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“The Law Written on the Heart”: Natural Law and Equity in Early Lutheran Thought

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Abstract

This Article analyzes the transformation of Western legal philosophy in the sixteenth-century Lutheran Reformation, with a focus on the legal thought of theologian Martin Luther, moral philosopher Philip Melanchthon, and legal theorist Johann Oldendorp. Starting with Luther’s two kingdoms theory, Melanchthon developed an intricate theory of natural law based not only on the law written on the hearts of all persons, but also on the law rewritten in the Decalogue, whose two tables provided the founding principles of religious law and civil law respectively. Building on both Luther and Melanchthon, Oldendorp developed an original theory of equity and equitable law making and law enforcement as part of a broader biblical-based theory of natural law. Together these writers, laid the foundations for a new legal, political, and social theory which dominated Lutheran Germany and Scandinavia for the next three centuries.

Keywords: Lutheran Reformation; Martin Luther; Philip Melanchthon; Johann Oldendorp; Divine Law; Natural Law; Positive Law; Biblical Law; Conscience; Equity; Two Kingdoms Theory; Decalogue; Two Tables of Decalogue; Criminal Law; Church Law; Contract Law; Religious Establishment; Religious Liberty; Peace of Augsburg; *Cuius regio, eius religio*

Introduction

“Jurists are bad Christians.”² This is one of Martin Luther’s most famous aphorisms about law that every German schoolboy still learns and that every pious Protestant still ponders when considering the legal profession. The phrase was of a piece with many other derogatory comments that Luther made about jurists. “Of the Gospel, jurists know nothing, and therefore they are justly excluded from the circuit of divinity.”³ “Every jurist is an enemy of Christ.”⁴ “We theologians have no worse enemies

¹ This Article is excerpted and updated from my *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge, 2002), chaps. 3 and 4 and is used herein with permission of the publisher, Cambridge University Press.

² *D. Martin Luthers Werke: Tischreden*, 6 vols. (Weimar, 1912-), 3, No. 2809b [hereafter WA TR]; see also WA TR 6, No. 7029-7030.

³ *The Table Talk of Martin Luther*, trans. W. Hazlitt (Philadelphia, 1848), 135.

than jurists.”⁵ “There is eternal strife and war between jurists and theologians.”⁶ “Every jurist is either a good-for-nothing or a know-nothing.”⁷ “A jurist should not speak until he hears a pig fart” for only then will his words have a proper climate to be appreciated.⁸ And more scatological still: “I shit on the law of the pope and of the emperor, and on the law of the jurists as well.”⁹

Luther’s shrill comments were, in part, the fallout of his bitter struggles with the University of Wittenberg law faculty about teaching the same medieval canon law texts that he had just risked life and limb to burn and bury for good. They were, in part, echoes of contests among sixteenth-century Germans about the propriety of supplanting German customary law with Roman law and civilian jurisprudence.¹⁰ They were, in part, expressions of Luther’s theological contempt for any jurist who pretended to extend his ken and jurisdiction into the heavenly kingdom. They were, in part, just another contribution to the vats of vitriol that every generation has poured over its jurists and lawyers for their hair-splitting casuistry, pretentious self-indulgence, and cleverly-cloaked theft from their clients.¹¹ Every community at one time or other is drawn to Shakespeare’s call: “The first thing we do, let’s kill all the lawyers!”¹²

But Luther eventually made his grudging peace with the jurists of his day. The reality was that Luther needed the jurists to support his theological reformation. It was one thing to deconstruct the institutional framework of medieval law, politics, and society with a sharp and skillfully wielded theological sword. It was quite another thing to try to reconstruct a new institutional framework of Protestant law, politics, and society with only this theological sword in hand. Luther learned this lesson the hard way in witnessing the bloody Peasants’ Revolt in Germany in 1525, and the growing numbers of radical egalitarian and antinomian experiments engineered out of his doctrines of the priesthood of all believers and justification by faith alone. He came to realize that law was not just a necessary evil, it was an essential blessing for life in the earthly kingdom. Equally essential was a corps of well-trained jurists, eager and able to give institutional form to the best theological teachings of the Reformation.

In this chapter, I sample the new legal teachings of two leading scholars of the Lutheran Reformation in Germany -- the Lutheran philosopher, Philip Melancthon, and Lutheran jurist, Johann Oldendorp. These two great legal minds, who worked largely

⁴ WA TR 3, No. 2837, 3027.

⁵ WA TR 5, No. 5663.

⁶ WA TR 6, No. 7029.

⁷ WA TR 5, No. 5663.

⁸ Ibid.

⁹ *D. Martin Luthers Werke: Kritische Gesamtausgabe*, repr. ed., 78 vols. (Weimar, 1883-1987), 49:302 [hereafter WA]. See further Hans Liermann, “Der unjuristische Luther,” *Luther-Jahrbuch* 24 (1957): 69; Roderich von Stintzing, *Das Sprichwort ‘Juristen böse Christen’ in seinen geschichtlichen Bedeutung* (Bonn, 1875).

¹⁰ See Gerald Strauss, *Law, Resistance and the State: The Opposition to Roman Law in Reformation Germany* (Princeton, NJ, 1986).

¹¹ See, e.g., Luther’s comments on lawyers’ tricks in *Triglott Concordia: The Symbolic Books of the Ev. Lutheran Church German-Latin-English* (St. Louis, MO, 1921), 665ff. [hereafter TC]; and further Stintzing, *Das Sprichwort* and Wilfried R. Prest, ed., *Lawyers in Early Modern Europe and America* (London, 1981).

¹² Henry the VI, Part 2, Act 4, Scene 2.

independently, produced the most original and enduring teachings on law and politics in early modern Lutheranism. They differed in accent and application, but both anchored their theory in a novel treatment of the natural law – “the law written on the hearts of all men” as St. Paul had called it in Romans 2.

Martin Luther and Philip Melanchthon on Natural Law, Biblical Law, and Positive Law

Wilhelm Dilthey called Melanchthon “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.”¹³ In his own time Melanchthon was called “the teacher of Germany” (*præceptor Germaniæ*) -- not only because he helped to construct the early modern German primary school system, but also because he wrote with a fluidity, power, and profundity that made him a must-read in so many quarters.¹⁴

Born in 1497, Melanchthon received his bachelor’s degree at the University of Heidelberg in 1511 and his master’s degree at the University of Tübingen in 1514. In 1518, he was appointed to the University of Wittenberg to serve as its first professor of Greek. He soon joined the Lutheran cause, and became a gifted professor of theology as well. In 1519 and 1520, he wrote several learned defenses of Luther against his opponents and a number of short popular theological pamphlets. In 1521, he published his famous *Common Topics of Theology (Loci communes theologiarum)* the first systematic treatise on Protestant theology and a standard classroom text for centuries to come.¹⁵ During the 1520s and 1530s, Melanchthon played a leading role in the debates between the Lutheran reformers and their multiple Catholic and Protestant opponents. He drafted the chief declaration of Lutheran theology, the Augsburg Confession (1530) and its Apology (1531). 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*.¹⁶

¹³ Wilhelm Dilthey, *Gesammelte Schriften* (Leipzig/Göttingen, 1921-), 21:193.

¹⁴ Karl Hartfelder, *Philipp Melanchthon als Præceptor Germaniæ* (Berlin, 1899); Irene Dingel and Armin Kohlne, eds., *Philipp Melanchthon: Lehrer Deutschlands, Reformator Europas* (Leipzig: Evangelisches Verlagsanstalt, 2011). For biography, see Martin Greschat, *Philipp Melanchthon: Theologie, Pädagoge und Humanist* (Gütersloh: Gütersloher Verlagshaus, 2010); Heinz Scheible, *Melanchthon: Eine Biographie* (Munich, 1997); Robert Stupperich, *Philip Melanchthon: Gelehrter und Politiker* (Zürich, 1996); Wilhelm Maurer, *Der Junge Melanchthon zwischen Humanismus und Reformation*, 2 vols. (Munich, 1969).

¹⁵ Philip Melanchthon, *Loci Communes Theologici* (1521), translated in Wilhelm Pauck, ed., *Melanchthon and Bucer* (Philadelphia, 1969), 18-152 [hereafter LC (1521)].

¹⁶ The 1535, 1543, 1555, and 1558 editions of his *Loci communes* appear respectively in *Melanchthons Werke*, 28 vols. in G. Bretschneider, ed., *Corpus Reformatorum* (Brunswick, 1864), 21:81, 229, 561; 22:47 [hereafter CR].

In the course of all this, Melanchthon wrote a good deal about law, chiefly in the context of theology and of natural and moral philosophy.¹⁷ He was especially drawn to the study of Roman law, and to the theological and philosophical foundations of legal and political institutions. He also participated in the drafting of several reformation ordinances for Germany and Scandanavia, and was frequently consulted on cases that raised intricate legal, political, and moral questions. Through these writings and activities, Melanchthon had a formidable influence on the legal and theological reforms of marriage, education, and social welfare in Germany and Scandanavia.¹⁸

Lutheran Premises. Melanchthon started with Luther's two-kingdoms framework,¹⁹ and its founding theological doctrines of Law and Gospel, total depravity, and justification by faith alone.²⁰ God has ordained two kingdoms or realms in which humanity is destined to live, Luther argued, the earthly kingdom and the heavenly kingdom. The earthly kingdom is the realm of creation, of natural and civil life, where a person operates primarily by reason and law. The heavenly kingdom is the realm of redemption, of spiritual and eternal life, where a person operates primarily by faith and love. These two kingdoms embrace parallel heavenly and earthly, spiritual and temporal forms of righteousness and justice, government and order, truth and knowledge. These two kingdoms interact and depend upon each other in a variety of ways, not least through biblical revelation and through the faithful exercise of Christian vocations in the earthly kingdom. But these two kingdoms ultimately remain distinct. The earthly kingdom is distorted by sin and governed by the Law. The heavenly kingdom is renewed by grace and guided by the Gospel. A Christian is a citizen of both kingdoms at once and invariably comes under the distinctive government of each. As a heavenly citizen, the Christian remains free in his or her conscience, called to live fully by the light of the Word of God. But as an earthly citizen, the Christian is bound by law, and called to obey the natural orders and offices that God has ordained and maintained for the governance of this earthly kingdom.

¹⁷ See discussion in Sachiko Kusukawa, *The Transformation of Natural Philosophy: The Case of Philip Melanchthon* (Cambridge, 1995) and sample texts in Guido Kisch, *Melanchthons Rechts- und Soziallehre* (Berlin, 1967), 189-287.

¹⁸ On Melanchthon legal philosophy, see among many others, *ibid.*; Clemens Bauer, "Melanchthons Rechtslehre," *Archiv für Reformationsgeschichte* (1951): 64; *id.*, "Der Naturrechtsvorstellungen des jüngeren Melanchthon," in *Festschrift für Gerhard Ritter zu seinem 60. Geburtstag* (Tübingen, 1950), 244; Albert Hänel, "Melanchthon die Jurist," *Zeitschrift für Rechtsgeschichte* 8 (1869): 249; Walter Sohm, "Die Soziallehren Melanchthon," *Historische Zeitschrift* 115 (1916): 68; Roderich von Stintzing, *Geschichte der deutschen Rechtswissenschaft, Erste Abtheilung* (Munich/Leipzig, 1880), 287ff.; Alfred Voigt, "Die juristische Hermeneutik und ihr Abbild in Melanchthons Universitätsreden," in *Festgabe für Ernst von Hippel zu seinem 70. Geburtstag* (Munich, 1965), 265. On Melanchthon's influence on sixteenth-century jurists, see Stintzing, *Geschichte*, 241-338; Kisch, *Melanchthons Rechtslehre*, 51-73.

¹⁹ See esp. TC 328-33; Philip Melanchthon, *Melanchthon on Christian Doctrine: Loci Communes 1555*, trans. and ed. Clyde L. Manschreck (New York/Oxford, 1965), 39-44, 274-279, 323-344 [hereafter LC (1555)]; CR 11:68ff., 357ff., 917ff. and detailed discussion in Adolf Sperl, *Melanchthon zwischen Humanismus und Reformation* (Munich, 1959).

²⁰ See LC (1521), 49-111; LC (1555), 83-174, with further sources and discussion in Kusukawa, *Natural Philosophy*, 27-74; Timothy J. Wengert, *Philip Melanchthon's Exegetical Dispute with Erasmus of Rotterdam* (New York/Oxford, 1998).

These earthly authorities, Luther argued, operate first and foremost by the law of nature. Luther defined this law, conventionally, as the set of norms ordained by God in the creation, written by God on the hearts of all persons, and rewritten by God on the pages of the Bible. Luther called this variously the “law of nature,” “natural law,” “divine law,” “Godly law,” “the law of the heart,” “the teachings of conscience,” “the inner law,” among others.²¹ His main point was that God’s natural law set at creation continued to operate in the earthly kingdom after the fall into sin, and that it provided the foundation for all positive law and public morality in the earthly kingdom.

The natural law, said Luther, defined the basic obligations that a person owed to God, neighbor, and self. The clearest expression of these obligations was the Ten Commandments which God inscribed on two tables and gave to Moses on Mt. Sinai. The First Table of the Decalogue set out basic obligations to honor the Creator God, to respect God’s name, to observe the Sabbath, to avoid idolatry and blasphemy. The Second Table set out basic obligations to respect one’s neighbor—to honor authorities, and not to kill, commit adultery, steal, bear false witness, or covet.²² Luther believed this to be a universal statement of the natural law binding not only on the Jews of the Old Testament but on everyone. “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.”²³ “[W]hoever knows the Ten Commandments perfectly must know all the Scriptures, so that, in all affairs and cases, he can advise, help, comfort, judge, and decide both spiritual and temporal matters, and is qualified to sit in judgment upon all doctrines, estates, spirits, laws, and whatever else is in the world.”²⁴ And again: “[A]lthough the Decalogue was given in a particular way and place and ceremony, ... all nations acknowledge that there are sins and iniquities.”²⁵

Knowledge of this natural law comes not only through revealed Scripture, Luther argued, but also through natural reason. Luther built on St. Paul’s notion that even the heathen have a “law written in their hearts, their conscience also bearing witness” to a natural knowledge of good and evil (Rom. 2:15). Every rational person thus “feels” and “knows” the Law of God, said Luther, even if only obliquely. The basic teaching of the

²¹ See the collection of quotations in Hermann W. Beyer, *Luther und das Recht: Gottes Gebot, Naturrecht, Volksgesetz in Luthers Deutung* (Munich, 1935) and fuller sources from WA in J.M. Porter, ed., *Luther - Selected Political Writings* (Philadelphia: Fortress Press, 1974). Among numerous studies, see esp. Johannes Heckel, *Lex Charitatis: A Juristic Disquisition on Law in the Theology of Martin Luther*, trans. and ed. Gottfried G. Krodel (Grand Rapids, MI: Wm. B. Eerdmans, 2010); Antii Raunio, “Divine and Natural Law in Luther and Melancthon,” in Virpi Mäkinen, ed., *The Lutheran Reformation and the Law* (Leiden: Brill, 2006), 21-62; W. Cargill Thompson, *The Political Thought of Martin Luther* (Brighton, Sussex, 1984); John Tonkin, *The Church and the Secular Order in Reformation Thought* (New York, 1971), 37-72; F. Eward Cranz, *An Essay on the Development of Luther’s Thought on Justice, Law, and Society* (Cambridge, MA, 1959), 73-112; Joseph Binder, “Zur Hermeneutik der Rechtslehre Martin Luthers,” *Archiv für Rechts- und Sozialphilosophie* 51 (1965): 337; John T. McNeill, “Natural Law in the Thought of Luther,” *Church History* 10 (1941): 211.

²² See esp. LW 44:15-114; TC 581-677. See further Heinrich Bornkamm, *Luther and the Old Testament*, trans. Eric W. and Ruth C. Gritsch (Philadelphia, 1969).

²³ WA 39/1:478.

²⁴ TC 573.

²⁵ WA 39/1:540; see also WA 18:72; 30:192.

natural law “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.”²⁶

But sinful persons do not, of their own accord, “pay attention” to the natural law written on their hearts, and rewritten in the Bible. Thus God has called upon other persons and authorities in the earthly kingdom to elaborate its basic requirements. All Christians, as priests to their peers, must communicate the natural law of God by word and by deed. Parents must teach it to their children and dependents. Preachers must preach it their congregants and catechumens. And magistrates must elaborate and enforce it through their positive laws and public policies.

The magistrate’s elaboration and enforcement of the natural law through positive law was particularly important, Luther believed, since only the magistrate holds coercive legal authority in the earthly kingdom. “Natural law is a practical first principle in the realm of public morality,” Luther wrote; “it forbids evil and commands good. Positive law is a decision that takes local conditions into account,” and “credibly” elaborates the general principles of the natural law into specific precepts to fit these local conditions. “The basis of natural law is God, who has created this light, but the basis of positive law is the earthly authority,” the magistrate, who represents God in this earthly kingdom.²⁷ The magistrate must promulgate and enforce these positive laws by combining faith, reason, and tradition. He must pray to God earnestly for wisdom and instruction. He must maintain “an untrammelled reason” in judging the needs of his people and the advice of his counsellors.²⁸ He must consider the wisdom of the legal tradition-- particularly that of Roman law, which Luther called a form of “heathen wisdom.”²⁹ “The polity and the economy” of the earthly kingdom, Luther wrote, “are subject to reason. Reason has first place. There [one finds] civil laws and civil justice.”³⁰

Natural Law and Biblical Law. Melanchthon repeated and endorsed Luther’s teachings on natural law many times.³¹ But, already in his early writings, developed in his first years at the University of Wittenberg, he was more explicit than Luther in expounding the content of this natural law. While the Bible helped to define and illustrate the natural law, he argued, classical and post-biblical sources provided additional insights into its content. Melanchthon ultimately identified ten principles of natural law that he considered to be common to classical and Christian sources: (1) to worship God and to honor God’s law; (2) to protect life; (3) to testify truthfully; (4) to marry and raise children; (5) to care for one’s relatives; (6) to harm no one in their person, property, or reputation; (7) to obey all those in authority; (8) to distribute and

²⁶ WA 17/2:102.

²⁷ WA TR 3, No. 3911; see also WA 51:211.

²⁸ LW 45:120-126.

²⁹ WA 51:242. See also WA 12:243; WA 14:591, 714; WA 16:537; WA 30/2:557; WA 51:241.

³⁰ WA 40:305.

³¹ MW 4:164; CR 21:116-117; CR 16:167ff.

exchange property on fair terms; (9) to honor one's contracts and promises; and (10) to oppose injustice.³²

Melanchthon also went well beyond Luther in grounding this natural law philosophically. Building on Luther's two-kingdoms theory, Melanchthon taught that God has implanted in all persons certain "inborn elements of knowledge" (*notitiae nobiscum nascentes*). These he called variously a "light from above," a "natural light," "rays of divine wisdom poured into us," "a light of the human faculty" without which we could not find our way in the earthly kingdom.³³ These *notitiae* included various "theoretical principles" of logic, dialectics, geometry, arithmetic, physics, and other sciences--that two plus two equals four, that an object thrown into the air will eventually come down, that the whole is bigger than any one of its parts, and the like. These *notitiae* also include certain "practical principles" (*principia practica*) of ethics, politics, and law – that "men were born for civil society," that offenses which harm society should be punished, that "promises should be kept," and many others.³⁴ "All these natural elements of knowledge," Melanchthon believed, "are congruent with the eternal and unchanging norm of the divine mind that God has planted in us." They provide the starting point for life and learning in this earthly kingdom.³⁵

Melanchthon often equated the natural law with these "practical principles," these "natural elements of knowledge concerning morals" that undergird life and law in the earthly kingdom.³⁶ The ten natural law principles that he had identified early in his career remained in place, but he now tended to distill them into more general virtues as well:

The greatest and best things in the divine mind, the creator of the human race, are wisdom, distinguishing honorable from shameful things, and justice, truth, kindness, clemency, and chastity. God planted seeds of these best things in human minds, when he made us after his own image. And he wished the life and behavior of men to correspond to the standard of his own mind. He also revealed this same wisdom and doctrine of the virtues with his own voice [in the Bible].

This knowledge, divinely taught both by the light that is born in us and by the true divine voice, is the beginning of the laws and of the political order [of the earthly kingdom]. God wishes us to obey them not only for the sake of our needs, but more, so that we may acknowledge our creator and learn from this same order that this world did not arise by chance, but that there is both a creator who is wise, just, kind, truthful, and chaste and who

³² See notes in CR 21:25-27. See another early summary in CR 21:119-20; and in Maurer, *Der junge Melanchthon*, 2:288ff.

³³ CR 13:150, 647; CR 11:920-921; CR 21:712l see also CR 13:642ff.; CR 20:695ff., 748ff.; *Dialectices Philippi Melanthonis* (Louvain, 1534), esp. bks. II-III; Dilthey, *Gesammelte Schriften*, 2:162ff.; Heinrich Bornkamm, *Das Jahrhundert der Reformation: Gestalten und Kräfte* (Göttingen, 1966), 69ff.

³⁴ CR 21:117, 398-400, 711-13; CR 11:918-919.

³⁵ CR 16:228.

³⁶ Robert Stupperich, ed., *Melanchthons Werke in Auswahl*, 6 vols. (Gütersloh, 1951), 3:208 [hereafter MW].

demands similar virtues in us. We may also learn that He is an avenger who punishes violations of this order.³⁷

Human reason, Melanchthon argued, cannot prove the existence of these natural law principles.³⁸ They are facts and facets of human nature, forms of innate knowledge that are in the mind of God, and “placed in our mind by God” when he created us “in his image.”³⁹ Moreover, they cannot be fully understood using reason alone. “Our nature is corrupted by original sin,” Melanchthon wrote, echoing Luther’s doctrine of total depravity. “Thus the law of nature is greatly obscured.”⁴⁰ The best way for a Christian to understand the natural law, therefore, is to turn to the Bible, though Greek philosophy and Roman law also remained edifying in his view.⁴¹ Among the most relevant biblical texts reflecting the contents of the natural law, said Melanchthon, were the Torah, the Beatitudes, the moral codes of Jesus and St. Paul. These biblical moral teachings he variously called the “divine law,” “the law of God,” “the law of morality,” “the law of virtue,” “the judgment of God,” “the eternal immutable wisdom and rule of justice in God himself.”⁴²

The best single summary of biblical moral law, Melanchthon wrote, was the Ten Commandments which Luther had also held up. Accordingly, the best source of knowledge of the content of the natural law was the Decalogue.⁴³ “[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.⁴⁴

³⁷ CR 11:918-919.

³⁸ CR 21:399-400; see also CR 13:547-55; 21:116-17.

³⁹ Quoted in Kusukawa, *Natural Philosophy*, 94.

⁴⁰ MW 4:146ff.; TC 157-59; CR 21:399-402.

⁴¹ CR 21:392.

⁴² CR 21:1077; 22:201-02.

⁴³ CR 21:392; see also CR 12:23.

⁴⁴ CR 22:256-57; see also CR 16:70.

The Ten Commandments presented Melanchthon with a somewhat different iteration of the core principles of natural law than the ten principles he had listed earlier in his career based on his reading of the classical sources. The Ten Commandments, he stressed, are not the only valid iteration of natural law. Classical formulations, particularly those of Greek philosophy and Roman law, continue to be effective. Indeed, the overlap between classical and biblical teachings attests to the universality of these natural law norms.⁴⁵ But, given their authorship by God himself on Mount Sinai, the Ten Commandments are the most authoritative rendering of the meaning of the natural law.

The Ten Commandments and Positive Law. Given their importance as a source and summary of the natural law, a pious Christian magistrate would do well to start with the Ten Commandments as the foundation of the positive law. “When you think about *Obrigkeit*, about princes or lords,” Melanchthon wrote, “picture in your mind a man holding in one hand the tables of the Ten Commandments and holding in the other a sword. Those Ten Commandments are above all the works which he must protect and maintain,” using the sword if necessary. Those Ten Commandments are “also the source from which all teaching and well-written laws flow and by which all statutes should be guided.”⁴⁶

Melanchthon took this image directly into his understanding of the nature and purpose of the positive law. The Christian magistrate, he said, is to enforce and elaborate the natural law principles set out in the Decalogue. His positive laws are to be organized and informed by the two main tables of the Decalogue. The First Table is to support positive laws that govern spiritual morality, the relationship between persons and God. The Second Table is to support positive laws that govern civil morality, the relationships between persons.

As custodians of the First Table of the Decalogue, Melanchthon wrote, magistrates must pass laws against idolatry, blasphemy, and violations of the Sabbath--offenses that the First Table prohibit on its face.⁴⁷ Magistrates must also pass laws 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.⁴⁸ “[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,” Melanchthon argued. “All rulers are obliged to do this.”⁴⁹

Melanchthon’s move toward the establishment of the Christian religion by state positive laws was a marked departure from Luther’s original teaching. In 1523, for example, Luther had written: “Earthly government has laws that extend no further than to life, property, and other external things on earth. For God cannot and will not allow

⁴⁵ Ibid; CR 11:66-86, 919-924.

⁴⁶ CR 22:615.

⁴⁷ CR 16:87-88; 22:615-617.

⁴⁸ CR 22:617-18.

⁴⁹ CR 22:617. Melanchthon hinted at this doctrine of religious establishment by civil law in his earlier writings (see, e.g., CR 2:710; MW 2:2, 21). But his first systematic articulation of the doctrine appears in his *Epitome of Moral Philosophy*, Book II published separately in 1539 and then as part of the full tract in 1540, reprinted in CR 16:85-105.

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.”⁵⁰ Luther eventually softened this stance, particularly in his late-life railings against Jews, Antinomians, and Anabaptists.⁵¹ But he remained firmly opposed to the magistrate defining by positive law what Christian doctrines and liturgies were orthodox, what heterodox.

Melanchthon had held similar views in the 1520s and 1530s. But he eventually retreated from this position, despite Luther’s objections that he was thereby betraying the essence of the Lutheran two-kingdoms theory.⁵² Melanchthon, even more than Luther in his later life, had been party to two decades of intense religious rivalries between and among Catholics and Protestants in Germany. He had become increasingly dismayed at the fracturing of German society and the perennial outbreaks of violent antinomianism and spiritual radicalism. He had become especially incensed at the “great many frantic and bewildered souls” who were blaspheming God and His law with their “monstrous absurdities” and “diabolical rages.”⁵³ To allow such blasphemy and chaos to continue without rejoinder, Melanchthon believed, was ultimately to betray God and to belie the essence of the political office. After all, he reasoned, “earthly authority is obliged to maintain external discipline according to *all* the commandments. External idolatry, blasphemy, false oaths, untrue doctrine, and heresy are contrary to the First Table [of the Decalogue]. For this reason, earthly authority is obliged to prohibit, abolish, and punish these depravities [and] to accept the Holy Gospel, to believe, confess, and direct others to true divine service.” The political office “before all else should serve God, and should regulate and direct everything to the glory of God.”⁵⁴

With this teaching, Melanchthon helped to lay the 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 Lutheran confessions and doctrines, songs and prayers, and liturgies and rites. The principle of *cuius regio eius religio* (“whosever region, his religion”) set forth in the Religious Peace of Augsburg (1555) and expanded in the Peace of Westphalia (1648), rested ultimately on Melanchthon’s theory that the magistrate’s positive law was to use the First Table of the Decalogue to establish for his people proper Christian doctrine, liturgy, and spiritual morality.

As custodians of the Second Table of the Decalogue, Melanchthon argued, magistrates are called to govern “the multiple relationships by which God has bound men together.”⁵⁵ Melanchthon listed a whole series of positive laws that properly belong under each of the Commandments of the Second Table. On the basis of the Fourth

⁵⁰ WA 11:262.

⁵¹ See esp. *Luther's Works*, Jaroslav Pelikan and Helmut T. Lehmann, trans. and eds. (Philadelphia, 1955-1968); 47:99-119, 121-306 [hereafter LW].

⁵² See, e.g., LW 49:378-390; and notes on subsequent letters in LW 50:85-92.

⁵³ LC (1555), 324; CR 11:918.

⁵⁴ LC (1555), 335-336 (rendering “weltliche” as “earthly” not “worldly”).

⁵⁵ CR 22:610.

Commandment (“Honor thy father and mother”), magistrates are obligated to prohibit and punish disobedience, disrespect, or disdain of authorities such as parents, political rulers, teachers, employers, masters, and others. On the basis of the Fifth Commandment (“Thou shalt not kill”), they are to punish unlawful killing, violence, assault, battery, wrath, hatred, meanness, and other offenses against neighbors. On the basis of the Sixth Commandment (“Thou shalt not commit adultery”), they are to prohibit adultery, fornication, in chastity, incontinence, prostitution, pornography, obscenity, and other sexual offenses. On the basis of the Seventh Commandment (“Thou shalt not steal”), they are to outlaw 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”), they are to punish all forms of perjury, dishonesty, fraud, defamation, and other violations of a person’s reputation or status in the community. Finally, on the basis of the Ninth and Tenth Commandments (“Thou shalt not covet”), they are to punish all attempts to perform these or other offensive acts against another’s person, property, reputation, or relationships.⁵⁶

Many of these aspects of social intercourse had traditionally been governed by the Church’s canon law and organized in part by the seven sacraments. The sacrament of marriage, for example, supported the positive law of sex, marriage, and family life. The sacrament of penance supported the canon law of crimes against the persons, properties, and reputations of others. The sacraments of baptism and confirmation undergirded a constitutional law of natural rights and duties of Christian believers. The sacrament of holy orders supported the law of the clergy. The sacrament of extreme unction supported the positive laws of burial, inheritance, foundations, and trusts.⁵⁷ Melancthon used the Ten Commandments, instead of the seven sacraments, to organize the various systems of positive law. And he looked to the state, instead of the church, to promulgate and enforce these positive laws on the basis of the Ten Commandments and biblical and extrabiblical sources of natural law and morality. Melancthon’s argument provided a further rationale, beyond Luther’s, to support the abrupt transfer of legal power from the church to the state upon the burning of the canon law books.⁵⁸ The magistrate was God’s vice-regent called to enforce God’s law in the earthly kingdom through positive laws. God’s law was most clearly summarized in the Ten Commandments. The magistrate therefore had to pass positive laws for each of these Commandments, reforming the *ius commune* in light of the new Lutheran teachings.

In criminal law, Melancthon urged magistrates to develop comprehensive codes of criminal law that defined and prohibited all manner of offense against the person, property, reputation, or relationships of another and to enforce these laws “swiftly and severely.” He described three main purposes of criminal law and punishment. First, criminal law and punishment served the goal of deterrence, both special deterrence of the individual defendant and general deterrence of the broader community who witness

⁵⁶ See LC (1521), 53ff.; LC (1555), 97ff.; CR 21:294ff., 387ff; CR 22:256ff.; CR 16:70ff.

⁵⁷ See detailed sources in Witte, *Law and Protestantism*, chap. 1.

⁵⁸ See sources in *ibid.*, chap 2.

his punishment. "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." Second, criminal law and punishment served the goal of retribution. "God is a wise and righteous being, who out of his great and proper goodness created rational creatures to be like him," Melanchthon wrote. "Therefore, if they strive against him the order of justice [requires that] he destroy them." The magistrate, as God's vice-regent, was called to effectuate this divine end by defining the meaning of God's law through criminal laws, and punishing those who violated the same. Third, criminal punishment served the goal of rehabilitation -- of allowing a person to learn again how to "distinguish between virtue and vice," and so come to better and fuller understanding of God's law, order, and justice.⁵⁹

Melanchthon's theory of the three purposes of criminal law was part and product of his theology of "the three uses of natural law." Luther, Melanchthon, and other early Protestants had developed this *usus legis* doctrine to explain why the law of God and nature was still "useful" in the life of the earthly kingdom, even if justification and salvation came only through faith in God's grace. The natural law, Melanchthon argued, had three uses – a civil use of restraining sin, a theological use of encouraging contrition, and an educational use of learning good works, even if they could never be done perfectly enough to warrant salvation.⁶⁰

The *deterrent* function of the criminal law ran closely parallel to the civil use of the natural law. Melanchthon, the theologian, stressed the "wrath of God against all unrighteousness" which coerced persons not to follow their natural inclination to sin. He adduced ample biblical examples of the ill plight of the sinner to drive home his point. Melanchthon, the jurist, stressed the severity of the magistrate against all uncivil conduct. He pointed to many examples of the law's harsh public sanctions against criminals to deter persons from all such uncivil conduct. The *retributive* function of the criminal law ran closely parallel to the theological use of the natural law, though the emphases were different. Melanchthon, the theologian, emphasized the need to avenge violations of the natural law and to impel a sinner to seek grace. Melanchthon, the jurist, emphasized the need for the community to participate in such avenging of its law and emphasized the responsibility of the magistrate to induce the sinner to seek forgiveness from God, the state, and the victim at once. The *rehabilitative* function of the criminal law ran closely parallel to the educational use of the natural law, though here, too, the emphases were different. Melanchthon, the theologian, emphasized the need for moral reeducation of justified believers alone. Melanchthon, the jurist, emphasized the need for moral reeducation of all persons, especially those convicted criminals who had not yet been justified. This blending of the uses of natural law and the purposes of criminal law was an important bridge between theology and law in the Lutheran Reformation.⁶¹

⁵⁹ CR 22:224.

⁶⁰ See a careful sifting of the sources and literature in Edward Engelbrecht, *Friends of the Law: Luther's Use of the Law for the Christian Life* (St. Louis, MO, 2011).

⁶¹ See sources and discussion in John Witte, Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids, MI: Wm. B. Eerdmans, 2006), 263-94; [cite recent article by Mathias](#)

In civil law, as opposed to criminal law, Melanchthon postulated the duty of the ruler to facilitate and regulate the formation and function of various types of voluntary social relationships or associations. He focused on three such relationships, those of (1) private contract, (2) marriage and the family, and (3) the visible church.

“God has ordained contracts of various kinds,” Melanchthon wrote.⁶² These include contracts of sale, lease, exchange of property, procurement of labor and employment, lending of money, extension of credit, and more.⁶³ All such contracts serve not only the utilitarian ends of exchanging goods and services but also the social ends of promoting equality and checking greed.⁶⁴ Accordingly, God has called the magistrate 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 largely content to state these general principles of contract law in categorical form, although he occasionally applied them to specific cases. For example, he condemned with particular vehemence loan contracts that obligated debtors to pay usurious rates of interest—a subject on which Luther had also written at length, and which would become a regular feature of Protestant ethics and legal theory.⁶⁵ He also condemned contracts or mortgages that entitled creditors to secure a 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 anything on full performance from the servant, and contracts of purchase and sale that were based on inequality of exchange.⁶⁶ Such moral teachings on contract were quite consistent with prevailing teachings of the *ius commune*.⁶⁷ Melanchthon’s articulation of them, however, was an important impetus for the transplantation and implementation of them in the new Protestant civil law of obligations.⁶⁸

Christian magistrates were also to promulgate positive laws to govern marriage and family relations. These laws must prescribe monogamous heterosexual marriages between two fit parties and to proscribe homosexual, polygamous, and other “unnatural” relations. They must ensure that each marriage is formed by voluntary consent of both

Schmoeckel – need to find information to plug in]; Heikki Pihlajamäki, “*Executor divinarum et suarem legam*: Criminal Law and the Lutheran Reformation,” in Mäkinen, ed., *The Lutheran Reformation and the Law*, 171-204.

⁶² CR 22:241.

⁶³ CR 22:241-242.

⁶⁴ CR 16:128-152, 251-269, 494-508; 22:240; MW 2/2:802-803.

⁶⁵ CR 16:128-152. See Luther’s views in LW 45:231-310. On traditional views, see John T. Noonan, Jr., *The Scholastic Analysis of Usury* (Cambridge, MA, 1957) and the chapters by Mathias Schmoeckel and Jordan Ballor herein.

⁶⁶ CR 16:251-69, 494-508.

⁶⁷ See Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta, 1993), 197ff.; R.H. Helmholz, *The Spirit of the Classical Canon Law* (Athens, GA, 1996), 229ff.; Stephan Kuttner, *Kanonistische Schuldhlehre von Gratian bis auf die Dekretalen Gregors IX, systematisch auf Grund der handschriftlichen Quellen dargestellt* (Vatican City, 1935); Alfred Söllner, “Die causa in Konditionen- und Vertragsrecht des Mittelalters bei den Glossatoren, Kommentaren, und Kanonisten,” *Zeitschrift der Savigny-Stiftung (Romanisches Abteilung)* 77 (1960): 182.

⁶⁸ See further Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA, 2003), 156-75.

parties and undo relationships based on fraud, mistake, coercion, or duress. They must promote the created marital functions of procreation and childrearing and prohibit all forms of contraception, abortion, and infanticide. They must protect the authority of the *paterfamilias* over his wife and children but punish severely all forms of adultery, desertion, incest, and wife or child abuse, especially by that *paterfamilias*. These teachings, together with those of Luther and other reformers, would have a formidable influence on the reformation of marriage law.⁶⁹

Finally, Christian magistrates were to regulate the visible church by positive laws. These “ecclesiastical laws” were to govern not only doctrine, liturgy, and Sabbath observance, according to the First Table of the Decalogue, but also church polity and property, according to the general principles of the Second Table of the Decalogue. “The prince is God’s chief bishop (*summus episcopus*) in the church,” Melanchthon wrote.⁷⁰ He is to define the hierarchical polity of the church—from local congregations to urban ecclesiastical circuits to 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, maintenance, and alienation of church property.⁷¹ He is to send out his superintendents to ensure faithful compliance of the local church both with the Gospel of Christ and the law of the magistrate. Melanchthon subjected the local visible church both to the rule and to the protection of the local magistrate.

Melanchthon described the duties not only of political officials but also of political subjects, that is, those who were subject to the magistrate’s 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.”⁷² Melanchthon based this theory of absolute civil obedience on various biblical texts

⁶⁹ For Melanchthon’s views of marriage and the family, see CR 16:509; CR 21:1051; CR 22:600; CR 23:667; MW 2/2:801-802. See further for Germany. John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2d ed. (Louisville, KY: Westminster John Knox Press, 2011), ch. 5. On Scandinavian developments, see Mia Korpiola, *Between Betrothal and Bedding: Marriage Formation in Sweden, 1200-1600* (Leiden: Brill, 2009) and her chapter herein; see also Agnes S. Arnórsdóttir, *Property and Virginité: The Christianization of Marriage in Medieval Iceland, 1200-1600* (Aarhus, 2010); Anne Irene Riisøy, *Sexuality, Law, and Legal Practice and the Reformation in Norway* (Leiden, 2009).

⁷⁰ Quoted by Emil Sehling, *Kirchenrecht* (Leipzig, 1908), 36-37.

⁷¹ CR 16:241ff., 469ff., 570ff.; CR 22:227ff., 617ff. and further discussion in Peter Meinhold, *Philipp Melanchthon: Der Lehrer der Kirche* (Berlin, 1960), 40ff.; Hans Liermann, *Deutsches evangelisches Kirchenrecht* (Munich, 1933), 150ff.; Wilhelm Maurer, *Die Kirche und ihr Recht: Gesammelte Aufsätze zum evangelischen Kirchenrecht* (Tübingen, 1976), 254ff.

⁷² CR 21:223-224.

especially Romans 13 -- 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 God's wrath.⁷³

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 1550, he joined those who recognized a right of resistance against tyrants based on natural law – including the authors of the famous Magdeburg Confession.⁷⁴ "Conscious disobedience of the secular *Obrigkei*t 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."⁷⁵ However, if the positive law promulgated by the political official contradicts natural law, particularly the Ten Commandments, it is not binding in conscience and must be disobeyed. This was traditional medieval lore. It had radically different implications, however, 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.

Philip Melanchthon defined a good deal of the content and the character of Lutheran theories of law, politics, and society. A whole generation of Germany's leading jurists in the sixteenth century came under his direct influence as students, colleagues, and correspondents.⁷⁶ Generations of students thereafter studied his legal, political, and moral writings, many of which were still being printed two centuries later and used as textbooks in universities throughout Germany and well beyond.⁷⁷ One of these readers was the Lutheran jurist, Johann Oldendorp.

Johann Oldendorp on Law and Equity

Oldendorp was described in his day as "the one person for whom the maxim 'a jurist is a bad Christian' could never apply."⁷⁸ He was a man of extraordinary piety and erudition, famous throughout Germany and beyond for his Christian humanity and legal

⁷³ Ibid.

⁷⁴ For detailed sources and discussion, see my *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), 102-22; id., *Rechte, Widerstand und Revolution in westlicher Tradition: Frühe protestantische Grundlagen*, *Zeitschrift der Savigny-Stiftung: Kanonische Abteilung* 127 (2010): 1485.

⁷⁵ CR 22:613.

⁷⁶ See Karl Köhler, *Luther und die Juristen: Zur Frage nach dem gegenseitigen Verhältnis des Rechtes und der Sittlichkeit* (Gotha, 1873), 125ff.; Guido Kisch, "Melanchthon und die Juristen seiner Zeit," *Mélanges Philippe Meylan* (Paris, 1963), 2:135 and the detailed index in Heinz Scheible, ed., *Melanchthons Briefwechsel*, 10 vols. (Stuttgart, 1977-1987).

⁷⁷ See the editorial comments at the head of each of his works in CR on Melanchthon's writings. See details on some of the main jurists' writings in Gisela Becker, *Deutsche Juristen und ihre Schriften auf den römischen Indices des 16. Jahrhunderts* (Berlin, 1970).

⁷⁸ Jacob Spiegel, *Lexicon iuris civilis* (Basel, 1554), col. 210, quoted by Friederich Merzbacher, "Johann Oldendorp und das kanonische Recht," in Siegfried Grundmann, ed., *Für Kirche und Recht: Festschrift für Joh. Heckel* (Cologne, 1959), 223n.

learning. Ernst Troeltsch and Roderich von Stintzing both called him “the most influential jurist” of the Reformation era.⁷⁹ He was also one of the most prolific, the author of at least 56 separate volumes on law. Eight volumes were decidedly jurisprudential, treating concepts of law and equity, authority and liberty, justice and judgment. Most of his other volumes dealt with legal issues of property, inheritance, civil procedure, domestic relations, statutory interpretation, and conflict of laws. He also published commentaries on several Roman law texts, an encyclopedic legal dictionary, and several famous student handbooks and textbooks.⁸⁰

Oldendorp was born in Hamburg about 1486. He studied civil law and canon law at the Universities of Rostock and Bologna. In 1516 he became a professor of Roman law and civil procedure at the University of Greifswald. In his early years, he was steeped in legal humanism, with a particular interest in the styles of legal advocacy and judgment, and in the techniques of resolving conflicts between and among canon laws and civil laws.⁸¹ In the course of the early 1520s, Oldendorp was slowly drawn to the Lutheran cause. In 1526, he resolved to support the Reformation. He left Greifswald to become a city official (*Stadtsyndicus*) of Rostock, and he soon became a leader of the city’s reformation party. He helped to draft the city’s new reformation ordinance of 1530.⁸² He also served as a superintendent for the new Lutheran churches, involving himself in the reforms of preaching, liturgy, and church polity, in the reorganization of church properties, and in the creation of a new Lutheran public school and almshouse. While in Rostock, Oldendorp also published two texts that outlined several main themes of his legal theory—*What is Equitable and Right* (1529) and *A Statesman’s Mirror on Good Policy* (1530).⁸³

In 1534, the city council of Rostock retreated from the Reformation, and Oldendorp was forced to leave. He moved to Lübeck, an important commercial center that had just promulgated two lengthy reformation ordinances for the city and

79 Ernst Troeltsch, *Die Soziallehren der christlichen Kirchen und Gruppen*, 2 vols. (Berlin, 1912), 1:545 n.253; Stintzing, *Geschichte*, 311.

⁸⁰ See bibliographies in Hans-Helmut Dietze, *Oldendorp als Rechtsphilosoph und Protestant* (Königsberg, 1933), 18-21; Peter Macke, *Das Rechts- und Staatsdenken des Johannes Oldendorp* (Inaug. Diss., Cologne, 1966), viii-xi, with most of his writings in Johann Oldendorp, *Opera Omnia* (Basel, 1559; facs. repr. ed., Graz, 1968).

⁸¹ See Johann Oldendorp, *Rationes sive argumenta, quibus in iure utimur* (Rostock, 1516) and his later publication, already begun in this early period, id., *Collatio juris civilis et canonici, maximam afferens boni et aequi cognitionem* (Cologne, 1541).

⁸² Reprinted in Amelius L. Richter, ed., *Die evangelischen Kirchenordnungen des sechszehnten Jahrhunderts*, repr. ed. (Nieuwkoop, 1967), 1:144-145; see autobiographical reflections in Johann Oldendorp, *Wahrhaftige entschuldige Doct. Johann Oldendorp, Syndici tho Rostock, wedder de mortgirigen uproschen schantdichter und falschen klegen* (Rostock, 1533); and further O. Plettke, “Zur Rolle Johann Oldendorps bei der offiziellen Durchführung der Reformation in Rostock,” *Zeitschrift der Savigny-Stiftung (Kanonisches Abteilung)* 101 (1984): 339.

⁸³ Johann Oldendorp, *Wat byllich und recht ist* (Rostock, 1529), reprinted in modern edition in Erik Wolf, ed., *Quellenbuch zur Geschichte der deutschen Geistesgeschichte* (Frankfurt am Main: V. Klostermann, 1950), 51-68 [hereafter Billig und Recht]; id., *Van radtslagende, wo men gude Politie und ordenunge ynn Steden und landen erholden möghe* (Rostock, 1530), excerpted in modern edition as “Ratmannenspiegel,” in Wolf, *Quellenbuch*, 69-98 [hereafter Ratmannenspiegel] and published separately in full as *Ein Ratmannen-Spiegel von Joh. Oldendorp* (Rostock, 1971).

surrounding rural areas.⁸⁴ There, too, Oldendorp served as *Stadtsyndikus* and superintendent for the new Lutheran churches. But there, too, Catholic opposition eventually forced him to leave. From 1536 to 1543, Oldendorp moved back and forth among the universities of Frankfurt an der Oder, Cologne, and Marburg, changing venues as local leaders in Frankfurt and Cologne changed their minds about Protestantism. Despite his itinerancy, he published a dozen volumes in this period, including *A Methodology of Natural, Common, and Civil Law* (1539), *Principles of the Decalogue* (1539), and *A Legal Disputation on Law and Equity* (1541).⁸⁵

In 1539, Oldendorp came into personal contact with Melanchthon--a Christian theologian and philosopher of "the highest erudition," as he later called him.⁸⁶ Oldendorp was particularly taken with Melanchthon's topical method of systematic theology set out in his *Loci communes theologiarum* (1521). He dedicated one of his next works to Melanchthon,⁸⁷ and shortly thereafter published his own new legal synthesis, aptly titled *Loci communes iuris civilis*.⁸⁸

In 1543, Oldendorp returned for good to the University of Marburg, where the Reformation had become firmly established, and he remained on the law faculty until his death in 1567. He accepted the call to Marburg on condition that he be freed from the usual requirement of lecturing on the Roman law texts and their medieval glosses.⁸⁹ He would come, he insisted, only if he could "teach the laws with special attention to their just consequences and to their relationship to God's Word." "The study of law is the most important pursuit after God's Word," Oldendorp wrote. Accordingly, the study of law "should be organized not only in light of the Word, but in accordance with it in deed; the Word of God must be its starting point and its guide."⁹⁰

Oldendorp took this maxim to heart both in teaching his courses and in devising his theory of law and equity. His textbooks and formal writings on legal philosophy are a dense blend of insights drawn from classic Greek and Roman jurists and

⁸⁴ Richter, *Kirchenordnungen*, 1:141-154.

⁸⁵ Johann Oldendorp, *Iuris naturalis gentium et civilis isagoge* (Antwerp, 1539) [hereafter *Isagoge*]; id., *Divinae tabulae X. praeceptorum*, a title in *ibid.*, Ciii-Div, reprinted in Carl Kaltenborn, *Die Vorläufer des Hugo Grotius* (Leipzig, 1848), Appendix, 1-25; Johann Oldendorp, *De iure et aequitate forensis disputatio* (Cologne, 1541) [hereafter *Disputatio*].

⁸⁶ Oldendorp, *Isagoge*, 6.

⁸⁷ Id., *Disputatio*, dedicatory letter, where Oldendorp lauds Melanchthon as one "who, by the method of reason, had collected in an epitome the whole of moral philosophy." See also id., *Responsio ad impiam delationem parochorum Coloniensium de communicatione sacramenti corporis et sanguinis Christ sub utraque specie, cum exemplo litterarum, quas Phil. Melanthon dedit ad Joh. Old.* (Marburg, 1543).

⁸⁸ Id., *Loci communes iuris civilis ex mendis tandem et barbarie in gratiam studiosorum utiliter restituti* (Louvain, 1545; rev. ed., Louvain, 1551). See also id., *Topicorum legalium* (Marburg, 1545; Louvain, 1555); id., *Loci iuris communes* (Frankfurt am Main, 1546). In all these tracts, Oldendorp drew heavily on Aristotle's and Cicero's and medieval topical methods as well. On these see generally Theodore Viehweg, *Topik und Jurisprudenz*, 2d ed. (Munich, 1963); Hans Erich Troje, *Graeca Leguntur: Die Aneignung des byzantinischen Rechts und die Entstehung eines humanistischen Corpus iuris civilis in der Jurisprudenz des 16. Jahrhunderts* (Cologne/Vienna, 1971).

⁸⁹ On this traditional method of teaching, the *mos italicus*, see generally Donald R. Kelley, *The Foundations of Modern Historical Scholarship: Language, Law, and History in the French Renaissance* (New York, 1970).

⁹⁰ Quoted by Stintzing, *Geschichte*, 323. See further Dietze, *Oldendorp*, 59; Köhler, *Luther*, 127.

philosophers, medieval civilians and canonists, and the new Lutheran theologians and jurists of his day. But it was the Bible, and conscientious meditation on the same, that provided the lynch pin for his theory of the sources of law and of the relationship between law and equity.

Sources of Law. Oldendorp's account of the sources of law effectively merged the overlapping hierarchies elaborated by the civil lawyers and canon lawyers of his day. Civil lawyers, building on various texts in Justinians' *Corpus Iuris Civilis*, generally distinguished among: (1) natural law (*ius naturale*), the set of immutable principles of reason and conscience, which are supreme in authority and divinity; (2) the law of nations (*ius gentium*), a relatively stable set of principles and customs common to several communities and often the basis for treaties and other diplomatic conventions; and (3) civil law (*ius civile*), both the statutes and the customs of political communities, whether imperial, royal, territorial, urban, manorial, feudal, or more local in character. Canon lawyers sometimes repeated this Roman law taxonomy. But, building especially on Gratian's *Decretum* (c. 1140), they also developed their own hierarchy of: (1) divine law (*ius divinum*), principally the norms of the Bible as interpreted by the Church and the Christian tradition; (2) natural law, the set of norms known through reason or intuition, and generally common among all peoples; and (3) civil law, the customs and statutes of local political communities.⁹¹ Some canonists and philosophers superimposed on this trilogy a category of eternal law (*lex aeterna*), understood as the created order and wisdom of God himself, which stands prior to and above the biblical revelation of divine law. Other canonists interposed a category of canon law (*ius canonicum*), understood as a separate source of positive law that elaborates and illustrates the norms of divine and natural law and that corrects and guides the provisions of civil law. In this fuller iteration of the sources of law, the late medieval canonists thus distinguished: (1) eternal law; (2) divine law; (3) natural law; (4) canon law; and (5) civil law.

Oldendorp was conversant with these traditional accounts of the sources of law, and he rehearsed them sympathetically and repeatedly in his student textbooks and handbooks. In formulating his own hierarchy, however, Oldendorp focused on three sources or states of law: divine law, natural law, and civil law, each of which he defined in his own way.

Divine Law. The highest source and state of law was divine law (*ius divina*), which for Oldendorp consisted exclusively of the laws of the Bible (*leges Bibliae*). Biblical laws were of three types, Oldendorp argued, following theological conventions. The *moral* laws of the Bible, particularly the Ten Commandments, were universal norms binding on all authorities and all subjects at all times. The *juridical* laws of the Bible (such as the Old Testament laws of tithing and sanctuary or the New Testament stories of ordering life in the apostolic church) were probative of the meaning of the moral law, and useful for the governance of contemporary churches and states, but they were not *per se* binding. The *ceremonial* laws of the Torah (Old Testament laws respecting

⁹¹ See, e.g., *Decretum*, Dist. I, with glosses, in Gratian: *The Treatise on Laws with the Ordinary Gloss*, trans. Augustine Thompson and James Gordley (Washington, DC, 1993).

sacrifice, diet, ritual, temple life) were preempted by the new teachings of Christ and the apostles, and were no longer binding on anyone.⁹²

Contrary to some traditional teachings, Oldendorp had little place in his system for an eternal law of the created order that stood prior to and superior to the divine law revealed in the Bible. To be sure, said Oldendorp, the creation order came prior to the Bible, and was indeed a perfect expression of God's being, will, and law in Paradise.⁹³ But though prior in time and perfect in genesis, the eternal law was no longer superior in authority as a source of law for life in the earthly kingdom. For with the fall into sin, the norms of the created order can be read "only through a glass darkly," leading to inevitable distortion and deception. Thus as a source of law for this earthly life, the eternal law of nature has effectively collapsed into the natural law of human nature. It is a useful, but ultimately a fallible, guide to proper human living.⁹⁴ Citing the reformers' doctrine of *sola Scriptura*, Oldendorp wrote: "What we know of God, his will, his law, his wisdom, his purposes, his being is most fully revealed in the Bible."⁹⁵ The laws of the Bible, particularly its moral commandments and counsels, are the clearest and most authoritative source of law in this world.

Oldendorp believed that the magistrate is the "vicar of God" directly called to interpret, apply, and enforce these biblical laws in the earthly kingdom.⁹⁶ Oldendorp considered the moral laws of the Bible to be the divine legal principles needed to guide various systems of positive law. Building on but revising Melanchthon's formulations, he traced public or constitutional laws for governing the earthly kingdom to the principles of the Fourth Commandment ("Honor thy father and thy mother," the magistrate being the "father of the community"). He traced the ecclesiastical laws of the visible church to the first Three Commandments on idolatry, false swearing, and Sabbath Day observance. He traced criminal laws to the principles of the Fifth, Sixth, and Seventh Commandments ("Thou shalt not kill, steal, or commit adultery"), the private law of property and contracts to the principles of the Seventh Commandment ("Thou shalt not steal"), the laws of procedure and evidence to the principles of the Eighth Commandment ("Thou shalt not bear false witness"), and family law to the principles of the Fourth and Sixth Commandments as well as the Tenth Commandment ("Thou shalt not covet ... thy neighbor's wife"). He traced the laws of taxation and social welfare to the general summary of the law ("Thou shalt love thy neighbor as thyself").⁹⁷

Natural Law. Though superior in clarity and authority, the divine law did not eclipse the natural law (*ius naturale*), Oldendorp argued. Natural law for Oldendorp was

⁹² Oldendorp, *Divinae Tabulae*, 17-18.

⁹³ See id., *Isagoge*, 6, and quotes from other sources in Macke, *Oldendorp*, 30-31.

⁹⁴ Oldendorp, *Isagoge*, 9-10.

⁹⁵ Johann Oldendorp, *De copia verborum et rerum in iure civile* (Cologne, 1542), 233.

⁹⁶ See, e.g., Oldendorp, *Collatio*, 46; id., *Lexicon Juris* (pagination missing) (s.v. "magistratus"); id., *Isagoge*, 19; id., *De copia verborum*, 260.

⁹⁷ See esp. Oldendorp, *Divinae Tabulae*, 15-25; id., *Billig und Recht*, 60-62; id., *De copia verborum*, 170ff., 253ff., with analysis in Dietze, *Oldendorp*, 114-121; Krause, *Naturrechtslerer*, 118-22; Macke, *Oldendorp*, 39-46. Oldendorp urged citizens "to enhance the common good (*gemeyne nütlichkeit*) as the highest ideal. For by serving the common good, you not only help one person but many." Oldendorp, *Billig und Recht*, 60.

the law of the human heart or conscience. Oldendorp called this variously the “law inside people” (*lex in hominibus*), the “law inscribed” on the heart (*ius insculpta*), and the “instruction of conscience” (*instructio conscientiae*).⁹⁸ Following Melanchthon, Oldendorp believed that “God has implanted in us natural elements (*notitiae*) of knowledge by which we distinguish equity from iniquity.”⁹⁹ “The source of [these] natural norms ... is the heart and conscience of man, on which God has inscribed them.”¹⁰⁰ Even independent of their knowledge of the divine law of the Bible, all persons are thus by nature inclined toward the general moral principles taught by the Bible—love of God, neighbor, and self, love for one’s spouse, child, and kin, love of peace, order, and stability, a predisposition toward the golden rule, an inclination to speak the truth, to honor one’s promises, to respect another’s person, property, and reputation.¹⁰¹ Many of these natural norms were thus held in common among all peoples of the world, regardless of their direct access to biblical law. They formed a common law, or law of nations (*ius gentium*).

The teachings of natural law and biblical law are ultimately the same, Oldendorp believed. But “the natural elements of knowledge in persons have been obscured because of original sin.” Thus “a merciful God has restored and inscribed 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.”¹⁰² Neither the biblical law nor the natural law, however, provide a comprehensive code of human conduct that covers every contingency of human action and interaction. Accordingly, the moral laws of the Bible had given rise to various forms of juridical and ceremonial laws that were specific to the biblical time and place of the Hebrew people. Likewise, the moral principles of natural law must give rise to multiple forms of statutory and customary laws that are specific to the current time and place of the German people. In biblical times, God often directly guided the elaboration and application of moral law—through his personal interventions in Paradise and on Mt. Sinai and through the later teachings of Moses and the prophets, of Christ and the apostles. In our times, God’s guidance in the application and elaboration of moral principles comes less personally but more pervasively—through the perennial teachings of every human conscience on which God has inscribed his natural law.¹⁰³

Conscience, for Oldendorp, was a form of reason. It was not just ordinary human reason or civil reason (*ratio civilis*). It was a God-given reason or natural reason (*ratio naturalis*). Thus the natural law implanted by God in human 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 [its teachings]

⁹⁸ Oldendorp, *Isagoge*, 15; id., *Actionum iuris civilis*, 11; id., *De copia verborum*, 259.

⁹⁹ Id., *Isagoge*, 6.

¹⁰⁰ Ibid., 15.

¹⁰¹ Ibid., 15, 17; Oldendorp, *Billig und Recht*, 58-65; 9-10.

¹⁰² Oldendorp, *Disputatio*, 15. See also Oldendorp, *Isagoge*, 9-10: “the nature of man has been corrupted through the fall of Adam; so that just sparks (*notitiae*) remain, by which nevertheless it is possible to recognize the magnificent bounty of divine and natural law.”

¹⁰³ Ibid., 3, 11.

diligently.”¹⁰⁴ When consulted and followed in its purest form, “conscience is an infallible guide.”¹⁰⁵ To be sure, Oldendorp acknowledged, no sinful person is fully capable of an unbiased consultation of his or her conscience. Hence there is a perennial need for the Bible, for prayer, for the intervention of the Holy Spirit to come to better understanding of God’s law. But, even independent of invocation of these spiritual aids, the God-given conscience provides ample instruction on the meaning and measure of the natural law.¹⁰⁶ In effect, conscience was, for Oldendorp, a form of practical reason.

Civil Law. Civil law (*ius civile*) consists simply of all the laws of a commonwealth or republic (*leges rei publicae*). “In its ultimate sense,” Oldendorp wrote capaciously, “the category of law” consists of all legal norms that command, prohibit, permit, or punish human conduct.¹⁰⁷ Such legal norms may be written or unwritten, general or particular, universal or local, positive or customary, public or private, criminal or civil, legislative or judicial.¹⁰⁸ All these, in their own way, are legitimate forms and norms of civil law, Oldendorp believed. A dialectical presentation of these laws—a taxonomy that presses them into ever more refined sets of binary opposites—is the best way for students and practitioners to come to terms with the category of law. In his legal textbooks, handbooks, and dictionary, Oldendorp spelled out these contrasts in great detail, grounded them in the writings of medieval canonists and civilians, and demonstrated their utility for legal advocacy and decision-making. Such dialectical legal writing was of a piece with that of many other Protestant jurists in the sixteenth century—Konrad Lagus and Christoph Hegendorf of Wittenberg, Francis Duaren and Francis Hotman of France, Nicolaus Everardus and Johannes Althusius of the Netherlands, and many others who worked under the direct inspiration of Protestant theology and theologians.¹⁰⁹

All such civil laws, Oldendorp insisted, depend for their authority and legitimacy on their conformity with natural law and ultimately with divine law. “A civil law that departs *in toto*” from these higher laws “is not binding,” Oldendorp insisted.¹¹⁰ He listed a number of civil laws of his day that he considered to be *per se* illegitimate. He condemned, as directly contrary to divine law, human laws permitting the sale of church benefices, allowing for divorce and remarriage, and tolerating usurious rates of interest on loans. He condemned, as contrary to natural law, human laws permitting bad faith possession of property, allowing disinheritance of family members, causing undue delay in administering justice, rendering judgment in a case in which one has an interest, and instituting slavery and other strict forms of servitude.¹¹¹ More generally, he argued that natural law requires an owner to use private property for social ends and not, for

¹⁰⁴ Oldendorp, *Billig und Recht*, 57.

¹⁰⁵ Quoted by Dietze, *Oldendorp*, 81.

¹⁰⁶ Oldendorp, *Lexicon Juris*, 101 (s.v. “conscientia”).

¹⁰⁷ *Id.*, *Disputatio*, 72ff.

¹⁰⁸ *Id.*, *Billig und Recht*, 57-58; *id.*, *Lexicon Juris* (Frankfurt am Main, 1553) (s.v. “ius”).

¹⁰⁹ Stintzing, *Geschichte*, 114-153, 251-265, 282-310; Guido Kisch, *Erasmus und die Jurisprudenz seiner Zeit: Studien zum humanistischen Rechtsdenken* (Basel, 1960); Berman, *Law and Revolution II*, 100-30.

¹¹⁰ Oldendorp, *Isagoge*, 13.

¹¹¹ *Ibid.*, 12-13. See further quotations in Macke, *Oldendorp*, 49-50.

example, to exclude others from use of it in instances where such use does the owner no harm.¹¹²

It was the magistrate's duty to institute "good policy" through the promulgation and enforcement of positive civil laws.¹¹³ Much of what Oldendorp considered to be "good policy" in a Christian commonwealth was rather conventional. But he described this in the Lutheran language of the "civil, theological, and educational uses" of law which enable us to "peacefully pass through this shadowy life and be led to Christ and to eternal life."¹¹⁴ With Melanchthon, he emphasized the "educational use" of the law, "our teacher in the path to Christ" (*pädagogus noster ad Christum*), and the corresponding paternal and pedagogical role of the magistrate, the "father of the community."¹¹⁵ Moreover, specific to his Lutheran sympathies, Oldendorp insisted that the magistrate must support the true faith by seeing to it (among other things) that there are enough well-qualified and well-paid preachers, so that they may "combat unbelief among the people."¹¹⁶ The magistrate must also prohibit and punish acts of greed, idleness, sumptuousness of dress, and other immoral conduct that had traditionally been within the jurisdiction of the Church.¹¹⁷ And the magistrate must institute and support good public schools and public charities—policies that Oldendorp had himself pursued in Rostock and Lübeck, and which other reformers pressed relentlessly.¹¹⁸

The magistrate must also seek to maintain peace with other civil polities. Despite the divisions born of the Reformation, Oldendorp argued, the people of all republics still form the body of Christ on earth (*corpus Christianum*) and should live "next to each other, not against each other."¹¹⁹ 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. If that proves impossible, a polity should leave three days before defending itself in order to give the imminent attackers a chance to change their minds—a rather startling, some might say suicidal, application of the biblical principle of "turning the other cheek." Moreover, defense should be limited to that which is necessary, because its only purpose is to restore peace.¹²⁰

It was also the magistrate's duty to abide by the law—not only the divine and natural laws that empowered his office, but also the civil laws that he and his predecessors promulgated. "It is an old question," Oldendorp wrote, "whether the

¹¹² Oldendorp, *Billig und Recht*, 60-62.

¹¹³ The most comprehensive formulation of the nature and function of the state and politics appears in id., *Ratmannsiegel*. See analysis of this and other writings in Dietze, *Oldendorp*, 90-111; Macke, *Oldendorp*, 73-105. Oldendorp used various terms to describe the state (*der Staat*): the secular regime (*weltliches Regiment*), the political regime (*politien Regiment*), the republic (*res publica*), the civil order (*ordo civilis*), the magistracy (*Oberkeit*), and the corporation of citizens (*universitas civium*). See detailed sources in Dietze, *Oldendorp*, 94ff.

¹¹⁴ Oldendorp, *Lexicon Juris*, 249.

¹¹⁵ *Ibid.*

¹¹⁶ *Id.*, *Ratmannsiegel*, 90-92.

¹¹⁷ *Ibid.*, 92-94.

¹¹⁸ *Ibid.*, 94-97.

¹¹⁹ *Id.*, *Lexicon Juris*, 407.

¹²⁰ *Id.*, *Ratmannsiegel*, 92-94.

magistrates are superior to the law or whether the law binds the magistrates.” His answer was that “the magistrates are ministers, that is, servants of the laws.”¹²¹ “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”--whether divine, natural, or civil.¹²²

Theory of Equity. There remained, for Oldendorp, a crucial question that neither Luther nor Melanchthon 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.”¹²³

Luther had spoken cryptically but provocatively to the issue. “The strictest law [can do] the greatest wrong,” he wrote, citing Cicero. Thus “equity is necessary” in the application of rules of all sorts, whether in the state or the church, in the household or the classroom.¹²⁴ Any ruler, whatever his office, “who does not know how to dissemble does not know how to rule,” Luther said pithily. “This is what is meant by [doing] equity (*epieikeia*).”¹²⁵ To apply a rule equitably, Luther insisted “is not rashly to relax laws and discipline.” It is rather to balance firmness and fairness and to recognize circumstances that might mitigate against literal application of the rule or that might raise questions that the rule does not and perhaps should not reach. In such instances, “equity will weigh for or against” strict application of the rule, and a wise ruler will know the juster course. “But the weighing must be of such kind that the law is not undermined, for no undermining of natural law and divine law must be allowed.”¹²⁶

Melanchthon had addressed the problem at greater length, but had largely followed the teachings of Aristotle¹²⁷ and the Roman law, and the ample medieval glosses and elaborations on the same.¹²⁸ Rulers were required, he wrote, to “tailor” the general principles of natural law “to fit the circumstances.”¹²⁹ If a “generally just law

¹²¹ Id., *Lexicon Iuris*, 272; see also id., *Divinae Tabulae*, 19; id., *Ratmannsiegel*, 73-77.

¹²² Quoted by Macke, *Oldendorp*, 79-80.

¹²³ Immanuel Kant, *Critique of Pure Reason*, A/32-B/71-A/34-B/74.

¹²⁴ WA TR 3, No. 4178, LW 54:325, citing Cicero, *De officiis*, I.10.

¹²⁵ WA TR 1, No. 315, LW 54:43-44. See further WA 14:667ff. on judges.

¹²⁶ WA TR 3, No. 4178, LW 54:325. See also Luther’s discussion of the equitable application of the rules of war and soldiers in LW 46:100: “[I]t is impossible to establish hard and fast rules and laws in this matter. There are so many cases and so many exceptions to any rule that is very difficult or even impossible to decide everything accurately and equitably. This is true of all laws; they can never be formulated so certainly and so justly that cases do not arise which deserve to be made exceptions. If we do not make exceptions and strictly follow the law we do the greatest injustice of all.”

¹²⁷ See Aristotle, *Ethics*, bk. 5, ch. 1.10; id., *The Art of Rhetoric*, bk. 1, ch. 12:13-19.

¹²⁸ See esp. CR 11:218-223, 551-555, 669-675; CR 16:66-72. See further sources and discussion in Christoph Strohm, “Die Voraussetzungen reformatorischer Naturrechtslehre in der humanistischen Jurisprudenz,” *Zeitschrift der Savigny-Stiftung (Kanonische Abteilung)* 86 (2000): 398-413.

¹²⁹ CR 16:72-81; CR 21:1090.

works injustice in a particular case,” it is the responsibility of a judge to apply the law as “equitably and benevolently,” as possible, so as to mitigate or to remove the injustice.¹³⁰ But a “generally just law” must be maintained even if in a particular case it results in injustice, for “pious persons may not be left in uncertainty” about the requirements of the law.¹³¹ Even the highest judges, Melanchthon insisted, “must decide cases according to the law that is written. Otherwise what use would it be to enact laws, if judges were allowed to invent equities out of their heads just like spiders spin webs.”¹³²

Oldendorp took a very different approach by insisting that every application of a legal rule required a judge to apply equity (*Billigkeit, aequitas, epieikeia*). Luther and Melanchthon, following tradition, had contrasted equity with strict law. Equity, they believed, corrected defects in a strict rule or its application. But equity was for the exceptional case. To use it indiscriminately, they believed, would erode the rule of law--of both natural law and civil law. Oldendorp contrasted equity with all law, not just strict law. Every law, he believed, was a strict law, because every law by its nature is general and abstract.¹³³ No law-maker can anticipate perfectly the circumstances in which the rule will be applied. Thus every application of every rule has to be governed by equity. For Oldendorp, therefore, equity is to be used in every case. And not to use it would erode the rule of law. In Oldendorp’s formulation, law and equity, *Recht und Billigkeit, ius et aequitas* stood opposite each other and completed each other, becoming a single thing.¹³⁴

Equity, for Oldendorp, was the capacity or faculty of a judge to make a reasoned and conscientious judgment in each particular case. Equity was an exercise of both civil reason and natural reason, of both the mind and the soul of the judge. On the one hand, equity required careful examination of the concrete circumstances of the particular case, enabling the judge properly to apply the general rule to those particular circumstances. It included earnest study, analysis, and comparison of comparable cases and legal authorities, as any good jurist and judge is trained to do. This was an exercise of civil reason, which was essential to every legal judgment. On the other hand, equity also required what Oldendorp called “a judgment of the soul” (*iudicium animi*).¹³⁵ It required consultation and application of the natural law of conscience, the God-given law inside people.¹³⁶ This was effectively an exercise of natural reason, which was essential to making every judgment of law (*Rechtsentscheidung*) a judgment of conscience (*Gewissensentscheidung*) as well.

¹³⁰ CR 16:66-72, 245-247. See also MW 2/1: 159; LC (1555), 332-33; CR 11:218-23, 262ff.

¹³¹ CR 22:612.

¹³² CR 11:671-672.

¹³³ See Oldendorp, *Disputatio*, 72: “[T]he highest law is sometimes simply Law, 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.”

¹³⁴ Oldendorp writes: “Natural law and equity are one thing.” Id., *Billig und Recht*, 59.

¹³⁵ Oldendorp, *Lexicon Juris*, 28-29 (s.v. “aequitas”), 238-240 (s.v. “iudicium”); id., *Topicorum Legalium*, 194-196. See also Oldendorp, *Disputatio*, 13: “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.”

¹³⁶ See esp. Macke, *Oldendorp*, 151ff.

To retrieve equity from one's conscience and to ensure that one's judgment was an exercise of both reason and conscience, Oldendorp argued, required a combination of refined professional craftsmanship and simple Christian piety.¹³⁷ "A judgment cannot be made in conscience," Oldendorp wrote, "without some formula of law which indicates in the heart of man that what he does is just or unjust. Therefore, law, that is, the law of Holy Scripture, is in the person."¹³⁸ In order to discern what is equitable, the individual jurist, having exercised his or her legally-trained civil reason to the maximum degree, must then study the Bible, pray to God, and search his or her conscience for instruction. This pious method was to be used not only for the hard case—whether to execute a felon convicted for a capital crime on slender evidence or to separate a young child dependent on its loving mother in a case of disputed custody. This method was to be used in every legal case, since every case required the equitable application of a rule. In some cases, this equitable method would yield a strict application of the rule. In other cases, it would compel the judge to suspend a legal rule, to interpret it favorably towards one of the parties, to give special solicitude to a civil litigant or criminal defendant who was poor, orphaned, widowed, or abused, or to reform and improve the rule and thus to create a basis for its future equitable application in a comparable case. When applied in the courtroom, Oldendorp's theory of equity was a unique form of Christian practical reasoning, on the one hand, and pious judicial activism, on the other.

Oldendorp's theory of equity built squarely on Luther's belief in the Christian conscience as the ultimate source of moral decisions. Luther had justified his own defiance of Emperor Charles V at the Diet of Worms in 1521 as acts "for God and in my conscience." As he reputedly put it: "I am bound by the scriptures, ... 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."¹³⁹ In his later writings, Luther had also urged every magistrate not only to "have the law as firmly in hand as the sword," but also, Solomon-like, to "cling solely to God, and to be at him constantly, praying for a right understanding [of the law] beyond that of all the law books and teachers, to rule his subjects." With such an attitude, "God will certainly accord him the ability to implement all laws, counsels, and actions in a proper and godly way."¹⁴⁰

Oldendorp developed Luther's emphasis on a biblically- and prayerfully-informed conscience into a constituent element of his theory of law and equity. Every legal decision, for Oldendorp, was ultimately a moral decision. Every such decision, therefore, required consultation of conscience, and conscientious invocation of Scripture, prayer, and reflection. While such consultation of conscience was a general duty for every law-abiding citizen, it was a special duty for the judge in the interpretation and application of legal rules. Just as Luther, a learned theologian of the church, could ultimately break a positive law of the church that violated conscience, so the judge, a

¹³⁷ See Oldendorp, *Disputatio*, 14; id., *Billig und Recht*, 66-68.

¹³⁸ Oldendorp, *Disputatio*, 145-146. See discussion in Dietze, *Oldendorp*, 78-89, 126-131; Macke, *Oldendorp*, 67-72.

¹³⁹ WA 7:838.

¹⁴⁰ WA 11:272-273.

learned counselor of the state, could ultimately waive a positive law of the state that trespassed these same transcendent norms.

Oldendorp also built on the traditional teaching that the Church's canon law was the "the mother of exceptions," "the epitome of the law of love," and "the mother of justice." These equitable qualities had traditionally rendered the canon laws applied in the Church courts an attractive alternative to the civil laws applied in secular courts.¹⁴¹ Oldendorp's theory sought to render these equitable qualities endemic to all laws and to all courts in a Christian commonwealth. Law and equity, he believed, were fundamentally conjoined, whatever the source of the law, and whatever the forum for its implementation. It was the duty of the Christian legislator to promulgate civil laws consistent with the moral teachings of divine law and natural law. It was the duty of the Christian judge to interpret these laws with the equitable methods of both civil and natural reason.

Traditionally, equity was considered to be a unique quality of the canon law and a unique ability of the ecclesiastical judge. Thus in medieval Germany cases that required formal equity were removed to the church courts for resolution. Likewise in medieval England, equity was administered in the court of the Chancellor, staffed by a ranking ecclesiastic trained in the canon law. Oldendorp's theory effectively merged law and equity. All law required equity to be just, and all equity required law to be applied justly. Law and equity belonged together and completed each other. It was the general responsibility of the legislator to "build equity into the law," in passing new laws. But it was the special calling of every judge to do equity in every case. Oldendorp's theory had direct implications for legal reform in Lutheran Germany. It helped to support the merger of church courts and state courts; separate courts of equity were no longer required. It helped to support the convergence of canon law and civil law in Evangelical Germany. And it helped to support the growing professionalization of the German judiciary in the sixteenth century, and the requirement that judges be educated both in law and in theology, in civil law and in canon law.¹⁴²

Summary and Conclusions

The foregoing pages have sought to take the measure of the emerging theories of natural law of Philip Melancthon, the great moralist of the University of Wittenberg, and Johann Oldendorp, a distinguished and prolific jurist, at the other early capital of Lutheran learning, the University of Marburg. There were dozens of other Lutheran moralists and jurists in the first half of the sixteenth century who wrote on law, politics, and society. Sometimes their views echoed those of Melancthon or Oldendorp. Sometimes, they hewed more closely to the traditional teachings of medieval canonists and civilians. The Lutheran Reformation did not produce a single or uniform jurisprudence. But it did produce a series of direct and dramatic legal applications of several cardinal teachings of Lutheran theology.

¹⁴¹ Oldendorp, *Collatio*, 32-33.

¹⁴² See generally Karl H. Burmeister, *Das Studium der Rechte im Zeitalter des Humanismus im deutschen Rechtsbereich* (Wiesbaden, 1974).

Melanchthon and Oldendorp both began their theories with a basic understanding of Luther's two-kingdoms framework. More than Luther, however, they emphasized that the Bible was an essential source of earthly law. Luther was all for using the Bible to guide life in the earthly kingdom. But he touched only intermittently and ambivalently on the Gospel's precise legal role within the state. He tended to use the Bible as a convenient trope and trump in arguing for certain legal reforms, without spelling out a systematic theological jurisprudence. Melanchthon and Oldendorp viewed the Bible as the highest source of law for life in the earthly kingdom. For them, it was the fullest statement of the divine law. It contained the best summary of the natural law. It provided the surest guide for positive law. With human reason distorted by sin, the jurists argued, faith in the Gospel was essential to rational apprehension and application of law in the earthly kingdom. The Gospel was the best fuel to bring to light and life what the jurists called the "inborn sparks" of natural knowledge of good and evil that God has allowed us to retain in our reason and conscience despite the fall into sin.

With Luther, Melanchthon and Oldendorp laid special emphasis on the Ten Commandments. The First Table of the Ten Commandments, they believed, laid out the cardinal principles of spiritual law and morality that governed the relationship between persons and God. The Second Table laid out the cardinal principles of civil law and morality that governed the basic relationships among persons. This division of principles was useful not only for preaching, catechesis, and theological ethics, as Luther and the theologians had argued. For the jurists, the Ten Commandments also proved useful to systematizing the positive law of the earthly kingdom. The First Table undergirded the positive laws of religious establishment and ecclesiastical order. The Second Table undergirded the positive laws governing crime, property, family, civil procedure, evidence, and more.

Both Melanchthon and Oldendorp emphasized the three uses of law in the governance of the earthly kingdom. Luther had developed the uses of the law doctrine as part of his theology of salvation, and part of his answer to the antinomians. Legal works played no role in the drama of salvation. Yet, the law itself was useful in the earthly kingdom to restrain sin and to drive sinners to the repentance that was necessary for faith in Christ and thus entrance into the heavenly kingdom. Melanchthon and Oldendorp concurred in this understanding of the civil use and the theological use of law. But, they also emphasized the educational use of the law in the earthly kingdom. When properly understood and applied, the law not only coerced sinners, it also educated saints. It yielded not only a basic civil morality, but also a higher spiritual morality. This was a further argument that the jurists used to insist on positive laws that established religious doctrine, liturgy, and morality in each polity. The positive law was to teach not only the civil morality of the Second Table of the Decalogue, but also the spiritual morality of the First Table. It was to teach citizens not only the letter of the moral law, but also its spirit. The law thereby was useful in defining and enforcing not only a "morality of duty" but also a "morality of aspiration."¹⁴³

¹⁴³ These terms are from Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT, 1964).

Melanchthon applied the three uses of the law to differentiate and define the three purposes of criminal law and punishment. In his view, the civil use of the law corresponded to criminal deterrence. The theological use of the law corresponded to criminal retribution. The educational use of the law corresponded to criminal rehabilitation. This argument had obvious implications for the exercise of ecclesiastical and parental discipline as well. Indeed, political, ecclesiastical, and parental authority alike had to be exercised with an eye to balancing the civil, theological, and educational uses of the law. More specifically, the prince, the preacher, and the *paterfamilias* had to strive to balance the concurrent concerns for deterrence, retribution, and reformation of their subjects.

Oldendorp applied this uses doctrine in part to develop his theory of Christian equity. The task of the Christian judge was not only to apply the letter of the law using the tools of civil legal reasoning. It was also to apply the spirit of the law, using the tools of prayer, conscientious meditation, and reading of Scripture. Civil legal reasoning would only yield a civil understanding and application of positive law. Spiritual legal reasoning would yield a higher spiritual understanding and application. Oldendorp did not put his theory of Christian equity in quite these terms. But his theory depended upon a distinction that was central to the uses doctrine, that between a lower civil use and a higher spiritual use of the law.

In a 1531 oration at the University of Wittenberg, Philip Melanchthon declared: “It is impossible to uphold civil discipline without religion, and jurisprudence is shaped most by religious doctrine.” Indeed, only when “religion adds its voice to civil precepts,” does law have the authority to govern and the power to reform.¹⁴⁴ These early sentiments were the watchwords of sixteenth-century Lutheran jurisprudence. For the early Evangelical jurists, law and Gospel, justice and mercy, rule and equity, discipline and love, order and faith, structure and spirit all properly belonged in the governance of the earthly kingdom. To separate one dimension from the other was to serve the Devil and to get a foretaste of hell. To hold them in tension was to serve the Divine and to see a glimmer of heaven.

¹⁴⁴ CR 11:210.