linkage between Roman law and canon law provided a good reason for keeping both at arm’s length. In his \textit{History of the Common Law} (probably written and circulated in the 1660s, although not published until long after his death), Sir Matthew Hale congratulates the common law for standing apart from the laws of “Rome, as well Ancient as Modern.”\textsuperscript{21} One of Milton’s favorite writers, John Selden, offered a similar linkage in a 1628 speech to the House of Commons: “[T]he canon law and civil law we have from Rome and out of the Empire.” While both kinds of law are “\textit{lex terrae} . . . that is such as by the law of the land [i.e., England] are in force,” they are both subordinate to and different from “the common law.”\textsuperscript{22} In their different ways and for different reasons, English Civilians, canonists, and common lawyers all stressed the connective tissue binding Roman law to canon law. Arguing against this consolidated juridical common sense, Milton tried his hardest to pry the two legal systems apart.

\section*{II. Equity and the Law}

The sheer strangeness of Milton’s enthusiastic reliance on Roman law in treatises about divorce raises the question of “Why?” Why is he so intent on shielding the Roman law from the “canonicall infection” (600)? What is so vital about the Civil law such that it must be present in his treatises, even at the expense of making unproductively Romanist arguments to common law legislators? One possible answer has to do with subject matter: Milton

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\item \textsuperscript{19} Thomas Ridley, A View of the Civile and Ecclesiastical Law 226 (1607).
\item \textsuperscript{20} Three Civilian Notebooks, supra note 18, at xlvi.
\item \textsuperscript{22} 2 Commons Debates 1628: 17 March-19 April 1628, at 463-64 (Robert C. Johnson & Maija Jansson Cole eds., 1977).
\end{itemize}
needs Roman law because it includes statutes allowing for divorce. However, while Milton does address matters such as the Roman law regarding “Nuptials” (635) and the way that “Justinian or Tribonian defines Matrimony” (611), a surprising number of his Roman law references are not about divorce or marriage at all. To give some examples, sometimes he uses Civil law to make broad jurisprudential points, as when he cites Ulpian and Hermogen- nian to argue that customs can be considered legally binding in the absence of statutes (618). Similarly, he refers to the “civil Law” principle that similar offenses should receive similar treatment: “[F]rom like causes to like the Law interprets rightly” (330). Consistent judgment was a goal of all judicial systems, and in Milton’s day common law jurists were increasingly researching precedents to regularize judicial decisions and thus make the common law more equitable. Instead of citing domestic legal sources, however, Milton looks abroad, and this impulse suggests the degree to which he associates equity with Civil law. Elsewhere he appeals to the “three general doctrines of Justini ans law”: “To live honestly, To hurt no man, To give every one his due” (653). Sometimes Milton leaves this more theoretical jurisprudential plane and drills into specific legal issues. For example, he argues by analogy from “the Roman law” regarding “contracts and dowries” (620). He uses the laws of “that Civilian Emperor” about “donations” and the “rescript of Antoninus in the Civil Law” that governed the treatment of slaves (626). He even detours through the Roman law’s provision for “Tutelage” and the “defense of Orfanes” (i.e., the Roman law of guardianship) (660). In all of these instances, Milton is not simply mining Roman law for its precepts about marriage. Instead, he relies on it for another, larger reason: it gives him a productive way to think about law in general. Faced with contradictory Biblical laws about marriage, Milton turns to Roman law because it offers a sophisticated tool for interpreting written evidence and for understanding how statutes should be applied to the infinitely varied field of human actions. This tool is the judicial principle known as equity.

Milton’s interest in equity is unmistakable. Here is a representative sampling from Doctrine and Discipline of Divorce: Milton refers to the “precious equity” of the Mosaic Law (231); he finds a comparable “equitie” in Roman law (238); “all sense and equity” supports his argument (245); a good lawgiver takes heed of “equity” (289); all people must obey “the law of nature and of equity imprinted” in them (297); and “plain sense and equity” can be found in the Bible (309). Using the adjectival version, Milton finds an “equall plea of divorce” (240); justice proceeds in “ever-equall proportion” (263); and the law is “equal” as well as “just” (281). Tetrachordon shows this same pattern. In his discussion of Deuteronomy 24:1-2, Milton refers to the “equity” of “Roman law” (620), the “true equity” of “Moses” (621), the “equal” nature of divorce (622), the “equity” implicit in “equal” contracts (624),

23 Tribonian was the jurist and advisor whom Justinian commissioned to lead the compilation of the Corpus Juris Civilis.

24 Milton’s use of Roman law to argue for divorce supports Quentin Skinner’s point that Roman law was turned to for a wide variety of ideological purposes. For example, see his Foundations of Modern Political Thought (1978); and Milton and the Politics of Slavery, in Milton and the Terms of Liberty 1 (Graham Parry & Joad Raymond eds., 2002). See also Stein’s point that Roman law provided a kind of “legal supermarket” of ideas; Stein, supra note 16, at 2.
and the “equity” of the Civil law regarding gifts (626). Given the relative absence of critical commentary on Milton’s use of equity, scholars have presumed that Milton is appealing to a basic sense of fairness. However, if we think of equity as merely a synonym for fairness, we flatten out its complexities and particularly its status as a long-standing point of jurisprudential debate.

Virtually everyone in the early modern period agreed that equity was an important part of justice. In his Treatise of Christian Equity and Moderation, William Perkins writes that two kinds of men should not be judges: those who have too little zeal for the law and those who have too much. On the second count, Perkins explains, “[H]e is but halfe a Judge, who can doe nothing but urge the law, and the plaine words of the lawe, and is not able also, to mitigate the rigour of the law, when neede so requireth.” Perkins is reframing the standard maxim summun ius, summa iniuria—the greater the strict adherence to the letter of the law, the greater the potential for injustice. The solution to the problem of summun ius, summa iniuria was equity. In one of the earliest and most influential accounts, Aristotle writes that equity (which he calls epikieia) is necessary because while temporal laws must necessarily be framed in terms of general, abstract pronouncements, “about some things it is not possible to make a universal statement which will be correct.” The role of equity is to bridge the gap between the generality of laws and the particularity of circumstances.

Although there was broad agreement about the need for equity, there was less consensus about the exact relationship between equity and law. Generally speaking, there were two approaches to equity in the ius commune. Milton embraces one and repudiates the other, and this push/pull dynamic, in turn, powers his argument about God’s law in both Doctrine and Discipline and Tetrachordon. Proponents of what we might call “internal equity” regarded it as a principle found inside the law itself. When a judge recognized that following the strict letter of the law in a particular case would result in injustice and when he provided instead a softened outcome, he was obeying the equitableness implicit in the law. Others favored “external equity,” meaning that they regarded equity as a principle outside the law that was manifested through extra-legal principles such as mercy, humanity and commiseration. Historian Dennis R. Klinck sums up this opposition as follows:

Thus “equity” could refer to the justice or reason which was regarded as essential to the law, or to a mode of interpretation whereby the true spirit of the law was discerned. Both these meanings emphasize that equity is already in the law. Or equity could mean the adjusting of the ordinary law—already “just” in its general application—in response to

25 The one exception is Mark Fortier, The Culture of Equity in Early Modern England (2005), who registers the presence of equity in Milton’s thinking in the divorce tracts. For arguments about equity in Milton’s other works, see Elliott Visconsi, Lines of Equity: Literature and the Origins of Law in Stuart England (2008); and Victoria Silver, “A Taken Scandal Not a Given”: Milton’s Equitable Grounds of Toleration, in Milton and Toleration 144 (Sharon Achinstein & Elizabeth Sauer eds., 2007).


particular circumstances, or even the merciful application of the law. The latter meanings tend to make equity something that is added to the law.  

The legal outcome might be the same in either case (i.e., internal and external equity did not necessarily differ in their effects), but each approach was based on different assumptions about the ontology and authority of law itself.

Each of these philosophies of equity was associated with a different—albeit cognate—group of jurists. Internal equity or aequitas had been developed in classical Roman law by writers such as Cicero and Quintilian who elaborated on the theories of Aristotle.  

For Cicero, doing equity meant appealing to “an element intrinsic to the positive law and imbedded in any system of law.” Milton approvingly cites Cicero’s theory of equitable interpretation in Tetrachordon: “All law, saith he, we ought refer to the common good, and interpret by that, not by the scrowl of letters” (588). The “common good” here is not an external principle that can reach in and adjust the law. Instead, it is the actual telos and substance of the law itself. Judges are to push past the “scrowl of letters” (i.e., the words of a law) to find the equity at the law’s heart (588). To give another example, we see a characteristically Roman expression of aequitas in Doctrine and Discipline when Milton writes, “[E]xceptions [to laws] that arise from natural equity are included silently under general terms” (330). The magistrate who makes these “exceptions” is authorized to do so by the “silent[]” logic of the law itself.

In contrast, external equity was associated more with the canonical tradition. Given its core assumption that a transcendent justice should at times override the mandates of merely human law, external equity was particularly consonant with the theological concerns of canon law. Canonists were fond of quoting St. Cyprian’s maxim aequitas est iustitia dulcore misericordiae temperata—“equity is justice tempered by sweet mercy.” This maxim separates justice (iustitia) from sweet mercy (misericordia temperata), and equity results when these two distinct principles are properly combined and especially when mercy adjusts the rigors of law. Similarly, the medieval canonist Hostiensis saw equity as an expression in the juridical realm of the compassion that all Christians should display. Over the centuries, this idea of equity was reified and formalized into the canon law’s system of dispensations, exceptions, and indulgences. These practices allowed the rigors of the canon law to be relaxed or

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30 Charles Lefebvre, Natural Equity and Canonical Equity, 8 Am. J. Juris. 122, 124 (1963). However, as Lefebvre notes, equity is also a remarkably slippery concept. At times, Civilians speak of equity as supplementing the ius civile from without, while at times canonists refer to equity as a principle internal to the law. As a result, the difference traced here between internal and external equity should be viewed as a broad jurisprudential pattern rather than a categorical division.
31 Id. at 122. On the canon law’s association of equity with the extra-legal principle of misericordia, see also Peter Landau, Aequitas in the “Corpus Iuris Canonici,” 20 Syracuse J. Int’l L. & Com. 95, 102-03 (1994).
32 John J. Coughlin, Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law 113 (2012).
suspended in certain instances, and, as forms of external equity, they were “understood to function apart from law (praeter legem) or against law (contra legem).”

These two kinds of equity, and especially the Roman law’s internal equity or aequitas, are important to understanding Milton’s divorce tracts because of the conflicting Biblical evidence he faced. One of the foundational texts he considers is Deuteronomy 24:1 which allows for divorce: “When a man hath taken a wife, and married her, and it comes to pass that she find no favour in his eyes, because he hath found some uncleanness in her: then let him write her a bill of divorcement, and give it in her hand, and send her out of his house.” However, Jesus says the opposite in Matthew 19:9: “Whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery: and whoso marrieth her which is put away doth commit adultery.” Encountering this tension between the Old Testament and the New, most exegetes reasoned away the former on the grounds that Moses’s law had to give way before Christ’s. But while they needed to explain away the Mosaic Law’s allowance of divorce, theologians and canonists did not want to say that that law itself was bankrupt. External equity allowed them both to save the moral integrity of Moses’s proclamation and to subordinate it to Jesus’s words. According to canonist thinking from Gratian onward, Adam’s claim that Eve was “bone of my bone and flesh of my flesh” (Genesis 2:23) showed that God had established marriage as a sacramental bond. Subsequently, the Israelites fell into the lustful practice of divorcing one wife and taking another. Moses wanted to bring them into a closer relationship with God, but, faced with a people used to sexual profligacy, he saw the wisdom of permitting divorce as a concession to their hard-heartedness. This view of Moses as giving a concession shows the logic of external equity at work. Although Protestant theologians rejected the sacramental nature of marriage, many of them followed the canonists’ interpretation of this passage. For example, Thomas Fuller’s Sermon of Reformation, published the same year as Milton’s Doctrine and Discipline, argues that the “Bill of Divorce [was] cancelled by Christianity” but “permitted to the Jewes,” not because divorce can be regarded as good, but “because [the Jews] were bad, and by this Tolleration were kept from being worse.”

When he uses words such as “permitted” and “Tolleration,” Fuller applies external equity to the law. Faced with the tension between an Edenic law that makes marriage unbreakable and a Deuteronomic law that allows for divorce, Fuller follows Protestant orthodoxy in regarding Deuteronomy as an instance in which charity intervenes to soften the law’s unproductive rigor.

Throughout Doctrine and Discipline of Divorce and Tetrachordon, Milton is implacably hostile to this reading of Deuteronomy 24:1-2. For Milton, the dispensation or external equity argument makes divorce a failing to be excused under particular circumstances, whereas he wants to make it a liberty allowed to all. It also diminishes the importance of Deuteronomy 24:1-2, which, as the most salient verses authorizing divorce, form the cornerstone of his argument. The external equity approach shrinks Deuteronomy down to

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34 Thomas Fuller, A Sermon of Reformation Preached at the Church of Savoy 7 (1643).
something of a footnote in the story of sacramental marriage. Instead of a generally valid set of precepts, the Deuteronomic verses about divorce become merely an instance when an exception was made to accommodate a people’s weakness. Moreover, most people thought that this exception effectively proved the Edenic rule that marriages cannot be dissolved. When Milton talks about external equity, he uses terms such as “permissions,” “indulgences,” and “dispensations” (he reserves “equity” for the Roman aequitas), and he is always being derisive as when in Doctrine and Discipline’s opening address to Parliament, he scorns the “ungirt permissions” and “venial . . . dispenses” proposed by the canonists (233).

Milton attacks the external equity reading of Deuteronomy along two main lines. First, he argues that it is an affront to the law’s consistency. If Moses is regarded as having granted divorce as a dispensation, then he must also be regarded as having more or less permanently created an exception to the law. For Milton, this outcome is inconsistent with the nature of God as a just lawgiver. While a “human law-giver may slacken somthing of that which is exactly good, to the disposition of the people and the times” (284), the same kind of dispensation cannot be said of God’s laws. God cannot be said to have enacted “a dispensation as long liv’d as a law” since such an arrangement effectively highlights the defectiveness of the law (300). Milton’s second, related argument is that the dispensation reading implicates the Mosaic Law itself in sin. If one regards marriage as a sacramental bond, then the man or woman who divorces and remarries commits the mortal sin of adultery. Milton is outraged at the logical conclusion: it is a “most absurd and rash imputation fixt upon God and his holy Laws” to think that the Mosaic Law has been “conniving and dispensing with open and common adultery among [God’s] chosen people” (250). This reasoning attributes to God an “impure and treacherous dispense,” one that betrays believers “under the vizard of Law to a legitimate practice of uncleanness” (297). Since “the Law [was] ordained unto life” (Romans 7:10), how can God “publish dispenses against that Law, which must needs be unto death?” (297). Milton likens this kind of dispensation to a secular “Judge or Law” indulgently allowing a man to “cut his owne throat”—an “absurd and monstrous” conclusion (297). He even ironically likens the dispensation idea of divorce to “such a dispense as that . . . which the serpent gave to our first parents” (300). The permission to divorce, like the metaphorical permission to eat what Satan gave to Adam and Eve, does not remove the sin from the action in question; instead, it simply tempts humans to push deeper into sin. Milton concludes that no one, not even God, can issue a dispensation that absolves a sinful action: “God is no covnant breaker, he cannot do this” (297).

This attack on external equity is clearest in the three whole chapters he devotes to a proper understanding of dispensations. He agrees that in some occasions a dispensation should be allowed, as in the face of “some particular accident rarely hap’ning and therefore not specify’d in the Law, but left to the decision of charity” (299). As an example of an allowable dispensation, Milton points to King David and his hungry followers entering the temple and unlawfully eating the show bread (1 Samuel 21:6). For Milton, this Davidian dispensation differs crucially from the dispensation that the canonists saw in Deuteronomy 24:1, since it was a violation of only the ceremonial law and did not involve intrinsically immoral actions.
While *Doctrine and Discipline of Divorce* and *Tetrachordon* are distinguished by Milton’s adamant rejection of one kind of equity, they are equally characterized by his enthusiastic embrace of another. Milton consistently argues that the Bible verses that underpin and structure his argument should be read through the principle of internal equity. For example, in *Doctrine and Discipline* he writes that Christ refused to abolish even the “smallest jot and tittle of precious equity contained in that Law” (231). Equity is inside the law, not waiting in the wings to be added to it. Similarly, he writes that if we regard the Mosaic Law “in the best and equalest sense,” we can understand that God’s law itself makes room for divorce (244). The Law itself is both “wise and equal” (303), “full of moral equity” (306), and “a most equall and requisite law” (325). God has provided “just and equal inferences” in his “his pure and chast Law” (312). When Milton looks at God’s law, he sees equity already resident within it, and so there is no need to bring in *misericordia* or *humanitas* to arrive at justice. Thus, Moses allowed for divorce not despite the Edenic law of marriage but in fulfillment of it.

Milton explicitly connects this internal equity reading of the Bible to Roman jurisprudence. In *Doctrine and Discipline*, he argues against the “stony rigor” of a literal reading of the Bible by looking to the “equitie of those imperiall [i.e., Roman] decrees” about divorce (238). In *Tetrachordon*, he reflects on the fact that the “Roman law” of contracts and dowries declined to provide exhaustive conditions and offered instead the general stipulation that matters should be conducted honorably and in good faith. As he puts it, Roman law sensibly “left many things to equity” (620). He then reasons by analogy that Moses’s law of divorce, which consists of “true equity, high wisdom, and God-like pity,” has the same silent elasticity even though provisions and exceptions are not spelled out in detail (621). In another passage, Milton considers sections from the *Corpus Juris Civilis* that permit a donor to recall his gifts if the recipient “proves unthankful toward him” (626). Here, the Civil law makes an equitable exception to the principle that gifts are not revocable. Reasoning from this example, Milton argues that Moses acts “with much more equity” when he permits “the giver to recall no petty guift, but the guift of himself” (626). He also points out that a “re-script of Antoninus in the Civill Law” provided that in the event of a master’s cruelty, the Roman law of slave ownership could be relaxed to allow the abused slave to change masters (626). Again, he uses the equity he finds in Roman law to understand God’s ways: “[S]hould God who in his Law also is good to injur’d servants, by granting them thir freedom in divers cases, not consider the wrongs and miseries of a wife which is no servant” (626-27). Milton combs through the *Corpus Juris Civilis* not just for its provisions about marriage but for places in which *aequitas* can be shown to be part of the law’s basic genetic code. This Roman *aequitas* in turn allows him to argue that God’s laws similarly contain and allow for exceptions, and so divorce is simply a fulfillment of those laws’ equitable core.

**III. God’s Intention**
As critics have long recognized, Milton approaches the Bible in a new way in the divorce tracts. In Dayton Haskin’s words, before he wrote *Doctrine and Discipline*, Milton “was accustomed to accept the familiar doctrine that the plain words of the Bible provide the ultimate criterion for judgment in spiritual matters.” In the process of wrestling with the contradictory nature of God’s edicts on marriage, he changed his mind. Understanding the Bible, he decided, took great exegetical labor because its meaning on many subjects was not readily apparent. Haskin argues that Milton relied on an interpretative technique he learned from Cicero and Aristotle: “[T]he diligent ‘conferring place with place,’ whereby difficult texts were to be restored to their meanings and harmonized according to the overall drift and scope of the whole Bible.”36 When faced with a difficult or contradictory text, the interpreter was to compare different sections since thorny passages often made more sense when read in light of other more accessible ones. The only element missing from Haskin’s convincing account is that writers such as Aristotle and Cicero developed this interpretive approach as one means of doing equity, and in context, they were primarily focused on making sense of legal documents such as statutes, wills, and contracts. As Kathy Eden shows, this equitable manner of reading was later picked up and absorbed by Christian exegesis ranging from Augustine to Melanchthon, becoming a central component of their hermeneutics.37

What Milton calls “comparing other texts” (282) was just one of the techniques Roman jurists had developed for equitable reading. These techniques were intended to solve a real-world judicial problem: merely declaring that a judge should find the equity inside the law did not necessarily help those faced with a gap between the wording of a statute and the circumstances of the case at hand. What was needed was a consistent and adaptable set of interpretive techniques so that judges did not have to fall back on a vague sense of what was fair. While one solution was a comparison of statutes on similar subjects, two other approaches were to consider the intention of the lawgiver and the reason for which the law was established (*ratio legis*). Confronted with a case in which a statute did not clearly address the circumstances, the judge should ask himself: What would the lawgiver himself do on this occasion? What was his intention in establishing this law? What was the reason for this law, or what problem was it meant to correct? While thus far my focus has been on the *Corpus Juris Civilis* and its associated tradition of Continental texts, the forms of equitable interpretation laid out in these works had also migrated into English jurisprudence. For example, the common lawyer Edmund Plowden considers a statute of Westminster requiring that, in the event of shipwreck, salvaged goods should be stored intact for a year and a day so that the owner could claim them. Any failure to follow these provisions was

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punishable by fines and imprisonment. But, Plowden asks, what about perishable cargo such as fruit and nuts? If the sheriff sells them and holds the money for a year and a day, has he broken the law? Plowden argues that this hypothetical sheriff has rightly used equity to discern the “sense” and “intent” (le sence and lenent) of the act. Plowden provides a set of disarmingly self-referential instructions to his reader: “[I]t is a good method each time you peruse the words of a statute, to imagine that the institutor of that law is present and to ask him the question you want to know about the statute’s equity. And when you have asked him this question, then you must give yourself the answer that you think he would have done if he had been present.” While Plowden emphasizes that this manner of equitable reading is an important part of “our law” (nostre ley) and can be seen in English writers such as Bracton, he is also aware of its origins in the classical tradition, since he calls it “Equitas” and associates it with the theories of Aristotle.\textsuperscript{38}

In his divorce tracts, Milton turns repeatedly to these juristic principles of ratio legis and the intention of the lawgiver, ones that formed a living part of jurisprudence on both sides of the English Channel. For example, he gives the chapters of Doctrine and Discipline titles such as “The first reason of this Law” (245) and “The Second Reason of this Law” (250). He also pervasively stresses the intention of the lawgiver. Arguing in Doctrine and Discipline that the “strictnes of a literall interpreting” (242), or sumnum ius leads to summa iniuria, Milton says that the law should be understood instead in relation to “the end of the Lawgiver” (243). He identifies “that [which] was chiefly meant” in the Mosaic Law (254). He considers “the expresse end of Gods institution” of marriage (269). He discerns “the intent of [the] Law” (306) and what “Moses did in the true intent of the Law” (307). In one of the most famous phrases from the treatise, Milton says that in “Gods intention” a “meet and happy conversation” was the “noblest end” of marriage (246). It is as if Milton has followed Plowden’s instructions about imaginatively bringing the lawmaker into his study for questioning. Having asked God about his real “intention” for marriage, Milton then confidently supplies the answer. This same interpretive approach is equally prevalent in Tetrachordon as when he writes: “All Ordinances are establisht in thir end; the end of Law is the virtu, is the righteousness of Law. And thorefore him wee count an ill Expounder who urges Law against the intention theroF” (623). The lawgiver’s “intention” was to pass a statute that helped the law fulfill its own end, and since the “end” of the law is virtue and righteousness, the law of divorce must be interpreted in a way that leads to more virtuous lives among its subjects. And because Milton knows that profound marital incompatibility only pushes spouses deeper into mutual hatred, the path of virtue leads towards divorce.

\textsuperscript{38} Edmund Plowden, La Second Part De Les Reports, Ou Commentaries 466-67 (1610). Plowden is writing in Law French, the official language of the early modern common law courts. An English translation can be found in Edmund Plowden, The Second Part of the Commentaries or Reports 466-67 (1816). In his popular and often reprinted work about law and equity, Christopher St. German also stressed the need to consider the intention of the lawmaker. Together, Plowden and St. German’s thinking indicate how this aspect of classical jurisprudence had become a standard part of judicial interpretation in England. See Christopher St. German, The Dialoges in Englishe, Betwene a Doctour of Divinitty, and a Student in the Lawes of England (1530).
Milton’s use of the interpretive traditions of *aequitas* to understand Mosaic Law brings with it an assumption about the potential of human reason. 39 When writers such as Cicero or Quintilian instructed readers that the way to find the equity of a contract, will, or statute was to consider its intention, they took for granted that the mind reading the document was capable of fathoming the mind that created the document. While in practice the words of the intervening text might thwart this meeting of minds (e.g., if the statute was so poorly worded as to obscure its intention), in theory there was no intrinsic reason why the lawgiver’s intentions should be opaque to the judge. After all, both were human collaborators in the process of fostering justice in the world. When Milton talks about reading the Bible in an equitable way, he makes the same assumption about the mind of God. Moreover, he states this fact explicitly. As he explains in *Doctrine and Discipline of Divorce*, “God indeed in some wayes of his providence, is high and secret past finding out: but in the delivery and execution of his Law . . . [he] hath plain enough reveal’d himself.” While God’s nature might be inscrutable, his laws are not, and men and women should understand laws in accordance with “the law of nature and of equity imprinted” in them (297). In *Tetrachordon*, Milton further ratchets up this sense that God’s laws are like human laws: their meaning can be decoded by the proper application of juristic thinking and specifically by applying *aequitas*. In the Bible, “God presents himself like to a man deliberating” in order to show that he “intended” to establish the law “according to naturall reason,” and this human reason allows us to understand the “reason” behind the law itself (595). Thus the fit reader of the Bible uses “all equity” to arrive at proper “construction” and to “comprehend . . . what God spake,” meaning to discern the intention behind God’s law (603). Similarly, when Milton contrasts the “perfet scales of [God’s] justice” with the “fals and abominable” “ballances” of the canonists, he assumes that he can tell which balances are poised properly and which ones are not (658).

Because critics have not recognized that Milton’s references to the “intention” of the lawmaker or the “end” of the law spring from his deep reading in Roman jurisprudence, they have often overstated his resistance to law as a whole. For example, John Halkett argues that in the divorce tracts Milton has “taken marriage out of the realm of law and placed it in the realm of affective psychology.” 40 W. Scott Howard says that Milton celebrates the way that the “inward ordinance of individual acts of nearly prophetic interpretation—i.e., the spirit of the law”—can be used to correct “institutional practices, or custom—i.e., the letter of the law.” 41 In her account of the logical structures of Milton’s treatise, Lana Cable cites a passage from *Doctrine and Discipline of Divorce* where Milton refers to what “God intended” to be the “whole reason of the Law”—as classic an expression of *aequitas* as one finds in Milton’s works (310). Cable argues that this passage proves that “the

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39 On the way Milton echoes Christian rationalist contemporaries such as William Chillingworth and Lord Falkland, see Barker, supra note 36, at 80-85.


appropriateness of a given point of law to a given individual is determined not by any outside judge . . . but by the individual’s makeup and capacity.” Similarly citing Milton’s reference to “what Moses and the Law intended” (308), she reasons that “just law operates from within, realizing its meaning not as a stricture imposed from the outside but as a function of the understanding.”42 At one level, these arguments are true in that Milton indeed refuses to have the meaning of the law imposed from the outside and insists that the power to judge rests with the individual.

However, what needs to be added is that the interpretive practice he adopts himself and urges on his readers is itself a crucial part of Western jurisprudence. When Milton rejects a literalist reading and thinks instead about the reason for the law and the intention of the lawgiver, he is not moving from the realm of law into the realm of not-law. Instead, he is applying fundamental juristic techniques that had for centuries been at the center of jurisprudential thinking and had figured in decisions handed down in countless courtrooms. The great irony of the divorce tracts, and perhaps their greatest rhetorical achievement, is that Milton’s argument—that when it comes to divorce, each man should be “a Law in this matter to himself” (347)—would have not have been possible without the very judicial systems and traditions that he hopes to transcend.