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THE TRANSFORMATION OF WESTERN LEGAL  
PHILOSOPHY IN LUTHERAN GERMANY

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# THE TRANSFORMATION OF WESTERN LEGAL PHILOSOPHY IN LUTHERAN GERMANY\*

HAROLD J. BERMAN\*\* AND JOHN WITTE, JR.\*\*\*

*"I shit on the law of the emperor, and of the pope, and on the law of the jurists as well."* — Martin Luther, 1544\*\*\*\*

*"Law and worldly government are a great gift of God to mankind. Worldly dominion is an image, shadow, and figure of the dominion of Christ. . . . [T]hus one could indeed call a pious jurist . . . in the earthly kingdom the prophet, priest, angel, savior of the emperor."* — Martin Luther, 1529\*\*\*\*\*

## INTRODUCTION

It should not be surprising to find that the Lutheran Reformation had an enormous influence on the development of legal philosophy in sixteenth-century Europe, especially in Germany. How could it be

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We wish to express our appreciation to Frank S. Alexander, Martin E. Marty, and Thomas D. Morgan for their comments on an earlier draft of this Article. We have built partly on two earlier articles on which we both collaborated, Berman, *Law and Belief in Three Revolutions*, 18 VAL. U.L. REV. 569 (1984), and Berman, *Conscience and Law: The Lutheran Reformation and the Western Legal Tradition*, 5 J.L. & RELIGION 177 (1987).

\*\*\*\* 49 D. MARTIN LUTHER WERKE, KRITISCHE GESAMTAUSGABE 302 (1883-1974) ("Ich scheiss ins Kaisers und Papsts Recht und in der Juristen Recht dazu."). We have generally rendered sixteenth-century German texts in modern German.

\*\*\*\*\* 30 *id.* Part II, at 554 ("Recht und weltliches Regiment sind eine grosse Gabe Gottes an die Menschen. Weltliche Herrschaft ist ein Bild, Schatten und Figur der Herrschaft Christi. . . . [A]lso moechte man einen frommen Jurist . . . im weltlichen Reich wohl des Kaisers Prophet, Priester, Engel und Heiland heissen.").

otherwise? Could such a fundamental transformation of both the religious beliefs and the political institutions of one of the major European nations have taken place without substantial changes in legal thought? Yet virtually nothing has been written, either by historians or by philosophers, to show a relationship between religious and political thought, on the one hand, and legal thought, on the other, in Lutheran Germany.<sup>1</sup> Most accounts simply jump from (twelfth- to fifteenth-century) Roman Catholic natural-law theory to (seventeenth- and eighteenth-century) Enlightenment social contract theory, treating the sixteenth-century, at most, as a transition period. Those writers who do discuss sixteenth-century developments in legal philosophy usually regard the Lutheran contribution as a mere abridgement of medieval Roman Catholic thought.<sup>2</sup> Others even argue that there was no such thing as a Lutheran

1. See, for example, such standard historical surveys as E. BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 31-34 (rev. ed. 1974) (the "Protestant revolution" and "Machiavellian politics" are discussed in the Introduction to "the classical natural-law philosophy of the seventeenth and eighteenth centuries"); W. FRIEDMAN, *LEGAL THEORY* 114 (5th ed. 1967) ("the spiritual, social, and political revolution" of the sixteenth-century is mentioned in passing as a preparatory step to the social contract and natural-law theories of the seventeenth and eighteenth centuries); C. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (2d ed. 1963) (brief mention is made of the legal humanists of the sixteenth-century, but nothing is said about the influence of Protestantism); H. CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* (1949) (skips from Aquinas to Bacon, without mentioning sixteenth century developments); 1 F. STAHL, *DIE PHILOSOPHIE DES RECHTS* 73-83 (1887) (treats developments in the sixteenth-century Reformation as a "necessary catalyst . . . to the development of the modern scientific jurisprudential systems of Grotius and his followers"); C. VON KALTENBORN, *DIE VORLÄUFER DES HUGO GROTIUS AUF DEM GEBIETE DES IUS NATURAE ET GENTIUM SOWIE DER POLITIK IM REFORMATIONENZEIT* (1848) (consigns the Protestant and Roman Catholic jurists of the sixteenth century to the role of precursors of Hugo Grotius). Even narrower historical surveys of natural-law theory accord little importance to sixteenth-century developments. See, e.g., M. CROWE, *THE CHANGING PROFILE OF THE NATURAL LAW* 213-14 (1977) (refers briefly to contributions of Luther and the neo-scholastics in between compendious discussions of twelfth- to fourteenth-century and seventeenth- and eighteenth-century developments); A. D'ENTREVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* (1951) (skips from Roman Catholic natural-law theory to Enlightenment natural-law theory, with only passing mention of the Reformation); H. ROMMEN, *DIE EWIGE WIEDERKEHR DES NATURRECHTS* (1945) (skips from scholastic to Grotian natural-law theory); L. STRAUSS, *NATURAL RIGHT AND HISTORY* 120-65 (1953) (skips from classic natural right to modern rights theory, hardly mentioning sixteenth-century developments); H. THIEME, *DAS NATURRECHT UND DIE EUROPÄISCHE PRIVATRECHTSGESCHICHTE* 23ff. (1947) (makes oblique reference only to the "Lutheran German forerunners" of Pufendorf, Leibniz, Wolff, and other natural-law theorists). For further commentary on this historiography, see *infra* notes 230-31 and accompanying text.

2. This thesis has been argued most forcefully by the German historian and theologian Ernst Troeltsch (1865-1923). See, e.g., E. TROELTSCH, *PROTESTANTISM AND PROGRESS: A HISTORICAL STUDY OF THE RELATION OF PROTESTANTISM TO THE MODERN WORLD* 101 (W. Montgomery trans.; repr. ed. 1958) (Protestantism produced no change in "legal theory . . . [or] in new legal forms . . . [i]n essentials it continued the medieval conditions"); 2 E. TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 528 (O. Wyon trans. 1931); 4 E. TROELTSCH, *AUFSÄTZE ZUR GEISTESGESCHICHTE UND RELIGIONSGESCHICHTE* 161, 180 (H. Baron ed. 1925) (Luther produced only a "crude, raw, and aphoristic theory" largely repeating the commonplaces of scholastic and patristic

legal philosophy, since Luther and his followers had made law and religion mutually irrelevant.<sup>3</sup>

The Lutheran reformers did, however, have a distinctive legal philosophy rooted in their basic theological and political beliefs, and this legal philosophy had a great influence not only in Germany but also in other European countries and eventually America as well. The reformers did not, to be sure, break totally with the legal thought that had come to predominate in the Roman Catholic tradition since the late eleventh century. They retained much of the terminology and many of the concepts that had been first articulated by the scholastic jurists.<sup>4</sup> They also accepted certain basic postulates of Roman Catholic legal theory: that human law is rooted in the nature of the universe; that it takes its character in some degree from natural law as revealed in creation, in Scripture, and in human reason and conscience; and that, on the other hand, human selfishness and pride may give rise to unjust laws that are contrary to natural law and are, therefore, to be condemned. Yet the Lutheran reformers, starting from radically new theological and political premises, cast these traditional concepts and postulates in a new ensemble, with new meanings, new emphases, and new applications. Their legal philosophy thus differed markedly not only from that of the earlier

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jurisprudence); see also McNeill, *Natural Law in the Teaching of the Reformers*, 26 J. RELIGION 168 (1946) ("There is no real discontinuity between the teaching of the Reformers and that of their predecessors with respect to natural-law"—a thesis defended with discussion of theological and moral views of Luther, Melancthon, Zwingli, and Calvin, without reference to their theories of the relation of natural law to the prevailing legal systems); J. HABERMAS, *THEORY AND PRACTICE* 62 (J. Viertel trans. 1973) ("the Reformation . . . led [only] to a positivization and formalization of the prevailing Thomistic Natural Law"); 1 M. WEBER, *GESAMMELTE AUFSÄTZE ZUR RELIGIONSSOZIOLOGIE* 69 (1920); E. ERHARDT, *LA NOTION DU DROIT NATURAL CHEZ LUTHER* (1901); see also *infra* note 101 concerning Melancthon and *infra* note 203 concerning Oldendorp.

3. This thesis has been advanced primarily by Troeltsch and Emil Brunner. See E. BRUNNER, *THE CHRISTIAN DOCTRINE OF THE CHURCH, FAITH, AND THE CONSUMMATION* 306ff. (D. Cairns trans. 1962); E. BRUNNER, *THE DIVINE IMPERATIVE: A STUDY IN CHRISTIAN ETHICS* 261ff. (O. Wyon trans., 5th impr. 1953) (there is only an "artificial union" between law and theology in Luther's thought); E. BRUNNER, *JUSTICE AND THE SOCIAL ORDER* 21 (1945); E. TROELTSCH, *supra* note 2. For a criticism of the dualistic assumptions made primarily by Brunner, see H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 77-105 (1974); Niebuhr, *Love and Law in Protestantism and Catholicism*, 9 J. RELIGIOUS THOUGHT 95 (1952).

4. We use the term "scholastic" to refer to those writers who, after the Papal Revolution, adopted a dialectical method of analysis and synthesis to organize and systematize law, theology, and philosophy. The founder of the dialectic method was Peter Abelard (1079-1142). The method was utilized by Gratian (c.1095-1150) to systematize the canon law, by Peter Lombard (1100-1160) to systematize theological doctrines, and by Thomas Aquinas (1225-1274) to systematize the various branches of philosophy. See H. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 131-32 (1983), and sources cited therein.

Roman Catholic tradition but also from the legal philosophies that came to prevail in Europe in the seventeenth and early eighteenth centuries.

Lutheran legal philosophy is an important historical and philosophical source of the two major competing schools of contemporary Western legal philosophy, namely, legal positivism and natural-law theory. In terms of positivism, Lutheran legal philosophy defines law as the will of the state expressed in a body of rules and enforced by coercive sanctions. It sharply separates law and morals. In terms of natural law, Lutheran legal philosophy postulates the existence within every person of a conscience, or sense of justice, which enables him or her to apply to concrete circumstances general rules that, precisely because of their generality, are necessarily unjust. Thus, Lutheran jurisprudence seeks to cure the inevitable injustice of rules by the resort to equity in their application. A positivist theory of legal rules is combined with a natural-law theory of the legal application of rules.

The tension between rule and application of rule, strict law and equity, is reflected, in Lutheran legal philosophy, in the equal duty of civil obedience to lawful authority and civil disobedience to laws that offend conscience. Lutherans affirm that such laws are laws and, therefore, morally binding; at the same time, they affirm that morality may require that such laws be disobeyed. The only sure way of escape from this dilemma is, once again, by resort to conscience.

The reliance upon conscience is aided by the correspondence between the dictates of conscience and the revealed truth of the Ten Commandments. Lutheran theologians teach that God has implanted in the conscience of every person moral insights that correspond to the Biblical injunctions to worship God, to respect authority, not to steal, not to kill, to be honest, to deal fairly with others, to respect the rights of others, and the like. Lutheran jurists called this the moral law or natural law. It differed, however, from the natural law of the Roman Catholic Church, which was founded on reason and on the synthesis of reason and revelation rather than on the conscience of the individual.

In Part I of this Article, we shall discuss in turn some of the theological and political premises underlying sixteenth-century Lutheran legal philosophy. In Parts II-IV, we shall set forth the theories of law and politics developed by Martin Luther (1483-1546), Philip Melancthon (1497-1560), and Johann Oldendorp (c.1480-1567), respectively. In the Conclusion we shall discuss some of the reasons why Lutheran contributions to Western legal philosophy have been obscured and obfuscated,

and the significance of these Lutheran contributions for contemporary jurisprudential debates.

## I. THE THEOLOGICAL AND POLITICAL PREMISES OF LUTHERAN LEGAL PHILOSOPHY

### A. THEOLOGICAL PREMISES

In order to explain the relationship between Lutheran theology and Lutheran legal philosophy, a certain amount of theological analysis is required. We shall sketch (1) the Lutheran doctrine of salvation, together with closely related doctrines of human nature and of the authority of the Bible as the sole source of spiritual knowledge; and (2) the Lutheran doctrine of the two kingdoms, the heavenly and the earthly, together with the closely related doctrines of the priesthood of all believers and of their Christian calling in their various occupations.<sup>5</sup>

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5. In discussing Lutheran theological thought we draw on the works not only of Martin Luther (1483-1546) but also of other Lutheran theologians including such distinguished original thinkers as Philip Melancthon (1497-1560), Martin Bucer (1497-1551), and Johannes Brenz (1498-1570). Luther's works are collected in *D. MARTIN LUTHERS WERKE, KRITISCHE GESAMTAUSGABE* (1883-1974) [hereinafter WA], translated, in large part, in *LUTHER'S WORKS* (J. Pelikan et al. trans. & eds. 1955-1976) [hereinafter LW]; a selection of Luther's most influential theological writings are collected in *MARTIN LUTHER, SELECTIONS FROM HIS WRITINGS* (J. Dillenberger ed. 1961) [hereinafter Dillenberger collection]. Melancthon's theological writings are collected in *CORPUS REFORMATORUM* (G. Bretschneider et al. eds. 1834-1860) [hereinafter CR] together with *SUPPLEMENTA MELANCTHONIANA* (1910); a good selection of his theological and philosophical writings are included in *MELANCTHONS WERKE IN AUSWAHL* (R. Stupperich et al. eds. 1951) [hereinafter Stupperich collection]. Melancthon's first principal theological writing, *LOCI COMMUNES RERUM THEOLOGICARUM* is translated in *MELANCTHON AND BUCER 18-152* (W. Pauck ed. 1969) [hereinafter LC 1521]; the 1555 edition of the *LOCI COMMUNES* is translated in *MELANCTHON ON CHRISTIAN DOCTRINE* (C. Manschreck trans. & ed. 1965) [hereinafter LC 1555]; selections from several of his other theological tracts are included in *MELANCTHON: SELECTED WRITINGS* (E. Flack & L. Satre eds.; C. Hill trans. 1962) [hereinafter Flack collection]. Martin Bucer's writings are collected in *MARTIN BUCERS DEUTSCHE SCHRIFTEN* (R. Stupperich ed. 1960) [hereinafter M. BUCER, DS] and *MARTIN BUCERI OPERA LATINA* (F. Wendel ed. 1955); an English translation of M. BUCER, *DE REGNO CHRISTI* appears in LC 1521, *supra*, at 174-394; other important theological writings are included in *COMMON PLACES OF MARTIN BUCER* (D. Wright trans. & ed. 1972) [hereinafter COMMON PLACES]. Johannes Brenz's earlier theological writings are collected in *J. BRENZ, FRÜHSCHRIFTEN* (M. Brecht ed. 1970-1974). For citations to these Lutheran writings, we have used the standard translations listed above whenever applicable. For quotations from these Lutheran writings, we have provided our own English translations based on the authoritative German or Latin edition listed above and have included the passages in their original language (but with modernized spelling) in parentheses after the translation.

Among the most important Lutheran creeds, confessions, and catechisms on which we have relied are M. LUTHER, *SMALL CATECHISM* (1529), M. LUTHER, *LARGE CATECHISM* (1529), the *AUGSBURG CONFESSION* (1530), the *APOLOGY OF THE AUGSBURG CONFESSION* (1531), the *SCHMALKALD ARTICLES* (1537), and the *FORMULA OF CONCORD* (1577). These and other

## 1. *Salvation*

The Lutheran reformers broke with Roman Catholic theology, in the first instance, over the question: How is a person to become acceptable to God? How is his sinfulness, his alienation from God, to be overcome and his spiritual wholeness, his communion with God, to be restored?

The two sides agreed that God had created man in his own image and that man, having freedom of will, had revolted against God and had thereby lost his original righteousness. They further agreed that man was incapable of being "saved," that is, of regaining wholeness, by exercise of his own reason and will, but that as a result of Christ's atoning sacrifice it became possible for a penitent person, under certain conditions, to escape divine condemnation.

The two sides differed, however, about the conditions. First, the Roman Catholics believed that divine forgiveness, with relief from eternal punishment, could only come to baptized Christians through the sacrament of penance administered by the priesthood. The priest, they believed, was vested with divine authority to hear the sinner's confession, to absolve the sinner from eternal punishment, and to prescribe penitential works by which the sinner could be purged of his sin.<sup>6</sup> Lutherans, on the other hand, believed that forgiveness and absolution could only come

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Lutheran documents—in Latin, German, and English versions—are collected in TRIGLOT CONCORDIA, THE SYMBOLICAL BOOKS OF THE EV. LUTHERAN CHURCH (1921) [hereinafter TC].

<sup>1</sup> For general surveys of sixteenth-century Lutheran theological developments, see J. PELIKAN, REFORMATION OF CHURCH AND DOGMA (1300-1700) 127ff. (1984); R. JENSON, LUTHERANISM: THE THEOLOGICAL MOVEMENT AND ITS CONFESSIONAL WRITINGS (1976); 7 A. HARNACK, HISTORY OF DOGMA (N. Buchanan trans. 1958); A. DICKENS, MARTIN LUTHER AND THE REFORMATION (1967).

<sup>6</sup> For primary sources on the sacrament of penance in the twelfth- to fifteenth-century Roman Catholic tradition, see 4 PETRUS LOMBARDUS, QUATUOR LIBRI SENTENTIARUM Dist. 13-22' (1916 ed.), partly translated in PETER LOMBARD AND THE SACRAMENTAL SYSTEM (E. Rogers trans. & ed.; repr. ed. 1976); HUGH OF ST. VICTOR, DE SACRAMENTIS Part 14 (R. Deferrari trans. & ed. 1951); T. AQUINAS, SUMMA THEOLOGICA III (Supp.) QQ. 84-90 (Fathers of the English Dominican Province trans. 1922); A. DE CLAIVASSO, SUMMA ANGELICA DE CASIBUS CONSCIENTIAE, Section on 'Penitentia' (1486) (volume is unpaginated and folio number indecipherable) [hereinafter CLAIVASSO]; see also papal and conciliar decrees from the twelfth to sixteenth centuries collected in THE TEACHINGS OF THE ROMAN CATHOLIC CHURCH AS CONTAINED IN HER DOCUMENTS (K. Rahner ed. 1967); THE SOURCES OF CATHOLIC DOGMA (J. Deuzinger ed., R. Deferrari trans. 1954).

For authoritative secondary accounts of the Roman Catholic doctrine of penance, see P. ANCIAUX, THE SACRAMENT OF PENANCE (1962); J. JUNGSMANN, DIE LATEINISCHE BUSSRITEN IN IHRER GESCHICHTLICHEN ENTWICKLUNG (1932); J. MARTOS, DOORS TO THE SACRED: A HISTORICAL INTRODUCTION TO SACRAMENTS IN THE CATHOLIC CHURCH 307-63 (1943); Rahner, *Forgotten Truths Concerning the Sacrament of Penance*, in 2 K. RAHNER, THEOLOGICAL INVESTIGATIONS 135-74 (K. Kruger trans. 1963).

in a direct confrontation between the repentant sinner and God, without the mediation of a priest and without rules and procedures.<sup>7</sup> No priest, Luther said in 1517, is authorized to come between God and the individual human soul that seeks forgiveness of sins.<sup>8</sup>

Second, the Roman Catholics believed that not only faith but also good works were required to make a person "righteous" or "just" in God's sight, whereas the Lutherans believed in "justification" by faith alone. The Roman Catholic Church maintained a fundamentally optimistic view of human will and human reason. It taught that man's will and reason remained capable of attaining a "natural"—though not a "supernatural"—perfectability despite his sinfulness. Thus one who, by the use of his will and reason, led a life of goodness, love, piety, and similar virtues, could, by partaking of the sacraments, earn relief from punishment for sins, both in this life and after death.<sup>9</sup> The Lutheran reformers, on the other hand, taught that a person's will and reason are both essentially corrupted by his innate egoism. That was the meaning of the Lutheran doctrine of "total" depravity. It embraced the depravity both of human reason and of human will—including the reason and will

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7. The Roman Catholic sacrament of penance was based, in part, on the doctrine of the "power of the keys," which refers to the power bequeathed by Christ to the Apostle Peter in *Matthew 16:18-16:19*: "I tell you, you are Peter, and upon this rock I will build my church, and the powers of death shall not prevail against it. I will give you the keys of the kingdom of heaven; and whatever you bind on earth shall be bound in heaven, and whatever you loose on earth will be loosed in heaven." The Roman Catholic Church, particularly after the eleventh century, taught that the papacy had succeeded to Peter's supreme power of absolution as well as the power to prescribe detailed rules concerning the nature of both virtue and vice. See, e.g., T. AQUINAS, *supra* note 6, at III, Q. 17 (Of the Power of the Keys) & Q. 18 (Of the Effect of the Keys); see also H. BERMAN, *supra* note 4, at 172-73; B. TIERNEY, *THE ORIGINS OF PAPAL INFALLIBILITY 1150-1350: A STUDY ON THE CONCEPTS OF INFALLIBILITY, SOVEREIGNTY AND TRADITION IN THE MIDDLE AGES* 39-45, 82-19 (H. Oberman ed. 1972).

Lutherans rejected this doctrine. See 39 LW, *supra* note 5, at 39-40; APOLOGY OF THE AUGSBURG CONFESSION, Article 6 (Of Confession and Satisfaction), Article 8 (Of Human Traditions in the Church), and Article 14 (Of Ecclesiastical Power) in TC, *supra* note 5, at 280ff., 314ff., 442ff.; LC 1521, *supra* note 5, at 140-43; 2 J. BRENZ, *supra* note 5, at 45ff. For further elaboration of the Lutheran understanding of the power of the keys, see LC 1555, *supra* note 5, at 255ff.; 36 LW, *supra* note 5, at 16-18.

8. This is the clear implication of Articles 36, 37, and 76 of Luther's Ninety-Five Theses. See M. LUTHER, NINETY-FIVE THESES (1517), in 31 LW, *supra* note 5, at 28, 32. See also Luther's elaboration of these articles in M. LUTHER, EXPLANATIONS OF THE NINETY-FIVE THESES (1518), in *id.* at 189, 240-42.

9. On the optimistic view of human nature and human reason of the Roman Catholic Church, see the collection of primary sources in H. DEUZIGER, THE SOURCES OF CATHOLIC DOGMA 188ff., 201ff., 248ff. (R. Deferrari trans. 1957); DOCUMENTS ILLUSTRATIVE OF THE CONTINENTAL REFORMATION 1-20 (B. Kidd. ed. 1957).

of the ecclesiastical hierarchy.<sup>10</sup> A person's salvation from his or her sinful self could come only through faith in God's grace. Moreover, such faith was something that a person acquired not as a result of the exercise of his or her own will and reason but only as a free gift of God.<sup>11</sup>

Third, the Roman Catholic Church made salvation conditional upon compliance with the traditions and laws of the visible corporate church. They believed it was only through these traditions and laws that God's will was revealed.<sup>12</sup> The Lutheran doctrine of salvation, on the contrary, rested on the belief that knowledge of God's will—what the Lutherans called spiritual knowledge, as contrasted with temporal knowledge—was to be derived from the Bible alone. The Bible contained the whole Christian revelation and all that was requisite for human salvation. The Roman Catholic Church, the Lutherans charged, had “tyrannized the Christian conscience,” and “Judaized Christianity” by making compliance with the laws and traditions of the Church requisite for salvation.<sup>13</sup>

The Lutherans condemned with special vehemence the Roman Catholic doctrine of purgatory, with its theory of specific penalties to be paid, either in this world or the next, in proportion to the sinfulness of

10. See 35 LW, *supra* note 5, at 23; APOLOGY OF THE AUGSBURG CONFESSION, Article 20 (Of Good Works), in TC, *supra* note 5, at 336-43; SCHMALKALD ARTICLES Part III, Article 1 (Of Sin) in TC, *supra* note 5, at 467-79; LC 1521, *supra* note 5, at 30-49; COMMON PLACES, *supra* note 5, at 120-200.

11. APOLOGY OF THE AUGSBURG CONFESSION, Article 4 (Justification by Faith Alone) in TC, *supra* note 5, at 118-56; COMMON PLACES, *supra* note 5, at 201-34; LC 1521, *supra* note 5, at 88-109.

12. See the rich discussion of scholastic theories of the relation of scripture and tradition in A. McGRATH, *THE INTELLECTUAL ORIGINS OF THE EUROPEAN REFORMATION* 141-151 (1987).

13. See, e.g., 6 WA, *supra* note 5, at 169:

Who can recount all the tyrannies with which the troubled consciences of confessing and penitent Christians [are burdened]—the deadly enactments and customs with which they are daily harassed by silly manikins who bind and place on the shoulders of men very heavy and unbearable burdens which they themselves do not want to touch even with one finger? (Sed quis omnes tyrannides recenseat, quibus conscientium et poenitentium miserae conscientiae Christianorum—mortiferis constitutionibus et moribus quotidie exagitantur per ineptos homunculos, qui alligare tantum noverunt onera gravia et importabilia et imponere humeris humanum, quae ipsi nec digito volunt movere?)

See also APOLOGY OF THE AUGSBURG CONFESSION, Articles 7-8, in TC, *supra* note 5, at 236-39:

[T]he righteousness of faith is not a righteousness bound to certain traditions as the righteousness of the law was bound to the Mosaic ceremonies. . . . Some thought that human traditions were necessary for meriting justification. ([I]ustitia fidei non est iustitia alligata certis traditionibus, sicut iustitia legis erat alligata certis traditionibus. . . . Nonnulli putaverunt humanas traditiones necessarios . . . esse ad promerendam justificationem.)

See also AUGSBURG CONFESSION, Article 8 (Of Human Traditions in the Church), Article 26 (Of the Distinction of Meats), in TC, *supra* note 5, at 70 and 314; LC 1555, *supra* note 5, at 306-16; S. OZMENT, *THE REFORMATION IN THE CITIES: THE APPEAL OF PROTESTANTISM TO SIXTEENTH-CENTURY GERMANY AND SWITZERLAND* 49-56 (1975) (“The Assault on the Confessional”); J. PELIKAN, *supra* note 5, at 167-82.

acts. They attacked the doctrine, in the first instance, as having no foundation in the Bible.<sup>14</sup> They also attacked the practice of indulgences,<sup>15</sup> which grew out of the doctrine of purgatory, as a device whereby a corrupt priesthood could extort money for its own benefit.<sup>16</sup> Principally, however, they condemned the doctrine for its implicit conception that people could work off their sins, so to speak, and thus earn eternal salvation. God, said Luther, will accept the faithful person "just as he is," still a sinner but faithful and hence liberated from his or her alienation.<sup>17</sup>

If one asks what the Lutheran doctrine of salvation has to do with law, the first part of the answer must be negative. Lutheranism eliminated law as an element in the reconciliation of man with God. It attacked the Roman Catholic concept of a God who rules the human soul (in part) by law, a God who lays down rules, who establishes institutions and procedures, and who rewards and punishes on the basis of thoughts and deeds. In the thirteenth century a Roman Catholic German jurist had written, "God is himself law, and therefore law is dear to him."<sup>18</sup> For the Lutheran reformers God was not law. God had not ordained rules, institutions, or procedures for forgiveness of sins for the

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14. Although early in his career Luther averred that he had "never denied the existence of a Purgatory," see, e.g., 7 WA, *supra* note 5, at 450, by 1530 he had written a Disavowal of Purgatory, in which he denounced the doctrine as "scandalous" and "absent the support either of Scripture or of the Fathers." 30 WA, *supra* note 5, at 360-373. Many of the other reformers adopted this position. See, e.g., COMMON PLACES, *supra* note 5, at 265; LC 1555, *supra* note 5, at 254; APOLOGY OF THE AUGSBURG CONFESSION, Article 6 (Of Confession and Satisfaction), in TC, *supra* note 5, at 289ff.; see generally J. PELIKAN, *supra* note 5, at 136ff.; 1 J. KOESTLIN, THE THEOLOGY OF LUTHER IN ITS HISTORICAL DEVELOPMENT AND INNER HARMONY 324, 469 (1897).

15. The indulgence payment by the confessed sinner was regarded as an act of repayment to the Treasury of Spiritual Merits (a repository of grace made possible by Christ and the saints), which the priest had opened on behalf of the confessed sinner. For discussion of the Roman Catholic doctrine of indulgences, see P. ANCIAUX, *supra* note 6, at 166-84; J. MARTOS, *supra* note 6, at 343-45; B. POSCHMANN, Penance and the Anointing of the Sick (1964); H. LEA, A HISTORY OF AURICULAR CONFESSION AND INDULGENCES IN THE LATIN CHURCH (1896) (in two volumes) (a dated but still valuable study). For a discussion of the reformers' attack on the indulgence system, see J. PELIKAN, SCRIPTURE VERSUS STRUCTURE: LUTHER AND THE INSTITUTIONS OF THE CHURCH 24ff., 113ff. (1968).

Luther's diatribe against indulgence payments in his Ninety-Five Theses (which he subtitled Disputation on the Power and Efficacy of Indulgences) was motivated, in part, by his reaction to the indulgence trafficking of a Dominican friar and papal inquisitor Johannes Tetzel (1465-1519), who used the indulgence payment as a form of papal taxation. In Article 28 of the Ninety-Five Theses, Luther singles out for special criticism Tetzel's famous "sales pitch": "the moment the coin clinks in the bottom of the chest, the soul flies to heavenly rest." See 1 WA, *supra* note 5, at 234.

16. 31 LW, *supra* note 5, at 25-33; 56 WA, *supra* note 5, at 281. A summary of Luther's arguments is contained in B. REARDON, RELIGIOUS THOUGHT IN THE REFORMATION 63-64 (1981).

17. M. LUTHER, NINETY-FIVE THESES (1517), Article 36, in 31 LW, *supra* note 5, at 28.

18. SACHSENSPIEGEL V: LANDRECHT IN HOCHDEUTSCHER UEBERTRAGUNG Prolog and Part III, 78, no. 2 (K. Eckhardt ed. 1967). See H. BERMAN, *supra* note 4, at 503-05.

Christian life. Faith alone could save, and faith was itself a "passive" virtue, a free gift of a gracious God.<sup>19</sup>

The second part of the answer, however, is positive. The Lutheran doctrine of salvation by faith alone, together with the related doctrines of human depravity and of the Bible as the sole source of spiritual knowledge, presupposed the existence of another realm, the realm of sin, in which rules, institutions, and procedures are necessarily operative. Indeed, Luther and his followers invoked the doctrine of salvation to refute the antinomian Anabaptists and Spiritualists, who sought to base social and political life not on law but solely on grace and Biblical injunctions.<sup>20</sup> It is the paradox of the Lutheran doctrine that one cannot "earn" salvation *either* by works of the law *or* by any other means—including lovingkindness, humility, or any other moral virtues. Thus, the doctrine left entirely open the question of the relationship of morality to law and the significance of morality and law *apart* from salvation.

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19. In M. LUTHER, LECTURES ON GALATIANS (1531/5), Luther contrasts active and passive righteousness or virtue:

[According to] St. Paul righteousness is multifarious. There is political righteousness which the emperor, the princes of the world, philosophers, and lawyers deal with. There is also ceremonial righteousness, which human traditions teach [and which] parents and schoolmasters may hand on without danger, since they do not attribute to it the power to satisfy for sin, to placate God or to deserve grace; but they only hand on such ceremonies as are necessary for the correction of manners, and certain observations [concerning this life]. Besides these there is a legal righteousness or Decalogue which Moses teaches. And this we teach after the teaching of faith. Above and beyond all these is the Christian righteousness of faith which must be carefully distinguished from the others mentioned above. For the ones above are certainly contrary to this one, since they flow from the laws of Caesar or the traditions of the Pope or even from the gift of God, since the righteousness of works is also a gift to God, as all works, etc. But the righteousness [of faith] is just the opposite, a passive righteousness, which we only receive where we work nothing but only suffer something to be worked in us, namely, God. (Paulus . . . Est enim multiplex iustitia. Quaedam est politica quam Caesar, Principes mundi, philosophi et iureconsulti tractant. Alia est ceremonialis quam docent traditiones humanae . . . [e]am sine periculo tradunt patresfamilias et paedagogi, quia non tribuunt ei vim ad satisfaciendum pro peccatis, ad placandum deum et promerendam gratiam, sed tradunt ceremonias necessarias tantum ad disciplinam morum et certas observationes. Praeter has est alia quaedam iustitia legalis seu decalogia quam Moses docet. Hanc et nos docemus post doctrinam fidei. Ultra et supra has omnes est fidei set Christiana iustitia quae diligentissime discernenda est ab illis superioribus. Sunt enim superiores huic prorsus contrariae, tum quod fluunt ex legibus Caesarum, traditionibus Pape libus sive etiam ex dono dei, quia ipsa iusticia operarum est quoque donum dei, ut omnia opera etc. Sed iusticia . . . est mere contraria, passiva, quam tantum recipimus, ubi nihil operamur sed patimur alium operari in nobis scilicet deum.)

40 WA, *supra* note 5, at 40-41.

20. For Luther's opposition to the Anabaptist reformers on this point, see Dillenberger collection, *supra* note 5, at 143; 21 LW, *supra* note 5, at 3; 45 LW, *supra* note 5, at 82; see also Flack collection, *supra* note 5, at 103-24; FORMULA OF CONCORD (1577) (The Erroneous Articles of the Anabaptists), in TC, *supra* note 5, at 1096-1101. For a general discussion of the Anabaptists, and the antipathy expressed toward them by Lutherans and other Protestants, see M. MULLET, RADICAL RELIGIOUS MOVEMENTS IN EARLY MODERN EUROPE (1986); G. WILLIAMS, THE RADICAL REFORMATION (1962).

## 2. *The Two Kingdoms*<sup>21</sup>

The belief that both human will and human reason are essentially defective and that good works are not a means of union with God led Luther, Melancthon, and the other reformers to their central theological teaching that God has ordained two distinct realms, or kingdoms,<sup>22</sup>

21. The doctrine of the two kingdoms has been the subject of an enormous literature—and controversy—in recent decades. Scholars from a variety of perspectives have generally agreed that the doctrine is “the key to Luther’s mature social, political, and legal thought,” W. THOMPSON, *THE POLITICAL THOUGHT OF MARTIN LUTHER* 11 (1984), and “the key to the reformer’s theories of church, state, and law,” Grundmann, *Kirche und Staat nach der Zwei-Reiche Lehre*, in *LUTHER UND DIE OBRIGKEIT* 353 (G. Wolf ed. 1972) (quoting Johannes Heckel). Many have also agreed that “the two kingdoms doctrine must be seen as a general reformed doctrine,” advocated not only by Luther but also by Melancthon, Bucer, Brenz, and others and articulated in the Lutheran confessions and creeds of the sixteenth-century. Lau, *Die lutherische Lehre von den beiden Reichen*, in *LUTHER UND DIE OBRIGKEIT* 371 (G. Wolf ed. 1974). Beyond that general level of agreement, however, the doctrine has been what one scholar has called “a veritable garden of errors,” J. HECKEL, *IM IRRGARTEN DER ZWEI-REICHE-LEHRE* (1957) [hereinafter J. HECKEL, *IM IRRGARTEN*], setting forth a long series of contradictory interpretations. The following brief summary of the doctrine of the two kingdoms describes only that portion of the doctrine which is essential to Lutheran legal philosophy and which is generally advocated by the important Lutheran reformers.

For a more extensive study of the doctrine, see, besides the works already cited, the following: P. ALTHAUS, *THE ETHICS OF MARTIN LUTHER* 43-71 (1972); H. BORNKAMM, *LUTHER’S DOCTRINE OF THE TWO KINGDOMS IN THE CONTEXT OF HIS THEOLOGY* (K. Hertz trans. 1966); H. DIEM, *LUTHER’S LEHRE VON DEN ZWEI REICHEN, UNTERSUCHT VON SEINEM VERSTÄNDNIS DES BERGPREDIGT AUS* (1938); J. HECKEL, *LEX CHARITATIS, EINE JURISTISCHE UNTERSUCHUNG ÜBER DAS RECHT IN DER THEOLOGIE MARTIN LUTHERS* (1953) [hereinafter J. HECKEL, *LEX CHARITATIS*]; F. LAU, *ÄUSSERLICHES ORDNUNG UND WELTLICHES DING IN LUTHERS THEOLOGIE DES POLITISCHEN* (1933); F. LAU, *LUTHERS LEHRE VON DEN BEIDEN REICHEN* (1952); Lazareth, *Luther’s ‘Two Kingdoms’ Ethic Reconsidered*, in W. LAZARETH, *CHRISTIAN SOCIAL ETHICS IN A CHANGING WORLD: AN ECUMENICAL THEOLOGICAL INQUIRY* (1966); I. H. THIELICKE, *THEOLOGICAL ETHICS* 371ff. (W. Lazareth ed. 1966); G. TORNVALL, *GEISTLICHES UND WELTLICHES REGIMENTE BEI LUTHER* (1947); Wolf, *Das Problem der Sozialethik im Luthertum*, in E. WOLF, *PEREGRINATIO. STUDIEN ZUR REFORMATORISCHEN THEOLOGIE UND ZUM KIRCHENPROBLEM* 223 (1954); E. WOLF, *ZUR ZWEI-REICHE-LEHRE LUTHERS* (J. Haun ed. 1973); Althaus, *Luther’s Lehre von den beiden Reiche im Feuer der Kritik*, 24 *LUTHER-JAHRBUCH* 40 (1957); Clausert, *Das Problem der Gewalt in Luthers Zwei-Reiche-Lehre; zur heutigen Berufung auf Luther*, 26 *EVANGELISCHE THEOLOGIE* 36 (1966); H. Fischer, *Streit über die Zwei-Reiche-Lehre*, in *GESELLSCHAFTLICHE HERAUSFORDERUNG DES CHRISTENTUMS. VOM KULTURPROTESTANTISMUS ZUR THEOLOGIE DER REVOLUTION* 69 (W. Schmidt ed. 1970); Heinze, *Die sog. Zwei-Reiche-Lehre im Spiegel von Luthers Briefweschsels*, in *NACHRICHTEN DER LUTHER-AKADEMIE* 18 (1962); Joest, *Das Verhältnis der Unterscheidung der beiden Reichen zu der Unterscheidung von Gesetz und Evangelium*, in *DANK AN PAUL ALTHAUS. EINE FESTGABE ZUM 70. GEBURTSTAG* 79 (W. Kunneth & W. Joest eds. 1958); Kinder, *Gottesreich und Weltreich bei Augustin und Luther*, in *GEDENKSCHRIFT FÜR WERNER ELERT* 24 (F. Huebner et al. eds. 1955); Wingeren, *Geistliche und weltliche Regimente bei Luther*, 3 *THEOLOGISCHE ZEITSCHRIFT* 263 (1947).

22. The terms “realm” and “kingdom” are translations of the German term *Reich* and the Latin term *regnum*, which the reformers, particularly Luther, used interchangeably. Etymologically, *regnum* is related to *rex*, “king,” whereas *Reich* is cognate with the English “reach.” Both

in which mankind is destined to live—the earthly<sup>23</sup> and the heavenly.

terms—Reich and regnum—have two well accepted meanings, according to sixteenth-century lexicons; either (1) the territory and/or people which is being ruled; or (2) the reign, rulership, kingship, or exercise of governmental authority itself, which is also rendered in German by the term *Regiment*.

Luther generally used the terms Reich and regnum in the second sense of the reign or rulership of an authority. Thus, the phrases *Reich Gottes*, *Reich Christi*, *regnum dei*, and *regnum Christi* denote the heavenly rule or reign or kingship of God. The phrases *Teufels Reich* and *regnum diaboli* denote the evil rule or reign of the devil. The phrases *Reich der Welt* and *regnum mundi* mean the rule or reign of temporal authorities. (We nevertheless translate “Reich” and “regnum” as “kingdom,” in order to conform to traditional usage.) See, e.g., 11 WA, *supra* note 5, at 249, 262, where Luther writes:

[W]e children of Adam and all persons must be divided into two classes: the first belong to the kingdom of God, and the others to the kingdom of this world. . . . [T]he two classes of Adam's children, the one in God's kingdom under Christ, the other in the earthly kingdom under the Obrigkeit, have two kinds of laws. For every kingdom must have its own laws (Gesetze) and its own law (Recht) and without laws, no kingdom or government can exist. (“[S]ie müssen wir Adams Kinder und alle Menschen teilen in zwei Teile: die ersten zum Reich Gottes, die andern zum Reich der Welt . . . [D]ie zwei Teile Adams Kinder, der eins in Gottes Reich unter Christo, das andere in der Welt Reich unter Ueberkeit ist . . . zweierlei Gesetz haben. Denn ein irdisches Reich muss seine Gesetze und Rechte haben und ohne Gesetz kein Reich noch Regiment bestehen kann.)

See also APOLOGY OF THE AUGSBURG CONFESSION, Article 16 where Melancthon enjoins the reader to make a “distinction between the kingdom of Christ (regnum Christi, Reich Christi) and a political kingdom (regnum civile, weltliches Reich).” TC, *supra* note 5, at 328-31.

The reformers occasionally rendered the second sense of the terms Reich and regnum by the term Regiment. See, e.g., 11 WA, *supra* note 5, at 262, quoted *supra*, where Luther treats Reich and Regiment synonymously; see also 32 *id.* at 390, 45 *id.* at 669 (Luther speaks of the “*geistlichen Reich und Regiment*”); TC, *supra* note 5, at 328 (Melancthon denotes the earthly kingdom by the terms “political kingdom” (regnum civile, weltliches Reich) and “the civil state” (*politia aut oeconomia, Weltregiment*)).

For further discussion of Luther's terminology, see W. THOMPSON, *supra* note 21, at 39; J. HECKEL, IM IRRGARTEN, *supra* note 21, at 10; H. BORNKAMM, *supra* note 21.

23. The adjectives “worldly,” “earthly,” “secular,” and “temporal” are all translations of the German adjective *weltlich*. Luther and the other reformers also used this word in a twofold sense. As Paul Althaus puts it,

When [Luther] speaks of living “in the world” he frequently refers to people who live in this age of the world or who live “on earth” [i.e., are part of the earthly kingdom]. In this sense, the Christian is a “citizen of the world.” Luther explicitly says that this secular life and the stations that constitute it are given and instituted by God. . . . On the other hand, Luther, like the New Testament, frequently uses the word “world” to designate those men who have closed their hearts to God's word and live in enmity with him or to describe that area in which sin, Satan, and “the children of Satan” have power.

P. ALTHAUS, *supra* note 21, at 49-50.

When discussing the two kingdoms, Luther and other reformers generally (though not always) used the term *weltlich* in the first sense. Thus, the phrase *weltliches Reich* (or, occasionally, *weltliches Regiment*) refers to the earthly kingdom, the created natural order. On a few occasions, however, they also use the phrase *weltliches Reich* to denote the Kingdom of the Devil, the Kingdom of darkness, the Kingdom of evil, which stands utterly opposed in eternal eschatological conflict with the Kingdom of God. See, e.g., APOLOGY OF THE AUGSBURG CONFESSION, Articles 7/8, in TC, *supra* note 5, at 226-45. This is a different, and for Luther, at least, less important dualism which he took over from St. Augustine. As Thompson explains,

For Luther, as for Augustine, the human race is divided into two utterly opposed groups, the kingdom of God and the kingdom of the world—the Devil. To the former belong true Christians. . . . By contrast, to the kingdom of the world or the kingdom of the Devil belong the rest of mankind, the vast majority who do not have true faith, even though

The earthly kingdom is the realm of creation, of will and reason, and of moral duty and works. It is comprised of all the institutions and activities that contribute to man's natural or physical life—marriage and family, business and property, government and law—and all persons participate in it.<sup>24</sup> At the same time, however, it is the realm of sin and death, corrupted by man's essential selfishness. The heavenly kingdom is the realm of faith and grace, of salvation and eternal life, in which all faithful Christians participate equally.

The two-kingdoms theory was an elaboration of Luther's earlier distinction between law and Gospel, which he considered to be entirely new in the history of theology. "Of this distinction between Law and Gospel," he wrote, "you will find nothing in the books of the monks, canonists, or theologians, whether recent or ancient. Augustine understood this difference somewhat and showed it. Jerome and others were wholly ignorant of it."<sup>25</sup> Law reigns in the earthly kingdom, Gospel in the heavenly.

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many of them outwardly profess to be Christians; for Satan rules in their hearts. . . . These two kingdoms are completely opposite in character. The kingdom of God is a kingdom of love devoted to God. The kingdom of the world or the Devil, like Augustine's *civitas terrena*, is a kingdom of sin and lust. They are also mutually exclusive. Whereas a Christian can belong in both God's spiritual and his temporal "*Reich*," by definition no one can belong to both the *regnum dei* and the *regnum diaboli*.

W. THOMPSON, *supra* note 21, at 51.

The confusion over the meaning of Luther's concept of the worldly, earthly, or secular (weltlich) kingdom stems, in large part, from the failure of many commentators to separate out these two senses of "weltlich" and the concomitant failure to see that Luther is drawing at least two sets of contrasts and relationships.

24. See, e.g., 32 WA, *supra* note 5, at 390:

God himself ordained and established this temporal government and its distinctions and through his Word has confirmed and commended them. For without them, this life could not endure. We are all included in them, indeed, we were born into them even before we became Christians. Therefore, we must remain in them so long as we are on earth, but only according to our outward bodily life and being. (Gott hat solches weltliches Regiment und Unterschiede selbst geordnet und eingesetzt, dazu durch seine Wort bestetigt und gelobet. Denn ohne das könnte dieses Leben nicht bestehen und sind alle samt darin gefasst, ja darin geboren, ehe wir Christen sind worden, darum müssen wir auch darin bleiben, so lange wir auf Erden gehen, doch nur nach dem äusserlichen leiblichen Leben und Wesen.)

See also 31 *id.* at 409-10:

These godly [social] stations and [social] orders were ordained by God so that the world could have a stable, orderly, peaceful existence and law may be maintained. (Diese göttliche Stände und Ordnung sind dazu von Gott geordnet, dass in der Welt ein beständiges, ordentliches, friedliches Wesen sei und das Recht erhalten werde.)

See also APOLOGY OF THE AUGSBURG CONFESSION, Article 16, TC, *supra* note 5, at 328-33 (delineating aspects of the "political kingdom"); LC 1555, *supra* note 5, at 323-24; J. BRENZ, *supra* note 5, at 171ff.

25. 40 WA, *supra* note 5, at 486 ("De hoc Legis et Evangeli discrimine nihil invenis in libris Monachorum, Canonistorum, Theologorum, Recentium et Veterum. Augustine aliqua ex parte illud tenuit ac ostendit. Hieronymus et similes prorsus ignorunt."). On the relationship between Luther's earlier distinction between law and gospel and his more elaborate distinction between the

The two-kingdoms theory provided the Lutheran reformers with a framework for comparing certain parallel human and divine activities. First, it allowed them to compare two forms of justice or righteousness (*justitia, Gerechtigkeit*). Earthly justice, "the justice of law" or "justice of works," is a moral justice whose norms, though ordained by God, are perceived and carried out by sinful men. Heavenly justice, "the justice of Gospel" or "justice of faith," is a spiritual justice in which God alone acts, not men. By grace he inspires faith in their hearts, and then by grace he responds to their faith, delivering them from sin and forgiving them. It was through this distinction between God acting through grace and faith and men acting through law and works that Luther was able, both in his personal life and in his theology, to resolve the question: How can a person who is totally corrupt be made at the same time acceptable to God—and to himself?<sup>26</sup>

Second, the two-kingdoms theory allowed the Lutheran reformers to compare two forms of truth and knowledge. In the heavenly kingdom God reveals himself directly through Scripture, the sole source of moral truth and spiritual knowledge. In the earthly kingdom God is hidden. He is the absconded God (*deus absconditus*), who makes his truth and knowledge known only through masks (*larvae*).<sup>27</sup> He is hidden in a person's inborn moral sentiments (will) and in a person's inborn elements of temporal knowledge (reason).<sup>28</sup> Yet the devil, too, in the form of pride

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earthly and the heavenly kingdoms, see H. BEYER, LUTHER UND DAS RECHT. GOTTES GEBOT, NATURRECHT, VOLKSGESETZ IN LUTHERS DEUTUNG 6 (1935); Joest, *supra* note 21; T. McDONOUGH, THE LAW AND THE GOSPEL IN LUTHER (1963).

Luther was also convinced that, on the basis of the two-kingdoms theory, he was able to make an entirely new contribution to political theory. "[S]ince the time of the Gospel," he wrote in 1526, "the temporal sword and the Obrigkeit have never been so clearly described and magnificently praised . . . as they have been by me." ("[S]eit der Apostel Zeit [sind] das weltliche Schwert und Oberkeit nie so klar beschrieben und herrlich gepreiset ist . . . als durch mich.") 19 WA, *supra* note 5, at 625; see similar sentiments in 38 WA, *supra* note 5, at 102. We have throughout this Article used the German word *Obrigkeit* (often rendered in the sixteenth century as "*Oberkeit*") rather than an English equivalent. A rough translation is "magistracy." It may also be translated as "sovereign" or "sovereignty." See *infra* note 44 and accompanying text.

26. See 1 WA, *supra* note 5, at 293ff.; LC 1521, *supra* note 5, at 89, 121; COMMON PLACES, *supra* note 5, at 128-38; P. ALTHAUS, THE THEOLOGY OF MARTIN LUTHER 224ff. (R. Schultz trans. 1966); E. BIZER, FIDES EX AUDITA; EINE UNTERSUCHUNG UEBER DIE ENTDECKUNG DER GERECHTIGKEIT GOTTES DURCH MARTIN LUTHER (1958); J. IWAND, GLAUBENSGERECHTIGKEIT NACH LUTHERS LEHRE (3d ed. 1959). For a comparison between Luther's and the scholastic views on divine justice, see Bornkamm, *Iustitia dei in der Scholastik und bei Luther*, 4 ARCHIV FÜR REFORMATIONSGESCHICHTE 1 (1942).

27. On Luther's doctrine of the hiddenness of God, see P. ALTHAUS, *supra* note 26, at 274-86 and the numerous primary sources quoted and cited therein.

28. The doctrine of inborn moral sentiments and inborn elements of temporal knowledge was most clearly articulated by Melancthon, but it can also be found in the writings of Luther, Brenz,

and egoism, is hidden in human will and reason, and he distorts the knowledge and truth that God has implanted. Therefore, the Christian is not to think that by willing to do good and by having knowledge he can find union with God.<sup>29</sup>

Third, the two-kingdoms theory allowed the Lutheran reformers to compare two governments, two "regimes" (*Regimente*)—the invisible spiritual regime of the church and the visible political regime of the secular authority. This doctrine differed sharply from the Roman Catholic "two-swords" theory as it had developed since the eleventh and twelfth centuries. The Papal Revolution had established a duality of spiritual and secular authority. The Church became a visible corporate hierarchical polity governed by canon law with jurisdiction not only over its own priesthood but also over the laity in a very wide range of matters. This was the "spiritual sword." The "temporal sword"—whose function was primarily to keep the peace and to protect rights of property—was wielded by emperors and kings, now deprived of their earlier ecclesiastical supremacy, as well as by feudal lords, urban authorities, and others. Papalists sometimes claimed the ultimate supremacy of the spiritual sword over the temporal, but the reality was generally one of competition and cooperation between them.<sup>30</sup>

The Lutheran reformers withdrew from the church its sword-wielding character. The true church, they declared, is not governed by law

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Bucer, and others. On Melancthon's views, see 22 CR, *supra* note 5, at 83; 20 *id.* at 115, 695, 748; 2 W. DILTHEY, *GESAMMELTE SCHRIFTEN (WELTANSCHAUUNG UND ANALYSE DES MENSCHEN SEIT RENAISSANCE UND REFORMATION)* 162ff. (1921); LC 1555, *supra* note 5, at xxviii; E. TROELTSCH, *VERNUNFT UND OFFENBARUNG BEI JOHANN GERHARD UND MELANCTHON* 47 (1891). On Luther's views, see B. GERRISH, *GRACE AND REASON* (1962); B. HAEGGLUND, *THEOLOGIE UND PHILOSOPHIE BEI LUTHER UND IN DER OCCAMISTISCHEN TRADITION. LUTHERS STELLUNG ZUR THEORIE VON DER DOPPELTEN WAHRHEIT* (1955) (a controversial but, nonetheless, provocative account); B. LOHSE, *RATIO UND FIDES. EINE UNTERSUCHUNG ÜBER DIE RATIO IN DER THEOLOGIE LUTHERS* (1958). For further discussion of this Lutheran epistemology, see *infra* notes 68-71, 95-99 and accompanying text.

29. See, e.g., 7 WA, *supra* note 5, at 73:

[H]uman nature and natural reason, as it is called, are by nature superstitious and ready to imagine that when laws and works are prescribed, that righteousness must be obtained through laws and works. . . . [I]t is impossible that they should of themselves escape from that slavery of works and into a knowledge of the freedom of faith. (Natura humana et ratio [ut vocant] naturalis sit naturaliter supersitiosa et propositis quibusque legibus et operibus prompta sit in opinionem iustificationis. . . . [I]mpossibile est, ut per seipsam se exuat a servitute illa operaria in libertatem fidei cognoscendam.)

See also 40 *id.* at 42. For further discussion of the relation between the two-kingdoms theory and the reformers' (particularly Luther's) understanding of the limitations of human reason, see B. GERRISH, *supra* note 28, at 10-27, 57-68, and a summary of his major argument in Gerrish, *Luther, Martin*, 5 *ENCYCLOPEDIA OF PHILOSOPHY* 109-13 (P. Edwards ed. 1967).

30. On the development of the two-swords theory during the Papal Revolution, see H. BERMAN, *supra* note 4, at 279-88 and sources cited therein.

but solely by Gospel. It does not exercise political power. It has no "jurisdiction." It is an invisible "communion of saints," a purely spiritual fellowship, part of the heavenly kingdom of grace, faith, and salvation.<sup>31</sup> To be sure, the church assumes a visible form in the earthly kingdom, but the only authority which the visible church wields in the earthly kingdom is to preach the Word and administer the sacraments.<sup>32</sup> This doctrine left law and politics solely to political authorities. Christians exercising political jurisdiction were to be guided not by the organized church but by their own consciences.

Fourth, the two-kingdoms theory allowed the reformers to compare the nature of citizenship in each realm. In the heavenly realm the Christian believer, Luther said, is "a private person," "a person for himself alone," an individual being. In the earthly realm, on the contrary, each person is a "public person," a "person for the sake of others," a communal being.<sup>33</sup> In the heavenly realm he has spiritual freedom; in the earthly realm he is bound by the duties of political citizenship.<sup>34</sup>

31. See generally LC 1555, *supra* note 5, at 266; COMMON PLACES, *supra* note 5, at 201. Luther wrote: "The church is absconded, the saints hidden." (Abscondita est Ecclesia, latent sancti.) 18 WA, *supra* note 5, at 652. "Just as that rock [Jesus Christ], sinless, invisible and spiritual, is perceptible by faith alone so perforce the church is sinless, invisible and spiritual, perceptible by faith alone." ("Igitur sicut Petra ista sine peccato, invisibilis et spiritualis est sola fide perceptibilis, ita necesse est et Ecclesiam sine peccato, invisibilem et spiritualem sola fide perceptibilem.") 7 *id.* at 710.

32. See 36 LW, *supra* note 5, at 16; LC 1555, *supra* note 5, at 255; 15 CR, *supra* note 5, at 678, 985ff.; 23 *id.* at 640. See generally J. PELIKAN, *supra* note 5, at 172-82.

33. See 21 LW, *supra* note 5, at 23, 44, 83, 109; 46 *id.* at 122. Luther also uses several other phrases to denote the same contrast: "Christian person" versus "secular person"; life and activity "when you are the only person affected" versus life and activity when you are "a Christian-in-relation" or one "who is bound in this life to others." See the excellent discussion in P. ALTHAUS, *supra* note 21, at 66-69. Bucer articulates similar themes in M. BUCER, ONE SHOULD NOT LIVE FOR HIMSELF ALONE BUT FOR OTHERS, AND HOW TO GO ABOUT IT, in 1 M. BUCER, DS, *supra* note 5, at 16.

34. The reformers distinguished sharply between a Christian's spiritual freedom from the curse of the Old Testament law as a citizen of the heavenly kingdom and the Christian's political freedom under the civil law as a citizen of the earthly kingdom. They condemned with particular vehemence certain radical reformers, such as Thomas Muentzer, who argued that spiritual freedom was synonymous with political freedom and that, therefore, believers were excused from obedience to the civil law. See, e.g., M. LUTHER, THE FREEDOM OF A CHRISTIAN (1520), in Dillenberger collection, *supra* note 5, at 42; LC 1555, *supra* note 5, at 195. This position is also reflected in later Lutheran church ordinances. For example, the Church Ordinance of Rothenburg (1559) provides:

Christian freedom does not relate to the external order. . . . On the contrary, it confirms this order and commands that it be observed by all. Subjects may not under the cloak of Christian freedom withdraw their obedience from the lawful Obrigkeit, which has power over them. They must gladly submit to it with joy in their hearts in the full knowledge that in this they are obeying their Lord God. (Christliche Freiheit geht nicht auf die äusserlichen Stände. . . . [S]ondern viel mehr bestetigt dieselben und will sie von allen Menschen gehalten haben. Also entziehen die Untertanen unter dem Schein christlicher Freiheit ihrer ordentlichen Obrigkeit, die Gewalt über sie hat, den schuldigen Gehorsam nicht,

The two kingdoms were not, however, merely parallel. They also interacted with each other on at least three levels.

First, the Lutheran reformers taught that it is the duty of Christians "to work the work of God in the world." As citizens of the earthly kingdom, Christians are not to withdraw ascetically from the world, abstaining from its activities and institutions, as certain Anabaptists and Spiritualists taught. Rather, Christians are to participate actively in these earthly institutions and activities, to confirm their created origin and function, and to use human will and reason, however defective, to do as much good and to attain as much understanding as possible. "God himself ordained and established this temporal realm and its distinctions," Luther wrote. "[W]e must remain and work in them so long as we are on earth."<sup>35</sup>

Second, the reformers developed the doctrine of the priesthood of all believers. On the one hand, they abolished the special priestly jurisdiction and the traditional Roman Catholic distinction between a higher clergy and lower laity. On the other hand, they transferred to each individual believer the responsibility to minister directly to others—to pray for them, to instruct them, and to help them. In that sense all believers were themselves considered to be priests to their peers.<sup>36</sup>

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sondern leisten denselben von Herzen gern und mit Freuden wissen, dass hierinnen sie Gott ihrem Herrn dienen.)

11 E. SEHLING, *DIE EVANGELISCHE KIRCHENORDNUNG DES SECHSZEHNTEHNTEN JAHRHUNDERTS* 576 (1902-1978). See also the injunction of the Margrave of Brandenburg:

Christian freedom has nothing to do with being quit of rents, interest, groundrent, tribute, tax, service, or similar outward burdens and grievances (as subjects now call them), but it is solely an inner spiritual thing. In such temporal concerns, matters, and laws, all subjects owe obedience to all Obrigkeit. (Christliche Freiheit nicht in Erledigung Rent, Zins, Gult, Zent, Steuer, Dienst oder andern der gleichen äusserlichen Burden und Beschwerden (wie es die Untertanen nennen) steht, sondern allein, wie vorgemeldet, ein innerliches, geistliches Ding ist und dass alle Untertanen aller Obrigkeit in solchen zeitlichen Geschäften, Sachen und Geboten zu gehorsam schuldig sein.)

E. SEHLING, *supra*, at 87. See discussion in G. STRAUSS, *LAW, RESISTANCE AND THE STATE, THE OPPOSITION TO ROMAN LAW IN REFORMATION GERMANY* 233-34 (1986).

35. 32 WA, *supra* note 5, at 390 ("Gott hat solches weltliches Regiment und Unterschiede selbst geordnet und eingesetzt . . . müssen wir auch darin bleiben so lang wir auf Erden gehen").

36. Luther set forth his famous doctrine of the priesthood of all believers in M. LUTHER, *APPEAL TO THE RULING CLASS OF GERMAN NATIONALITY AS TO THE AMELIORATION OF THE STATE OF CHRISTENDOM* (1520), in 6 WA, *supra* note 5, at 406ff. The doctrine was intended both (1) to reject the Roman Catholic distinction between a higher spiritual class of ordained clergy and a lower secular class of laity; and (2) to support the doctrine of the Christian calling or vocation, discussed in the following paragraph in which Luther wrote:

[There is] really no other basic difference between laymen, priests, princes, bishops, or, as they put it, between spiritual and secular, than that of office or work, and not that of status, since they all have spiritual status, and all are truly priests, bishops, and popes. But they do not all pursue the same works. (So folget aus diesem, dass Laien, Priester, Fürsten, Bischöfe, und wie sie sagen, geistlich und weltlich, keinen andern Unterschied im Grund wahrlich haben, denn des Amts oder Werke halben, und nicht des Standes halben, denn sie

A third doctrine that served to bring the two kingdoms into interaction with each other was that of the Christian calling (*Beruf*).<sup>37</sup> Roman Catholic theology had treated as callings, or vocations, the monastic and the priestly professions. In contrast, Lutherans considered that every occupation in which a Christian engages should be treated as a Christian vocation—each one an equally virtuous and effective calling of God, though none of them in itself a path to salvation.<sup>38</sup> Both the carpenter and the prince, the housewife and the judge, should accept the Christian responsibility to perform their tasks conscientiously and in the service of others. Public officials, in particular, were said to have a special calling to serve the community. This calling might require them to adopt a Christian social ethic that differed from a Christian personal ethic. A Christian's duty in his direct relationship with God, "as a private person, a person for himself alone," is to love his enemy and to suffer injustice and abuse from his neighbor without resistance and without revenge. As a public person, serving in such offices as the military, the judiciary, or the legal profession, however, a Christian may be required to resist his

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sind alle geistliche Stände, wahrhaftige Priester, Bischöfe, und Pápste, aber nicht gleich einerlei Werke.)

*Id.* at 408. Steven Ozment explains:

The Protestant "priesthood of all believers," which enhanced the importance of secular life and vocations, also had a reverse effect. If it "sanctified" the laity it also worked to "secularize" the clergy. If lay Christians were now to be a "priesthood," clerics were expected to enter certain estates of the laity [such as marriage and family life].

S. OZMENT, *supra* note 13, at 84; see generally *id.* at 84-89 for other popular expressions of this view in sixteenth-century Protestant writings.

A number of historians, particularly since Max Weber, have considered the Lutheran doctrine of the priesthood of all believers as the harbinger of modern ideas of individualism. By levelling the distinction between the two dominant classes in Western Christendom, i.e., the clergy and the laity, and by according sanctity and dignity to the status of each individual and each occupation, it is argued, the reformers laid the groundwork for the great individualist theories of Locke, Hobbes, and Rousseau. See, e.g., 1 M. WEBER, *supra* note 2, at 158; see also the discussion of this strain of interpretation in H. BORNKAMM, LUTHER IM SPIEGEL DER DEUTSCHEN GEISTESGESCHICHTE 14 (1955); E. ZEEDEN, THE LEGACY OF LUTHER 79 (R. Behell trans. 1954). Such a thesis, however, confuses the Lutheran theory of the priesthood of all believers with that articulated by some of the radical Puritan Calvinists in the seventeenth century. It also ignores the fact that the purpose of the doctrine was not to foster individualism but rather to foster a communitarian society, wherein all participants are given an essential social role.

37. See Dillenberger collection, *supra* note 5, at 407-12; see also P. ALTHAUS, *supra* note 21, at 36-42; G. WINGEREN, LUTHER ON VOCATION (C. Rasmussen trans. 1957); 3 K. HOLL, GESAMMELTE AUFSÄTZE ZUR KIRCHENGESCHICHTE 217 (H. Lietzmann ed. 1932). Luther used the term *Beruf* synonymously with the terms *Amt* (office or function) and *Befehl* (command).

38. As Steven Ozment writes:

Protestants promoted a certitude of salvation and secular preoccupation unknown to either biblical or medieval man. . . . The Reformation did not set out to regulate and sanctify society so much as to make society's sacred institutions and religious doctrines social. Protestants embraced and enhanced secular life only after making it clear that, as pleasing to God as secular vocations were, they contributed not one whit to any man's salvation.

S. OZMENT, *supra* note 13, at 119.

neighbor and to avenge injustice and abuse, even to the point of violence and bloodshed.<sup>39</sup>

Luther and his followers applied this doctrine, above all, in their theory of the Christian prince. The Christian prince, they argued, should be inspired to govern in a decent and godly way, promoting the well-being of his subjects.<sup>40</sup> This was interpreted to mean that a ruler in the earthly kingdom "should not tolerate any injustice but should defend against and punish evil and should help, protect, and maintain the right, according to what each one's office or station may require."<sup>41</sup>

39. 21 LW, *supra* note 5, at 108-15; M. LUTHER, WHETHER SOLDIERS TOO CAN BE SAVED (1526), excerpted in M. LUTHER, SELECTED POLITICAL WRITINGS 104-06 (J. Porter ed. 1974); M. LUTHER, ON WAR AGAINST THE TURK (1529), in M. LUTHER, SELECTED POLITICAL WRITINGS 124-25 (J. Porter ed. 1974).

40. See, e.g., M. LUTHER, SECULAR AUTHORITY: TO WHAT EXTENT IT SHOULD BE OBEYED (1523), excerpted in Dillenberger collection, *supra* note 5, at 382-92; APOLOGY OF THE AUGSBURG CONFESSION, Article 16, in TC, *supra* note 5, at 328; J. BRENZ, *supra* note 5, at 169, 506; M. BUCER, DE REGNO CHRISTI, *supra* note 5, *passim*; LC 1555, *supra* note 5, at 323-44. For discussion of Luther's political doctrines, see W. THOMPSON, *supra* note 21; W. ELLINGER, LUTHERS POLITISCHES DENKEN UND HANDELN (1952); H. JORDAN, LUTHERS STAATSAUFFASSUNG: EIN BEITRAG ZU DER FRAGE DES VERHÄLTNISSSES VON RELIGION UND POLITIK (1917); G. TOERNVALL, GEISTLICHES UND WELTLICHES REGIMENTE BEI LUTHER (1947); L. WARING, THE POLITICAL THEORIES OF MARTIN LUTHER (1910).

41. 32 WA, *supra* note 5, at 394 ("in kaisers Regiment soll man kein Unrecht leiden sondern dem Boesen wehren und strafen und das Recht helfen schützen und erhalten, darnach eines iglichen Amt oder Stand foerdert"). Particularly in his diatribes against the Anabaptists, Luther insisted that intolerance of injustice and abuse was not a violation but a confirmation of the norms of Christian love and charity:

[A] pious judge with pain imposes judgment on the guilty and regrets the death penalty which the law requires. In this case, the act has the appearance of anger and meanness, but meekness is so thoroughly good that it remains even in such works of wrath. In fact, the heart is most tormented when it has to be angry and severe. . . . But we must defend God's honor and commandments and guard against injury or injustice to our neighbor. The authorities do this with the sword; the rest of us with words and punishments. But it is to be done with pity for those who have earned punishment. ([E]in frommer Richter mit Schmerzen ein Urteil fället über den Schuldigen, und ihm Leid ist der Tod, denn das Recht über den selben dringt. Hier ist ein Schein in dem Werk, als sei es Zorn und Ungnad, sogar gründlich gut ist die Sanftmut, dass sie auch bleibt unter solchen zornigen Werken. Ja am aller heftigsten im Herzen quält, wenn sie also zornig und ernst sein muss . . . aber Gottes Ehre und Gebot, und unseren Nächsten Schade oder Unrecht müssen wir wehren, den Überern mit dem Schwert, die andern mit Worten und Strafen, und doch alles mit Jammer der, die die Strafe verdient haben.)

6 *id.* at 267. And again:

[For] the hand that wields such sword and slays is not man's hand, but God's; and it is not man, but God, who hangs, tortures, beheads, slays, and fights. All these are his works and judgments. (Denn die Hand, die solches Schwert führet und würgt, ist auch als denn nicht mehr der Menschen Hand sondern Gottes Hand, und nicht der Mensch sondern Gott hängt, rädert, enthauptet, würgt und krieget. Es sind alles seine Werke und Gerichte.)

19 *id.* at 626. See also the collection of maxims under the rubric "Of Princes and Potentates" in THE TABLE TALK OR FAMILIAR DISCOURSE OF MARTIN LUTHER 307-14 (W. Hazliitt trans. 1848) [hereinafter TABLE TALK].

Thus, the Lutheran concept of the prince, rooted in the theological doctrine of vocation and office, was essentially different from that of Luther's famous contemporary, Niccolò Machiavelli (1469-1527). Machiavelli also believed in the secular state, removed from divine law; in that respect he also can be said to have had a "two-kingdoms" theory. Machiavelli's prince was to act solely from considerations of power politics; Luther's prince, however, was to strive also to do justice. The German Lutherans of the sixteenth century did not accept the Machiavellian view that makes selfishness and the struggle for power the basic principle of political action. They were unwilling to abandon the earthly kingdom to its own Satanic devices.<sup>42</sup> In this respect they continued the older Roman Catholic tradition, though from a different theological and philosophical perspective.

The Lutheran concept of the prince was also essentially different from the one presented by the French jurist Jean Bodin (1530-1596), who was among the first to develop a theory of the absolute power, or sovereignty, of the monarch. Bodin's prince, unlike Machiavelli's, was to strive to do justice and to follow divine law. He was, however, the sole representative of God in the political life of his principality, an absolute monarch who is "absolved" from answering to any earthly authority and free to violate even his own laws.<sup>43</sup> Luther's prince, on the contrary,

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42. Machiavelli was roundly denounced in the sixteenth century—by Roman Catholics and Protestants alike—for promoting a "godless politics," an "amoral form of government," and a ruler guided by concerns of utility rather than commands of morality. See 1 Q. SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 250ff. (1978); E. CASSIRER, *THE MYTH OF THE STATE* 117ff. (1946); Berlin, *The Originality of Machiavelli*, in *STUDIES ON MACHIAVELLI* 149, 158ff. (M. Gilmore ed. 1972). This interpretation of Machiavelli's contribution has remained the standard one from the seventeenth to the mid-twentieth centuries. For a classic twentieth-century statement, see, for example, B. CROCE, *POLITICS AND MORALS* 59 (1945) (Machiavelli discovered "the necessity and autonomy of politics, of politics which is beyond or, rather, below moral good and evil, which has its own laws against which it is useless to rebel, politics that cannot be exorcised and driven from the world with holy water"). Some recent writers, however, have offered another interpretation, arguing that Machiavelli had a concept of the "good society," which combined principles of "stability, harmony, security, justice, and a sense of power and splendor," and that he sought to replace a narrower Christian social morality with a more universal Graeco-Roman social morality. According to Isaiah Berlin,

[t]his is not a separation of politics from ethics. It is the uncovering of the possibility of more than one system of values, with no criterion common to the systems whereby a rational choice can be made between them. This is not a rejection of Christianity for paganism (although Machiavelli clearly preferred the latter), nor of paganism for Christianity . . . but the setting of them side by side.

Berlin, *supra*, at 167. See also E. CASSIRER, *supra*, at 140-62 (arguing that Machiavelli expresses in political terms the typical Italian humanist admiration of classical Graeco-Roman values). It is not clear that these two interpretations are as different as they first appear to be. In any case, they both are in sharp contrast to the Lutheran view of political authority.

43. See J. BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE* 131-32, 222 (1583; facs. repr. ed. 1961):

though politically supreme in his territory and ordained by God to rule, was subject to institutional checks upon his power. He ruled not alone but with his councilors, his courts, and his entire princely retinue, collectively called the *Obrigkeit*. Indeed, Bodin's notion of *souveraineté*, which was exercised by the monarch alone, was rendered in the first German translation of Bodin as *Oberkeit*, a term then used interchangeably with *Obrigkeit*, referring not to the prince alone but to the whole corps of ruling persons.<sup>44</sup> Moreover, the Lutheran prince, in contrast to Bodin's, was considered to be no nearer to God than any of his subjects, who were all under divine injunction to disobey any of the prince's laws or commands that contravened fundamental Biblical precepts.

### B. POLITICAL PREMISES

The new Lutheran theology sparked a political revolution. The doctrine of salvation along with the related doctrines of total depravity and of the Bible as the sole source of spiritual knowledge signalled the abolition of the ecclesiastical jurisdiction. Not only the papacy but the entire Roman Catholic priesthood was condemned as essentially anti-Christian.

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He who is sovereign cannot in any way be subject to the commands of another, and he makes laws for his subjects, and abrogates or amends obsolete laws. . . . If the sovereign prince is exempt from the laws of his predecessors, still less is he bound by the laws and ordinances which he makes. . . . Laws can break customs, and custom cannot derogate from a law . . . and, in brief, custom has force only at the sufferance and as long as it pleases the sovereign prince, who can make a law confirming it. (Or il faut que ceux-la qui sont souverains, ne soyent aucunement subjects aux commandemens d'autrui, et qu'il puissent donner loy aux subjects, et casser ou aneantir les loix inutiles, pour en faire d'autres. . . . Si donc le Prince souverain est exempt des lois de ses predecesseurs, beaucoup moins seroit-il tenu aux loix et ordonnances qu'il fait. . . . La loy peut casser les coutumes, et la coutume ne peut deroguer a la loy . . . et pour le faire court, la coutume n'a de force que par souffrance et tant qu'il plait au Prince souverain, qui peut faire une loy, y adjoutant son homologation.)

Although elsewhere Bodin stated that the prince is bound by natural law, this ultimately provided little restraint on his authority, since Bodin attributed neither to the church nor to the magistracy nor to individuals any right to challenge effectively an unjust law of the monarch, but only the right of passive disobedience. *Id.* at 409-29.

44. See comment of Ernst Hinrichs in JEAN BODIN: VERHANDLUNGEN DER INTERNATIONALEN BODIN TAGUNG IN MÜNCHEN 469 (H. Denzer ed. 1973), referring to J. BODIN, *REPUBLICA. DAS IST: GRÜNDLICHE UND RECHTE UNDERWEYSUNG, ODER EIGENTLICHER BERICHT, IN WELCHEM AUSFÜHRLICH VERMELDET WIRD, WIE NICHT ALLEIN DAS REGIMENT WOHL ZU BESTELLEN, SONDER AUCH IN ALLERLEY ZUSTANDT, SO WOHL IN KRIEG UND WIDERWERTIGKEIT, ALS FRIEDEN UND WOLDSTAND ZU ERHALTEN SEY* (1592). We have not been able to find this German translation of Bodin in order to corroborate Hinrichs's observation. Similarly, the sixteenth-century German translation of Bodin's essays on witchcraft and demonology, J. BODIN, *DE LA DEMONOMANIE DES SORCIERS* (1580) rendered the French term "souveraineté" with the German terms *Obrigkeit* and *Oberkeit*. See J. BODIN, *DE MAGORUM DAEMONOMANIA* 171-74, 201, 207-08 (1594). Bodin is usually credited with having introduced the term "sovereignty" into political theory, which he defines as "the absolute and perpetual power of the Commonwealth." J. BODIN, *supra* note 43, at 122. See W. WHITE, *WHITE'S POLITICAL DICTIONARY* 270 (1951).

This was the underlying significance of Luther's first revolutionary manifesto, *The Ninety-Five Theses*, published in 1517. His denunciation of papal indulgences was not merely an attack upon the abuse of papal authority but also an implicit denial of the necessity of the clergy and the validity of the canon law altogether.<sup>45</sup>

However, if the institutional Roman Catholic Church was to be abolished, who or what was to replace it? Who was to keep order in the fellowship of Christian believers? Who was to regulate worship, baptism, marriage, ordination, morals, or doctrine? Who was to replace the archbishops, bishops, and other ecclesiastics in the governing bodies of principalities and cities? Who would assume jurisdiction over education, poor relief, and church property? Indeed, who was to *get it all*, the vast wealth of the Roman Catholic Church, which included approximately one-third of the land of Germany?

The answers to such questions were not given at all in the doctrine of salvation and were only vaguely foreshadowed in the doctrine of the two kingdoms. The latter doctrine proclaimed that the secular authority was instituted directly by God, that the church may not wield political power of any kind, and, while the Bible is the direct source of spiritual knowledge, that temporal knowledge, that is, knowledge of political and economic affairs, is to be found in the defective reason of fallen man. Such propositions led to the doctrine that Christians have a duty to obey "the powers that be" (Romans 13:1), which, in turn, have a duty to promote the welfare of their subjects. Beyond that, such propositions could be invoked to support various political developments at various times. Taken by itself, however, Lutheran theology did not purport to offer solutions to the critical political problems in whose creation it had played such a crucial part.

The Lutheran Reformation brought forth not only new theological principles but also new political principles, which came to have a decisive influence on the political order that was introduced in Germany during the decades after 1517.

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45. See M. LUTHER, *THE NINETY-FIVE THESES, OR DISPUTATION ON THE POWER AND EFFICACY OF INDULGENCES*, Articles 2, 5-6, 21, 27, 36, 49, 52, in 1 WA, *supra* note 5, at 233. For a discussion of Luther's increasing awareness—before and after 1517—of the radical nature of his attack on the Roman Catholic tradition, see J. PELIKAN, *supra* note 15; S. HENDRIX, *LUTHER AND THE PAPACY: STAGES IN A REFORMATION CONFLICT* (1981).

1. "The Religion of a Territory Shall Be That of Its Ruler" (*Cuius regio eius religio*)

Initially, Luther gave little attention to forms of government or political institutions. Basically, in his view, they were all alike, whether Christian or heathen. They were all instituted by God for the benefit of sinful men, and their worth depended on the wisdom and virtue, or lack thereof, of those in power. Luther's initial indifference to the forms of government is reflected in the fact that he first hoped that the emperor would endorse the Reformation that he proclaimed, and, when the emperor failed him, he turned at various times to the nobility, the peasantry, the cities, and the princes.<sup>46</sup> It was chiefly princes and cities that effectively promoted and protected his cause.<sup>47</sup> Ultimately, his alliance with the prince of his own territory of Saxony, and eventually the alliance of Lutherans with other princes, secured the victory of Protestantism in the territories inhabited by a majority of the people of the German Empire. It was this alliance and this victory that transformed the Lutheran Reformation into the German Revolution.

The German prince, however, came to serve not only as the protector of the Lutheran cause but also as its ruler. Under the constitutional principle of *cuius regio eius religio*,<sup>48</sup> mandated by the Religious Peace of

46. For a careful study of Luther's cultivation of relations with different political and social leaders, see K. TRUEDINGER, *LUTHERS BRIEFE UND GUTACHTEN AN WELTLICHE OBRIGKEIT ZUR DURCHFÜHRUNG DER REFORMATION* (1975) (Reformationsgeschichtliche Studien und Texte, vol. 111). See also B. MOELLER, *IMPERIAL CITIES AND THE REFORMATION* (H. Midelfort & M. Edwards trans. & eds. 1972); S. OZMENT, *supra* note 13; Baron, *Religion and Politics in the German Imperial Cities during the Reformation*, 52 *ENG. HIST. REV.* 405, 614 (1937); Brecht, *Die gemeinsame Politik der Reichsstädte und die Reformation*, 63 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG* (Kan. Ab.) 180 (1977); Grimm, *The Reformation and the Urban Social Classes in Germany*, in *LUTHER, ERASMUS, AND THE REFORMATION* 75 (J. Smart & R. McNally eds. 1969); Holborn, *Luther and the Princes*, in *LUTHER, ERASMUS, AND THE REFORMATION* 67 (J. Smart & R. McNally eds. 1969).

47. In the so-called Peasants' War of 1524-1526, large numbers of peasants, and others drawn from the poorer classes of the cities and towns, revolted in the name of the new Biblical faith proclaimed by Luther, Zwingli, and other reformers. Luther, however, denounced the peasants for their resort to violence. His repudiation of them, coupled with the ruthlessness of the penalties they suffered in defeat, contributed to the defection of large numbers of the German peasantry from the Lutheran cause and ultimately to their adherence to Roman Catholicism. See generally P. BLICKLE, *DIE REVOLUTION VON 1525* (1975).

48. *The Religious Peace of Augsburg* (1555) is translated in *CHURCH AND STATE THROUGH THE CENTURIES: A COLLECTION OF HISTORIC DOCUMENTS WITH COMMENTARIES* 164 (S. Ehler & J. Morrall eds. 1954) [hereinafter *CHURCH AND STATE*]. The Religious Peace of Augsburg permitted the princes to establish either Lutheranism or Roman Catholicism in their territories, but not any other form of Protestantism. It entitled religious nonconformists to emigrate unimpeded from the territories in which they resided. It also prohibited any form of religious establishment in German imperial cities. For further discussion of the theoretical sources of this constitutional principle, see *infra* note 142 and accompanying text.

Augsburg of 1555, the religion of the prince was established in each German principality, and the prince's civil servants came to exercise legislative, administrative, and judicial powers over the temporal affairs of the territorial church. As a consequence, in many Lutheran communities monasteries, convents, religious schools, and ecclesiastical charitable institutions were closed down. Church property became subject to civil tax. Payments of annates, compulsory tithes, and other church taxes were barred. Clerics were stripped of all or part of their immunities and exemptions at civil law. Moreover, the civil courts assumed jurisdiction over subjects and persons previously within the province of the church alone. Crimes of heresy, blasphemy, sumptuousness of dress, and other moral and religious crimes were now subject to civil law. The canon law of marriage and family, wills and testaments, oaths and pledges of faith was secularized. Education, including theological education, was placed chiefly under civil authority. Poor relief, protection of widows, orphans, and transients, medical care, and other forms of public welfare were now left to civil authorities and civil law.<sup>49</sup> Luther and his followers thus ultimately came to favor and to strengthen monarchy—not only in Germany but also in other parts of Europe to which Lutheranism penetrated.

## 2. *The Fourth Commandment*

The support that Luther and his followers eventually gave to the authority of the prince was a matter not only of political strategy but also of theology. The Fourth Commandment of the Decalogue, the reformers believed, requires each citizen to render the same obedience to the prince that the child owes to a father, the wife to a husband, or the individual to God.<sup>50</sup> The application of the Fourth Commandment to the political ruler was the foundation of the Lutheran conception of civil obedience.

The Fourth Commandment, however, also “called” the prince to be just and to rule in the spirit of love and service to his subjects. He was

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49. See Berman, *Law and Belief in Three Revolutions*, 18 VAL. U.L. REV. 569, 585 (1984) [hereinafter Berman, *Law and Belief*]; Berman, *Religious Foundations of Law in the West*, 1 J. L. & RELIGION 3, 8 (1983); Witte, *The Transformation of Marriage Law in the Lutheran Reformation*, in THE WEIGHTIER MATTER OF THE LAW: ESSAYS ON LAW AND RELIGION: A TRIBUTE TO HAROLD J. BERMAN 57 (J. Witte & F. Alexander eds. 1988) [hereinafter Witte, *Transformation*]; Witte, *The Plight of Church Law in the Lutheran Reformation* (forthcoming) [hereinafter Witte, *Church Law*].

50. See, for example, Luther's exegesis of the Fourth Commandment in M. LUTHER, LARGE CATECHISM (1529), in 30 WA, *supra* note 5, at 132-82, which duplicates in substantial part his discussion in M. LUTHER, TREATISE ON GOOD WORKS (1520), in 6 WA, *supra* note 5, at 202-76. See also the exegesis of Melancthon in LC 1555, *supra* note 5, at 99.

the "father of his country" (*Landesvater*),<sup>51</sup> who was to show everyone, by his example, how to be a good manager of his household and his property as well as an upright person. Lutherans feared and denounced the tendency toward tyranny that is inherent in monarchical rule. They were acutely aware that secular rule unchecked by ecclesiastical power had to be restrained by other forces. One such restraint was the concept of the princely office or vocation. Lutherans sought to counterbalance the natural sinfulness of the ruler with the sanctity of his office. Esteem for office coupled with suspicion of those who occupy it became a central paradox of Lutheran political thought.<sup>52</sup>

### 3. *The Obrigkeit*

The Protestant princes, lacking a Roman Catholic clergy trained to administer the affairs of the state, developed a secular civil service to constitute their advisors, administrators, judges, diplomats, and other

51. Luther wrote:

Thus we have two kinds of fathers presented in this commandment, fathers in blood and fathers in office, or those to whom belongs the care of the family and those to whom belongs the care of the country. (Also haben wir zweierlei Väter in diesem Gebot vorgestelt, des Geblüts und des Amts oder der Sorge im Hause und im Lande.)

TC, *supra* note 5, at 626, 627. Similarly, Melanchthon wrote:

[F]athers and mothers, schoolteachers, governing authorities, and all rulers, high or low, in true knowledge of God and of the Lord Jesus Christ, in fear of God and in faith, should love those subject to them, and charge and rule them according to this [second] table of the Ten Commandments, and punish external disobedience, each one according to his own calling. (Väter und Mütter, Schulmeister, Herrschaften, und alle Regenten, hohe oder niedrige, in rechter Gottes und des Herrn Jesu Christi Erkenntnis Gottes sorcht und glauben, die Untertanen lieben, und ihnen diese Tafel zur zehn Gebote fürhalten, und sie danach regieren, und den äusserlichen Ungehorsam strafen, ein jeder nach seinem Beruf.)

22 CR, *supra* note 5, at 230.

52. See 22 *id.* at 604, 606, where Melanchthon argues that the office of political authority is a creation and blessing of God, not a product and curse of sin.

The Obrigkeit is of God, . . . and government is an order . . . which is a work of God. . . . [A]s long as God will maintain the human race, he will also maintain some sovereignty, law, judgment, right, and punishment. (Die Oberkeit sei von Gott . . . das Regiment eine Ordnung . . . [die] Gottes Werk ist . . . so lange Gott das menschliche Geschlecht erhalten will, erhält er auch etliche Hoheit, Gesetz, Gericht, Recht und Strafe.)

Some rulers have, to be sure, used this office as an instrument of exploitation, repression, and self-aggrandizement. But these abuses, Melanchthon declared, reflect the depravity only of the political official, not of the political office itself.

We should note that the person and the estate should be separated, as, for example, in the estate of marriage and the person. It may be that persons come together into marriage for some other reason than the will of God, for example, for the sake of money. Although the person misuses the estate, nevertheless the estate in itself is right. Thus, in speaking of the Obrigkeit and government as a whole, the person is to be distinguished from the office. (Erstlich aber is zu merken, das man die Person und den Stand unterscheiden soll, als Ehestand und Person. Es kann sein, dass die Personen nicht um Gottes willen zusammen in Ehestand kommen, als so eine um Gelds willen eine Heirat macht. Hier obgleich die Person den Stand misbraucht, so is dennoch der Stand an ihm selbst recht. Also von Oberkeit und der ganzen Regierung reden, ist die Person vom Amt zu unterscheiden.)

*Id.* at 602. Cf. 32 WA, *supra* note 5, at 529ff.

officials.<sup>53</sup> They were called, collectively, the Obrigkeit (or sometimes Oberkeit), a term signifying superiors, those who are in authority, or "the high and mighty." Though usually drawn from the upper classes, the sixteenth-century German Obrigkeit was not a hereditary nobility. Jurists and sometimes theologians could be drawn into it. Moreover, it was, to a certain extent, a mobile pan-German Obrigkeit: councilors could move from one principality or city to another. This mobility contributed significantly to their sense of calling and independence.

#### 4. *The Professors*

In analyzing the political background of Lutheran legal philosophy one must emphasize the important role played by legal scholars, both individually and collectively, in the governments of various territories and cities. For several centuries, individual law professors had served as councilors to princes and city magistrates, assisting them in their legislation and administration.<sup>54</sup> In the sixteenth century, however, there developed under Lutheran influence, the practice of submitting cases to the law faculties of the universities of the various principalities. Thus, law professors came to constitute a kind of supreme court to which difficult cases were referred by the regular courts.<sup>55</sup>

53. On the role of the Roman Catholic clergy in the bureaucracy of the civil authorities, see Genzmer, *Kleriker als Berufsjuristen im späten Mittelalter*, 2 *ÉTUDES D'HISTOIRE DU DROIT CANONIQUE DÉDIÉES À GABRIEL LEBRAS* 1207 (1965); Kunkel, *The Reception of Roman Law in Germany: An Interpretation*, in *PRE-REFORMATION GERMANY* 268ff. (G. Strauss ed. 1972); K. BURMEISTER, *DAS STUDIUM DES RECHTS IM ZEITALTER DES HUMANISMUS IM DEUTSCHEN RECHTSBEREICH* 7-17 (1974).

54. See generally F. WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT* 152-66 (2d ed. 1967) ("Die profane Juristenstand in Deutschland"). It had long been the practice in Italy, France, Germany, and elsewhere for law professors to dispense advice to officials in the form of *consilia* (opinions). It was not uncommon for a prominent law professor to issue several hundred, or even a thousand, *consilia* in the course of his career. The many extant collections of *consilia* are enormously valuable sources of our understanding of public law and private law in sixteenth-century Germany. For a list of the most important *consilia* of German jurists, see G. KISCH, *CONSILIA: EINE BIBLIOGRAPHIE DER JURISTISCHEN KONSILIENSAMMLUGEN* (1970). On the history of the *consilia* practice in Europe more generally, see F. WIEACKER, *supra*, at 80; GEHRKE, *DIE PRIVATRECHTLICHE ENTSCHEIDUNGSLITERATUR DEUTSCHLANDS. CHARAKTERISTIK UND BIBLIOGRAPHIE DER RECHTSSPRECHUNGS- UND KONSILIENSAMMLUNGEN VOM 16. BIS 19. JAHRHUNDERT* (1974).

55. When faced with particularly difficult applications of the law, courts of territories and of cities as well as the Imperial High Court (*Reichskammergericht*) itself were supposed to send the entire file of the case to a law faculty, and the law professors would study and discuss the case and render a reasoned judgment binding on the court. Called *Aktenversendung*, literally "the sending of the file," this institution, which lasted in Germany until 1878, was not only highly lucrative for the professors; it also had an enormous influence on the substance as well as the style of German law. It reflected and embodied an emphasis on written, instead of oral, procedure, on secrecy, instead of publicity, of proceedings, and on separation of issues of fact from issues of law on which errors below

Lutheranism placed a profound trust in professors, especially in matters of law and theology. Law professors produced the first systematic treatises purporting to embrace the entire law by which a given territory was governed as well as the first modern legal codes, namely, the criminal codes of various German principalities and also a criminal code of the Empire.<sup>56</sup> These treatises and codes reflected both a political and an intellectual transformation. They were, on the one hand, professors' law, comprehensive and systematic syntheses based on interlocking concepts, principles, and rules. They were, on the other hand, intended to be widely read and understood by all literate citizens, just as Lutheran systematic Biblical theology was intended to be understandable to all literate believers. The resort to systematic learning helped to counteract tendencies toward absolutism in politics and fragmentation in doctrine—tendencies that inevitably accompanied the revolt against the Church of Rome, the one force that had restrained the power of secular rulers and had at the same time unified Europe for four centuries.

These new theological and political premises of Lutheranism contributed to the transformation of Western legal philosophy. The founders of the new Lutheran legal philosophy were, in the first instance, Luther himself and Philip Melanchthon, the greatest German scholar of the time. Both were not only active political leaders of the Reformation but also professors at the University of Wittenberg, where Luther taught theology and Melanchthon taught philosophy, theology, and law. Their theories of law, politics, and society served as a principal foundation upon which a score of leading sixteenth-century German legal scholars developed, under their direct influence, new jurisprudential doctrines.<sup>57</sup> One of the most significant of these legal scholars was the jurist Johann

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were subject to appeal. This was new for German secular courts. Even more fundamental was the shift from the concept that the court was to find the law, and thereby "set right what was wrong," to the concept that the court was to apply the law, that is, bring the case before it under the appropriate rule "by a process of logical subsumption." F. WIEACKER, *supra* note 54, at 188. The latter intellectual process necessarily involved a new kind of systematization of legal rules. See J. DAWSON, *THE ORACLES OF THE LAW* 198-213, 240-41 (1968); Berman, *The Transformation of Western Legal Science in the Sixteenth Century* (forthcoming) [hereinafter Berman, *Transformation*].

56. These developments are treated in greater detail in Berman, *Transformation*, *supra* note 55, as well as in Berman, *Law and Belief*, *supra* note 49, at 577-85.

57. On the relationship between Luther and Melanchthon and the jurists of the sixteenth-century, see R. VON STINTZING, *DAS SPRICHWORT "JURISTEN BOESE CHRISTEN"* 7 (1875); R. VON STINTZING, *GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT (Erste Abtheilung)* 241-338 (1880) [hereinafter R. STINTZING, RW]; K. KOEHLER, *LUTHER UND DIE JURISTEN. ZUR FRAGE NACH DEN GEGENSEITIGEN VERHÄLTNIS DES RECHTS UND DER SITTICHKEIT* (1873); Liermann, *Der unjuristische Luther*, 24 *LUTHER-JAHRBUCH* 69 (1967); G. KISCH, *MELANCHTHON'S RECHTS- UND SOZIALLEHRE* 51-73 (1967); see also *infra* note 165 and accompanying text.

Oldendorp. In the following three sections we shall discuss, in turn, the legal philosophy of Luther, Melanchthon, and Oldendorp.

## II. THE LEGAL PHILOSOPHY OF MARTIN LUTHER

Throughout his career, Luther maintained an active interest in questions of law and legal philosophy. After he matriculated at the University of Erfurt in 1501, his father presented him with a book of Roman law and urged him to pursue legal studies.<sup>58</sup> Accordingly, Luther took preparatory courses in philosophy, theology, and canon law, and after receiving the master's degree in 1505 he enrolled in the doctorate program in civil law. Some two months later—apparently having been nearly killed by a bolt of lightning—Luther left the university and entered the Augustinian monastery at Erfurt. While cloistered, however, he continued his study of canon law and ecclesiastical politics, and in 1510 he journeyed to the papal curia in Rome to represent the Erfurt chapter in a legal dispute within the Augustinian order.<sup>59</sup>

In 1511 he forsook the monastic order to join the theology faculty of the newly founded University of Wittenberg. He received his doctorate in theology in 1512 and began his famous lectures on the Psalms and on the Epistle to the Romans, which first set forth the rudiments of his radical new theology.

During the course of his revolt against Rome from 1517-1522, Luther drew not only on his new theological insights but also on his extensive knowledge of the canon law. In his *Ninety-Five Theses* of 1517 and in his subsequent debates and polemics, he cited a litany of abuses and injustices not only in the confessional practices of the church but also in its canon laws. He also exposed what he considered to be the "fallacious legal foundation" of papal authority and the "myriad" inconsistencies between "the divine precepts and practices" of Scripture and the "human laws and traditions" of the Roman Catholic Church.<sup>60</sup>

In the course of the next two decades, Luther prepared a number of learned commentaries and sermons on the Old Testament Torah and devoted a large portion of his famous catechisms to exegesis of the Ten

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58. See R. BAINTON, *HERE I STAND: A LIFE OF MARTIN LUTHER* 24 (1950); J. HECKEL, *LEX CHARITATIS*, *supra* note 21, at 95ff.; M. BRECHT, *MARTIN LUTHER: HIS ROAD TO THE REFORMATION 1483-1521* 44-46 (J. Schaar trans. 1985); Liermann, *supra* note 57, at 71-72.

59. See M. BRECHT, *supra* note 58, at 44-46; R. BAINTON, *supra* note 56, at 21-52; V. GREEN, *LUTHER AND THE REFORMATION* 27-67 (1964).

60. See the collection of quotations from Luther in J. PELIKAN, *supra* note 15, at 20-24.

Commandments.<sup>61</sup> He embellished even his densest exegetical writings on other Biblical passages with citations to and quotations from Roman law and earlier canon law texts. He gave public lectures and published learned tracts on various legal and moral questions of marriage, crime, usury, property, commerce, sumptuousness, and social welfare.<sup>62</sup> He enthusiastically endorsed the efforts of legal humanists to reconstruct the ancient texts of Roman law and to reform legal education in the German universities.<sup>63</sup> He corresponded regularly with jurists and politicians throughout Europe and counted among his closest friends two of the most outstanding German jurists of his day, Hieronymus Schuerpf (1481-1554) and Johann Apel (1486-1536), both of whom were his colleagues at the University of Wittenberg.<sup>64</sup>

61. See sources cited *supra* note 5. For an overview of Luther's Old Testament commentaries, see H. BORNKAMM, *LUTHER AND THE OLD TESTAMENT* (V. Gruhn ed., E. Grisch & R. Gritsch trans. 1969).

62. Luther's writings on social and political questions include: M. LUTHER, *SHORTER SERMON ON USURY* (1519); M. LUTHER, *LONGER SERMON ON USURY* (1520); M. LUTHER, *AN APPEAL TO THE RULING CLASS OF GERMAN NATIONALITY AS TO THE AMELIORATION OF THE STATE OF CHRISTENDOM* (1520); M. LUTHER, *ON MARRIED LIFE* (1522); M. LUTHER, *A SERMON FROM THE GOSPEL ON THE RICH MAN AND THE POOR LAZARUS* (1523); M. LUTHER, *ON TEMPORAL AUTHORITY: TO WHAT EXTENT IT SHOULD BE OBEYED* (1523); M. LUTHER, *A LETTER TO THE MAYOR, COUNCIL, AND COMMUNITY OF THE CITY OF MUEHLHAUSEN* (1524); M. LUTHER, *TO THE COUNCILMEMBERS IN THE CITIES OF GERMAN TERRITORIES* (1524); M. LUTHER, *THAT PARENTS SHOULD NOT COMPEL THEIR CHILDREN TO MARRIAGE* (1524); M. LUTHER, *ON TRADE AND USURY* (1524); M. LUTHER, *AGAINST THE RAPACIOUS AND MURDERING HORDES OF PEASANTS* (1525); M. LUTHER, *WHETHER SOLDIERS TOO CAN BE SAVED* (1526); M. LUTHER, *ON THE KEEPING OF A COMMUNITY CHEST* (1528); M. LUTHER, *CONCERNING WAR AGAINST THE TURK* (1529); M. LUTHER, *A SERMON ON KEEPING CHILDREN IN SCHOOL* (1530); M. LUTHER, *ON MARRIAGE MATTERS* (1530). Beyond these formal tracts, Luther wrote numerous forewords and introductions to books on social and political questions by other reformers and addressed the same questions in hundreds of letters.

63. See, e.g., M. LUTHER, *AN APPEAL TO THE RULING CLASS OF GERMAN NATIONALITY AS TO THE AMELIORATION OF THE STATE OF CHRISTENDOM* (1520), in Dillenberger collection, *supra* note 5, at 470-73; see also K. KOEHLER, *supra* note 57, at 125-32; K. BURMEISTER, *supra* note 53, at 22; R. STINTZING, RW, *supra* note 57, at 97; 2 H. COING, *HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHE PRIVATRECHTSGESCHICHTE* Part I, 4 (1977).

64. See K. KOEHLER, *supra* note 57, at 125-32; Liermann, *supra* note 57, at 73. The involvement of these jurists in the life of Luther and of the whole Lutheran Reformation is fascinating. Hieronymus Schuerpf, a professor of law at the University of Wittenberg, was among Luther's most intimate friends. He served as the "best man" at Luther's wedding in 1525. He rediscovered with Luther the cardinal theological doctrine of justification by faith alone, stood by when Luther burned the canon law and confessional books in 1520, accompanied and represented Luther at the Diet at Worms in 1521, spoke on Luther's behalf, and remained an eloquent spokesman throughout Germany for the new Lutheran theology. It was Schuerpf's example most of all, Luther wrote later in his life, that "inspired me [in 1517] to write of the great error of the Catholic church." Quoted by T. MÜTHER, *AUS DEM UNIVERSITÄTS- UND GELEHRTENSLEBEN IM ZEITALTER DER REFORMATION* 190 (1866). For further information on Schuerpf, see T. MÜTHER, *supra*; W. SCHAICH-KLOSE, *D. HIERONYMUS SCHÜRPF: LEBEN UND WERK DES WITTENBERGER REFORMATIONSJURIST, 1481-1554* (1967); R. STINTZING, RW, *supra* note 57, at 267-68; P. MELANCHTHON, *ORATIO DE*

## A. VIEWS OF DIVINE LAW, NATURAL LAW, AND POSITIVE LAW

Although Luther did not write systematically about either legal or political philosophy, he drew many legal and political implications directly from his theology.<sup>65</sup> He drew the implications that it is the duty of Christians to carry out God's work in the earthly kingdom and that they are to accept the Ten Commandments as a divine law to be applied not only directly in their personal lives but also indirectly through laws of civil authorities derived from it in their practical lives.

Luther believed not only that the power of civil rulers is ordained by God but also that the laws through which they exercise their power are ordained by God.<sup>66</sup> The civil ruler, he argued, holds his authority from

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VITA CLARISSIMIVIRI HIERONYMI SCHURFFI, in 12 CR, *supra* note 5, at 86. Johan Apel, professor of law and from 1524-1525 the rector of the University of Wittenberg, was also a close colleague and friend of Luther. Luther came to Apel's aid in 1523 when Apel was imprisoned for marrying a former nun in violation of the canon law and in defiance of his archbishop. He strongly endorsed Apel's tract DEFENSIO PRO SUO CONIUGIO (1524) and wrote a foreword to an "amicus curiae" brief submitted to the local ecclesiastical tribunal on Apel's behalf. Thereafter, Apel became an ardent defender of Luther and the Lutheran cause, attended Luther's wedding, strongly endorsed Luther's writings on marriage and the family, and, after leaving the university in 1529, frequently corresponded and consulted with him. For further information on Apel, see T. MÜTHER, *supra*, at 455; T. MÜTHER, DOCTOR JOHANN APPEL. EIN BEITRAG ZUR GESCHICHTE DER DEUTSCHEN JURISPRUDENZ IN SECHSZEHNTEM JAHRHUNDERT (1861); R. STINTZING, RW, *supra* note 57, at 287; F. WIEACKER, GRÜNDER UND BEWAHRER. RECHTSLEHRER DER NEUEREN DEUTSCHEN PRIVATRECHTSGESCHICHTE 44 (1959); Berman, *Transformation*, *supra* note 55.

Although he befriended Schuerpf, Apel, and several other lawyers, including Basilius Monner (c.1501-1566), Melchior Kling (1504-1571), and Johannes Schneidewin (1519-1568), Luther often berated the legal profession of his day for its avarice, apathy, and indifference to the demands of justice and the needs of society. See H. BEYER, *supra* note 25, at 51-54; K. KOEHLER, *supra* note 57; G. STRAUSS, *supra* note 34, at 215-28.

65. For further discussion of Luther's legal and political views, see F. ARNOLD, ZUR FRAGE DES NATURRECHTS BEI MARTIN LUTHER (1937); P. ALTHAUS, *supra* note 21, at 25-35, 112-54; H. BEYER, *supra* note 25, *passim*; J. HECKEL, LEX CHARITATIS, *supra* note 21, *passim*; O. KRAUSE, NATURRECHTLER DES SECHSZEHNTEM JAHRHUNDERTS. IHRE BEDEUTUNG FÜR DIE ENTWICKLUNG EINES NATÜRLICHEN PRIVATRECHTS 101 (1982); W. MUELLER, CHURCH AND STATE IN LUTHER AND CALVIN 1-59 (1954); G. STRAUSS, *supra* note 34, at 199-223; W. THOMPSON, *supra* note 21, *passim*; J. TONKIN, THE CHURCH AND THE SECULAR ORDER IN REFORMATION THOUGHT 37-72 (1971); Cranz, *An Essay on the Development of Luther's Thought on Justice, Law and Society*, 19 HARV. THEOLOGICAL REV. 1 (1959); Ehrhardt, *La notion du droit naturel chez Luther*, ÉTUDES DE THEOLOGIE ET D'HISTOIRE 287-320 (1901); Lang, *The Reformation and Natural Law*, in CALVIN AND THE REFORMATION 63 (1959); Mayer, *Zur Naturrechtslehre des Luthertums*, in FESTSCHRIFT FÜR HANS WELZEL 65-99 (1974); McNeill, *supra* note 2, at 168-72; McNeill, *Natural Law in the Thought of Luther*, 10 CHURCH HISTORY 211 (1941).

66. 11 WA, *supra* note 5, at 247; 30 *id.* at 556; 31 *id.* at 191. In various places in his writings, Luther did distinguish between a variety of types of laws: divine law, Mosaic law (with its moral, judicial, and ceremonial types), natural law, civil (or statutory) law, and customary law—though neither his taxonomy nor his terminology is consistent. For Luther, however, all these types of law are merely manifestations of one law, God's law, which he has allowed to appear in a variety of guises.

God. He serves as God's vice-regent in the earthly kingdom. His will is to appropriate and apply God's will. His law is to respect and reflect God's law. The civil ruler is thus not free to rule arbitrarily. He is under a duty to rule according to divinely inspired principles of justice. Luther found those principles of justice expressed most perfectly in the Ten Commandments, which he believed to be a summary of the natural law and, thus, accessible to pagans as well as to Christians.<sup>67</sup> He found justice also expressed, though less perfectly, in Roman law, which was in his view an embodiment of human reason—a reason implanted by God but corrupted by human sinfulness.<sup>68</sup>

67. See, e.g., 39 *id.* at 478:

The Decalogue is not the law of Moses . . . but the Decalogue of the whole world, inscribed and engraved in the minds of all men from the foundation of the world. (Decalogus non est Mosi lex . . . sed decalogus est totius mundi, inscriptus et insculptus mentibus omnium hominum a condito mundo.)

See also *id.* at 540:

Since all nations share these common elements of knowledge [of the principles of justice], as experience itself testifies . . . I know in my heart that I certainly owe this to God, not because the Decalogue was written and handed down to us, but because we knew and took these laws with us when we entered the world. . . . For although the Decalogue was given in a particular way and place and ceremony, . . . all nations acknowledge that there are sins and iniquities. ([Q]uia hae notitiae communes erant omnibus gentibus, sicuti experientia ipsa testatur . . . sentio in corde, me certe hoc debere Deo, non quia traditus et scriptus decalogus sit nobis, sed quod scimus vel leges has nobiscum in mundum attulimus. . . . Nam etsi decalogus singulari modo et loco et pompa datus sit . . . omnes gentes fatentur peccata esse et iniquitates.)

See also 18 *id.* at 72; 30 *id.* at 192.

Luther wrote that the Decalogue was "superfluous" (*zum Ueberfluss*) to the rest of the Torah, for it merely repeated the law of nature written in the hearts and consciences of all men. Man's knowledge of this law, however, had been darkened by sin, and it was thus necessary to repeat its provisions. 40 *id.* at 66:

For although all men have a certain natural knowledge implanted in their souls, by which they naturally know that what one wants to have done to himself should be done to another (this sentiment and others like it, which we call the law of nature, are the foundation of human law and of all good works), nevertheless, human reason is so corrupt and blind through the devil's wickedness that it does not understand the knowledge that it is born with. (Tametsi enim omnes homines notitiam quandam naturalem habeant, animus ipsorum insitam, qua naturaliter sentiunt alteri faciendum esse, quod quis velit sibi fieri (quae sententia et similes, quas legem naturae vocamus, sunt fundamentum humani juris et omnium bonorum operum), tamen adeo corrupta et caeca est vitio diaboli humana ratio, ut illam cognitionem secum natam non intelligat.)

See also 39 *id.* at 374.

68. Although Luther often deprecated Roman law and Roman society, see, e.g., 51 *id.* at 241, he occasionally also gave it unstinted praise, see, e.g., 30 *id.* at 557:

our government in German lands must and shall adhere to Roman imperial law, which is also our government's wisdom and reason, given by God. (unser Regiment in deutschen Ländern nach dem römischen kaiserlichen Recht sich richten muss und soll, welch auch unsers Regiments Weisheit und Vernunft ist, von Gott gegeben.)

See also 51 *id.* at 242 (where Luther calls the Roman law a paradigm of "heathen wisdom" ("heidnische Weisheit")). Nevertheless, Luther continued to criticize specific provisions of Roman law, such as those relating to slavery, marriage and family, and property, and in such contexts he often denounced Roman law in general. See, e.g., 12 *id.* at 243; 14 *id.* at 591, 714; 16 *id.* at 537. For

"The polity and the economy," Luther wrote, "are subject to reason. Reason has first place. There [one finds] civil laws, civil justice."<sup>69</sup> Such reason is to be found not only in Christian texts. "The heathen on their side have their heathen books," he wrote, "[and] we Christians on our side [have] our books of Holy Scripture. Theirs teach virtue, rights, wisdom for the temporal good, honor, peace on earth. Ours teach faith and good works for eternal life, the kingdom of heaven. . . . The poets and historians, like Homer, Virgil, Demosthenes, Cicero, Livy, as well as the ancient jurists [are] prophets, apostles, and theologians or preachers for worldly government."<sup>70</sup>

Contrary to what some commentators have argued, Luther's more favorable view of reason in matters of law and politics is not inconsistent with his less favorable view of reason in matters of doctrine and belief. Luther predicated this distinction on the two-kingdoms theory, which separates the spiritual knowledge and activity of the heavenly kingdom, based on faith, from the temporal knowledge and activity of the earthly kingdom, based on reason. This ontological distinction allowed Luther, on the one hand, to dismiss reason as "the devil's whore" and "Aristotle's evil brew" (when it intrudes on the heavenly kingdom) and, on the other hand, to treat it as "a divine blessing" and "an indispensable guide to life and learning" (when it remains within the earthly kingdom).<sup>71</sup>

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a more general treatment, see G. STRAUSS, *supra* note 34, at 201; J. HECKEL, *LEX CHARITATIS*, *supra* note 21, at 82-85.

69. 40 WA, *supra* note 5, at 305 ("Politia et oeconomia est subjecta rationi. Ratio prima. Ibi leges Civilis, justitia Civilis."); see also 51 *id.* at 211 ("Natural law and natural reason are the source of all written law." ("[N]atürliches Recht und natürliche Vernunft, als daraus kommen und geschlossen sei alles geschriebenes Recht.")); 17 *id.* at 102:

There is no one who does not feel and must not acknowledge that what the natural law says is right and true. . . . This light lives and shines in all human reason, and if people would only pay attention to it, what need would they have of books, teachers, or of law. For they carry with them in the recesses of the heart a living book which would tell them more than enough about what they ought to do, judge, accept, and reject. (Denn niemand ist, der nicht fühlt und bekennen muss, dass es recht und wahr sei, dass das natürliche Gesetz spricht . . . das Licht lebt und leuchtet in aller Menschen Vernunft, und wenn sie es wollten ansehen, was dürften sie der Bücher, Lehrer oder eines Gesetzes? Da tragen sie ein lebendiges Buch bei sich im Grund des Herzens, das würde ihn alles reichlich genug sagen, was sie tun lassen, urteilen, annehmen, und verwerfen sollten.)

70. 51 *id.* at 242-43

(Die Heiden auf ihrer Seite haben ihre heidnische Bücher, wir Christen auf unserer Seite der heiligen Schrift Bücher, jene lehren die Tugend, Rechte und Weisheit auf zeitlich Gut, Ehre, Friede auf Erden. Diese lehren den Glauben und gute Werke auf ewiges Leben im Himmelreich. . . . die Poeten und Historien, wie Homerum, Virgilium, Demosthenem, Ciceronem, Livium und hernach die altern seinen Juristen . . . Propheten, Aposteln und Theologen oder Prediger zum weltlichen Regiment.)

See also 11 *id.* at 202; 32 *id.* at 394; 45 *id.* at 669.

71. See generally B. LOHSE, *supra* note 28, at 70 (1958); B. GERRISH, *supra* note 28, at 10, 57, 84.

Luther's understanding of law differed, however, from that of his Roman Catholic predecessors in both its philosophical and theological foundations.

Philosophically, Luther espoused a radically different ontological view of the relationship between human reason and conscience and a radically different epistemological view of their respective roles in the apprehension and application of natural law.<sup>72</sup> The prevailing scholastic doctrine had made conscience a handmaiden of reason. It had distinguished between a rational faculty of apprehension, which was called *synderesis* (reason), and a practical faculty of application, which was called *conscientia* (conscience). A rational person, it was said, uses his *synderesis* to apprehend and elucidate the principles and precepts of natural law; he uses his *conscientia* to apply those principles and precepts to concrete practical circumstances. Thus, for example, through the exercise of *synderesis* a person apprehends and understands the principle of love of neighbor; through the exercise of *conscientia* he connects this principle with the practice of aiding the poor and helpless or of keeping his promises. For the scholastics, reason was considered a superior cognitive or intellectual faculty, conscience an inferior practical or applicative skill.<sup>73</sup> Luther, by contrast, subordinated reason to conscience. Conscience, he taught, is not merely the skill of applying rational principles of natural law and knowledge. Conscience is the "bearer of man's relationship with God," the "religious root of man"<sup>74</sup> that shapes and

72. For further discussion, see M. BAYLOR, *ACTION AND PERSON: CONSCIENCE IN LATE SCHOLASTICISM AND THE YOUNG LUTHER* (1977); I. E. HIRSCH, *LUTHERSTUDIEN* (1954); J. NEAL, *CONSCIENCE IN THE REFORMATION PERIOD* (Diss., Harvard, 1964); Alanen, *Das Gewissen bei Luther*, 29 *ANNALES ACADEMIE SCIENTIARUM FENNICAE* 1 (1934); Scholler, *Martin Luther on Jurisprudence—Freedom, Conscience, Law*, 15 *VAL. U.L. REV.* 265 (1981).

For a jurisprudential elaboration of the Lutheran concept of conscience by Johann Oldendorp, see *infra* notes 203-10 and accompanying text.

73. On the scholastic concept of the relation of reason and conscience in, *inter alia*, the apprehension and application of natural law, see H. APPEL, *DIE LEHRE DER SCHOLASTIKER VON DER SYNTERESIS* (1891); E. D'ARCY, *CONSCIENCE AND ITS RIGHT TO FREEDOM* (1961); O. LOTTIN, *PSYCHOLOGIE ET MORALE AUX XII<sup>E</sup> ET XIII<sup>E</sup> SIÈCLES* (1948) (4 vols.); J. STELZENBERGER, *SYNEIDESIS, CONSCIENTIA, GEWISSEN* (1963). Bernhard Lohse writes:

Since the days of high scholasticism a distinction had been made on the basis of earlier linguistic usage between *synteresis* and *conscientia* in connection with what we call conscience. In general, *synteresis* was regarded as an ability of the soul, not entirely corrupted by the fall, to incline toward the good, whereas *conscientia* makes practical application of the principles of *synteresis*. Whether, following Thomas [Aquinas] or Duns [Scotus], *synteresis* is primarily associated with the reason or, following Bonaventura [or Ockham], with the will . . . makes little difference. In any case, the basic design remained the same.

Lohse, *Conscience and Authority in Luther*, in *LUTHER AND THE DAWN OF THE MODERN ERA* 159 (H. Obermann ed. 1974).

74. See I. E. HIRSCH, *supra* note 72, at 127-28 and sources cited therein.

governs all the activities of his life including both his rational apprehension and his application of the natural law. "Where a man's conscience remains fallen," Luther wrote, ". . . his reason will also inevitably be darkened, distorted and deficient." Where his conscience is redeemed, "his rational apprehension will also be enhanced."<sup>75</sup>

Theologically, Luther's conception of law differed from that of the scholastics in that he considered not only civil law but also natural law and divine law to be ordained by God only for the earthly and not for the heavenly realm. Luther did not consider law to be an integral part of the objective reality of God himself, nor did he consider that law was ordained by God as a way of leading people to union with him. In Luther's theology, all law, including the Ten Commandments, was ordained by God solely for sinful man, fallen man. Obedience to it did not rescue man from his sinfulness, nor did it make him acceptable to God.<sup>76</sup>

## B. THE USES OF THE LAW

Once it is granted that salvation does not depend on "the works of the law," the question arises: Why does God ordain the law? What are, from God's point of view, its "uses"?<sup>77</sup> This is an essentially different

75. Quoted by F. STAHL, *DIE KIRCHENVERFASSUNG NACH PROTESTANTEN* 37 (2d ed. 1862).  
76. See, e.g., 11 WA, *supra* note 5, at 249-50, where Luther writes:

Now observe, these people [i.e., the members of the heavenly kingdom] are allowed no earthly sword or law. And if all the world were right Christians, that is, right believing, no prince, king, lord, sword, or law would be needed or useful. For what would be the use of them? [Christians] have in their hearts the Holy Spirit, who instructs them and causes them to wrong no one, to love everyone, gladly and cheerfully to suffer injustice, and even death, from everyone. Where every wrong is suffered and every right is done, no quarrel, strife, trial, judge, penalty, law or sword is needed. Therefore, it is not possible for the secular sword and law to find any work to do among Christians, since of themselves they do much more than its law and doctrine can demand. Just as Paul says in I Timothy 1[:9], "The law is not given for the righteous, but for the unrighteous." (Nun, siehe, diese Leute dürfen kein weltliches Schwert noch Recht. Und wenn alle Welt rechte Christen, das ist, Rechtgläubiger waren, so wäre kein Fürst, König, Herr, Schwert, noch Recht nötig oder nuetzlich. Denn wozu sollte ihn? Die, weil sie den Heiligen Geist im Herzen haben, der sie lehrt und macht, dass sie niemandem Unrecht tun, jedermann lieben, von jedermann gerne und fröhlich unrecht leiden, auch den Tod. Wo jedes Unrecht gelitten und jedes Recht getan ist, da ist kein Zank, Hader, Gericht, Richter, Strafe, Recht noch Schwert nötig. Darum ist es unmöglich, dass unter den Christen sollte weltliches Schwert und Recht zu schaffen finden, seitdem sie viel mehr tun von sich selbst als alle Rechte und Lehre fördern mögen. Gleich als Paulus sagt 1 Timo. 1: "Dem gerechten ist kein Gesetz gegeben, sonder dem ungerechten.")

But see Luther's caveat, *infra* note 78.

77. On Luther's doctrine of the uses of the law (*usus legis*), see Cranz, *supra* note 65, at 94-112; Alexander, *Validity and Function of Law: The Reformation Doctrine of Usus Legis*, 31 MERCER L. REV. 509, 514-19 (1980); W. JOEST, *GESETZ UND FREIHEIT. DAS PROBLEM DES TERTIUS USUS LEGIS BEI LUTHER UND DIE NEUTESTAMENTLICHE PARAINESE* (1956); Elert, *Eine theologische Fälschung zur Lehre von Tertius usus legis*, 2 ZEITSCHRIFT FÜR RELIGIONS- UND GEISTESGESCHICHTE

question from that asked by earlier Roman Catholic theologians, who made obedience to the moral law together with faith essential to a person's justification and salvation. For the scholastic theologian, to speak of "the uses" of the law would be like speaking of "the uses" of faith—or, indeed, the uses of God.

Luther set forth in rough terms two "uses of the law" (*usus legis*) and endorsed a third. One such use is to restrain people from misconduct by threat of penalties. He called this the "civil" or "political" use of the law. God, Luther argued, wants even sinners to observe the moral law—to honor their parents, to avoid killing and stealing, to respect marriage vows, to testify truthfully, and the like—so that "some measure of earthly order, concourse and concord may be preserved."<sup>78</sup> Fallen man, not naturally inclined to observe these commandments, may nevertheless be induced to do so by fear of punishment—divine punishment as well as human punishment. This "first use" of the law applies both to the Ten Commandments and to the civil laws derived therefrom.<sup>79</sup>

Luther's civil use of the law helped to lay the foundation for modern theories of legal positivism. "Stern hard civil rule is necessary in the world," he wrote, "lest the world be destroyed, peace vanish, and commerce and common interest be destroyed."<sup>80</sup> He emphasized that to maintain order it is important that there be precise legal rules, not only to deter lawbreakers but also to restrain officials, including judges, from their natural inclination to wield their powers arbitrarily. Especially in

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168 (1948); R. BRING, *GESETZ UND EVANGELIUM UND DER DRITTE GEBRAUCH DES GESETZES IN DER LUTHERISCHE THEOLOGIE* (1943).

78. 10 WA, *supra* note 5, at 454; see also 11 *id.* at 251:

Since few believe and still fewer hold to the Christian way of not resisting evil and themselves doing no evil, God has provided for them a different government outside the Christian estate and God's kingdom, and has subjected them to the sword, so that, even though they would wish to do so, they cannot practice their wickedness, and if they do, they may not do it without fear, nor in peace and prosperity. . . . If it were not so, since the whole world is evil and that scarcely one in a thousand is a right Christian, men would devour one another, and no one could preserve wife and child and support himself and worship God, so that the world would become a wilderness. (Denn seitdem wenig glauben und das weniger Teil hält sich nach christlicher Art, dass es nicht widerstrebe dem Übel, ja dass es nicht selbst Übel tue, hat Gott denselben ausser dem christlichen Stand und Gottes Reich ein anderes Regiment verschafft und sie unter dem Schwert geworfen, dass, obwohl sie gleich gerne wollten, doch nicht tun könnten ihre Bösheit, und obwohl sie es tun, dass sie es doch nicht ohne Furcht noch mit Friede und Glück tun mögen. . . . Denn wenn das nicht wäre, seitdem alle Welt böse und unter tausend kaum ein rechter Christ ist, würde eins das andere fressen, dass Niemand könnte Weib und Kind ziehen, sich nähren und Gott dienen, damit die Welt Wüste wuerde.)

79. Luther generally spoke of the "civil use" as the "first use of the law," and the "theological use" as the "second use of the law," see, e.g., 10 *id.* at 454; 40 *id.* at 486. But "for Luther the primary emphasis is on the theological use of the law . . . particularly later in his career." Alexander, *supra* note 77, at 515. See also the quotation from Luther, *infra* note 83.

80. 15 WA, *supra* note 5, at 302.

wicked times, he wrote, written laws are needed because of the excessive generality of natural law.<sup>81</sup> Thus, Lutheran jurisprudence was an important source of the nineteenth-century legal positivist's definition of law as the will of the state expressed in rules and enforced by coercive sanctions.<sup>82</sup>

In contrast to nineteenth-century legal positivism, however, Lutheran jurisprudence postulated that the state, its will, its rules, and its sanctions are ordained by God, and that they have, in addition to their civil use, a second and even more important "theological" or "spiritual" use. The natural law as well as the civil laws derived therefrom serve to make people conscious of their duty to give themselves completely to God and their neighbors while at the same time making them aware of their utter inability to fulfill that duty without divine help. Through the law man is thus driven to seek God.<sup>83</sup> Here Luther relied on St. Paul's explanation of the significance of the Ten Commandments for Christians: to make them conscious of their inherent sinfulness and to bring them to repentance.<sup>84</sup>

Luther also acknowledged a third use of the law, its "pedagogical" use, namely, to educate the faithful—those who are already penitent and do not need to be coerced to obey—in what God wants of them and, thus, to guide them to virtue. Luther himself never expressly expounded

81. 4 *id.* at 3911, 4733ff.

82. We are using the term "legal positivism" in the general sense elaborated in Berman, *Toward an Integrative Jurisprudence: Politics, Morality, and History*, 76 CALIF. L. REV. 779 (1988).

83. See, e.g., 40 WA, *supra* note 5, at 481-86:

The true office and the chief and proper use of the law is to reveal to man his sin, blindness, misery, wickedness, ignorance, hate, contempt of God, death, hell, judgment, and the well deserved wrath of God. . . . When the law is being used correctly, it does nothing but reveal sin, work wrath, accuse, terrify, and reduce minds to the point of despair. (Itaque verum officium et principalis ac proprius usus legis est, quod revelat homini suum peccatum, caecitatem, miseriam, impietatem, ignorantiam, odium, contemptum Dei, mortem, infernum, iudicium et commeritam iram apud Deum. . . . Sic lex, quando in suo vero usu est, nihil aliud facit, quam quod revelat peccatum, efficit iram, accusat, perterrefacit et fere ad desperationem mentes adigit.)

84. *Romans* 7:7-25; *Galatians* 3:19-22. See Dillenberger collection, *supra* note 5, at 14, and discussion in Cranz, *supra* note 65, at 112. "For this reason," Luther continues, "Paul called Moses a minister of sin [Amtmann der Suende] and his office an office of death. . . . So it is all the fault of Moses: he both creates and punishes sin through the law. And death follows perforce . . . unless the sinner has faith and finds grace." Quoted and discussed in H. BORNKAMM, *supra* note 61, at 144-49. See generally M. LUTHER, *HOW CHRISTIANS SHOULD REGARD MOSES* (1525), in 16 WA, *supra* note 5, at 363-93.

this third use,<sup>85</sup> although he endorsed without qualification those confessions and treatises in which it was set forth.<sup>86</sup> It was his colleague and close friend Philip Melanchthon who systematically developed the doctrine of the threefold use of the law in both theological and jurisprudential terms.

### III. THE LEGAL PHILOSOPHY OF PHILIP MELANCHTHON

It has been said that whereas Luther taught the justice of God, Melanchthon taught the justice of society, and that his teaching on social justice "deserves to be viewed alongside the teachings of an Aristotle, a Thomas Aquinas, a Leibniz, and alongside the teachings of the German school of jurisprudence of the nineteenth century."<sup>87</sup> Wilhelm Dilthey calls him "the ethicist of the Reformation" and the "greatest didactic genius of the [sixteenth] century, [who] liberated the philosophical sciences from the casuistry of scholastic thought. . . . A new breath of life

85. See generally 7 A. HARNACK, *supra* note 5, at 206; W. JOEST, *supra* note 77, at 196; W. ELERT, *LAW AND GOSPEL* 38 (E. Schroeder trans. 1967); G. EBELING, *WORD AND FAITH* 75 (J. Leitsch trans. 1963). For a discussion of the controversy over the place of the third use of the law in early and later Lutheran theology, see R. BRING, *supra* note 77; L. HAIKOLA, *USUS LEGIS* (1958).

86. See, e.g., *APOLOGY OF THE AUGSBURG CONFESSION*, Article 4, in TC, *supra* note 5, at 127, 161, 163 (Melanchthon speaks of the virtues that the law teaches). In the 1535 edition of his *Loci communes*, Melanchthon argues that "the third office of the law . . . is to teach us the good works that are pleasing to God." ("Tertium officium legis . . . doceat eos de bonis operibus . . . Deo placeant.") See 21 CR, *supra* note 5, at 406. Luther approved of both these writings by Melanchthon.

In several places in his writings, Luther also suggested the idea of, although not the precise phrase, the pedagogical use of the law. In his 1522 commentary on Galatians, for example, 10 WA, *supra* note 5, at 449ff., Luther spoke generally of "a three-fold use of the law" and endorsed strongly Paul's comment that "the law was our teacher until Christ came," *Galatians* 3:24, but then went on to elaborate only two uses of the law. See G. EBELING, *supra* note 85, at 64. In his famous Table Talk, Luther distinguished obliquely between a written law, an oral law, and a spiritual law and then wrote, "the spiritual law cannot operate without the holy spirit, which touches the heart and moves it, so that a man not only ceases to persecute, but . . . desires to be better." *TABLE TALK*, *supra* note 41, at 135-36; cf. similar sentiments in 38 *id.* at 310. In M. LUTHER, *LARGE CATECHISM* of 1529, which he described as a set of instructions for the daily lives of Christian believers, Luther devoted more than fifty pages to exegesis of the Decalogue, concluding that

outside of the Ten Commandments, no work can be good or pleasing to God, however great or precious it may appear in the eyes of the world. (extra decem praecepta nullum bonum opus, quod quidem Deo placere possit, esse existimandum sit, quamlibet tandem coram mundo aut magnum aut speciosum esse videatur.)

TC, *supra* note 5, at 670-71. He includes a similar exegesis in M. LUTHER, *TREATISE ON GOOD WORKS* (1520), in 6 WA, *supra* note 5, at 196, and M. LUTHER, *DISPUTATIONS AGAINST THE ANTI-NOMIANS* (1537-1539), in 39 *id.* at 359, 418, 486, respectively. It is clear from these and other passages that for Luther law could serve not only as a harness against sin and an inducement to faith but also as a teacher of Christian virtue.

87. H. FILD, *JUSTITIA BEI MELANCHTHON* 150 (Theol. Diss. Erlangen, 1953).

went out from him.”<sup>88</sup> Indeed, in his own time Melanchthon was called “the teacher of Germany” (*praeceptor Germaniae*).<sup>89</sup>

What needs also to be said, however, is that Melanchthon’s teachings on social justice and on ethics were combined with a new theory of natural and positive law which came to replace Thomistic and other Roman Catholic theories in those parts of Europe where Lutheranism triumphed.

Born in 1497 and orphaned by the age of ten, Melanchthon was a child prodigy.<sup>90</sup> He received his bachelor’s degree at the University of Heidelberg in 1511 and his master’s degree at the University of Tuebingen in 1514. From 1514 to 1518 he worked as an editor at a publishing house and prepared both his own translations of Greek verse and an important book of classical grammar, *Rudiments of the Greek Language*.

In 1518, at the age of 21, Melanchthon was called to the University of Wittenberg to serve as its first professor of Greek. In his brilliant inaugural address entitled “The Improvement of Education,” he urged his colleagues to abandon the “arid, barbaric fulminations of the scholastics” and to return to the study of classical and Christian sources.<sup>91</sup> Melanchthon’s iconoclastic manifesto won the accolade of Luther, who was in the audience. Luther defended his young colleague against detractors and ultimately became one of his staunchest friends and supporters.

Under Luther’s inspiration, Melanchthon joined the cause of the German Protestant Reformation. In his first year at Wittenberg, he studied theology while he taught Greek and rhetoric, and early in 1519 he received the bachelor’s degree in theology. He soon became a gifted professor of theology—as many as 600 students attended his lectures. He also became an eloquent exponent of Lutheran theology. In 1519 and 1520 he wrote several learned defenses of Luther against his Roman

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88. 21 W. DILTHEY, *supra* note 28, at 193. Haenel, *Melanchthon der Jurist*, 8 ZEITSCHRIFT FÜR RECHTSGESCHICHTE 249 (1869) (“Among the reformers, it was Melanchthon who first brought together the fruits of humanism in a clear and systematic manner. . . . The greatest jurists of the Reformation era followed him and were influenced by him.”); O. KRAUSE, *supra* note 65, at 106 (“Melanchthon was the first on the Protestant side to deal systematically with the natural-law.”).

89. K. HARTFELDER, *PHILIP MELANCHTHON ALS PRAECEPTOR GERMANIAE* (1889; repr. ed. 1964).

90. Melanchthon was raised and tutored by his grandfather, John Reuter, and the linguist John Unger. He studied at the Pforzheim Latin School where his uncle, the famed Hebraist and humanist Johann Reuchlin, imbued in him a deep love of logic, linguistics, and literature.

91. P. MELANCHTHON, *DE CORRIGENDIS ADOLESCENTIAE STUDIIS* (1518), in 3 Stupperich collection, *supra* note 5, at 29-42.

Catholic opponents and a number of short popular theological pamphlets. In 1521 he published his famous *Loci communes rerum theologicarum*, the first systematic treatise on Protestant theology.<sup>92</sup>

During the 1520s and 1530s, Melanchthon played a leading role in the debates between the Lutheran reformers and their Roman Catholic and radical Protestant opponents. He drafted the chief declaration of Lutheran theology, the *Augsburg Confession* (1530) and its *Apology* (1531), and participated in the drafting of the *Schmalkald Articles* (1537), another important Lutheran creed. He prepared a number of Lutheran catechisms and instruction books and published more than a dozen commentaries on Biblical books and ancient Christian creeds as well as several revised and expanded editions of his *Loci communes*.<sup>93</sup>

Although Melanchthon's theological writings were more systematic, irenic, and logical in form than Luther's, they differed little in substance.<sup>94</sup> At no time did Luther and Melanchthon ever oppose each other on any substantial point of theology or, indeed, of moral, political, or legal philosophy.<sup>95</sup>

92. For further biographical information on Melanchthon, see K. HARTFELDER, *supra* note 89; W. MAURER, *DER JUNGE MELANCHTHON ZWISCHEN HUMANISMUS UND REFORMATION* (1969) (2 volumes); J. RICHARD, *PHILIP MELANCHTHON, THE PROTESTANT PRÆCEPTOR OF GERMANY* (1898).

93. The 1535, 1543, 1555, and 1558 editions of his *Loci communes* appear respectively in 21 CR, *supra* note 5, at 81, 229, 561, and 22 *id.* at 47. The treatise, initially written in Latin, appeared in German, French, Italian, Croatian, and Dutch translations and had a wide reading not only among Lutherans, but also among Anglicans and Calvinists. See the editorial notes in 22 *id.* at 653, and in LC 1521, *supra* note 5, at 16-17.

94. A number of earlier commentators argued that, since Melanchthon achieved fame not only as a theologian but also as a humanist, his outlook differed markedly from that of Luther. See, e.g., 2 O. RITSCHL, *DOGMEGESCHICHTE DER PROTESTANTISMUS* 39 (1908-1912) (dismissing Melanchthon as "a scholastic" and a "distorter of pristine Lutheran dogma"); see also O. RITSCHL, *DIE CHRISTLICHE LEHRE VON DER RECHTSFERTIGUNG UND VERSÖHNUNG* 126 (1870); 4 R. SEEBERG, *DOGMEGESCHICHTE* Part 2 (1920); F. HILDERBRANDT, *MELANCHTHON: ALIEN OR ALLY?* (1946). For a survey of literature reflecting this judgment of Melanchthon, see W. HAMMER, *DIE MELANCHTHONFORSCHUNG IM WANDEL DER JAHRHUNDERTE* (1967); R. STUPPERICH, *MELANCHTHON* 128-35 (1960). More recent writers, however, have lauded Melanchthon as the great systematizer of Lutheran doctrine. As Ernst Troeltsch put it: "It was not Luther, but Melanchthon who determined fully what the exact consistency of Lutheranism was to be. He was the chief teacher and instructor, the scholarly publicist, and the theological diplomat of Lutheranism; as such he passed Luther's ideas through the sieve of his formulations." *Quoted by* M. ROGNESS, *PHILIP MELANCHTHON. REFORMER WITHOUT HONOR* vii (1969).

95. Luther's correspondence is filled with glowing accolades of Melanchthon and of his writings. Luther was particularly impressed with Melanchthon's chief theological work *Loci communes* (see *supra* note 5). See, e.g., *TABLE TALK, supra* note 41, at 21:

We possess no work wherein the whole body of theology, wherein religion is more completely summed up than in Melanchthon's *Loci communes*; all the Fathers, all the compilers of sentences, put together, are not to be compared with this book. It is after the Scriptures the most perfect of works.

Melanchthon wrote much on legal philosophy, chiefly in the context of moral and political philosophy. He taught university courses in Roman law and wrote widely on the theological and philosophical foundations of legal institutions. He also participated in the drafting of a number of urban and territorial statutes and was frequently consulted on cases that raised intricate legal, political, and moral questions.

Melanchthon's writings, taken as a whole, set forth a systematic Lutheran legal philosophy. To be sure, Melanchthon drew freely on the entire tradition of Western legal philosophy, particularly on Graeco-Roman sources, but he restated and revised that tradition in a new way, reconciling it with and subordinating it to the cardinal Lutheran doctrines of the two kingdoms, total depravity, justification by faith alone, *sola Scriptura*, the Christian calling, and the priesthood of all believers.<sup>96</sup>

We shall summarize Melanchthon's legal philosophy under three headings: (1) the relationship of natural law to divine law (the Ten Commandments), (2) the uses of natural law in civil society, and (3) the relationship of natural law to positive law.<sup>97</sup>

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*See also* 18 WA, *supra* note 5, at 601: Philip Melanchthon's book on theological topics, in my judgment, deserves not only immortality, but also to be placed in the canon of the church." ("[P]er Philippi Melanchthonis de locis Theologicis . . . libellum, meo iudicio, non solum immortalitate, sed canone quoque Ecclesiastico dignum."); 1 *id.* at 514. For a general treatment of the relationship between Luther and Melanchthon, see LUTHER AND MELANCHTHON IN THE HISTORY AND THEOLOGY OF THE REFORMATION. REFERATE DES 2 INTERNATIONALEN LUTHERFORSCHUNGSKONGRESS (V. Vatja ed. 1961).

96. *See, e.g.*, APOLOGY OF THE AUGSBURG CONFESSION, Article 16 (Of Political Order), in TC, *supra* note 5, at 328-33; LC 1555, *supra* note 5, at 39-44, 274-79, 323-44. For a brilliant discussion of Melanchthon's development of the two-kingdoms theory, see A. SPERL, MELANCHTHON ZWISCHEN HUMANISMUS UND REFORMATION: EINE UNTERSUCHUNG DES TRADITIONSVERSTÄNDNISSES BEI MELANCHTHON UND DIE DAMIT ZUSAMMENHÄNGENDEN GRUNDFRAGEN SEINER THEOLOGIE 141-70 (1959). Sperrl traces the idea of two kingdoms (and two corresponding forms of government and law) to some of Melanchthon's lectures and writings in 1521 and 1522 (*see, e.g.*, I Stupperich collection, *supra* note 5, at 168), and shows how Melanchthon developed these ideas in the course of the 1520s and 1530s in close collaboration with Luther and other reformers. For further discussion, see Mueller, *Luther und Melanchthon über das ius gladii 1521*, in GESCHICHTLICHEN STUDIEN FÜR ALBERT HAUCK 458 (1916); Virck, *Melanchthons politische Stellung auf dem Reichstag zu Augsburg*, 9 ZEITSCHRIFT FÜR KIRCHENGESCHICHTE 67, 293 (1888).

97. For analysis of Melanchthon's jurisprudential contributions, see Bauer, *Melanchthons Rechtslehre*, 42 ARCHIV FÜR REFORMATIONSGESCHICHTE 64 (1951); Bauer, *Der Naturrechtsvorstellungen des jüngeren Melanchthon*, in FESTSCHRIFT FÜR GERHARD RITTER ZU SEINEM 60. GEBURTSTAG 244 (1950); 2 W. DILTHEY, *supra* note 28, at 162; Haanel, *supra* note 88; G. KISCH, *supra* note 57; O. KRAUSE, *supra* note 65, at 106; Liermann, *Zur Geschichte des Naturrechts in der evangelischen Kirche: Eine rechts- und geistesgeschichtliche Studie*, FESTSCHRIFT FÜR ALFRED BARTHOLET ZUM 80. GEBURTSTAG 294 (1950); McNeill, *supra* note 2, at 175; W. SOHM, *Die Soziallehren Melanchthons*, 115 HISTORISCHE ZEITSCHRIFT 68 (1916); G. STRAUSS, *supra* note 34, at 223; R. STINTZING, RW, *supra* note 57, at 287; Voigt, *Die juristische Hermeneutik und ihr Abbild in Melanchthons Universitätsreden*, FESTGABE FÜR ERNST VON HIPPEL ZU SEINEM 70. GEBURTSTAG

### A. THE RELATIONSHIP OF NATURAL LAW TO DIVINE LAW (THE TEN COMMANDMENTS)

Melanchthon departed in only some minor respects from the traditional Roman Catholic conception that there are certain moral principles inscribed on the hearts of all people by which they should be governed in their relations with each other and that these are accessible to human reason.<sup>98</sup> Like his Roman Catholic predecessors and contemporaries, he called these moral principles the law of nature (*lex naturae*), or natural law (*ius naturale*).<sup>99</sup> He postulated, as did they, that reason was given to man by God partly in order to discern and apply this natural law.<sup>100</sup>

265 (1965). A convenient collection of Melanchthon's lectures and essays on legal subjects is included in G. KISCH, *supra* note 57, at 189.

98. P. MELANCHTHON, ANNOTATIONS IN EVANGELIUM MATTHAEI OF 1519-1520, in 4 Stupperich collection, *supra* note 5, at 164 ("Natural [laws] are particular statements or reflections to which all men assent, just as in human observations certain principles are apparent from nature." ("Naturales [leges] sunt sententiae quaedam sive cogitationes, quibus assentiuntur omnes homines, ut in speculabilibus sunt quaedam principia natura nota.")); 21 CR, *supra* note 5, at 116:

In the second chapter of Romans, in a wonderfully elegant and cogent argument, Paul teaches that there is within us a natural law. [He comes to the conclusion that] there is in the nations a conscience which either defends or accuses their acts, and therefore, it is law. (Paulus mire eleganti et arguto enthymemate in secundo capite ad Romanos docet, cum sic colligit. Est in gentibus conscientia factum defendens, vel accusans, est igitur lex.)

In this early period, Melanchthon identified at least nine principles or precepts of natural law: (1) to worship and honor God and his law; (2) to protect life; (3) to testify truthfully; (4) to marry and bear children; (5) to care for one's relatives; (6) to harm no one; (7) to obey all those in authority; (8) to distribute and exchange property on fair terms; (9) to oppose injustice. See notes in 21 *id.* at 25-27.

In his *Loci communes* of 1521, Melanchthon summarized these principles thus:

(1) Worship God. (2) Since we are born into a common social life, harm no one but help everyone with kindnesses. (3) If it is impossible that absolutely no one be harmed, act in such a way that the fewest be harmed, letting those suffer who disturb public order and for this purpose let magistracies and punishments for the guilty be set up. (4) Property shall be divided for the sake of public peace. For the rest, some shall supply the needs of others through contracts. (I. Deum cole. II. Quia nascimur in quendam communem vitae societatem, neminem laede, sed officiis quosvis iuvato. III. Si fieri nequit ut prorsus nemo laedatur, hoc agatur, ut paucissimi laedantur, sublatis iis qui publicam quietem interturbant, et in hoc magistratus, penaeque sontibus constituantur. IV. Res dividunto, propter publicam pacem. Caeterum per contractus alii aliorum inopiam sublevant.)

21 *id.* at 119-20. For a provocative discussion of Melanchthon's development of the principles of natural-law and the relation of these principles to broader Lutheran theological doctrines, see 2 W. MAURER, *supra* note 92, at 288-95.

99. See 21 CR, *supra* note 5, at 116-17:

The law of nature, therefore, is a common judgment to which all persons equally give their assent, and which God has engraved on the mind of each person, appropriate for the formation of morals. (Est itaque lex naturae sententia communis, cui omnes homines pariter adsentimur, atque adeo quam deus insculpsit cuiusque animo, ad formandos mores accommodata.)

See also 16 *id.* at 70; 21 *id.* at 392 for similar definitions.

100. In 21 *id.* at 116, Melanchthon writes: "For when natural laws are being proclaimed, it is proper that their formulas be collected by the method of human reason, through the natural syllogism." ("Nam cum naturales dicantur, oportebat a rationis humanae methodo earum formulas colligi per naturalem syllogismus.") Melanchthon immediately adds a caveat, however: "I have not yet

Melanchthon offered, however, a radically new theory of the ontology of natural law, that is, its origin in the essential nature of man.<sup>101</sup> Building on the two-kingdoms theory, he taught that God has implanted in all persons, certain "elements of knowledge" (*notitiae*), which are a light from above, a "natural light," without which we could not find our way in the earthly kingdom.<sup>102</sup> These *notitiae* include not only certain logical concepts, such as that the whole is bigger than any one of its parts, and that a thing either exists or does not, but also certain moral concepts, such as that God is good, that offenses which harm society are to be punished, and that promises should be kept.<sup>103</sup>

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seen this done by anyone, and I do not know if it is able to be done at all, since human reason is so blinded [by sin]." ("Id quod nondum video a quoquam factum, et haud scio an omnino possit fieri, . . . occaecataque ratione humana.") See also 16 *id.* at 167-69, where Melanchthon discusses his method of a moral philosophy; *infra* notes 107-10 and accompanying text.

101. For an introduction to Melanchthon's theory of human nature, see Bornkamm, *Melanchthons Menschenbild*, in PHILIP MELANCHTHON'S FORSCHUNGSBEITRÄGE ZUR VIERHUNDERTSTEN WIEDERKEHR SEINES TODESTAGES 76 (W. Ellinger ed. 1961). The significance of Melanchthon's theory of human nature has been lost even on some of those who are most sympathetic to Melanchthon's contribution. See, e.g., 2 W. DILTHEY, *supra* note 28, at 193 (who traces Melanchthon's teachings to Aristotle, Plato, the Church Fathers, and the scholastic theologians and philosophers of the twelfth to fifteen centuries); McNeill, *supra* note 2, at 168 (there is "no real discontinuity" between Melanchthon's theory of natural-law and that of the scholastics). See also F. WIEACKER, *supra* note 54, at 165 (Melanchthon is a "restorer of scholastic jurisprudence"); *id.* at 264 (Melanchthon represents "the later return of Lutheran theology to a natural-law theory rooted in Thomistic Aristotelianism").

102. 13 CR, *supra* note 5, at 150, 647; 21 *id.* at 712 (where Melanchthon calls these inborn elements of knowledge "a natural light in the intellect" ("naturalis lux in intellectu"), "a light of the human faculty" ("lux humani ingenii"), and "a divine light engrafted on minds" ("lumen divinitus insitum mentibus").

103. See 16 *id.* at 228:

The laws of nature are the elements of knowledge of practical principles and of axioms constructed from them, concerning prevailing morals. These elements of knowledge are congruent with the eternal and unchanging norm of the divine mind that God has planted in us. (Leges naturae sunt notitiae principiorum practicoorum et conclusionum ex his constructarum de regendis moribus, congruentes cum aeterna et immota norma mentis divinae insita nobis divina.)

See also 21 *id.* at 117:

For just as there are in theoretical disciplines, such as mathematics, certain common principles, common concepts, or assumptions, such as that "the whole is greater than its parts," so there are in morals certain common principles and first axioms [which] constitute the ground rules of all human functions. These you will rightly call the laws of nature. (Nam ut sunt in disciplinis theoreticis, ut mathematicis, quaedam communia principia, sive *koinai ennoiai e prolepseis*, quale illud est, totum esse maius partibus. Ita sunt quaedam in moralibus tum principia communia, tum conclusiones primae, regulae omnium humanarum functionum. Has recte vocaveris leges naturae.)

See also 3 Stupperich collection, *supra* note 5, at 208:

[The term] law of nature signifies natural elements of knowledge concerning morals, that is, practical principles and right axioms and necessary consequences arising from these principles. These elements of knowledge are revealed in their best and most appropriate form in the Decalogue, which is the epitome and summary of the law of nature. (Ius naturae significat naturales notitias de moribus, hoc est, principia practica, et conclusiones

These inborn moral concepts, Melanchthon argued, are "facts of [human] nature," which form the premises, not the objects, of rational inquiry.<sup>104</sup> They are thus beyond the power of human reason either to prove or to disprove. This was a marked departure from the Roman Catholic scholastic tradition, which taught that human reason can prove moral propositions that are consistent with divine revelation.<sup>105</sup> Melanchthon also rejected the related scholastic doctrine that the universal acceptance of a given principle of justice is proof of its rationality; thus, he did not include the law of nations (*ius gentium*) automatically within the category of natural law.<sup>106</sup>

Human reason, according to Melanchthon, is capable neither of proving the existence of certain fundamental inborn moral concepts nor of apprehending and applying them without distortion.<sup>107</sup> The scholastics had also recognized that human reason can be distorted by self-interest, but they had argued that it need not be. For Melanchthon, however,

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recta et necessaria consequentia ex illis principiis ortas. Quae sint illae notitiae, decalogus optime et aptissime ostendit, qui est epitome et summa legum naturae.)

Melanchthon describes his general doctrine of the inborn elements of knowledge in greater detail in P. MELANCHTHON, *COMPENDARIA DIALECTICES RATIO* (1520) (20 CR, *supra* note 5, at 748), P. MELANCHTHON, *DE LOCI COMMUNIBUS RATIO* (1526) (20 CR, *supra* note 5, at 695), and P. MELANCHTHON, *DIALECTICES* (1534). A systematic exposition of Melanchthon's epistemology appeared in P. MELANCHTHON, *EROTEMA DIALECTICES* (1547), Book IV (13 CR, *supra* note 5, at 642). For a careful analysis of Melanchthon's theory of the *notitiae nobiscum nascentes* in his earlier and later works, see 2 W. DILTHEY, *supra* note 28, at 162. Dilthey describes Melanchthon as:

the middle link [*Mittelglieder*] who . . . tied the natural knowledge of God and the world as revealed in the renewed classics with faithful piety as revealed in the renewed Christendom.

In this universal spirit a balance was struck between Humanism and Reformation.

*Id.* at 162; see also comments of Manschreck in the introduction of LC 1555, *supra* note 5, at xxviii; E. TROELTSCH, *supra* note 28, at 46ff.

104. Melanchthon, *quoted by* 2 H. DOOYEWEERD, *ENCYCLOPEDIA DER RECHTSWETENSCHAP* 58 (c.1946).

105. 2 W. DILTHEY, *supra* note 28, at 175-76.

106. 16 CR, *supra* note 5, at 70-72.

107. 13 *id.* at 547-55; 21 *id.* at 116-17, 399-400.

[T]he law of nature is the element of knowledge of divine law. [However, since our] nature is corrupted by original sin, the law of nature is greatly obscured. ([A]utem legem naturae notitiam esse legis divinae. Hic sciendum est, in hac natura corrupta vitio originis legem naturae valde obscuratam esse.)

In his *Loci communes* of 1535 and in his Latin edition of the *Loci communes* of 1555, Melanchthon added one minor qualification to this view. He first distinguished between (1) theoretical principles (*principia theoretica*), which he defined as the principles and axioms of geometry, arithmetic, physics, dialectics, and other (what we now call) exact sciences; and (2) practical principles (*principia practica*), which he defined as the principles and norms of ethics, politics, law, and theology. He then argued that man's rational knowledge of theoretical principles is far less distorted by sin than is his rational knowledge of practical principles. Theoretical principles, therefore, command greater assent than do practical principles. All men can agree, he argues, that two and two equal four or that an object thrown into the air will eventually come down. Not all men can agree, however, that God must be worshipped, that adultery is evil, that property must be respected, or that

as for Luther, human reason not only can be but also is inevitably corrupted by man's innate inclination to greed and power.<sup>108</sup>

Melanchthon's strong emphasis on the limitations of human reason rendered his doctrine of natural law paradoxical. On the one hand, he argued that "the law of nature is the law of God concerning those virtues which the reason understands."<sup>109</sup> On the other hand, he argued that "in this enfeebled state of nature," human reason is "darkened" and thus "the law of nature is distorted . . . and invariably misunderstood."<sup>110</sup> His resolution of this paradox was to subordinate the natural law that is both discernible to and distorted by human reason to the Biblical law that is revealed to faith.<sup>111</sup> The Biblical law (which Melanchthon also called the

honorable contracts must be kept. 21 *id.* at 398-400, 711-13. See the further discussion in 2 W. DILTHEY, *supra* note 28, at 173-74.

108. P. MELANCHTHON, ANNOTATIONS IN EVANGELIUM MATTHAEI, in 4 Stupperich collection, *supra* note 5, at 146ff.; APOLOGY OF THE AUGSBURG CONFESSION, Article 3 (Of Love and the Fulfilling of the Law), in TC, *supra* note 5, at 157-59; 21 CR, *supra* note 5, at 399-402.

109. 16 CR, *supra* note 5, at 23.

110. *Id.* at 24; 21 *id.* at 400-01.

111. 21 *id.* at 392.

In order more easily to understand natural laws, the best method is to use the Decalogue, in which all moral laws are able to be included. It is to the Decalogue that we must accommodate the laws of nature. (Ut autem facilius intelligi leges naturales decalogus . . . aptissima quaedam methodus est, in quam omnes leges morales includi possunt. Et ad decalogum postea leges naturae accommodabimus.)

22 *id.* at 256-57:

[W]hy then did God proclaim the Ten Commandments? . . . [First], in the wake of sin, the light in human reason was not as clear and bright as it had been before. . . . Against such blindness, God not only proclaimed his law on Mt. Sinai, but has sustained and maintained it since the time of Adam in his Church. . . . The other reason is that it is not enough that a person know that he is not to kill other innocent persons, nor rob others of their wives and goods. Rather, one must know who God is and know that God earnestly wants us to be like him, and that he assuredly rages against all sins. Therefore, he proclaims his commandments himself, so that we know that they are not only our thoughts but that they are God's law, and that God is the judge and punisher of all sinners, and that our hearts may recognize God's wrath and tremble before it. . . . Still another reason that God proclaims his law is this: human reason, without God's word, soon errs and falls into doubt. If God himself had not graciously proclaimed his wisdom, men would fall still further into doubt about what God is, who he is, about what is right and wrong, what is order and what is disorder. (Warum hat denn Gott die zehn Gebote . . . verkündigt? [Erstlich,] nach der Sünde ist das Licht in menschlicher Vernunft, nicht so klar und hell wie es zuvor gewesen ist. . . . Wider solche Blindheit hat Gott sein Gesetz nicht allein am Berge Sinai verkündigt, sondern hat es auch von Adams Zeiten an in seiner Kirche erhalten und erholet. . . . Die andere Ursache ist, es ist nicht genug, dass Mensch wisse, dass er nicht sollte andere unschuldige Menschen töten, und nicht ändern ihre Weiber oder Güter rauben, sondern man muss dieses zu fördern wissen, wer Gott ist, und dass Gottes ernstlich Wille ist, dass wir ihm gleichförmig sind, und dass er gewisslich wider alle Sünden zürnet. Darum verkündigt er sein Gebot selbst, dass wir wissen, dass es nicht allein unsere Gedanken sind, sondern dass es Gottes Gesetz sei, und das Gott der Richter und Strafer ist, wider die Sünder, und dass unsere Herzen Gottes Zorn erkennen, und dafür erschrecken. . . . Diese ist auch eine Ursache warum Gott sein Gesetz verkündigt: Die menschliche Vernunft ohne Gottes Wort wird bald irre, und fällt in Zweifel. Wenn nur Gott nicht gnädig diese seine Weisheit selbst verkündigt hätte, so fielen die Menschen noch mehr in Zweifel, was Gott sei, wer er sei, was Recht oder Unrecht sei, was Ordnung oder Unordnung sei.)

divine law)<sup>112</sup> reiterates and illuminates the natural law. This Biblical law is summarized in the Ten Commandments,<sup>113</sup> whose two "tables" Melancthon divided into the first three commandments and the remaining seven.<sup>114</sup> The first three commandments—to acknowledge one God

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See further discussion in 16 *id.* at 70; cf. 2 W. MAURER, *supra* note 92, at 288-90; Bauer, *supra* note 97, at 67-71.

112. Melancthon generally used the terms Biblical laws (*leges Biblicae*) and divine laws (*leges divinae*) interchangeably throughout his writings. See, e.g., the definition of divine law (*lex dei*) in 21 CR, *supra* note 5, at 1077. In his 1555 *Loci communes*, 22 *id.* at 201-02, however, Melancthon referred to this Biblical law variously as the "law of morality" (*lex moralis*), "law of virtue," (*Gesetz von Tugendem*), "judgment of God" (*Urteil Gottes*), "Ten Commandments" (*zehn Gebote*), and "the eternal immutable wisdom and rule of justice in God himself" (*die ewige unwandelbare Weisheit und Regel der Gerechtigkeit in Gott selbst*).

113. Like Luther, and like the earlier scholastics, Melancthon distinguished three types of Biblical laws: the ceremonial, judicial, and moral laws. Only the moral law (which was summarized in the Decalogue, as well as in the Golden Rule, the Beatitudes, and various injunctions in Paul's letters) remained in effect after Christ. The ceremonial laws (dealing with sacrifices, rites, feasts, and similar matters) and judicial laws (dealing with forms of Old Testament monarchical government, law, and similar matters) were no longer binding. See 21 CR, *supra* note 5, at 294-96, 387-92; LC 1521, *supra* note 5, at 53-57. For further discussion of the importance of the Decalogue, see 12 CR, *supra* note 5, at 23.

114. There are at least three traditions for numbering and arranging the Ten Commandments: (1) In the Judaic tradition, the prologue to the Decalogue ("I am the Lord, thy God, who brought thee out of the land of Egypt, out of the house of bondage") is the first commandment; the prohibitions against false gods and graven images are, collectively, the second; and the subsequent provisions concerning blasphemy, honoring the Sabbath, honoring one's parents, killing, adultery, stealing, false witness, and coveting are the third through tenth commandments, respectively. The early Talmudists, at least, regarded the first five commandments as precepts of piety which they assigned to the First Table of the Decalogue and the second five commandments as precepts of probity, which they assigned to the Second Table. Later Talmudists assigned only the first four commandments to the First Table, regarding the injunction to honor one's parents as a precept of probity, not piety. On the history of the Judaic interpretation of the Decalogue, see B. REICKE, *DIE ZEHN WORTE IN GESCHICHTE UND GEGENWART* 42-49 (1973) (*Beiträge zur Geschichte der biblischen Exegese*); A. SCHREIBER, *JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME* 43-44 (1979); W. SMITH, *OLD TESTAMENT IN THE JEWISH CHURCH* 331-45 (2d rev. ed. 1908). (2) A second tradition, espoused by Greek Orthodox as well as non-Lutheran Protestant groups, is based on the writings of the Hellenistic Jew Philo of Alexandria (c.15 B.C.-c.45 A.D.) and the early Church Fathers Clement of Alexandria (c.160-c.215) and Origen of Alexandria (c.185-254). This tradition treats the prologue and the prohibitions against other gods as the first commandment, the prohibition against false images as the second commandment, and numbers the subsequent commandments in the same manner as does the Judaic tradition. Following Philo, most Greek Orthodox theologians have assigned five precepts to each of the two tables of the Decalogue. Following Clement and Origen, sixteenth- and seventeenth-century Anabaptist, Calvinist, Zwinglian, and Anglican writers have assigned the first four commandments to the First Table and the last six commandments to the Second Table. On the history of this tradition of interpretation, see B. REICKE, *supra*, at 21-42; L. LEMME, *DIE RELIGIONSGESCHICHTLICHE BEDEUTUNG DER DEKALOGUS* (1880). (3) A third tradition, espoused by both scholastic and Lutheran theologians, is based on the writings of Augustine of Hippo (354-430). This tradition treats the prologue and the prohibitions against false gods and graven images, collectively, as the first commandment. The provisions concerning blasphemy, honoring the Sabbath, honoring one's parents, killing, adultery, stealing, and

and make no graven image, to utter no blasphemy, and to keep the sabbath holy—correspond to man's need for union with God. The remaining seven commandments—to honor authority, to preserve life, to protect the family, to respect property, to maintain truth, and to avoid envy and greed—correspond to man's need for community.

Thus, following Luther's lead, Melanchthon transformed traditional Western moral and legal philosophy by making not reason but the Bible, and more particularly the Ten Commandments, the basic source and summary of natural law. Earlier Roman Catholic writers—particularly in the fifteenth century—had, to be sure, also discussed and interpreted the Ten Commandments at some length. They had also argued that the Ten Commandments “clearly set forth the obligations of the natural law.”<sup>115</sup> Most Roman Catholic writers, however, had relied on the Ten Commandments to develop a moral law for the inner spiritual life rather than a natural law for the outer civil life. Accordingly, most of the discussion of the Ten Commandments in the Roman Catholic tradition occurred in confessional books and in treatments of the internal form and the sacrament of penance, and not in books on law.<sup>116</sup> For Melanchthon,

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false witness are considered as the second through eighth commandments, respectively. The prohibition against coveting one's neighbor's wife is identified as the ninth commandment and the prohibition against coveting his possessions as the tenth commandment. In this tradition, moreover, the first three commandments are assigned to the First Table of the Decalogue, the last seven commandments to the Second Table. This numeration and division of the Ten Commandments was set forth both by such scholastic writers as Peter Lombard, Thomas Aquinas, and Nicolaus of Lyra and early Lutheran writers such as Luther, Melanchthon, Johannes Oekolampadus, and Johannes Grynaeus. It was set forth in M. LUTHER, *LARGE CATECHISM* and in the *APOLOGY OF THE AUGSBURG CONFESSION* and was accepted as orthodox Lutheran doctrine until well into the seventeenth century. See TC, *supra* note 5, at 29, 41-42, 166-215. On the history of this interpretation, see B. REICKE, *supra*, at 9-21; Baumgaertel, *Die zehn Gebote in der christlichen Verkündigung*, in *FESTSCHRIFT O. PROCKSCH* 29 (1934); J. GEFFCKEN, *DER BILDERCATECHISMUS DES FÜNFZEHNTEN JAHRHUNDERTS UND DIE CATECHISTISCHEN HAUPTSTÜCKE IN DIESER ZEIT BIS AUF LUTHER* (1855) (an older, critical study, although still valuable).

In the Bible, of course, the Ten Commandments are not numbered at all. See *Exodus* 20:1-17, *Deuteronomy* 5:6-21.

115. T. AQUINAS, *supra* note 6, at I-II, Q. 98, Art. 5.

116. See, e.g., CLAVAISSO, *supra* note 6, section on “Penitentia”; passages from Huguccio, Laurentius, and Raymond of Pennafort, *quoted by* R. WEIGAND, *supra* note 6, at 220, 438. For a good example of later sixteenth-century Roman Catholic writing on the Decalogue, see *THE CATECHISM OF THE COUNCIL OF TRENT* 406-16 (J. Donovan trans. 1829). For further discussion, see S. OZMENT, *supra* note 13, at 17:

In the late fourteenth and the fifteenth centuries, the Ten Commandments replaced the Seven Deadly Sins as the main guideline for oral catechesis and confession. This was an important shift which enlarged the areas of religious self-scrutiny of and by the laity. At no other time were the Ten Commandments so zealously promoted and carefully expounded.

See also B. REICKE, *supra* note 114, at 9 (“[d]uring the Middle Ages, the chief role played by the Decalogue was in the church's confessional practice”); cf. M. CROWE, *supra* note 1, at 158-65.

by contrast, the Ten Commandments were both the ultimate source and summary of the natural law and hence a model for the positive law enacted by the earthly rulers.

This represented a new way of reconciling faith and reason. In contrast to traditional Roman Catholic thought, Melanchthon denied the capacity of human reason to discern divine and natural law unless it is aided by faith.<sup>117</sup> At the same time, he conflated divine and natural law, identifying both with the Ten Commandments. By so doing, he restructured the traditional learning about natural law in such a way as to bring it entirely within the Bible, and he reinterpreted the Bible in such a way as to embrace the traditional learning about natural law.

Basic to Melanchthon's theory of the Ten Commandments was the theory of the two kingdoms. In Melanchthon's conception, the first three commandments relate to a person's direct relationship with God, that is, the heavenly kingdom; the last seven relate to a person's multiple relationships within the human community, that is, the earthly kingdom. Only if people will accept by faith the first table of the Decalogue will they be able, by reason, to establish an ethic, and hence a law, based on the second table.<sup>118</sup>

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117. See, e.g., APOLOGY OF THE AUGSBURG CONFESSION, Article 3, in TC, *supra* note 5, at 157:

[T]he law cannot be [kept] without Christ; and . . . without the Holy Spirit. . . . Although, therefore, civil works, that is, the external works of the law, can be done, to a certain extent, without Christ and without the Holy Spirit [from our inborn light], nevertheless . . . those things which belong peculiarly to the divine law, i.e., the affections of the heart toward God, which are commanded in the first table [of the Decalogue], cannot be done without the Holy Spirit. . . . Accordingly, Paul says that the law is established by faith, and not made void; because the law can only then thus be kept when the Holy Spirit takes hold. ([L]ex non potest sine Christo . . . sine Spiritu Sancto. Quamquam igitur civilia opera, hoc est, externa opera legis, sine Christo et sine Spiritu Sancto aliqua ex parte fieri possint, tamen . . . illa, quae sunt proprie legis divinae, hoc est, affectus cordis erga Deum, qui praecipuntur in prima tabula, non posse fieri sine Spiritu Sancto. . . . Ideo Paulus dicit, legem stabiliri per fidem, non aboleri; quia lex ita demum fieri potest, quum contingit Spiritus Sanctus.)

But *cf. infra* notes 160-66 and accompanying text, where Melanchthon lauds Roman law as a deposit of divine wisdom, though attained by the Romans without faith.

118. Both Luther and Melanchthon insisted that compliance with the First Commandment of the Decalogue ("I am the Lord thy God who brought thee out of the land of Egypt, out of the house of bondage; thou shalt have no other gods before me; thou shalt not make for thyself a graven image") was a prerequisite for compliance with the other commandments. See, e.g., M. LUTHER, LARGE CATECHISM, in TC, *supra* note 5, at 166-215; 22 CR, *supra* note 5, 220 ("The first commandment must be included in all subsequent commandments. For one should consider that he must honor and obey God, as he has decreed." ("In allen folgenden Geboten, soll das erste mit eingeschlossen sein. Denn man soll betrachten, dass dieser Gehorsam Gott zu ehren geschehen soll, und wie er ihn geordnet hat.")).

B. THE USES OF NATURAL LAW IN CIVIL SOCIETY<sup>119</sup>

Like Luther, Melanchthon believed that in “the drama” of faith and grace, that is, in the heavenly kingdom, law “plays no useful role.”<sup>120</sup> “So one may ask,” he wrote, “for what, then, is the law useful?”<sup>121</sup> In this context, by “law” he meant both the natural law embodied in the Ten Commandments and positive law reflecting it. His answer, like Luther’s, was that both natural law and positive law have important uses within the earthly kingdom—for Christians and non-Christians alike.

Melanchthon elaborated systematically the “civil” and “theological” uses of the law that Luther had adumbrated. The first use is to

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119. Melanchthon sets forth his theory of the uses of the law in a variety of different writings, most notably in P. MELANCHTHON, *EPITOME RENOVATAE ECCLESIASTICAE DOCTRINAE* (1524) (1 CR, *supra* note 5, at 706-09); P. MELANCHTHON, *ORATIO DE LEGIBUS* (1525) (11 *id.* at 66); P. MELANCHTHON, *LOCI COMMUNES* (1535) (21 CR, *supra* note 5, at 405-06); P. MELANCHTHON, *LOCI COMMUNES* (1543) (21 CR, *supra* note 5, at 716-19); and LC 1555, *supra* note 5, at 122-28; *cf. id.* at 54-57. The doctrine of the threefold use of the law was repeated in later sixteenth-century Lutheran confessions and catechisms, notably THE FORMULA OF CONCORD, Part 6 (1577) (Of the Third Use of the Law). See TC, *supra* note 5, at 805:

[T]he law was given to men for three reasons: first, that thereby outward discipline might be maintained and wild and intractable men may be coerced by certain rules; second, that men thereby may be led to the knowledge of their sins; third, that men who have already been reborn . . . may on this account have a fixed rule according to which they can and ought to form their whole life, etc. A controversy has arisen among a few theologians concerning the third use of the law, namely, whether the laws to be taught to the reborn and the observance of it shall be pressed upon them or not. ([L]egem Dei propter tres causas hominibus datam esse: primo, ut externa quaedam disciplina conservetur, et feri atque intractabiles homines quasi regulis quibusdam coercentur; secundo, ut per legem homines ad agnitionem suorum peccatorum adducantur; tertio, ut homines iam renati . . . eam ipsam ob causam certam aliquam regulam habeant, ad quam totam suam vitam formare possint et debeant etc.: orta est inter paucos quosdam theologos controversia super tertio usu legis, videlicet an lex etiam renatis inculcanda et eius observatio apud eos urgenda sit an non.)

See also *id.* at 963. This doctrine also found a prominent place in Calvinist theology. See, e.g., 2 J. CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION*, Ch. 7 (1559).

120. 22 CR, *supra* note 5, at 153. In the same passage, Melanchthon writes:

While it is certainly true that all persons are obligated to live in external discipline and that God earnestly punishes external depravity in this life, and in the next life will punish all those who do not become converted, it is also necessary to know that external discipline cannot merit forgiveness of sins and eternal life. It is not the fulfillment of the law and is also not the righteousness by which a person is made just and acceptable to God, but only the Son of God has merited forgiveness of sins for us, and for his sake we are received, out of grace and mercy, without our deserving it, by faith. (Wie wohl gewissenlich wahr ist, dass alle Menschen in äusserliche Zucht zu leben schuldig sind, und dass Gott äusserliche Laster in diesem Leben ernstlich strafft, wird sie auch in denen, die nicht bekehrt werden, nach diesem Leben ewig straffen, so ist doch dieses dabei und nötig zu wissen, dass die äusserliche Zucht nicht kann Vergebung der Sünden und ein ewiges Leben verdienen, und ist nicht die Erfüllung des Gesetzes, ist auch nicht die Gerechtigkeit, damit ein Mensch für Gott gerecht und angenehm ist, sondern allein der Sonn Gottes, hat uns Vergebung der Sünden verdient, und um seinet willen werden wir angenommen aus Gnade und Barmherzigkeit, ohne unser Verdienst, durch den Glauben.)

121. 21 *id.* at 716.

coerce people by fear of punishment to avoid evil and do good.<sup>122</sup> Although such "external morality . . . does not merit forgiveness of sin," Melancthon wrote, "it is pleasing to God,"<sup>123</sup> since it allows persons of all faiths to live peaceably together within the earthly kingdom that God has created,<sup>124</sup> it enables persons who are Christians to fulfill the vocations to which God has called them, and it allows "God continually to gather to himself a church among men."<sup>125</sup>

122. 22 *id.* at 250:

[Law] teaches, and with fear and punishments forces, one to keep his external members under moral discipline, concerning all the commandments about external works. . . . This civil use is binding on all persons whatsoever, although they are not holy; and this external obedience is possible for all persons to some extent. . . . It is God's earnest will that all men live in external discipline; he punishes external vice in this life with public plagues, with the sword of the Obrigkeit, and with illness, poverty, war, dispersion, distress in children, and with many kinds of misfortunes. And he who is not converted to God falls into eternal punishment. (Dass es lehre, und mit Sorge und Strafen zwingt, dass man die äusserlichen Glieder in Zucht halte, nach allen Geboten von äusserlichen Werken. . . . Dieser bürgerliche Brauch bindet alle Menschen durchaus, obwohl sie gleich nicht heilig sind, und ist dieser äusserliche Gehorsam allen Menschen etlichermassen möglich. . . . Und ist Gottes ernstlicher Wille, dass alle Menschen in äusserlicher Zucht leben, und straft äusserlichen Untugend in diesem Leben mit vielen öffentlichen Plagen, mit dem Schwert durch die Oberkeit, und sonst mit Krankheit, Armut, Krieg, Verlagung, Elend an Kindern, und mit mancherlei Verderbung. Und wer nicht zu Gott bekehrt wird, fällt hernach in ewige Strafe.)

See also *id.* at 285:

For the worldly Obrigkeit, God has commanded principally these four offices: The first, that it shall be a voice of the Ten Commandments in external moral discipline. Next, that with physical force and with the sword and gallows it shall punish all who have done external works against the divine commandments, and shall protect the innocent; and, if possible, shall drive away murderers and robbers. The third office is that the worldly Obrigkeit shall make its own laws for moral discipline and for peace, but these are not to be opposed to divine commandments. The fourth, that it shall physically punish those who disobey these commandments. (Nun hat Gott der weltlichen Oberkeit vornehmlich diese vier Ämter befehlen: Das erste, dass sie soll eine Stimme sein der zehn Gebote, in äusserliche Zucht. Das andere, dass sie mit leiblicher Gewalt, mit dem Schwert und Galgen strafen soll, alle die, so äusserliche Werke wider die göttlichen Gebote getan haben, und dass sie die unschuldigen schützen, und so es möglich ist, die Mörder und Räuber in der Tat abtreiben. Das dritte Amt ist, dass das weltliche Oberkeit eigene Gesetze zur Zucht und zum Frieden machen soll, doch, dass dieselben nicht wider goettliche Gebote sind. Das vierte, dass sie auch die Ungehorsamen wider diese Gebote leiblich strafen soll.)

See also APOLOGY OF THE AUGSBURG CONFESSION, Article 4, in TC, *supra* note 5, at 127.

123. 22 CR, *supra* note 5, at 250 ("gleichwohl diese Zucht nicht Vergebung der Sünde verdient . . . [es ist] Gott gefällig").

124. 22 *id.* at 151 ("God commands all men to lead a morally disciplined life, so that other people next to you may have peace." ("Gott ein züchtiges Leben fordert, dass andere Leute neben dir Frieden haben.")); see also *id.* at 249:

God [attaches] physical punishments [to the law] so that many people may be together in a tolerable civil life. For if God himself did not protect civil life, and did not punish murderers and robbers, there would be nothing but devastations on earth. (Gott diese leibliche Strafen . . . dass noch viele Menschen in einem ziemlichen bürgerlichen Leben beisamen bleiben mögen. Denn wenn Gott nicht selbst das bürgerliche Leben schützt, und nicht die Mörder und Räuber straft, so würden eitel Verwüstungen auf Erden.)

125. *Id.* at 249 ("Nun will Gott dennoch dieses bürgerliche Leben auch erhalten, denn er will ihm für und für eine Kirche im menschlichen Geschlecht sammeln, bis zur Auferweckung der Toten.").

The second use of the law, for Melanchthon, as for Luther, is to make people conscious of their inability by their own will and reason, *without* coercion, to avoid evil and do good.<sup>126</sup> Such consciousness, Melanchthon argued, is a precondition to both their search for God's help and their faith in God's grace.<sup>127</sup>

Melanchthon added a third "pedagogical" or "educational" use of the law not articulated by Luther, namely, to educate the faithful themselves, the righteous, "those saints who now are believers, who have been born again through God's word and the Holy Spirit."<sup>128</sup> They also, Melanchthon said, need the law so they may "know and have a testimony of the works that please God."<sup>129</sup> Melanchthon's third use of the law built on Luther's teaching that the Christian believer, though saved, is not yet perfect. He is at once saint and sinner, citizen of both the heavenly kingdom and the earthly kingdom.<sup>130</sup> Thus, even the greatest saints, Melanchthon stated, need the instruction of the natural law, "for they carry with them . . . weakness and sin,"<sup>131</sup> and they "are still partly ignorant of God's will and desire for their lives."<sup>132</sup>

Melanchthon's emphasis on the pedagogical use of the law brought the heavenly kingdom into a close relationship, though not a complete interdependence, with the earthly kingdom. The natural law, which God has implanted in every human heart and has confirmed in the Ten Commandments, guides all persons, whether Christians or non-Christians, in

126. 21 *id.* at 69-70; 22 *id.* at 250-51.

127. Melanchthon makes clear that not only the divine law (i.e., the Ten Commandments) but also the civil law serves both to make men aware of their depravity and to impel them to grace. See, e.g., 22 *id.* at 152:

All punishments by the Obrigkeit and others should remind us of God's wrath against our sin, and should warn us to reform and better ourselves. (Und alle Strafen durch die Oberkeit und andere sollen uns erinnern von Gottes Zorn wider unsere Sünde und sollen uns zur Bekehrung und Besserung vermahnen.)

See also *infra* note 138 and accompanying text analyzing Melanchthon's theory that the civil authority is the guardian of both tables of the Decalogue.

128. 21 CR, *supra* note 5, at 255 ("nun gläubig sind und wieder geboren durch Gottes Wort, und heiligen Geist").

129. *Id.* at 255 ("dass sie daraus wissen und Zeugnis haben, welche Werke Gott gefallen").

130. LC 1521, *supra* note 5, at 138-40. Luther set forth his thesis that man is at once saint and sinner (*simul iustus et peccator*) in 21 LW, *supra* note 5, at 205; see also 7 WA, *supra* note 5, at 50:

Man has a twofold nature, a spiritual one and a bodily one. According to his spiritual nature, which men refer to as the soul, he is called the spiritual, inner, or new man. According to his bodily nature, which men refer to as the flesh, he is called the carnal, outer, or old man. (Homo enim duplici constat natura, spirituali et corporali: iuxta spiritua-lem, quam dicunt animam, vocatur spiritualis, interior, novus homo, iuxta corporalem, quam carnem dicunt, vocatur carnalis, exterior, vetus homo.)

131. LC 1555, *supra* note 5, at 127.

132. *Id.* at 132.

ways that are pleasing to God.<sup>133</sup> It imbues in them a respect for authority, a concern for society, a love for justice and fairness, and a desire for right living. Melanchthon called this a form of "civic" or "political righteousness," which, though "it must be sharply distinguished from religion or evangelical righteousness," is, nonetheless, a "useful benefit" that the law provides.<sup>134</sup>

### C. THE RELATIONSHIP OF NATURAL LAW TO POSITIVE LAW

Melanchthon's concept of the educational role of natural law in guiding saints and sinners alike in their understanding of "political righteousness" is an important link between his theory of the uses of natural law in civil society and his theory of the relationship of natural law to positive law. His theory of that relationship, put briefly, was that even as God sets guidelines for civil society through natural law, so civil society, especially through the state, has the task of transforming the general principles of natural law into detailed rules of positive law. That is what natural law "educates" the state to do. At the same time, the state—and here Melanchthon used the word "state" in its modern sense<sup>135</sup>—is to

133. 1 CR, *supra* note 5, at 706-08:

Paul says in Galatians 3[24] that the law is a teacher in Christ, and that a child should be subject to the law, as though he were subject to teachers, until he matures in Christ. . . . Nevertheless, God has also subjected to this teaching all who are not in Christ or who are weak . . . [for] the multitude must be instructed, ruled, and coerced in this manner even now by laws and by certain offices. . . . This political pedagogy, which is justice, forms morals and includes both [religious] rites and human and civil offices. Through teaching and exercise it accustoms children to the worship of God and restrains foolish people from vices. (Paulum, qui ad Galatas III ait, legem paedagogum esse in Christum, et puerum tantisper sub lege debere tanquam sub tutoribus esse, dum grandescat in Christo. . . . tamen subiecerit Deus huic paedagogiae omnes, qui vel non sunt in Christo, vel imbecilles sunt. . . . Ad hunc modum etiamnum erudienda, regenda et cohercenda erat multitudo legibus et certis officiis. . . . Haec paedagogia politica, quaedam iustitia est, quae mores format, et ritus et humana ac civilia officia continet, pueros assuefacit ad cultum Dei, docendo, exercendo, stolidum vulgus a vitiis cohibet.)

134. *Id.* at 707-08. For an excellent discussion of this point, see K. KOEHLER, *supra* note 57, at 104:

The emphasis on the pedagogical character [of the state and its law] is much stronger in Melanchthon than in Luther. Initially, Melanchthon had maintained Luther's view that the Obrigkeit exists to punish crimes and to maintain peace. Subsequently, however, he modified his position: the Obrigkeit should serve not only to preserve external peace and harmony [in society] but also to ensure that persons live properly [within this society]. Instruction (*disciplina*) and a sense of obligation (*pietas*) are the goals which the Obrigkeit must seek to attain through the instrument of the positive law.

See also G. STRAUSS, *supra* note 34, at 228 (for Melanchthon, "law is part of a paedagogica politica capable of mending public mores").

135. See *infra* note 239 and accompanying text. Compare also *infra* notes 211-29 and accompanying text.

exercise through *its* law an educational function with respect to its subjects parallel to the educational function which God exercises through natural law with respect to the state.

For Melanchthon, as for Luther, political rulers were called to be God's "mediators" and "ministers," and their subjects were called to render to them the same obedience that they rendered to God.<sup>136</sup> Melanchthon went beyond Luther, however, in articulating the divinely imposed task of political authorities to promulgate "rational positive laws" for the governance of both the church and the state in the earthly kingdom.<sup>137</sup> To be rational, Melanchthon stated, positive laws have to be based on both (1) the general principles of natural law; and (2) practical considerations of social utility and the common good. Unless both criteria are met, a positive law is neither legitimate nor obligatory.

In elaborating the first criterion, Melanchthon started from the position that it is the office of political rulers to be the "custodians of the first table and the second table of the [Decalogue]."<sup>138</sup> As such, they are responsible for defining and enforcing by positive laws both the right relationship between man and God, as reflected in the three commandments of the first table, and the right relationships among persons, as reflected in the seven commandments of the second table.

As guardians of the first table, political rulers are not only to proscribe and punish all idolatry, blasphemy, and violations of the Sabbath—offenses that the first table prohibits on its face<sup>139</sup>—but they are

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136. See 11 CR, *supra* note 5, at 69-70; 21 *id.* at 1011.

137. 22 *id.* at 611-12:

But I say rational laws, that is, those that follow the natural-law which God has created in people. That one should honor virtue and should punish vice. (Ich sage aber vernünftige Gesetze, das ist, die dem natürlichen Recht folgen, das Gott im Menschen geschaffen hat. Dass man Tugend ehren, und Untugend strafen soll.)

See also 16 *id.* at 230 (where Melanchthon speaks of "rationes iuris positivi").

138. *Id.* at 87 ("Magistratus est custos primae et secundae tabulae legis"); see also 22 *id.* at 286 ("the worldly Obrigkeit . . . should be a voice of the Ten Commandments" within the earthly kingdom ("die weltliche Oberkeit soll eine Stimme der zehn Gebote")); *id.* at 615:

When you think about Obrigkeit, princes, or lords, picture in your mind a man holding in one hand the tables of the Ten Commandments and wielding in the other a sword. Those same Commandments are above all the works which he [the ruler] is to protect and maintain in external moral discipline [that is, in the earthly kingdom]. Indeed, the table [of the Ten Commandments] is the government ordained by God. It is also the source from which all teaching and well written laws flow and by which all statutes should be regulated. (So oft du an Oberkeit, Fürsten oder Herrn gedenkest, so male dir in deinen Gedanken ein Mann, der die Tafeln der zehn Gebote in der einen Hand hält, und in der andern ein Schwert führt. Denn die selbigen Gebote sind vornehmlich die Werke, die er in äusserlichen Zucht schützen und erhalten soll. Ja die Tafel ist die Regierung von Gott geordnet. Sie ist auch die Quelle, daraus alle Lehre und wohlgeschriebene Recht fließen, und dadurch alle Gesetze reguliert werden.)

139. 16 *id.* at 87-88; 22 *id.* at 615-17.

also to "establish pure doctrine" and right liturgy, "to prohibit all wrong doctrine," "to punish the obstinate," and to root out the heathen and the heterodox.<sup>140</sup> Thus, Melanchthon laid a theoretical basis for the welter of new religious establishment laws that were promulgated in Lutheran cities and territories, many of which contained comprehensive compendia of orthodox confessions and doctrines, songs and prayers, and liturgies and rites.<sup>141</sup> The principle of *cuius regio eius religio*, which was set forth in the Religious Peace of Augsburg (1555) and again in the religion

140. 22 *id.* at 617-18. Melanchthon concludes:

[W]orldly princes and rulers who have abolished idolatry and false doctrine in their territories and have established the pure doctrine of the gospel and the right worship of God have acted rightly. All rulers are obliged to do this. ([W]eltliche Fürsten und Herrschaften, so in ihren Gebieten, Abgötterei und falsche Lehre abgetan, und die reine Lehre des Evangelii und rechte Gottesdienst aufgerichtet haben, daran Recht tun, und sind alle Regenten dies zu tun schuldig.)

*Id.* at 617. See also 16 *id.* at 85-105 (section entitled: *An principes debeant mutare impios cultus, cessantibus aut prohibentibus episcopis, aut superioribus dominis*).

Though Melanchthon hinted at this doctrine of religious establishment by civil law in his earlier writings (see, e.g., 2 *id.* at 710; 2 Stupperich collection, *supra* note 5, at 2, 21), his first systematic articulation of the doctrine appears in P. MELANCHTHON, EPITOME OF MORAL PHILOSOPHY, Book II ("On Justice"), in 16 CR, *supra* note 5, at 85-105. The Epitome as a whole was first published in 1540; the second book of the Epitome was apparently first published separately in 1539. (See editor's notes, *id.* at 2-20.) A summary of the doctrine also appears in the 1555 edition of the *Loci communes*. For further discussion of Melanchthon's development of this doctrine and its broader acceptance in Lutheran Germany as well as Scandinavia and Tudor England, see A. SPERL, *supra* note 96, at 152; G. STRAUSS, *supra* note 34, at 233.

This doctrine of religious establishment by civil law was a departure from the original Lutheran message. Luther in 1523, for example, wrote:

Worldly government has laws that extend no further than to life, property, and other external things on earth. For God cannot and will not allow anyone but himself alone to rule over the soul. Thus when the earthly power presumes to prescribe laws to souls, it encroaches upon God and his government and only seduces and corrupts souls. (Das weltliche Regiment hat Gesetze, die sich nicht weiter strecken denn über Leib and Güte und was äusserlich ist auf Erden. Denn über die Seele kann und will Gott niemand lassen regieren denn sich selbst allein. Darum wo weltlich Gewalt sich vermisst, der Seelen Gesetz zu geben, so greisst sie Gott und sein Regiment und verführet und verdirbt nur die Seelen.)

11 WA, *supra* note 5, at 262; see also J. BRENZ, *supra* note 5, at 302.

141. Many of the establishment ordinances are collected and discussed in the first sixteen volumes of E. SEHLING, *supra* note 34, and in the two volumes of A. RICHTER, DIE EVANGELISCHEN KIRCHENORDNUNGEN DES SECHSZEHNTE JAHRHUNDERTS (1846), and in 2 QUELLEN ZUR NEUEREN PRIVATRECHTSGESCHICHTE (W. Kunkel ed. 1938) [hereinafter QUELLEN]. These ordinances also include a number of ecclesiastical laws, which are discussed *infra* note 156 and accompanying text. Melanchthon himself played a leading role in the drafting and promulgation of the CONSTITUTION AND ARTICLES OF THE SPIRITUAL CONSISTORY OF WITTENBERG (1542) and the WITTENBERG REFORMATION (1545), in 1 E. SEHLING, *supra* note 34, Part I, at 200, 209. For descriptions of the establishment laws included within these *evangelischen Kirchenordnungen*, see M. RAEFF, THE WELL-ORDERED POLICE STATE: SOCIAL AND INSTITUTIONAL CHANGE THROUGH LAW IN THE GERMANIES AND RUSSIA, 1600-1800 56-57 (1983); G. SCHWANHAUSSER, DIE GESETZGEBUNGSRECHT DER EVANGELISCHEN KIRCHE UNTER DEM EINFLUSS LANDESHERRLICHEN KIRCHENREGIMENTS IM 16. JAHRHUNDERT (1967).

clauses of the Peace of Westphalia (1648), rested ultimately on Melanchthon's theory of positive law as defining and enforcing the first table of the Decalogue.<sup>142</sup>

As guardians of the second table of the Decalogue, political rulers are responsible for governing "the multiple relationships by which God has bound men together."<sup>143</sup> Thus, on the basis of the Fourth Commandment ("Honor thy parents), officials are obligated to prohibit and punish disobedience, disrespect, or disdain of authorities such as parents, political rulers, teachers, employers, and others; on the basis of the Fifth Commandment ("Thou shalt not kill")—unlawful killing, violence, assault, battery, wrath, hatred, merciliness, and other offenses against one's neighbor; on the basis of the Sixth Commandment ("Thou shalt not commit adultery")—unchastity, incontinence, prostitution, pornography, obscenity, and other sexual offenses; on the basis of the Seventh Commandment ("Thou shalt not steal")—theft, burglary, embezzlement, and similar offenses against another's property, as well as waste or noxious use or sumptuous use of one's own property; on the basis of the Eighth Commandment ("Thou shalt not bear false witness")—all forms of dishonesty, fraud, defamation, and other violations; and, finally, on the basis of the Ninth and Tenth Commandments ("Thou shalt not covet")—all attempts to perform these or other offensive acts against others.<sup>144</sup>

Many of these aspects of social intercourse had traditionally been governed by the Roman Catholic Church both through the confessional laws of the internal forum and through the canon laws of the external forum.<sup>145</sup> Melanchthon's legal philosophy provided a rationale for political officials to bring these subjects within the province of the state. Accordingly, new urban, territorial, and imperial ordinances began to appear throughout mid-sixteenth-century Germany, replete with detailed regulations of social conduct.<sup>146</sup>

142. See *supra* note 48 for discussion of the Religious Peace of Augsburg. The basic principle, though not the precise formula, of *cuius regio eius religio* was written into Article 7, Sections 1-2 of the Peace of Westphalia (1648), a document which served as the basic constitutional law of German cities and territories until the dissolution of the Holy Roman Empire in 1806. For a translation and discussion of the latter document, see CHURCH AND STATE, *supra* note 48, at 189-93.

143. 22 CR, *supra* note 5, at 610.

144. See *supra* notes 111 and 113 for citations to various passages in which Melanchthon interprets the Ten Commandments. The fullest example appears in LC 1555, *supra* note 5, at 97-122.

145. See H. BERMAN, *supra* note 4, at 199-224 and sources cited therein.

146. Many of these new imperial policy ordinances (Polizeiordnungen), territorial ordinances (Landesordnungen), and urban "reformations" (Stadtrechtsreformationen) are collected in QUELLEN, *supra* note 141. See also M. RAEFF, *supra* note 141, at 70-118; G. SCHMELZEISEN, POLIZEIORDNUNGEN UND PRIVATRECHT (1955). Many of the laws of social intercourse, based on

In elaborating his second criterion of the rationality of positive laws, namely, their correspondence to practical considerations of social utility and the common good,<sup>147</sup> Melanchthon drew from the Ten Commandments as a whole, in the context of Scripture as a whole, a general duty of the state "to maintain external discipline, judgment, and peace in accordance with the divine commandments and the rational laws of the land."<sup>148</sup> Neither the divine commandments, however, nor the rational laws of the land based on them contained a systematic statement of the nature of the legal order required for the maintenance of "discipline, judgment, and peace." In laying foundations for such a systematic statement, Melanchthon developed general theories of both criminal law and civil law.

In criminal law, Melanchthon urged political rulers to develop comprehensive laws that define and prohibit "all manners of offense against the person or the property of another" and to enforce these laws "swiftly and severely." He listed "four most important reasons" for punishment of crime: (1) "God is a wise and righteous being, who out of his great and proper goodness created rational creatures to be like him. Therefore, if they strive against him the order of justice [requires that] he destroy them. The first reason for punishment, therefore, is the order of justice in God." (2) "The need of other peaceful persons. If murderers, adulterers, robbers, and thieves were not removed, nobody would be safe." (3) "[To set an] example. When some are punished, others are reminded to take account of God's wrath and to fear his punishment and thus to reduce the causes of punishment." (4) "The importance of divine judgment and eternal punishment, in which all remain who in this life are not converted to God. As God in these temporal punishments shows that he distinguishes between virtue and vice, and that he is a righteous judge, we are reminded more of this example that also after this life all sinners

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the Second Table of the Decalogue, also appear in the evangelical church ordinances of the sixteenth-century. See *supra* note 141 and accompanying text.

147. The concept of *Gemeinnutz*, or common good, was a dominant theme of sixteenth-century German law reform. See H. BERMAN, *supra* note 49, at 583, and sources cited therein. A German scholar has written that for Melanchthon,

the common good becomes the model for the religious and moral education which church and state have to undertake. The state is a teacher of virtue (*paedagogium virtutis*), its policy is directed to facilitating progress (*foelicitatis progressum*), its final goal is eternal blessedness. . . . For Melanchthon the political order (*ordo politicus*) is synonymous with the common weal (*salus publica*), . . . and history is viewed optimistically as progress.

L. ZIMMERMAN, *DER HESSISCHE TERRITORIALSTAAT IM JAHRHUNDERT DER REFORMATION* 384, 386 (1933).

148. 22 CR, *supra* note 5, at 615 ("Was weltlicher Obrigkeit Amt und Werk ist, nämlich, äusserliche Zucht, Gericht, und Frieden nach göttlichen Geboten, und vernünftigen Landrechten, mit leiblicher Strafe, erhalten.").

who are not converted to God will be punished."<sup>149</sup> Thus, for Melanchthon, criminal punishment served as a form of divine retribution, special deterrence, general deterrence, and education.

In civil law, as opposed to criminal law, Melanchthon postulated the duty of the ruler to facilitate and regulate the formation and functioning of various types of voluntary social relationships. He focused on three in particular: contractual relationships, family relationships, and relationships involving the visible church. Each of these relationships also had traditionally been subject, at least in part, to the jurisdiction of the Roman Catholic Church. The canon law had governed all contracts involving oaths or pledges of faith as well as most aspects of marriage and family life and of church polity and property. Under the inspiration and instruction of Melanchthon and other reformers, these social institutions were also brought within the jurisdiction of the state and subjected to an elaborate system of civil law.

"God has ordained contracts of various kinds,"<sup>150</sup> Melanchthon wrote, to facilitate the sale, lease, or exchange of property, the procurement of labor and employment, and the lending of money and extension of credit.<sup>151</sup> Such contracts serve not only the utilitarian ends of

149. *Id.* at 224:

(Und sind vornehmlich vier hochwichtige Ursachen der leiblichen Strafen in diesem Leben. Das erste, Gott ist ein weises und gerechtes Wesen, und hat die vernünftige Creatur also geschaffen aus grosser und ordentlicher Gütigkeit, dass sie ihm gleichförmig sein sollte, darum so sie ihm widerstrebt, ist Ordnung der Gerechtigkeit, dass er sie widerum vertilgt. Also ist die erste Ursache der Strafen, Ordnung der Gerechtigkeit in Gott. Die andere Ursache ist, Notdurft der andern stillen Menschen. Denn so die Mörder, Ehebrecher, Räuber, und Diebe, nicht aufgeräumt würden, wäre niemand sicher. Die dritte Ursache ist, das Exempel. Denn so etlich gestraft werden, werden die Andern erinnert, dass sie Gottes Zorn betrachten und die Strafe fürchten, und also die Ursachen der Strafen meiden. Die vierte Ursache ist, Bedeutung goettliches Gerichts und der ewiger Strafen, darin bleiben werden alle, die in diesem Leben nicht zu Gott bekehrt werden. Denn dieweil Gott in diesen zeitlichen Strafen anzeigt, dass er Unterschied halte zwischen Tugend und Untugend, und dass er ein gerechter Richter sei, werden wir durch dieses Exempel erinnert, dass auch nach diesem Leben alle Sünder gestraft werden, die nicht zu Gott bekehrt sind.)

150. 22 *id.* at 241 ("Gott selbst die verschiedene Contractus geordnet").

151. *Id.* at 241-42:

Your heart and hand should not desire the goods of another, or acquire them in another way than through voluntary exchange and equal payment, as God has ordained. For in this life, we need a variety of things, and to some God has given the fruits of the earth, to others wool and cloth, etc. Thus, [to facilitate exchange of these goods], God himself has ordained contracts of purchase and sale, and others. Through these means, he desires us to maintain equality, for else we would soon consume one another. He also desires to remind us that justice is equality, and that he himself is equal [in the Trinity]. He further desires us to maintain equality among ourselves, according to his godly order. The strong should not trample the weak underfoot with impunity. (Dein Herz und Hand soll keine fremde Güter begehren, oder zu sich ziehen, anders, denn wie Gott die Verwechslung der Güter mit Bewilligung und gleicher Bezahlung geordnet hat. Denn in diesem Leben bedürfen wir mancherlei, und Gott gibt einem Früchte der Erden, dem andern Wollen und Tuch, etc. Darum hat Gott selbst die Contractus geordnet, in Kaufen und Verkaufen, etc. Darin will

exchanging goods and services but also the social ends of promoting equality and checking greed.<sup>152</sup> Accordingly, God has called his political officials to promulgate general contract laws that prescribe "fair, equal, and equitable" agreements, that invalidate contracts based on fraud, duress, mistake, or coercion, and that proscribe contracts that are unconscionable, immoral, or offensive to the public good. Melanchthon was content, for the most part, to state these general principles of contract law in categorical form, although he occasionally applied them to specific cases. He condemned with particular vehemence loan contracts that obligated debtors to pay usurious rates of interest or entitled creditors to secure the loan with property whose value far exceeded the amount of the loan, unilateral labor and employment contracts that conditioned a master's obligation to pay on full performance from the servant, and contracts of purchase and sale that were based on inequality of exchange.<sup>153</sup>

Officials, Melanchthon argued, are also to promulgate rules to govern family relations. Civil laws are to prescribe monogamous heterosexual marriages between two fit parties and to proscribe homosexual, polygamous, bigamous, and other "unnatural" relations. They are to ensure that each marriage is formed by voluntary consent of both parties and to undo relationships based on fraud, mistake, coercion, or duress. They are to promote the created marital functions of propagation and childrearing and to prohibit all forms of contraception, abortion, and infanticide. They are to protect the authority of the *paterfamilias* over his wife and children but to punish severely all forms of adultery, desertion, incest, and wife or child abuse.<sup>154</sup>

The church, too, in Melanchthon's view, is to be regulated by laws promulgated by the political ruler, not only with respect to doctrine and liturgy, according to the first table of the Decalogue, but also with

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er, dass wir Gleichheit halten sollen, denn sonst zehret ein Teil den Andern bald aus. Er will uns auch erinnern, dass Gerechtigkeit Gleichheit ist, und dass er selbst gleich ist. . . . Er will auch, dass wir unter uns selbst gleichheit halten, nach göttlicher Ordnung, nämlich, dass der Stärker den Schwachen nicht zum Boden stosse unverschuld.)

152. For Melanchthon's discussion of contracts, see 16 *id.* at 128-52, 251-69, 494-508 (*Dissertatio de contractibus*); 22 *id.* at 240; 2 Stupperich collection, *supra* note 5, Part 2, at 802-03.

153. See 16 CR, *supra* note 5, at 128-52, 251-69, 494-508.

154. For Melanchthon views of marriage and the family, see 16 *id.* at 509; 21 *id.* at 1051; 22 *id.* at 600; 23 *id.* at 667; 2 Stupperich collection, *supra* note 5, Part 2, at 801-02. For a more detailed treatment of the Lutheran theory and law of marriage in the sixteenth-century, see Witte, *Transformation*, *supra* note 49.

respect to polity and property. "The prince is God's chief bishop (*summus episcopus*) in the church," Melancthon wrote.<sup>155</sup> He is to define the episcopal hierarchy within the church—from local congregations to urban ecclesiastical circuits or the territorial council or synod. He is to decide the responsibilities and procedures of congregational consistories, of circuit councils, and of the territorial synod. He is to appoint ecclesiastical officials, to pay them, to supervise them, and, if necessary, to admonish and discipline them. He is to ensure that the local universities and schools produce the pastors, teachers, and administrators needed to operate the church. He is to furnish the land, the supplies, and the services necessary to erect and maintain each church building. He is to oversee the acquisition, use, and alienation of church property.<sup>156</sup>

Thus, Melancthon, in the style of model legal positivism, described political rulers as the makers of positive law. Yet he also insisted that the validity of positive law is limited by the natural law revealed in Scripture and written in the hearts of men. It is natural law that both gives the ruler authority to make positive laws and governs the exercise of that authority. Only positive laws that are consistent with natural law are authoritative and legitimate. Moreover, since the ultimate source of positive law is natural law, the ruler is bound by the positive laws that he and his predecessors have made.

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155. Quoted by E. SEHLING, *KIRCHENRECHT* 36-37 (1908). Cf. 1 E. SEHLING, *supra* note 34, Part I, at 149-52, 163-65 (similar sentiments by Melancthon in his *INSTRUCTION TO VISITORS OF 1528*).

156. See 16 CR, *supra* note 5, at 241, 469, 570; 22 *id.* at 227, 617; 1 E. SEHLING, *supra* note 34, Part I, at 149. Melancthon writes in summary:

God-fearing rulers are obliged for the properties of the Church to supply necessary offices, pastors, schools, church buildings, courts, and hospitals. It is not right to allow these properties to be squandered by idolatrous, idle, immoral monks and canons. Also it is not right for rulers to take possession of these properties unless they decree proper assistance for the pastors, schools, and courts. (Gottfürchtige Herrschaften schuldig sind, mit den Kirchengütern, die nötigen Ämter, Pfarren, Schulen, Kirchen, Gericht, Hospital zu versorgen. Und ist nicht recht, dass man diese Güter durch abgöttliche, müßige, unzüchtige Mönche und Canoniken verschwinden lässt. Auch ist nicht recht, so die weltliche Herrschaften diese Güter einnehmen, dass davon nicht den Pfarren, Schulen und Gerichten gebührende Hilfe tun.)

22 CR, *supra* note 5, at 617-18. For further discussion, see P. MEINHOLD, *PHILIP MELANCTHON, DER LEHRER DER KIRCHE* 40, 94 (1960); H. LIERMANN, *DEUTSCHES EVANGELISCHES KIRCHENRECHT* 150ff. (1933); R. NUERNBERGER, *KIRCHE UND WELTLICHE OBRIGKEIT BEI MELANCTHON* (1937); Maurer, *Über den Zusammenhang zwischen Kirchenordnungen und christlicher Erziehung in den Anfängen lutherischer Reformation*, in W. MAURER, *DIE KIRCHE UND IHR RECHT. GESAMMELTE AUFSÄTZE ZUM EVANGELISCHEN KIRCHENRECHT* 254 (1976).

Melancthon's bold new description of the responsibility of the political authority in ecclesiastical affairs helped to inspire the promulgation of a rich new body of Lutheran ecclesiastical law (evangelisches Kirchenrecht) in cities and territories throughout sixteenth-century Germany. These church ordinances are collected in E. SEHLING, *supra* note 34 and A. RICHTER, *supra* note 141. For further discussion, see Witte, *Church Law*, *supra* note 49, and literature cited therein.

Melanchthon described the duties and rights not only of political officials but also of those subject to their authority and law. Early in his career, Melanchthon, like Luther, taught that all subjects have the duty to obey and no right to resist political authority and positive law—even where such authority and law has become arbitrary and abusive. If the “magistrate commands anything with tyrannical caprice,” he wrote in 1521, “we must bear with this magistrate because of love, where nothing can be changed without a public uprising or sedition.”<sup>157</sup> Melanchthon based this theory of absolute obedience on the political texts of St. Paul: that “the powers that be are ordained by God,” that unswerving obedience to them is “mandated by conscience,” and that to defy them is to defy God and to incur his wrath.<sup>158</sup>

As the power of German princes continued to grow, however, Melanchthon became deeply concerned to safeguard subjects from abuse and to restrain princes from tyranny. At least by 1555, he joined those who recognized a right of resistance against tyrants based on natural law. “Conscious disobedience of the secular Obrigkeit and against true and proper laws,” he still maintained, “is deadly sin, that is, sin which God punishes with eternal damnation if one in conscious defiance finally persists in it.”<sup>159</sup> However, if the positive law promulgated by the political official contradicts natural law, particularly the Ten Commandments, it is not binding in conscience. The principle that positive law cannot bind in conscience if it contradicts the fixed standards of natural law is, of course, consistent with Roman Catholic jurisprudence. The principle, however, had radically different implications in a unitary Protestant state in which there were no longer concurrent ecclesiastical and civil jurisdictions to challenge each other’s legislation on the ground of violation of natural law. It was now left to the people—acting individually or collectively through territorial and imperial diets—to resist officials who had strayed beyond the authority of their office and to disobey laws that had defied the precepts of natural law.

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157. 21 CR, *supra* note 5, at 223-24 (“[S]i quid imperent tyrannice, hic quoque ferendus est magistratus, propter caritatem, ubi sine publico motu, sine seditione nihil mutari potest.”). Melanchthon, however, did counsel those subject to tyrannical authority and law to escape if they could do so without tumult and uprising: “Quod si citra scandalum, citra publicum motum elabi possis, elabere, ut si coniectus sis in carcerem nihil mali meritus, et efringere possis, sine publico motu, nil vetat fugere.” *Id.*

158. *Romans* 13:1-7.

159. 22 CR, *supra* note 5, at 613 (“Wissentlicher Ungehorsam gegen die weltliche Obrigkeit, und wider rechte oder ziemliche Gesetze, ist Todsünde, das ist, solche Sünde, die Gott mit ewiger Verdammis straft, so man im selbigen wissentlichen Trotz endlich verharret.”).

In addition, Melanchthon emphasized throughout his career the importance of published written law as a restraint on arbitrary power.<sup>160</sup> He argued that all the great legal civilizations of the past, including the Israelite, Cretan, Greek, and Roman, had met this requirement. Written and published laws are more secure, more predictable, and more permanent. They protect citizens against groundless violations of their person and property by officials. They also protect authorities against unjustified rebellions and groundless charges of arbitrariness or capriciousness. Written positive laws provide "an iron wall against the ruthlessness of the crowd" (*die Rücksichtslosigkeit der Menge*) and a common bond between ruler and people for the defense of order and peace.<sup>161</sup>

Melanchthon also considered Roman law to be a restraint on arbitrary authority. The Roman law, he argued, was positive law imposed by the ruler; in that connection he stressed both its written character and its detailed character. Yet he also considered it to be "written reason" (*ratio scripta*) that implemented natural law. He countered the argument that the Roman laws were of pagan, not Christian, origin by stating that they "are pleasing to God, although they were promulgated by a heathen ruler," and that they "stem not from human cleverness [but] rather they are beams of divine wisdom," a "visible appearance of the Holy Spirit" to the heathen.<sup>162</sup> Thus, the Roman law bound the *Obrigkeit*. It was *their* law, positive law imposed by them, yet since it stemmed from their predecessors (the Roman emperors) and since it was in the form of glosses and commentaries on ancient texts (the *jus commune*), it was to a certain extent beyond their reach. It had a certain objectivity and exercised a certain restraint over them.<sup>163</sup>

Melanchthon's effusive praise of Roman law was not based on ignorance of its content. He studied it intensively and knew its development from the texts of Justinian through the glosses of Irnerius, the commentaries of Bartolus, and the revisions of his contemporaries.<sup>164</sup> Colleagues and friends with whom he discussed Roman law included some of the

160. See, in particular 11 *id.* at 66. For further discussion, see G. KISCH, *supra* note 57, at 86; K. KOEHLER, *supra* note 57, at 103; Haenel, *supra* note 88, at 257.

161. Quoted by G. KISCH, *supra* note 57, at 177. See further discussion in 11 CR, *supra* note 5, at 73, 552.

162. 11 CR, *supra* note 5, at 921-22.

163. *Id.* at 218ff., 357ff., 630ff., 922ff.

164. See particularly P. MELANCHTHON, DE IRNERIO ET BAROLO IURISCONSULTIS ORATIO RECITATA A D. SEBALDO MUNSERO (c.1537), in 11 CR, *supra* note 5, at 350. For further discussion, see G. KISCH, *supra* note 57, at 117; Haenel, *supra* note 88, at 259.

foremost legal scholars of the age.<sup>165</sup> Yet his interest in Roman law was not primarily that of a legal scholar. It was rather that of an ethicist and political theorist who found in Roman law a source of political order that protects against "seizure of power by the crowd," on the one hand, and a restraint on abuse of authority that "guards us against tyranny," on the other.<sup>166</sup> Thus, Melanchthon set forth the idea, made popular in the nineteenth century by the famous German jurist Rudolf von Jhering, that "Roman law . . . is in a certain sense a philosophy."<sup>167</sup>

#### IV. THE LEGAL PHILOSOPHY OF JOHANN OLDENDORP

Philip Melanchthon helped to shape the content and character of German legal philosophy until well into the seventeenth century. A whole generation of Germany's leading jurists in the sixteenth century—Johann Oldendorp (c.1480-1567), Konrad Lagus (c.1499-1546), Basilius Monner (c.1501-1566), Melchior Kling (1504-1571), Johannes Schneidewin (1519-1568), and many others—came under his direct influence as students, colleagues, and correspondents.<sup>168</sup> Generations of students thereafter studied his legal, political, and moral writings, many of which were still being published in the late seventeenth century and being used as textbooks in the universities.<sup>169</sup> His basic jurisprudential insights dominated German legal scholarship until the early Enlightenment.

Melanchthon's legal philosophy, however, was neither the only nor the most comprehensive Lutheran legal philosophy developed in the sixteenth century. Although sixteenth-century Lutheran jurists and moralists accepted Melanchthon's basic insights, they often criticized the

165. For an account of Melanchthon's connections with numerous leading German jurists, as a teacher, colleague, and/or correspondent, see Kisch, *Melanchthon und die Juristen seiner Zeit*, in 2 MELANGES PHILIPPE MEYLAN 135 (1963). See further sources cited *supra* note 57.

166. Quoted by G. KISCH, *supra* note 57, at 113.

167. 11 CR, *supra* note 5, at 358 ("Romanum ius . . . quendam philosophiam esse").

168. See *supra* note 57; see also K. KOEHLER, *supra* note 57, at 125:

Melanchthon in particular was held in the highest regard by jurists both within and without Germany. Leading legal scholars recommended strongly his Elements of Ethical Doctrine to young students, for nowhere else were the sources of law so clearly set forth. Especially in Wittenberg there was formed, under his personal influence, a school of jurists who in their lives and in their jurisprudence strongly manifested the new religious movements of the time.

Much of Melanchthon's correspondence is included in the first 10 volumes of CR, *supra* note 5; a thorough index of his letters is provided in MELANCHTHON: BRIEFWECHSEL (H. Scheible ed. 1977-1987) (5 volumes).

169. Information on the history of publication of each of Melanchthon's writings is included in the editorial notes in CR, *supra* note 5.

formulation and focus of these insights and systematized and supplemented them in their own way. Perhaps the most significant such critical systematization of Lutheran legal philosophy was that of Johann Oldendorp.

Oldendorp was "one of the strongest legal figures of his epoch,"<sup>170</sup> "surpassing all others," in Roderich von Stintzing's words, "in the power of his personality . . . and in his significance as a writer and as a teacher."<sup>171</sup> Born in Hamburg circa 1480,<sup>172</sup> he studied law from 1504 to 1508 at the University of Rostock and from 1508 to 1515 at the University of Bologna, then a leading center of humanist thought. In 1516 he became a professor of Roman law and civil procedure at the University of Greifswald. In these early years, Oldendorp was steeped in the new humanism. He became a close student of the classics—Plato, Aristotle, and Cicero—and of Roman law. He was in close contact with the leading German exponents of legal humanism—Claudius Cantiuncula (d. 1560) and Christophus Hegendorf (1500-1540).

In the early 1520s, Oldendorp resolved to dedicate his life to the cause of the Lutheran Reformation. Accordingly, in 1526 he left Greifswald to become a leading city official (*Stadtsyndikus*) of Rostock and leader of the city's Reformation party. Eventually he was influential in inducing the Rostock City Council to adhere to the Reformation, and he himself played an important part in supervising church activities there and in establishing a public school for the education of the young. Roman Catholic opposition, however, led him in 1534 to leave Rostock in order to accept the post of *Stadtsyndikus* in Lübeck, one of Germany's

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170. P. MACKE, DAS RECHTS- UND STAATSDENKEN DES JOHANNES OLDENDORP, INAUGURAL-DISSERTATION ZUR ERLANGUNG DER DOKTORWÜRDE EINER HOHEN RECHTSWISSENSCHAFTLICHEN FAKULTÄT DER UNIVERSITÄT ZU KÖLN 165 (n.d.; date of oral examination 25 May 1966). Most of the biographical information presented below is derived from H. DIETZE, JOHANN OLDENDORP ALS RECHTSPHILOSOPH UND PROTESTANT 448-84 (1933); O. KRAUSE, *supra* note 65, at 115-25; P. MACKE, *supra*; E. WOLF, GROSSE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE 129-32 (3. Aufl. 1951); Petke, *Zur Rolle Johann Oldendorps bei der offiziellen Durchführung der Reformation in Rostock*, 101 ZEITSCHRIFT DER SAVIGNY-STIFTUNG (Kan. Ab.) 339 (1984).

171. R. STINTZING, RW *supra* note 57, at 311. Stintzing also calls Oldendorp "the most significant of the German jurists of the middle of the sixteenth-century." *Id.* Ernst Troeltsch describes him as the "most influential jurist" (*massgebendster Jurist*) of the age of the Reformation. 1 E. TROELTSCH, DIE SOZIALLEHREN DER CHRISTLICHEN KIRCHEN UND GRUPPEN, GESAMMELTE SCHRIFTEN 545 n.253 (1912).

172. The year of Oldendorp's birth remains a point of controversy. The date 1480 is accepted by R. STINTZING, RW, *supra* note 57, at 311, as well as by many later historians. More recently, however, Wieacker has given Oldendorp's birthdate as 1486, F. WIEACKER, *supra* note 54, at 283, and Macke has adopted the date 1488, P. MACKE, *supra* note 170. Even later dates have been argued by other historians. 1486 or 1488 seems more plausible in light of Oldendorp's career.

chief commercial centers. There, too, he worked to bring Protestantism to the city, but there, too, Roman Catholic opposition eventually forced him out. In 1536 he accepted a teaching position in Frankfurt an der Oder, where he had also taught for a short time, from 1520-21. In 1539 he was invited to Cologne both to teach at the university and to serve the city government. The Roman Catholic Archbishop of Cologne, Cardinal Hermann von Wied (1477-1552), was himself drawn to Protestantism and befriended Oldendorp. Oldendorp came in personal contact there with Melanchthon<sup>173</sup> and the Strassburg reformer Martin Bucer (1491-1551). Once again, however, facing opposition, Oldendorp left Cologne in 1541. Following a brief term as professor at the University of Marburg, he returned to Cologne at the urging of Cardinal Hermann, but in 1543 he was finally expelled from the city by the Roman Catholic authorities. He returned to Marburg, where Protestantism was firmly established, and taught in the law faculty there for twenty-four years until his death in 1567.

Oldendorp accepted the call to Marburg on condition that he be freed from the usual requirement of lecturing on the texts of the *Corpus Juris Civilis* in the order and manner imposed by the post-glossators—the famous *mos italicus* that had dominated European legal education and legal scholarship for some two centuries. He would come, he insisted, only if he could “teach the laws with special attention to their just consequences and in their relationship to God’s word, which, above all, must be pursued and taught.”<sup>174</sup> Eventually Oldendorp was authorized by the

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173. Prior to this meeting, and thereafter, Oldendorp held Melanchthon in the highest regard. In J. OLDENDORP, *IURIS NATURALIS GENTIUM ET CIVILIS ISAGOGE* (1539), reprinted in C. VON KALTENBORN, *supra* note 1, Appendix A, at 6, Oldendorp referred to Melanchthon as a writer of “the highest erudition” (*plenam eruditionis*). In a dedicatory letter to J. OLDENDORP, *DE JURE ET AEQUITATE DISPUTATIO* (1541) [hereinafter J. OLDENDORP, *DISPUTATIO*], he lauded Melanchthon as one “who, by the method of reason, had collected in an epitome the whole of moral philosophy” (“P. Melanchthonem totam de moribus philosophiam methodica rationale in epitomen contraxisse”). These and other of Oldendorp’s writings are sprinkled with references and citations to Melanchthon’s writings, both philosophical and theological.

174. Oldendorp, quoted by R. STINTZING, *RW*, *supra* note 57, at 323. Oldendorp’s full response to the Landgrave is instructive:

First, Your Eternal Princely Grace, the Praise, the Honor, and the Betterment of this land and the entire German nation—the study of law (which after God’s Word is the most important pursuit and study) should be organized not only in light of the Word, but in accordance with it in deed; the Word must be its starting point and its guide. And when the true teaching of virtue through written laws and equity is required, (as I have seen some do and Philip Melanchthon truly helps in this), [Your Eternal Princely Grace] and other estates will be relieved of much deception and aversion. (Nämlich zum ersten ein studium juris [neben Gottes Wort, das vor allen muss getrieben und gelehrt sein] dermassen auszurichten, das Ew. Fuerstl. Gnaden, desselbigen Lande und ganzen deutschen Nation Lob, Ehre, und Besserung, nicht allein im Schein des Wortes, dan auch mit der Tat folgen musste und solches im Druck offenbar ausgehen zu lassen und zu halten. Denn

founder of the university, Landherr Philip the Magnanimous, to introduce a basic reform of legal education at Marburg, whereby the entire body of law was considered philosophically and historically in its relationship to the Word of God.<sup>175</sup>

Oldendorp's copious legal writings<sup>176</sup> present a complex legal philosophy in which classical Greek, Roman, scholastic, humanist, and other elements are recombined in an original way and are subordinated to Biblical faith and the Christian conscience. Thus, one may say that Oldendorp, like Melanchthon, was both a humanist and a Lutheran.

#### A. THEORY OF DIVINE LAW, NATURAL LAW, AND POSITIVE LAW

Oldendorp started with a deceptively simple definition of law (*Recht, ius*) as the totality of legal norms. Legal norms, in turn, he defined as general rules issued by certain authorities that command, prohibit, permit, or punish conduct. Thus, Law with a capital "L" (*Recht, ius*) is identified with law with a small "l" (*Gesetz, lex*), in the style of modern legal positivism.<sup>177</sup>

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wann die wahrhaftige Lehre und Education der Tugend in beschriebenen Rechten und der Billigkeit möchte wiederum (als bei Etlichen vor Augen und Philipp Melanchthon treulich dazu hilft) in den Zwang gebracht, so wurde E.F.G. und andere Stände vieler Moge und Unlust enthoben bleiben.)

Quoted in *id.*; see also H. DIETZE, *supra* note 170, at 59; K. KOEHLER, *supra* note 57, at 127; P. MACKÉ, *supra* note 169, at 9.

175. See R. STINTZING, *RW*, *supra* note 57, at 323.

176. Oldendorp wrote at least 56 separate tracts, of which three are in old German and the rest in Latin. The German writings are among the earliest. The fullest bibliography of Oldendorp's writings is given in H. DIETZE, *supra* note 170, at 18-21. Macké's bibliography, *supra* note 170, at viii-xi, while not as exhaustive as Dietze's, includes six works not found in Dietze.

Two of the German works have been translated into modern German and published in E. WOLF, *QUELLENBUCH ZUR GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT* (1949). These are J. OLDENDORP, *WAS BILLIG UND RECHT IST* (1529) (E. WOLF, *supra*, at 29) [hereinafter J. OLDENDORP, *BILLIG UND RECHT*], and J. OLDENDORP, *RATMANNSPIEGEL* (1530) (E. WOLF, *supra*, at 69) [hereinafter J. OLDENDORP, *RATMANNSPIEGEL*]. The latter work is also published separately as *EIN RATMANNENSPIEGEL VON JOH. OLDENDORP, DOCTOR UND STADTSYNDICUS ZU ROSTOCK* (1971). Two of Oldendorp's Latin works, J. OLDENDORP, *ISAGOGE IURIS NATURALIS GENTIUM ET CIVILIS* (1539) [hereinafter J. OLDENDORP, *ISAGOGE*] and J. OLDENDORP, *DIVINAE TABULAE X PRAECEPTORUM* (c.1539) [hereinafter J. OLDENDORP, *DIVINAE TABULAE*], are reproduced in edited form in C. VON KALTENBORN, *supra* note 1, Appendix A, at 1-25. (Kaltenborn mistakenly identifies the *DIVINAE TABULAE* as Title V of the *ISAGOGE*, though the two works were written separately. The two works, however, were bound together, along with Oldendorp's *EPITOME SUCCESSIONIS AB INTESTATO & ALIA QUAEDAM PRO TYRONIBUS JURIS* in a 1539 Antwerp publication, available in the Treasure Room, Langdell Library, Harvard Law School.)

177. See J. OLDENDORP, *ISAGOGE*, *supra* note 176, at 7 ("Law . . . is the same as statute" ("Ius . . . idem est quod lex")). But see J. OLDENDORP, *BILLIG UND RECHT*, *supra*, note 176, at 57, where Oldendorp also puts customary law on an equal level with enacted law: "Law, or laws, is [*sic*]

Laws issued by civil authorities (*leges rei publicae*), that is, positive laws, are subordinate, in Oldendorp's theory, to the laws that are implanted by God in the human heart and that are discerned by conscience. These Oldendorp called variously the "law inside people" (*lex in hominibus*), the law of nature (*lex naturae*), and natural law (*lex naturalis, ius naturae*). He considered these to be directly binding upon the civil authorities.<sup>178</sup> Laws promulgated by God in the Bible (*leges Biblicae*) are themselves to be discerned, in Oldendorp's view, by the conscience of each believer.<sup>179</sup>

Thus, in Oldendorp's theory, as in the traditional Roman Catholic scholastic jurisprudence first enunciated systematically by the great twelfth-century canonist Gratian, there are three states, or levels, of law, which form a hierarchy: divine law, natural law, and human law. In contrast to the scholastic theorists, however, Oldendorp restricted the divine law (*lex divina*) to the laws set forth in the Bible, which in effect meant chiefly the Ten Commandments. In doing so, he followed both Luther and Melanchthon, who declared that of the many rules laid down in the Old Testament only the Ten Commandments are binding on Christians. Also, like Luther and Melanchthon and unlike the scholastics, Oldendorp did not speak of an eternal law (*lex aeterna*) transcending the Bible.

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twofold: written and unwritten" ("Recht, oder die Gesetze . . . ist zweierlei, geschrieben und ungeschrieben"). Under written law, he included the civil law (Roman law) and positive law, and under unwritten law he included custom, the law of nations, and natural-law.

178. Echoing Melanchthon, Oldendorp defined natural law as "the natural elements of knowledge that God has implanted in us by which we distinguish equity from iniquity" ("lex est notitia naturalis a deo nobis insita, ad discernendum aequum ab iniquo"). J. OLDENDORP, ISAGOGE, *supra* note 176, at 6. And again: "The source of natural norms . . . lies in the heart and conscience of man, on which God has inscribed them" ("ex norma naturae cue fonte . . . in corde et conscientia hominis deo insculpta"). *Id.* at 15.

179. Conscience, for Oldendorp, is a form of reason. See *infra* notes 196-97 and accompanying text. Cf. O. KRAUSE, *supra* note 65, at 118:

Ratio and revelation are two independent ways of ascertaining the natural-law. However, Oldendorp saw ratio as the first source of natural law. Only when ratio fails should man resolve his doubt through the Decalogue, and here again, it is reason that we use to draw conclusions from the divine commandments. Equating the Decalogue with natural law unmistakably separated Oldendorp from the teachings of Melanchthon. Oldendorp tried to show that ratio is a divine spark in a spoiled human nature and that this was the primary source of natural law. However, Oldendorp was still very far from being a typical rationalist nor did he believe in the supremacy of reason because in the end—and of this Oldendorp was sure—ratio, like human nature, is the creation of God. Reason is free [only] so long as it does not contradict divine commandments.

Krause also points out that for Oldendorp the Decalogue "built an ideal order and foundation for human coexistence, but contained no concrete rules of law, only very general principles." *Id.* Krause is wrong, however, in suggesting that Melanchthon did not "equate" the Decalogue with natural-law. See *supra* notes 111-18 and accompanying text.

Oldendorp also departed from Roman Catholic teaching in deriving the law inside people, or natural law, not from human reason as such, that is, the reason that originates in the mind, but, once again, from the Bible. Natural law, Oldendorp wrote, is derived from those parts of the Bible, especially the Ten Commandments and portions of the New Testament, that establish general moral principles of love and truthfulness—especially love of one's fellowmen as a community, love of one's individual neighbors, the golden rule, and the duty to be truthful in one's relations with others.<sup>180</sup> This is a God-given, Biblical natural law, and through his God-given conscience each person has the capacity to discern it and to observe it. Conscience was, for Oldendorp, indeed a form of reason—not, however, ordinary human reason or civil reason (*ratio civilis*), but a divine reason implanted in man, which Oldendorp called natural reason (*ratio naturalis*). For nature, in Oldendorp's concept, is the creative power of God; indeed, "nature is God the creator of all things."<sup>181</sup> The natural law implanted by God in man's conscience "does not depend on the power of the person but stands free, unchangeable. God has written it into your reason. Therefore you must apply your unbiased mind and read diligently."<sup>182</sup> "Conscience," he wrote, "is an infallible guide."<sup>183</sup>

Civil reason, which does depend on the power of the person, operates primarily in the sphere of the positive law of the civil polity. That

180. See J. OLDENDORP, ISAGOGE, *supra* note 176, at 15 ("[T]he divine tables restore and describe law [ius] and the law of nature [lex naturae] with such a sure testimony that there can be no variations [between them]." ("[T]abulae . . . divinae, in quibus renovatum et descriptum est ius vel lex naturae tam certo testimonio, ut varia non possint.")); J. OLDENDORP, DIVINAE TABULAE, *supra* note 176, at 17:

Since . . . the natural elements of knowledge in persons have been obscured because of original sin, a merciful God has restored and described them on tables of stone so that there would be a sure testimony that these laws of nature are confirmed by the word of God, which he has also inscribed on the souls of men. (Quandoquidem . . . obscurata esset in hominibus naturalis notitia propter originis vitium: voluit misericors deus . . . eam renovari atque in tabulas lapideas describi: ut certum existaret testimonium, has esse naturae leges verbo die confirmatas, quas in animos hominum quoque insculpsisset.)

See also J. OLDENDORP, BILLIG UND RECHT, *supra* note 176, at 58-65.

181. Quoted in P. MACKE, *supra* note 170, at 30-31 ("Natura: hoc est, Deus creator omnium."). See also J. OLDENDORP, ISAGOGE, *supra* note 176, at 6: "Nature [stands] for God himself, who is the first cause from whom all causes flow." ("Proinde naturam hoc in loco accipi oportet pro deo ipso: qui est causa prima, a quo omnes causae proflexerunt.")

182. J. OLDENDORP, BILLIG UND RECHT, *supra* note 176, at 57 ("Auch hängt die Billigkeit nicht von der Macht der Menschen ab, sondern steht frei, unwandelbar. Gott hat sie in deine Vernunft geschrieben und ihr eingeblendet, darum musst du dein unparteiische Gemüt wenden und fleissig lesen."). We have substituted the term "natural law" for the term "equity" (*Billigkeit*) in the original quotation; Oldendorp uses the two synonymously, as is explained *infra* note 200 and accompanying text.

183. Quoted by H. DIETZE, *supra* note 170, at 81.

law, however, also is derived ultimately from Holy Scripture. Like Luther and Melanchthon, Oldendorp traced all laws for ordering the earthly kingdom to the Fourth Commandment ("Honor thy father and thy mother"—the prince being the parent). More clearly than Melanchthon, he traced all criminal laws to the Fifth Commandment ("Thou shalt not kill"), the law of private property to the Seventh Commandment ("Thou shalt not steal"), and the law of procedure to the Eighth Commandment ("Thou shalt not bear false witness"). He also (unlike Melanchthon) traced family law to the Tenth Commandment ("Thou shalt not covet . . . thy neighbor's wife") and the law of taxation to the general commandment, "Thou shalt love thy neighbor as thyself."<sup>184</sup>

Oldendorp placed special emphasis on the Seventh Commandment ("Thou shalt not steal"), in which he saw "the common locus for the whole civil law, namely, that which pertains to things," including both property law and contract law.<sup>185</sup> He argued that in the earthly kingdom, given the depravity of human nature, it is ordained by God that property is primarily individual and private and only secondarily and in special circumstances to be held in common.<sup>186</sup>

Thus, Oldendorp viewed the positive laws by which Germany was governed in his time (*leges rei publicae*) as ordained by God. Yet he also subjected those laws to the tests of both natural law (the law inside people, *lex in hominibus*) and divine law (the laws of the Bible, *leges Biblicae*), and he said that in the exceptional instances in which they were found wanting it is the duty of the Christian conscience to disavow and disobey them. "A civil law that departs *in toto* from natural law is not binding," he stated.<sup>187</sup> He did in fact find a number of such precepts. He condemned as directly contrary to divine law human laws permitting the sale of church benefices, divorce, and usury, and as contrary to natural law human laws permitting bad faith possession of property, disinheritance of family members, delay of justice, interest of a judge in the outcome of proceedings before him, privileges granted by a ruler against

184. J. OLDENDORP, *DIVINAE TABULAE*, *supra* note 176, at 15-25. See further discussion in O. KRAUSE, *supra* note 65, at 118-22.

185. J. OLDENDORP, *DIVINAE TABULAE*, *supra* note 176, at 21 ("vide ex hac lege et sequentibus colligi secundum locum communem totius iuris civilis, videlicet qui pertinent ad res").

186. *Id.* at 20-22.

187. J. OLDENDORP, *ISAGOGE*, *supra* note 176, at 13 ("Ius civile . . . quod neque in totum a naturali iure . . . recedit, neque per omnia ei servit."). Later in the same passage, Oldendorp adduces Melanchthon in support of his position:

For the civil law can prescribe nothing that is contrary to natural law, as Philip says. If [the civil law] departs in toto from natural reason it is not binding. (Nam ius civile nihil aliud est quam determinatio iuris naturalis, ut Philippus dicit. Si igitur recedat in totum a naturali ratione, non determinat.)

natural law, conduct of war on the basis of a mere advance declaration, strict forms of servitude such as slavery, and some others.<sup>188</sup> More generally, he argued that natural law requires an owner to use his property for social ends and not, for example, to exclude others from use of it in instances where such use does him no harm.<sup>189</sup> He also argued that natural law imposes substantial duties on the state.<sup>190</sup>

Thus, the positivist character of Oldendorp's definition of law ("law is the totality of legal norms") was corrected, to a certain extent, by his innovation of divine legal norms revealed in the Bible, and revealed through the Bible in the individual conscience.

### B. THEORY OF EQUITY

There remained, for Oldendorp, another equally crucial question that neither Luther nor Melancthon had adequately addressed, namely, by what criteria are legal norms, whether Biblical, natural, or civil, to be applied in individual cases? The very generality of a legal norm or rule, Oldendorp wrote, presupposes that it is applicable in a wide variety of different situations, each with its own unique circumstances; yet the rule itself contains no indication of how the multiplicity of differences are to be taken into account. Two centuries after Oldendorp, Immanuel Kant expressed this point succinctly in his dictum that "there is no rule for applying a rule."<sup>191</sup>

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188. *Id.* at 12-13. See also the collection of quotations from other works of Oldendorp in P. MACKE, *supra* note 170, at 49-50. Of slavery, Oldendorp writes:

[A]lthough slaves are by all means men, created in the image of God, they are driven into the rank of brute beasts; . . . all these [rules] concerning strict servitude were introduced into civil law against natural law. Therefore they are not to be obeyed. ([C]um servi utique homines, ad imaginem Dei creati, cogentur in brutorum animalium ordinem . . . haec omnia de praedura servitute introducta sunt iure civili contra ius naturale. Ergo non sunt observanda.)

*Quoted by id.* at 50. A similar quotation appears in J. OLDENDORP, *ISAGOGUE*, *supra* note 176, at 13.

189. J. OLDENDORP, *BILLIG UND RECHT*, *supra* note 176, at 60-62. Oldendorp urged citizens "to enhance the common good as the highest ideal. For by serving the common good, you not only help one person but many." ("So gilt nun als die allervornehmste Grad die Gemeinnützigkeit. Denn wenn du diese förderst, so wird nicht allein einem, sondern vielen geholfen.") See *supra* note 147 and accompanying text (concerning the theological antecedents and the importance of the common good for the Lutheran tradition).

190. See *infra* notes 216-22 and accompanying text.

191. See I. KANT, *CRITIQUE OF PURE REASON* A/32-B/71-A/34-B/74 (N. Smith trans. 1929), and discussion in Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 332-33 (1989). This is similar to the position Lon L. Fuller took in his debate with H.L.A. Hart in Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958). Hart's position was that each rule has "a core of settled meaning" and that it is only in the "penumbral" cases that it becomes unclear how to apply the rule. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-08 (1958). Fuller contended that rules are not to be applied by cataloguing those

Melanchthon had addressed the problem in the manner of the scholastic jurists. Rulers were required, he wrote, to "tailor" the general principles of natural law "to fit the circumstances."<sup>192</sup> General principles, he said, anticipating a twentieth-century American jurist, do not decide concrete cases.<sup>193</sup> If a "generally just law works injustice in a particular case," it is the responsibility of a judge to apply the law "equitably and benevolently," if he can, so as to remove the injustice.<sup>194</sup> Nevertheless, a "generally just law" must be maintained even if in a particular case it results in injustice, since "pious persons may not be left in uncertainty" about the requirements of the law.<sup>195</sup>

Oldendorp filled the gap between rule and application with a new concept of equity (*Billigkeit, aequitas*). Equity, in his view, is that which requires careful examination of the concrete circumstances of the particular case, and which enables the judge properly to apply the general rule, the abstract norm, to those circumstances.<sup>196</sup> Here Oldendorp built on,

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situations to which their words clearly refer and those to which they refer less clearly. He proposed instead that in every case they should be applied according to their purposes. Translated into Oldendorp's terms, this means that rules are always to be applied "equitably."

192. 16 CR, *supra* note 5, at 72-81. See also Melanchthon's definition of *epikeia* in 21 *id.* at 1090.

193. *Id.* Cf. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases.").

194. 16 CR, *supra* note 5, at 66-72. See also *id.* at 245-47; 2 Stupperich collection, *supra* note 5, Part 1, at 159; LC 1555, *supra* note 5, at 332-33; 11 CR, *supra* note 5, at 218-23. For further discussion of Melanchthon's theory of equity see P. MELANCHTHON, IN QUINTUM LIBRUM ETHICORUM ARISTOTELIS ENARRATIONES PHILIPPI MELANCHTHONIS, in 11 *id.* at 262; see also G. KISCH, *supra* note 57, at 168-84; Voigt, *supra* note 97.

195. 22 CR, *supra* note 5, at 612.

196. See, e.g., J. OLDENDORP, *DISPUTATIO*, *supra* note 173, at 13, where Oldendorp writes:

Equity is the judgment of the soul, sought from true reason, concerning the circumstances of things which pertain to moral character, since [these circumstances] indicate what ought or ought not to be done. (Aequitas est iudicium animi, ex vera ratione petitum, de circumstantiis rerum, ad honestatem vitae pertinentium, cum indicunt, quid fieri aut non fieri oporteat.)

Joseph Story cited this very language in his *Commentaries on Equity Jurisprudence*. After discussing the various rules of equitable interpretation of laws which arise "according to their nature and operation, whether they are remedial, or are penal laws; whether they are restrictive of general right, or in advancement of public justice or policy; whether they are of universal application, or of a private and circumscribed intent." Story cited Grotius and others, adding: "There are yet other senses in which equity is used, which might be brought before the reader. The various senses are elaborately collected by Oldendorpius in his work *De Jure et Aequitate Disputatio*; and he finally offers, what he deems a very exact definition of equity, in its general sense, *Aequitas est iudicium animi, etc.*," quoting the above Latin passage in full. (Story, however, renders "indicunt" as "incidunt," and inserts immediately thereafter the words "recte discernens.") J. STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA* 7 n.2 (12th ed. 1877).

and went beyond, Aristotle's conception (largely repeated by Melancthon) that equity corrects the defect in a rule whose excessive generality would work an injustice if the rule were applied in a particular case that literally falls within it but that it was not actually meant to include.<sup>197</sup> The Aristotelian contrast is between equity and *strict* law, not between equity and all law: equity is for the exceptional case. The scholastic jurists had built on this Aristotelian concept of equity and had filled it with new content: equity, they said, protects the poor and helpless, enforces relations of trust and confidence, and otherwise departs from particular laws that work hardship in particular types of cases.<sup>198</sup> For Oldendorp, however, all law is strict law because all law is general and abstract;<sup>199</sup> therefore, every application of the law needs to be governed by equity. Thus, law and equity, *Recht und Billigkeit, ius et aequitas*, stand opposite each other and complete each other, becoming a single thing.<sup>200</sup>

197. See ARISTOTLE, *ETHICS* Book 5, Chap. 1, at 10 (J. Thomson ed. 1953):

[E]quity, though just, is not the justice of the law courts but a method of restoring the balance of justice when it has been tilted by the law. The need for such a rectification arises from the circumstance that law can do no more than generalize, and there are cases which cannot be settled by a general statement. . . . So when a case arises when the law states a general rule, it is then right when the lawgiver owing to the generality of the language left a loophole for error to creep in to fill the gap by such a modified statement as the lawgiver himself would make, if he was present at the time, and such an enactment as he would have made, if he had known the special circumstances.

See also ARISTOTLE, *THE ART OF RHETORIC* Book 1, Ch. 12, at 13-19 (J. Freese trans. 1926).

198. On the scholastic concept of equity, see Caron, *Aequitas et interpretatio dans la doctrine canonique aux XIII<sup>e</sup> et XIV<sup>e</sup> siècles*, 4 *MONUMENTA IURIS CANONICI SERIES C* 131 (1971); N. HORN, *AEQUITAS IN DEN LEHREN DES BALDUS* (1968); E. WOHLHAUPTER, *AEQUITAS CANONICA, EIN STUDIE AUS DEM KANONISCHEN RECHT* (1931); L. RILEY, *THE HISTORY, NATURE AND USE OF EPIKEIA IN MORAL THEOLOGY* (1948); Lange, *Ius aequum und ius strictum bei den Glossatoren*, 84 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG* (Rom. Ab.) 319 (1954). Cf. also Rueger, *Gerson's Concept of Equity and Christopher St. German*, 3 *HISTORY OF POLITICAL THOUGHT* 1 (1982).

199. See J. OLDENDORP, *DISPUTATIO*, *supra* note 173, at 72: "[T]he highest law is sometimes simply Law, at other times is the apex of law, inflexible Law, general definition, subtlety of words, firm Law, strict Law [all of which are contrasted with] equity, the good and equitable, epieikeia, or suitability, good faith, natural Justice, etc." ("[S]ummum ius . . . alias Ius simpliciter, alias apex iuris, Ius inflexibile, generalis definitio, subtilitas verborum, praedurum Ius, strictum Ius . . . aequitas, bonum et aequum, epieikeia seu convenientia, bona fides, naturalis Iusticia, etc.")

200. Oldendorp writes: "Natural law and equity are one thing." ("Natürlich Recht und Billigkeit ist ein Ding.") Quoted by H. DIETZE, *NATURRECHT IN DER GEGENWART* 71 (1936). Cf. E. WOLF, *supra* note 170, at 161. Guido Kisch hails Oldendorp as the first great humanist jurist to transform traditional Aristotelian concepts of equity. G. KISCH, *ERASMUS UND DIE JURISPRUDENZ SEINER ZEIT: STUDIEN ZUM HUMANISTISCHEN RECHTSDENKEN* 228 (1960). Kisch's exposition of Oldendorp's theory of equity does not make clear, however, the nature of that transformation. Dietze writes that, with Oldendorp, "thesis and antithesis stand over against each other unreconciled: the thesis [that] equity and law are two types of value, the antithesis [that] both are one and the same." H. DIETZE, *supra* note 170, at 88-89. It would be more accurate to say that Oldendorp in fact reconciles these contradictory propositions by stating that law and equity are two conflicting parts of a single whole.

Oldendorp concluded that equity has a threefold function: (1) to suspend legal norms that conflict with conscience, (2) to improve legal norms (for example, by favoring widows, orphans, the aged, and the sick), and (3) to interpret legal norms in every case to which such norms are to be applied.<sup>201</sup> The first and second of these functions reflect traditional views of equity and identify it, as Oldendorp identified it, with natural law. The third, to which Oldendorp subordinated the other two, reflects his own distinctive jurisprudence, in which natural law is merged with human law as it is merged with divine law.<sup>202</sup>

Equity is, in fact, for Oldendorp, the law of conscience. It is natural (God-given) law (*lex in hominibus*). It is not the product of human will or of the kind of reason that depends on human will, which Oldendorp called civil reason.<sup>203</sup> Equity, or natural law, is instilled by God in the conscience of the individual person, that is, in that faculty that enables us to distinguish good from evil, just from unjust, and to give judgment.<sup>204</sup>

Oldendorp thus drew on an earlier scholastic conception of conscience, insofar as he defined it as an aspect of practical reason through which general moral principles are applied to concrete circumstances. Thomas Aquinas had developed the conception of conscience as an act of applying knowledge of good and evil to a particular case.<sup>205</sup> Aquinas,

201. See P. MACKE, *supra* note 170, at 63-66.

202. Here, too, Oldendorp's concept of natural-law is sharply distinguished from that of Aquinas, who speaks of natural-law as a middle stage between divine and human law. See T. AQUINAS, *supra* note 6, at Part II-II, QQ. 93-95.

203. P. MACKE, *supra* note 170, at 151, rightly charges both Erik Wolf and Franz Wieacker with oversimplifying Oldendorp's conception of natural-law (or equity). The same charge can be leveled against C. VON KALTENBORN, *supra* note 1, at 233-36, on whom both Wolf and Wieacker partly rely. Wolf says that natural law for Oldendorp consists of unchangeable principles derived from natural reason, which are above human law; this characterization is derived principally from Oldendorp's *Billig und Recht*, and does not take adequately into account Oldendorp's other writings. See E. WOLF, *supra* note 170, at 161. Wieacker, relying principally on Oldendorp's *Isagoge*, characterizes his conception of natural-law as a source of legal norms, equivalent to the Decalogue. See F. WIEACKER, *supra* note 54, at 283-84. Kaltenborn, also relying on the *Isagoge*, describes Oldendorp's natural-law as a divine source of legal principles from which the positive law is derived and by which it is tested. In this view, the Decalogue merely aids the human reason to understand and apply the natural-law. Such a misunderstanding of Oldendorp stems, in part, from Kaltenborn's unwarranted reduction of Oldendorp's *Divinae Tabulae* to a mere title of the *Isagoge*. See discussion, *supra* note 175. Macke, relying on the totality of Oldendorp's writings, argues convincingly that his complete conception of natural-law can be derived only from his concept of nature as God himself, creator of all things (*deus creator omnium*). Natural law, therefore, includes both God-given legal norms (the Decalogue), from which civil legal norms are derived, and principles derived from God-given reason, but it also includes much more, namely, the capacity of conscience, implanted in man by God, equitably to apply norms and principles to concrete circumstances.

204. See J. OLDENDORF, *ISAGOGE*, *supra* note 176, at 6-11; J. OLDENDORF, *BILLIG UND RECHT*, *supra* note 176, at 58-67.

205. See E. D'ARCY, *supra* note 73, at 42.

however, had not translated this moral concept—as Oldendorp did—into a legal concept. Moreover, Oldendorp, in contrast to Aquinas, followed the Lutheran conception of conscience as pertaining to the whole person, including one's faith, and not simply one's intellectual and moral qualities. Thus, for Oldendorp, as for Luther, the conscience of sinful man can be redeemed by faith, through God's grace.<sup>206</sup>

One must ask: How is the individual person, faced with the difficult question of applying legal norms to concrete cases, to retrieve equity from his or her conscience? How is one to determine what it is that conscience tells him and to know whether it is his conscience speaking or merely his civil reason or his will? Oldendorp's answer may not satisfy the non-Lutheran reader. A "conscience-decision" (*Gewissensentscheidung*), he wrote, is a personal spiritual judgment, a judgment of the soul (*iudicium animi*). In the first instance, it is based, as is any legal decision (*Rechtsentscheidung*), on civil reason, that is, on human, legally trained reason, by which the relevant legal authorities are carefully studied, analyzed, and systematized. It is, however, also based on natural reason, that is, on God-given reason, which is instilled into the souls of those who subject themselves to the laws of Holy Scripture.<sup>207</sup> "A judgment cannot be made in conscience," Oldendorp wrote, "without some formula of law which indicates in the heart of man that that which he does is just or unjust. Therefore, law [i.e., the law of Holy Scripture] is in the person."<sup>208</sup> The answer, in short, is that in order to discern what is equitable, the individual jurist, having exercised his or her civil reason to

206. As Luther wrote, "[F]aith redeems, corrects and preserves our consciences." M. LUTHER, ON THE FREEDOM OF THE CHRISTIAN (1522), quoted by M. BAYLOR, *supra* note 72, at 247. For further discussion of Luther's concept of conscience, and its contrasts with that of the scholastics, see *supra* notes 70-75 and accompanying text.

207. See J. OLDENDORP, DISPUTATIO, *supra* note 173, at 14: "[God has implanted] in us a law of nature, from which is derived infallible judgment; this is called conscience." ("[I]n nobis esse legem naturae, a qua petitur infallibile iudicium [sic], quod vocat conscientiam.")

208. J. OLDENDORP, DISPUTATIO, *supra* note 173, quoted by H. DIETZE, *supra* note 170, at 129. See also *id.* at 78-89, 126-31; P. MACKE, *supra* note 170, at 67-72. There are striking parallels between Oldendorp's theory of judgment and that developed in the following century in England by the great Anglican-Puritan judge Sir Matthew Hale (1609-1676). In his diary of 1668, Hale wrote that "[t]he office of judge . . . requires a mind constantly awed with the fear of almighty God and sense of His presence." For the judge "should act as almighty God's substitute and consequently should, with all imaginable care and industry, endeavor that his judgment be conformable to the justice of [H]im whose person he sustains in that office so that he may reasonably persuade himself that his judgment and sentence is such as would be approved by the God of righteousness, wisdom, and justice." It is thus "becoming" of a judge "to call upon the name of the great God whom he thus fears, imploring His direction, guidance, assistance, wisdom, strength in the exercise of that employment that is of so great difficulty and yet wherein the honor of God and the good of mankind is so immediately concerned." Quoted in Jansson, *Matthew Hale on Judges and Judging*, 9 J. LEGAL HIST. 201, 205-07 (1988).

the maximum degree, must study the Bible, pray to God, and search his or her conscience.

Thus, Oldendorp built on Luther's belief in the Christian conscience as the ultimate source of moral decisions. Luther had justified his own breach of his monastic vows and his own defiance of Emperor Charles V at Worms as acts "for God and in my conscience."<sup>209</sup> He denounced laws that conflict with conscience. Oldendorp developed the Lutheran emphasis on conscience into a constituent element of a systematic legal philosophy.<sup>210</sup> He treated conscience, as Luther treated faith, as a "passive" virtue instilled in the heart by God's grace, rather than as an "active" virtue that is the result of human will and reason.

### C. THEORY OF POLITICS AND THE STATE<sup>211</sup>

Emphasis on the supremacy of the natural law of conscience over the positive laws of the civil polity did not, however, lead Oldendorp to a broad doctrine of civil disobedience. On the contrary, Oldendorp, like Luther and Melanchthon, emphasized that the civil polity—which he variously called the secular regime (*weltliches Regiment*), the political regime (*politien Regiment*), the republic (*res publica*), the civil order (*ordo civilis*), the magistrates (*magistrati*), and the corporation of citizens (*universitas civium*)—is ordained by God and commands the unconditional obedience of its subjects.<sup>212</sup> Yet Oldendorp was willing—in contrast to Luther and Melanchthon—to give an extensive list of exceptional instances in which the citizen's conscience may require him to disobey the civil authorities.<sup>213</sup> Moreover, Oldendorp went beyond both Luther

209. See the account of Luther's speech in 7 WA, *supra* note 5, at 838: "I am bound by the scriptures I have quoted and my conscience is captive to the Word of God. I cannot and will not retract anything, since it is neither safe nor right to go against conscience. I cannot do otherwise, here I stand, may God help me, Amen. ("[V]ictus sum scripturis a me adductis et capta conscientia in verbis dei, revocare neque possum nec volo quicquam, cum contra conscientiam agere neque tutum neque integrum sit. Ich kan nicht anderst, hie stehe ich, Gott helf mir, Amen.")

210. Cf. the important conclusions in P. MACKÉ, *supra* note 170, at 119-21.

211. The most comprehensive formulation of the nature and function of the state and politics appears in J. OLDENDORP, RATMANNSPIEGEL, *supra* note 176. See also H. DIETZE, *supra* note 170, at 90-111; P. MACKÉ, *supra* note 170, at 73-105; Scribner, *Police and the Territorial State in Sixteenth Century Wuerttemberg*, in POLITICS AND SOCIETY IN REFORMATION EUROPE: ESSAYS FOR SIR GEOFFREY ELTON ON HIS SIXTY-FIFTH BIRTHDAY 103, 104-06 (E. Kouri & T. Scott eds. 1987).

212. Cf. H. DIETZE, *supra* note 170, at 94. In his famous *Lexicon juris*, which was widely used in the sixteenth and seventeenth centuries, Oldendorp defines the state (*civitas*) as "a corporation of citizens brought together so that it may prosper by the law of associations" ("*universitatis civium, in hoc collecta, ut iure societatis, vivat optimo*"). J. OLDENDORP, LEXICON JURIS 78 (1547) [hereinafter J. OLDENDORP, LEXICON].

213. See *supra* notes 187-88 and accompanying text.

and Melanchthon in providing a systematic conception of the responsibility of the civil authorities to adhere to the laws of the Bible, to the law inside people, and to the civil laws including, in addition to its own civil laws, the laws of nations.<sup>214</sup> "It is an old question," he wrote, "whether the magistrates are superior to the law or whether the law binds the magistrates." His answer was: "the magistrates are ministers [i.e., servants] of the laws."<sup>215</sup> "It is false and simplistic," he wrote, "to assert that the prince has power to go against the law. For it is proper to such majesty . . . to serve the laws."<sup>216</sup>

In addition to placing limitations on state power, Oldendorp developed a consistent theory of the tasks of the civil polity, one that not only built on but also went beyond that of Luther and Melanchthon.<sup>217</sup> As servant of the law of nature and of the law of the Bible, he wrote, the civil polity has the legislative task of enacting laws that conform to God's will. In doing so, the civil authorities should compare the laws of other states, present and past.<sup>218</sup> Administratively, it is the task of the civil polity to support the true faith by seeing to it (among other things) that there are enough preachers, that they are well qualified, that they are well enough paid, and so on, so that they may combat unbelief—not by force but only by God's word;<sup>219</sup> to punish acts of greed, idleness, sumptuousness of dress, and other immoral conduct,<sup>220</sup> and to institute and support good schools and universities because only thereby can capable, conscientious people be trained who will enable the civil polity to achieve its God-given objectives.<sup>221</sup>

It is also the task of each civil polity to maintain peace with other civil polities. The people of all republics, he said, form a *corpus Christianum* and should live, as nature (God) requires, "next to each other,

214. A summary of his discussion of the *ius gentium* appears in J. OLDENDORP, ISAGOGE, *supra* note 176, at 11-13. See also K. KOEHLER, *supra* note 57, at 130, who states that Oldendorp was "the first among the [Lutheran] jurists" to treat in a systematic manner the origin, nature, and function of the *ius gentium*.

215. J. OLDENDORP, LEXICON, *supra* note 212, at 272 ("magistrata . . . legum ministri sunt"). Cf. J. OLDENDORP, DIVINAE TABULAE, *supra* note 176, at 19; J. OLDENDORP, RATMANNSPIEGEL, *supra* note 176, at 73-77.

216. Quoted by P. MACKE, *supra* note 170, at 79-80 ("Falsum igitur est simpliciter asserere, principem habere potestatem contra ius. Decet enim tantae maiestati, . . . servare leges.").

217. The fullest description of these appears in J. OLDENDORP, RATMANNSPIEGEL, *supra* note 176, at 81-97.

218. *Id.* at 81-82.

219. *Id.* at 90-92.

220. *Id.* at 92-94.

221. *Id.* at 94-97.

not against each other."<sup>222</sup> War is justified only for defense against an unjust attack. Even when attacked, Oldendorp wrote, a civil polity should seek to settle the conflict peaceably, and even when that is impossible it should leave three days before defending itself in order to give the imminent attackers a chance to change their minds. Moreover, defense should be limited to that which is necessary, because its only purpose is to restore peace.<sup>223</sup>

Oldendorp emphasized the legal personality of the civil polity. Like a single person, it has (in addition to tasks) rights and duties. It is bound not only internationally by the principle *pacta sunt servanda* and by the customary laws of war but also domestically by its own citizens. He carried his idea of state responsibility to the point of requiring the civil polity, as a legal person, to compensate for harm done by its illegal acts, citing the great fourteenth-century jurist Bartolus in support of his view that a court (he did not say which court) should have jurisdiction to impose both criminal and civil liability on a republic that has failed to perform its legal duties or has otherwise failed in legislating, judging, or administering.<sup>224</sup>

Oldendorp's theory of limitations on state power was derived from the Lutheran concept that earthly authority does not partake either of divine justice or of absolute reason or of human self fulfillment, but is a product of the fall of man from grace and of a lost paradise. As the great German jurist Erik Wolf has written, Oldendorp rejected the doctrine of Roman Catholic theology and of the canon lawyers that "tried to turn divine law into positive law." Oldendorp articulated in Wolf's words, "the first German natural-law doctrine," combining scholastic concepts and Roman law principles with the Lutheran ethic of conscience. This doctrine, Wolf states, was distinguished from the later Enlightenment concept of a rational law of nature by its emphasis on common needs, on the natural orders of the various social classes ("estates"), and on Holy Scripture.<sup>225</sup>

Peter Macke states that Oldendorp was closer to Erasmus than to Luther in his concern to Christianize public life through law.<sup>226</sup>

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222. J. OLDENDORP, *LEXICON*, *supra* note 212, at 407; *see also* P. MACKE, *supra* note 170, at 92.

223. *Id.* at 92-94.

224. *Id.* at 80-82.

225. E. WOLF, *GROSSE RECHTSDENKER*, *supra* note 170, at 140-41.

226. *Id.* at 110.

Oldendorp's concern, however, was based directly on Lutheran principles. "The purpose of law," Oldendorp wrote, "is that we may peacefully pass through this shadowy life and be led to Christ and to eternal life."<sup>227</sup> He emphasized "the third use" of the law—its pedagogical, or educational, function; Oldendorp called law *paedagogus noster ad Christum*—our teacher in the path to Christ.<sup>228</sup> This involved a certain confidence in human reason; while emphasizing the depravity of man, Oldendorp wrote that despite the Fall, sparks (*igniculi*) of human reason had been retained.<sup>229</sup> To be sure, he built a huge fire out of those sparks by uniting them with conscience and by uniting conscience, as Luther and Melancthon did *not* do, with Holy Scripture.

### SUMMARY AND CONCLUSIONS

Conventional accounts of the history of Western legal philosophy have obscured the contribution of the Lutheran Reformation of the sixteenth century—in substantial part because of their narrow view of the sixteenth century, of Lutheranism, and of legal philosophy in general.

Many writers have treated the sixteenth century as a mere transition period in the history of legal philosophy between the scholastic Middle Ages and the seventeenth-century inauguration of modern times. "The jurists of the sixteenth century," it is argued, "were doorkeepers to the modern age of legal philosophy," who "were largely incapable of entering ideas of their own."<sup>230</sup> At best, they served as middle links between Gratian, Aquinas, and Ockham, on the one hand, and Grotius, Hobbes, and Locke, on the other. Indeed, when sixteenth-century legal thought has been taken more seriously, it has usually been connected not with the Reformation but with "the Renaissance," an indefinite time period whose beginnings are often traced to the late thirteenth and fourteenth centuries and whose ending is variously located in the sixteenth or even early seventeenth century. The novelty and significance of the reformers' teachings have thus been lost on most contemporary interpreters. Lutheran

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227. J. OLDENDORP, *LEXICON*, *supra* note 212, at 249 ("Iuris finis est, ut pacifice transigamus hanc vitam umbratilem, ac perducamus ad Christum et aeternam vitam.").

228. *Id.*

229. See, e.g., J. OLDENDORP, *ISAGOGE*, *supra* note 176, at 9-10: "To be sure, the nature of man has been corrupted through the fall of Adam; so that just sparks remain, by which nevertheless it is possible to recognize the magnificent bounty of divine and natural-law." ("Ceterum natura hominis ex Adae lapsu adeo corrupta fuit, ut vix igniculi remaneant, ex quibus tam magna divini et naturalis iuris bonitas agnosci posset.")

230. Ernst Cassirer, *quoted by* 1 H. DOOYEWEERD, *supra* note 104, at 93.

legal philosophy has remained largely in the shadows of legal humanism and Machiavellian politics.

Many writers have also analyzed Lutheran thought in general from too narrow a perspective. They have confined their analysis to the writings of Martin Luther alone and have found therein only the rudiments of a legal philosophy haphazardly arranged. They have failed to consider the systematic exposition of Lutheran teachings in the many confessions, catechisms, and creeds of sixteenth-century Germany; in the voluminous writings of Melanchthon, Bucer, Brenz, and other important Lutheran theologians and ethicists; and in the treatises of Oldendorp, Lagus, Kling, and other important Lutheran jurists.

These writers have further confined their attention to Luther's reform of dogma and liturgy and thus come to regard Lutheranism as merely a spiritual, even mystical, movement. "Luther's Church," writes a leading Reformation historian, "was confined exclusively to the Word and to the spiritual comfort of the individual. . . . Luther [was] wary of attaching any significance to details of a secular order."<sup>231</sup> The fact that Luther and his colleagues consigned law to a secular realm under civil authority has misled many scholars to suppose that they had made law and religion mutually irrelevant, and, further, that their new beliefs and doctrines were applicable only to religion. Starting from this assumption, it is easy to conclude that the few contributions that Lutheran writers did make to legal philosophy remained unoriginal, eclectic, and superficial, comprised of little more than Patristic and Roman Catholic commonplaces. In fact, just the opposite is true. Lutheran conceptions of the relationship of the earthly to the heavenly realms and of law to faith was the source not only of a new theology but also of a new jurisprudence and a new political science as well.

Finally, many writers have stopped with the question of whether Lutheran legal philosophy belongs to the natural-law school or to the positivist school of jurisprudence. They have sought answers in those terms to analytical questions that are currently in vogue—concerning the nature of rules, the sources and sanctions of law, the definition of a legal system, the nature of legal obligation, and the like. These categories and questions of contemporary jurisprudence leave large portions of Lutheran legal philosophy untouched.

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231. H. HOLBORN, *A HISTORY OF MODERN GERMANY: THE REFORMATION* 188, 190 (1959). For further discussion of the evolution of this genre of Lutheran historiography, see generally H. BORNKAMM, *LUTHER IM SPIEGEL DER DEUTSCHEN GEISTESGESCHICHTE* (1955); A. DICKENS & J. TONKIN, *THE REFORMATION IN HISTORICAL THOUGHT* (1985).

The basic structure of Western legal philosophy was first established during and after the revolutionary upheaval of the late eleventh and early twelfth centuries.<sup>232</sup> Then, for the first time, great scholars of the newly revived and resystematized Roman law and the new system of canon law undertook to formulate a coherent set of principles concerning the nature and purposes of law, the sources of law, the various kinds of law, and the relationship of law to justice and order. They drew, to be sure, on the works of Plato, Aristotle, and the Greek and Roman Stoics as well as on the writings of the Church Fathers and later moralists and theologians. Nevertheless, none of their predecessors had treated legal philosophy as a separate comprehensive body of knowledge, distinct from, though related to, both moral philosophy and theology.

Not only the basic structure but also some of the basic postulates of Western legal philosophy were first articulated in the twelfth and thirteenth centuries. The early scholastic jurists taught that human law, including both customary and statutory law, derives its legitimacy from natural law, which is in turn a reflection of divine law. Natural law was thought to be immediately accessible to human reason. Divine law was revealed to human reason in sacred texts and in the traditions of the Church. At the same time, the scholastic jurists recognized that human selfishness, pride, and the drive for power are sources of unjust laws, which are contrary both to natural law and to divine law. Thus, human law, though a response to divine will, was seen to be also a product of a defective human will, which could be and needed to be corrected by human reason. Human reason, it was said, coincided with natural law and divine law in postulating that crimes should be punished, that contracts should be enforced, that relationships of trust and confidence should be protected, that accused persons should be heard in their defense, and, in sum, that legal rules and procedures should conform to standards of justice.

Stated broadly, these and other postulates of Western legal philosophy, first articulated by Roman Catholic jurists and theologians, survived in the writings of the Lutheran reformers. Lutheran legal philosophy must, therefore, be understood, in the first instance, in terms of its continuity with Roman Catholic teachings. The Lutheran assault upon scholastic legal philosophy was from within a tradition that the scholastics had first established.

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232. See H. BERMAN, *supra* note 4, at 143, 275, and sources cited therein.

Nevertheless, the Lutheran reformers introduced revolutionary changes in that tradition. In analyzing those changes we have drawn on the writings of the two persons who may be said to have founded Lutheran legal philosophy—Luther himself and his cohort Philip Melanchthon—and the one person, Johann Oldendorp, who developed that philosophy most fully. All three were trained in theology, philosophy, and law, though Luther was more the theologian, Melanchthon was more the philosopher, and Oldendorp was more the jurist. Despite differences among them, they all shared the same basic theological, philosophical, and legal outlook. In this summary we shall stress what they had in common.

By their theology, and especially by their twin doctrines of justification by faith alone and the priesthood of all believers, the Lutheran reformers undermined the canon law and the sacramental system, and, therewith, the entire jurisdiction of the Roman Catholic Church. This gave to civil rulers the sole prerogative of legislation, administration, and adjudication within their respective territories. By the same token, however, laws enacted by civil rulers now lacked the sanctity that they had formerly had by virtue of ecclesiastical endorsement under the two-swords theory, with its division of powers between the universal church organized under the papacy and the plurality of secular kingdoms, feudal lordships, and urban polities.<sup>233</sup>

Moreover, the reformers attacked the Roman Catholic belief that reason, standing alone, is compatible with faith and is capable of proving independently what is revealed by faith. It was this belief in the synthesis of reason and revelation that underlay the Roman Catholic doctrine of natural law.<sup>234</sup> Lutherans, on the other hand, taught that not only human will but also human reason itself is corrupted by innate pride, greed, and other forms of egoism. They did not doubt that there were transcendent moral principles by which human conduct and human laws were to be judged, but they did not believe that such principles could be derived ultimately from reason as such.

Lacking the endorsement of an independent ecclesiastical hierarchy, and lacking a foundation in objective and disinterested human reason, what was to justify civil laws other than mere expediency? Why should

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233. A detailed analysis of the character of the Roman Catholic Church as the first modern state and the rise of secular states after the Papal Revolution may be found in *id.* at 113, 275.

234. "The central problem of late medieval intellectual and religious history was the mentality that had given birth to the synthesis of reason and revelation, the presumptuous, seductive vision of high medieval theology." S. OZMENT, *THE AGE OF REFORM 1250-1550: AN INTELLECTUAL AND RELIGIOUS HISTORY OF LATE MEDIEVAL AND REFORMATION EUROPE* 21 (1980).

anyone obey the law unless compelled to do so? What made them laws and not mere commands?

The theological answer to these fundamental jurisprudential questions was rooted in the Lutheran two-kingdoms theory, with its postulate that God is present, though hidden, in the earthly kingdom. Despite their corruption, Christians living in the earthly kingdom are called to carry out God's work there. They are called to maintain order and to do justice, however defective such order and justice will inevitably be. Order and justice are not paths to salvation, but they are forms in which God's presence in the earthly kingdom is concealed. They are ordained by him partly to make human life livable and partly to point the way—though they themselves are not the way—to faith.

Although these theological beliefs do not in themselves constitute a legal philosophy, they nevertheless negate the conventional view that Lutheran theology is concerned solely with the spiritual life of the individual and is indifferent to politics and law. In addition, they provide a theological basis for distinguishing between the duties that the individual person owes to God and the duties that he owes to his neighbors.

Both sets of duties, according to Lutheran theology, are set forth in the Bible, especially in the Ten Commandments. Not only for Lutheran theology but for legal philosophy as well, the Ten Commandments replaced ecclesiastical tradition and the canon law as the transcendent source of divine, natural, and human law. With respect to that part of law that regulates civil relationships, the last seven Commandments were interpreted as an authoritative statement of fundamental principles of public and private law, including respect for political authority, for human life, for property rights, for family relationships, for procedural justice, and for the rights of others.

Lutheran legal philosophy was not content, however, to rest the ultimate test of the validity of law on the Bible alone, although early in his career Luther was tempted to do so.<sup>235</sup> The Bible speaks to the faithful, but not all people subject to civil authority are believers. God ordains civil authority and civil law for pagans as well as Christians. Indeed, it is because of the fallen state of humankind that law in any form is needed—primarily to show sinful man what is required of him and how helpless he is to fulfill those requirements. Therefore, outside the Bible, and independently of it, God has implanted in the conscience of every man certain moral insights, which, in fact, correspond to the principles revealed

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235. See J. PELIKAN, *supra* note 14, at 20; *cf. supra* note 76.

to faith in the Ten Commandments. Melanchthon classified these universal moral insights, among the "elements of knowledge," which themselves shape reason and hence cannot be proved by reason. Nevertheless, if reason is guided by faith, it can understand and accept, even though it cannot prove, that which is revealed directly to conscience. Thus, reason can be rescued, so to speak, by faith. In Oldendorp's terms, conscience is a higher form of reason—not ordinary reason but divine reason.

As the Lutheran theory of conscience brought faith into contact with reason, so the Lutheran theory of civic, or political, righteousness brought the heavenly kingdom into contact with the earthly kingdom. Here the "third use" of the law, emphasized by both Melanchthon and Oldendorp, played a major role. Natural law—the moral legal principles known to conscience and confirmed in the Decalogue—serves as a guide to faithful people, especially those in high places, in the ways of justice, fairness, altruism, and peace.

The concept of the educational role of law was carried over in Lutheran legal philosophy from natural law to positive law. As it is an important function of natural law to educate the civil authorities, Melanchthon and Oldendorp wrote, so it is an important function of the positive law of the civil authorities to nurture the moral attitudes and sentiments of those who are subject to such laws. Here Melanchthon and Oldendorp spelled out in detail the ways in which various branches of positive law, including criminal law, civil law, ecclesiastical law, and constitutional law, contribute not only to social order and social welfare but also to the moral improvement of society.

Of special significance for the development of Western legal philosophy was Oldendorp's insight that the generality and objectivity inherent in legal rules is both their great virtue and their great vice. Equally important was his further insight that the vice of generality and objectivity in legal rules can be cured and the virtue preserved through their conscientious application in specific circumstances. Melanchthon the philosopher sought to reconcile legal norms with reason and conscience in the general sense of those terms. Oldendorp the jurist explored at length and in depth particular applications of rules and principles, and showed the paradoxes that arise when general rules and principles are invoked in concrete cases. Oldendorp concluded that conscientious application of rules was required not only in exceptional cases but in all cases, and not only from the point of view of fairness in the particular case but also from the point of view of the ultimate consistency of the rules themselves. He found that ultimate consistency in the purposes

that the rules were intended to serve in their specific applications. Thus, Oldendorp made conscience the master key to the unity and integrity of the legal system in action. This was perhaps the most important specific contribution made by Lutheran legal thought to Western jurisprudence. Oldendorp's theory of equity as a higher reason that is brought into play in the conscientious application of rules is reflected in many modern Western legal concepts and institutions. Perhaps the most striking of these is the Anglo-American concept of "jury equity."<sup>236</sup>

The Lutheran emphasis on the role of individual conscience as a source of justice must be balanced against its equal emphasis on the role of civil authority in defining and enforcing justice and, more generally, in guarding religious worship, morality, and social welfare ("the common weal"). Luther himself considered that his conception of the dignity and mission of the state—the *Obrigkeit*—was one of his most important contributions to the religious and political thought of his time.<sup>237</sup> Indeed, the Lutheran Reformation created the modern secular state by allocating to the holders of state offices ultimate responsibility for the exercise of functions that had previously been in the jurisdiction of holders of ecclesiastical offices. Thus, state officials in Lutheran territories assumed jurisdiction over the clergy, church property, education, poor relief, medical care, moral and religious crimes, marriage and family relations, wills, and many other matters which in Roman Catholic territories were regulated by ecclesiastical officials operating under canon law. The very concept of secular state sovereignty was closely associated with the expanded role of the secular *Obrigkeit*, a German cognate of the Latin word *superanitas*, which literally means (as *Obrigkeit* literally means) "overness" or "highness" ("superness"), and that was translated into French as *souveraineté* and into English as sovereignty.

The elimination of the checks upon secular authority traditionally exercised by the Roman Catholic hierarchy substantially increased the danger that the prince would assert absolute power, that is, a power above the law. Moreover, Lutheran theology emphasized that the prince ruled by divine right and that his subjects were bound to honor and obey

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236. On the Anglo-American concept of jury equity, see the important article by Butler, *Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y 595, 713-20 (1985). Butler shows that in the development of trial by jury in England and America, with its sharp distinction between rules of law stated by judges and applications of the rules by the jury, the term "jury equity" is applied to the process of decisionmaking in concrete cases. "Jury equity" is to be distinguished from "jury nullification," which developed after courts began to lay down rules in absolute rather than provisional terms, thus attempting, in effect, to restrict the jury's ultimate power.

237. See 32 WA, *supra* note 5, at 390; 38 *id.* at 102.

him as the father of his country. It is this aspect of Lutheranism that has led some to see in it a basis for totalitarian dictatorship.<sup>238</sup> Nevertheless, Lutheran legal philosophy, like Roman Catholic legal philosophy, contained important counterbalances to tyranny. First, like Roman Catholic legal philosophy, it emphasized the principle that the ruler is bound by his own laws because their ultimate source is in natural law. The concept of the prince as a father to his people itself implied a responsibility on his part inconsistent with tyranny. Second, Lutheran legal philosophy emphasized the importance of written published laws, whose function was, in part, to restrain wicked rulers. Third, it declared the authority of

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238. See W. MCGOVERN, *FROM LUTHER TO HITLER; THE HISTORY OF FASCIST POLITICAL PHILOSOPHY* (1941), where the argument is made that Luther was the founder of the German national identity, which found its ultimate expression in Nazi totalitarianism and antisemitism. Similarly, William Ebenstein writes, "Luther added to his strong respect for the state an equally passionate feeling of German nationalism and even racialism; thus he became—the only Protestant leader to have such progeny—one of the spiritual ancestors of Prussian nationalism and German Nazism." W. EBENSTEIN, *GREAT POLITICAL THINKERS: PLATO TO THE PRESENT* 305 (4th ed. 1969).

The view that the totalitarian state has roots in Lutheran thought of the sixteenth century is sharply criticized by Thomas Brady, who points out that Luther's doctrine of the two kingdoms, so far from deifying the state, relegated it to the kingdom of this world, which is also the kingdom of the devil, and further, that Luther placed the state alongside the family and the church as three autonomous but interacting modes of social relationships. Brady attributes the source of the "Luther-to-Hitler legend" to certain German Lutheran theologians of the 1920s and early 1930s who supported Hitler and to Nazi propaganda. See Brady, *LUTHER AND THE STATE: THE REFORMER'S TEACHING IN ITS SOCIAL SETTING* 31, 33, 35-37, 43-44 (J. Tracy ed., 1986) [hereinafter *LUTHER*, Tracy ed.].

To be sure, a large majority of German Lutheran leaders supported Hitler after 1933, while only a very small minority, including Dietrich Bonhoeffer and Martin Niemoeller, stood up boldly against him. Yet this in itself proves only that Luther's sixteenth-century doctrine of "inner-worldliness" (as Bonhoeffer put it) was susceptible of being exploited in the twentieth century to justify non-resistance to evil and the fusion of church and state. Cf. L. RASMUSSEN, *D. BONHOEFFER: REALITY AND RESISTANCE* 19 (1972). In Norway, for example, Lutheran Bishop Berggrav invoked Luther's call for passive resistance to secular tyranny and active resistance to papal heresy as a basis for open opposition to the Nazi occupation of that country. See Gritsch, *LUTHER AND THE STATE: POST REFORMATION RAMIFICATIONS*, in *LUTHER*, Tracy ed., *supra*, at 45, 55-57.

The notion that Luther preached antisemitism is based on his violent denunciations of the Jews, which, however, must be understood, as Heiko Oberman has shown, in the context of his own time, which knew neither religious tolerance, on the one hand, nor antisemitism, on the other. Thus Luther could vehemently advocate the most severe repression of the Jews—and also of Turks, papists, and Anabaptists—because of their religious beliefs while at the same time praising Jews as the "blood-friends, cousins, and brothers of the Lord." It was the supposed sinfulness of adherents to Judaism, that is, to the Jewish faith, not any supposed biological or other inferiority of Jews as an ethnic group, that was offensive to Christians in an age when it was universally accepted that religion is essentially a communal, and not merely a personal, matter and that it is necessary that a given community should have a single common religious belief system. In fact, Luther rejected the earlier Roman Catholic doctrine of the collective guilt of the Jewish people for their part in the crucifixion of Christ and based his strong anti-Judaic doctrine on their present refusal to accept Christ as their savior. See generally H. OBERMAN, *THE ROOTS OF ANTI-SEMITISM IN THE AGE OF RENAISSANCE AND REFORMATION* (J. Porter, trans. 1983).

Roman law as the written embodiment of reason; although each territorial prince was thought to have succeeded to Roman imperial authority, nevertheless, Roman law was also seen as a transnational *jus commune*, whose interpretation was entrusted to learned jurists who glossed and commented on and synthesized the ancient texts. Finally, the Lutheran jurists found both in Scripture and in conscience a general right of resistance to tyrannical rule. Conscience was the seat of both civil obedience and civil disobedience. When positive law contradicts natural law, the conscientious Lutheran Christian is torn between one's duty to obey the divinely ordained "powers that be" and one's duty to obey one's own divinely ordained sense of justice.

A contemporary American legal philosopher may be frustrated by the inability of Lutheran legal philosophy to resolve the tension between law and morals by rational means. Yet it is important to recognize that Lutheran legal philosophy is a primary source, in the philosophical as well as the historical sense, of both contemporary legal positivism and contemporary natural-law theory. Viewed as a positivist theory, Lutheran legal philosophy defines the law of civil society as the will of the lawmaker expressed in a system of rules, backed by coercive sanctions, whose primary function is to preserve social order. Melanchthon wrote that "politics"—which he also called "the state" and sometimes "the Obrigkeit"—is simply the method of "creating legitimate order within the community" and of creating laws "to govern property, contracts, succession, and other matters."<sup>239</sup> This was the first statement of the German concept of the *Rechtsstaat*, "the law-state."<sup>240</sup> To be fully effective, legal rules, Melanchthon and Oldendorp stressed, must be promulgated, predictable, generally applicable, and binding on both political authorities and their subjects. The claim of a legal system, or of a given law or legal decision, to be an expression of reason and justice cannot be verified, according to Lutheran legal philosophy, from within the legal system itself but only on the basis of moral standards derived

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239. 16 CR, *supra* note 5, at 436. See discussion in G. KISCH, *supra* note 57, at 93; G. WEBER, *GRUNDLAGEN UND NORMEN POLITISCHER ETHIK BEI MELANCHTHON* 14 (1962); Elert, *Zur Terminologie der Staatslehre Melanchthons und seiner Schüler*, in 9 *ZEITSCHRIFT FÜR SYSTEMATISCHEN THEOLOGIE* 525 (1932).

240. On the development of the German *Rechtsstaat* theories in the later nineteenth and twentieth centuries, see O. GIERKE, *JOHANNES ALTHUSIUS UND DIE ENTWICKLUNG DER NATURRECHTLICHEN STAATSTHEORIEN* 264 ("Die Idee des Rechtsstaats") (J. Gierke 5th ed. 1958); F. DAEMSTÄEDTER, *DIE GRENZEN DER WIRKSAMKEIT DES RECHTSTAATS* (1930); H. DOOYEWEERD, *DE CRISIS DER HUMANISTISCHEN STAATSLER IN HET LICHT EENER CALVINISTISCHE KOSMOLOGIE EN KENNISTHEORIE* 40 (1931). On the contributions of Lutheranism to the modern idea of the state, see LUTHER, Tracy ed., *supra* note 238; H. HOLSTEIN, *LUTHER UND DIE DEUTSCHE STAATSIDEE* (1926).

from outside the legal system. Thus, Lutheran legal philosophy accepted the basic premise of contemporary legal positivism, namely, that law and morals are to be sharply distinguished from each other and that the law that *is* should not be confused with the law that *ought to be*. To identify law with morality is to foster uncertainty and instability in the law and hence disorder; it is also to make the civil law the source rather than the object of moral criticism and thus to foster injustice.

Lutheran legal philosophy rejects the definition of law propounded by Thomas Aquinas: that law is an ordinance of reason for the common good made by one entrusted with the care of the community.<sup>241</sup> Such a definition, according to Lutheran thought, gives an unwarranted sanctity to both law and reason. It rests on an overoptimistic conception of human nature and, consequently, on an overoptimistic conception of the role of the state as an instrument of justice. A lawfully promulgated decree of a sovereign is law, in Lutheran legal philosophy, even though it is arbitrary in its purpose and effect.

Viewed, on the other hand, as a natural-law theory, Lutheran legal philosophy postulates that every person has within himself or herself certain moral sentiments relating to legal justice, including a respect for civil authority, for human life, for property, for family responsibilities, for fair procedures, and, in general, for the rights of oneself and of others. These moral sentiments, insights, or inclinations reside partly in reason and will but primarily in conscience. The conscience of every person is thus a source of a natural law, that is, of a principle of thought and action that is inherent in human nature. Lutheran natural law theory, in contrast to Roman Catholic, is essentially a moral theory, not a legal one. It rests primarily on an innate sense of justice, to which reason is subordinate. Reason, from a Lutheran standpoint, is too weak, too biased by egoism, to sustain such a sense of justice. Thus, there are bound to be rational disagreements among people concerning the meanings of the various principles of the law and concerning their application to concrete cases. In the event of rational disagreement, each person must turn to his or her own conscience in making such application.

To the extent that the Lutheran theory of natural law is essentially a moral rather than a legal theory, it is reconcilable with contemporary legal positivism. It goes beyond the parameters of legal positivism, however, in invoking conscience for the application of legal rules to specific

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241. T. AQUINAS, *supra* note 6, at I-II, Q. 90, Article 4.

circumstances. In the legal process of judging or administering, injustices that would flow from a purely rational application of broad rules to concrete cases can only be corrected by sensitivity to the particular circumstances of the case, including the character of the parties, their motivation, the consequences of alternative decisions, and other specific factors. Similarly, in the legal process of legislating, legislators should be concerned not only with policy in the general sense but also with the specific circumstances that give rise to the need for the law in question and the specific consequences entailed in its application. Thus, Lutheran legal philosophy is congenial to—and, in fact, in sixteenth-century Germany led to—a massive classification and systematization of the rules of law coupled with a flexibility in their application based on conscience and called equity.<sup>242</sup> Stated in this condensed and abstract form, Lutheran legal philosophy has something to offer to contemporary jurisprudential thought. Above all, it suggests a mode of reconciling differences between what may be called the “higher law” school of legal thought, which would treat such values as equality and privacy as transcendent rights that are beyond the jurisdiction of the political community to infringe, and, on the other hand, what may be called the “political realities” school, which would deny the character of law to principles that have not been formally accepted as such by the duly constituted lawmaking authorities. Lutheran legal philosophy claims that the conflict between these two schools cannot be resolved by the exercise of reason. It claims further that it *can* be resolved, in practice, by the exercise of conscience. It offers no guide, however, to the exercise of conscience except a theological one. Those who cannot accept a theological guide are thus left with a hard but nevertheless interesting and even valuable lesson.

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242. See Berman, *Transformation*, *supra* note 55, for an analysis of the new systematic legal science developed by Lutheran jurists such as Johann Apel, Konrad Lagus, and Melchior Kling (all colleagues of Luther and Melanchthon at Wittenberg), Nicolaus Vigelius (a student of Oldendorp), Johannes Althusius, Johannes Schneidewin, and others.