

96 LPT

Draft

Published in *Villanova Law Review* 48 (2003): 727-762

**Twenty-Sixth Annual
Donald A. Gianella Memorial Lecture
Villanova University**

**Between Sanctity and Depravity:
A Protestant Contribution to the Theory of Human Dignity**

John Witte, Jr.*

Abstract

Martin Luther (1483-1546) was one of the great revolutionaries in the Western legal tradition. The Protestant Reformation that he inaugurated produced fundamental changes in legal theory, political organization, church-state relations, marriage, education, and social welfare. These changes were inscribed on the legal and confessional systems of that period. They have had an enduring effect on modern public, private, and criminal law, and on modern ideals of liberty, equality, and dignity. This essay surveys these sweeping changes that Luther's Reformation wrought, and then analyzes more closely the sources of inspiration and integration of these reforms in Luther's famous theory of the two kingdoms.

Keywords: Law and Religion, Legal History, Theology, Protestant Reformation; Martin Luther; Human Dignity; Human Rights; Religious Freedom; Decalogue

I. Human Dignity as "Ur-Principle"

"A sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man," Pope Paul VI declared in his preface to *Dignitatis Humanae* (1965). "And the demand is increasingly made that men should act on their own judgment, enjoying and making use of a responsible freedom, not driven by coercion but motivated by a sense of duty."¹

* Jonas Robitscher Professor of Law, Director of Law and Religion Program, Director of Center for the Interdisciplinary Study of Religion, Emory University. Portions of this text are drawn from my *LAW AND PROTESTANTISM: THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION* (2002).

¹ Reprinted in *THE DOCUMENTS OF VATICAN II* 675 (Walter M. Abbott and J. Gallagher eds. 1966).

This was an historic statement about human dignity, signaling a momentous swing in the pendulum of world opinion. Only two decades before, the world had stared in horror into Hitler's death camps and Stalin's gulags where all sense of humanity and dignity had been brutally sacrificed. In response, the world had seized anew on the ancient concept of human dignity, claiming this as the "ur-principle" of a new world order.² The Universal Declaration of Human Rights of 1948 opened its preamble with what would become classic words: "recognition in the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world."³

By the mid-1960s, church and state alike had translated this general principle of human dignity into concrete human rights precepts. In *Dignitatis Humanae* and several other documents produced during and after the Second Vatican Council (1962-1965), the Roman Catholic Church took some of the first decisive steps. Every person, the Church now taught is created by God with "dignity, intelligence and free will ... and has rights flowing directly and simultaneously from his very nature."⁴ Such rights include the right to life and adequate standards of living, to moral and cultural values, to religious activities, to assembly and association, to marriage and family life, and to various social, political, and economic benefits and opportunities. The Church emphasized the religious rights of conscience, worship, assembly, and education, calling them the "first rights" of any civic order. The Church also stressed the need to balance individual and associational rights, particularly those involving the church, family, and school. Governments everywhere were encouraged to create conditions conducive to the realization and protection of these inviolable rights and encouraged to root out discrimination, whether social or cultural, whether based on sex, race, color, social distinction, language, or religion.⁵ Within a decade, various Ecumenical groups, some Protestants, and even a few Orthodox Christian groups crafted comparable comprehensive declarations on human rights--albeit with varying emphases on the concept of human dignity.⁶

Not only the world's churches, but also the United Nations and several nation-states issued a number of landmark documents on human dignity and human rights in the

² The term "ur-principle" is from LOUIS HENKIN, ET AL., *HUMAN RIGHTS* 80 (1999).

³ Reprinted in *BASIC DOCUMENTS ON HUMAN RIGHTS* 21 (3d ed., Ian Brownlie ed. 1992).

⁴ *Pacem in Terris* (1963), paragraph 9, reprinted in *THE GOSPEL OF PEACE AND JUSTICE: CATHOLIC SOCIAL TEACHINGS SINCE POPE JOHN 201, 203* (Joseph Gremillion ed. 1976).

⁵ *Ibid.* and *Dignitatis Humanae* (1965), in *DOCUMENTS OF VATICAN II*, 675. See further discussion in DAVID HOLLENBACH, *CLAIMS IN CONFLICT: RETRIEVING AND RENEWING THE CATHOLIC HUMAN RIGHTS TRADITION* (1979); *A CENTURY OF CATHOLIC THOUGHT: ESSAYS ON RERUM NOVARUM AND NINE OTHER KEY DOCUMENTS* (George Weigel and Robert Royal eds. 1991).

⁶ See, e.g., *A CHRISTIAN DECLARATION ON HUMAN RIGHTS* (Allen O. Miller ed. 1977) (a Calvinist statement, with full endorsement of the concept of human dignity); *LUTHERAN WORLD FEDERATION, THEOLOGICAL PERSPECTIVES ON HUMAN RIGHTS* (1977) (a Lutheran document that largely eschews the concept of human dignity); *WORLD COUNCIL OF CHURCHES, HUMAN RIGHTS AND CHRISTIAN RESPONSIBILITY*, 3 vols. (1975) (ecumenical statements with only passing references to human dignity). See detailed analysis in WOLFGANG HUBER, HEINZ EDUARD TOEDT, *MENSCHENRECHTE: PERSPEKTIVEN EINER MENSCHENLICHEN WELT* (1977); WOLFGANG VÖGELE, *MENSCHENWÜRDE ZWISCHEN RECHT UND THEOLOGIE: BEGRÜNDUNGEN VON MENSCHENRECHTE IN DER PERSPEKTIVE ÖFFENTLICHER THEOLOGIE* (2001).

1960s. Foremost among these were the two great international covenants promulgated by the United Nations in 1966. Both these covenants took as their starting point the "inherent dignity" and "the equal and inalienable rights of all members of the human family," and the belief that all such "rights derive from the inherent dignity of the human person."⁷ The International Covenant on Economic, Social, and Cultural Rights (1966) posed as essential to human dignity the rights to self-determination, subsistence, work, welfare, security, education, and various other forms of participation in cultural life. The International Covenant on Civil and Political Rights (1966) set out a long catalogue of rights to life and to security of person and property, freedom from slavery and cruelty, basic civil and criminal procedural protections, rights to travel and pilgrimage, freedoms of religion, expression, and assembly, rights to marriage and family life, and freedom from discrimination on grounds of race, color, sex, language, and national origin. Other international instruments issued in the later 1960s and 1970s took particular aim at racial, religious, and gender discrimination in education, employment, social welfare programs, and other forms and forums of public life -- viewing such discrimination as a fundamental betrayal of the "dignity and equality inherent in all human beings."⁸

Parallel declarations on human dignity and human rights were set forth at American law. The most dramatic was the great Civil Rights Act (1964), with its pathbreaking prohibitions on discrimination on the grounds of race, religion, and gender.⁹ Also important were the Warren Court pronouncements giving fresh new meaning to the Bill of Rights and to the Fourteenth Amendment protections of due process and equal protection of law.

The 1960s and early 1970s were a golden age of international human rights declarations, so they were a golden age in Uthe American struggle for civil and constitutonal had ese international instruments had parallels in the

So matters stood a generation ago. Today, the concept of human dignity has become ubiquitous to the point of cliché -- a moral trump frayed by heavy use, a general principle harried by constant invocation. In the past thirty years, there have been more than 1,500 books and 15,000 scholarly articles on dignity published in English alone. We now read regularly of the dignity of animals, plants, and nature; the dignity of luxury, pleasure, and leisure; the dignity of ethnic, cultural, and linguistic purity; the dignity of aging, dying, and death. At the same time, the corpus of human rights has become swollen to the point of eruption -- with many recent rights claims no longer anchored in universal norms of human dignity but aired as special aspirations of an individual or a group. We now hear regularly of the rights to peace, health, and beauty; the right to rest, holidays, and workbreaks; the right to work, development and economic expansion; the right to abortion, suicide, and death; and a whole host of special rights claims of women,

⁷ See the preambles to both documents in BASIC DOCUMENTS ON HUMAN RIGHTS, supra note __, at 114, 125.

⁸ International Convention on the Elimination of all Forms of Racial Discrimination (1969), preface, in BASIC DOCUMENTS ON HUMAN RIGHTS, supra note __, at 148. See comparable language in International Convention on Suppression and Punishment of the Crime of Apartheid (1973), in *ibid.*, 162; Convention on the Elimination of all Forms of Discrimination Against Women (1979), in *ibid.*, 169.

⁹ [supply cite]

children, workers, immigrants, refugees, prisoners, minorities, indigenous peoples, and many others.¹⁰

On the one hand, the current ubiquity of the principle of human dignity testifies to its universality. And the constant proliferation of human rights precepts speaks to their power to inspire new hope for many desperate persons and peoples around the world. Moreover, the increased pervasiveness of these norms is partly a function of emerging globalization. Since the first international documents on human dignity and human rights were issued, many new voices and values have joined the global dialogue -- especially those from Africa, Asia, and Latin America, and from various Buddhist, Confucian, Hindu, Islamic, and Traditional communities. It is simple ignorance to assume that the first international documents were truly universal statements on human dignity and human rights. The views of Christians, Jews, and Enlightenment exponents dominated them.¹¹ And it is simple arrogance to assume that the 1940s through 1960s were the golden age of human dignity and human rights. Such theological and legal constructions are in need of constant reformation. The recent challenges of the South and the East to the prevailing Western paradigm of human dignity and human rights might well be salutary.

On the other hand, the very ubiquity of the principle of human dignity today threatens its claims to universality. And the very proliferation of new human rights threatens their long-term effectiveness for doing good. Human dignity needs to be assigned some limits if it is to remain a sturdy foundation for the edifice of human rights. Human rights need to be founded firmly on human dignity and other moral principles lest they devolve into a gaggle of wishes and wants. Fairness commands as broad a definition of human dignity as possible, so that no legitimate human good is excluded and no legitimate human rights claim is foreclosed. But prudence counsels a narrower definition of human dignity, so that not every good becomes part of human dignity, and not every aspiration becomes subject to human rights vindication.

The task of defining the appropriate ambit of human dignity and human rights today must be a multi-disciplinary, multi-religious, and multi-cultural exercise. Many disciplines, religions, and cultures around the globe have unique sources and resources, texts and traditions that speak to human dignity and human rights. Some endorse dignity and rights with alacrity and urge their expansion into new arenas. Others demur, and urge their reform and restriction. It is essential that each community be allowed to speak with its own unique accent, to work with its own distinct methods on human dignity and human rights -- that the exercise be multi- rather than inter-disciplinary, -religious, and -cultural in character. Happily a number of important new studies have appeared at the turn of the millennium by Jewish, Muslim, Confucian, Buddhist, and Hindu scholars working on issues of human dignity and human rights with their own texts and on their own terms.¹² It

¹⁰ See, e.g., sources and discussion in CARL WELLMANN, *THE PROLIFERATION OF RIGHTS: MORAL PROGRESS OR EMPTY RHETORIC* (Boulder/Oxford: Westview Press, 1999).

¹¹ See, e.g., sources and discussion in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE*, 2 VOLS. (John Witte, Jr. & Johan D. Vandervyver, eds., 1996).

¹² See, e.g., DAVID NOVAK, *COVENANTAL RIGHTS* (2001); ABDULLAHI AHMED AN-NA'IM, *TOWARD AN ISLAMIC REVOLUTION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* (1990);

also essential, however, that each of these disciplines, religions, and cultures develops a capacity for bilingualism -- an ability to speak with insiders and outsiders alike about their unique understanding of the origin, nature and purpose of human dignity and human rights.

My task in this Lecture is to take the measure of human dignity in the Protestant tradition. My argument is that the Protestant tradition has a deep and distinctive understanding of human dignity, which has had and can still have a monumental influence on the understanding of human rights. In my view, the essence of human dignity lies in the juxtaposition of human depravity and human sanctity. Human dignity is something of a divine fulcrum that keeps our depravity and sanctity in balance. The essence of human freedom is our right and duty to serve God, neighbor, and self, and to do so with the ominous assurance of divine judgment. Human freedom is the divine calling that keeps our individuality and community in balance.

This understanding of human dignity and freedom, I shall argue, was already adumbrated in Martin Luther's famous little tract, *Freedom of a Christian* (1520). Indeed, Luther's tract was something of a Protestant *Dignitatis Humanae* in its day, an enduring theological statement on the essence of human dignity and human freedom. Several theological teachings in this little tract were filled with radical political implications. While Luther did not draw out these implications, a number of later Protestants did, eventually rendering Protestantism a formidable force for the construction of modern Western human rights theories and laws. The last part of this essay reflects on the enduring efficacy of Luther's cardinal insights for our understanding of human dignity and human rights.

It must be stressed that I am presenting only one Protestant stream of reflection on human dignity, albeit a deep and enduring one. Other Protestants over the centuries have taken their departure more directly from those famous biblical texts proclaiming that persons are created in the "image of God," that they are made "a little lower than the angels," that they may partake of the universal spiritual dignity of Christ. Such Protestant views of human dignity tend to resonate more closely with prevailing Patristic, Catholic, and Humanist constructions, and today are considerably better known and more frequently proffered, especially in ecumenical discussions.¹³ My rendering of the Protestant teaching on human dignity herein is not meant to deprecate these other Protestant contributions but to complement them.

II. Saint and Sinner, Priest and King: Human Dignity in Martin Luther

CONFUCIANISM AND HUMAN RIGHTS (Wm. Theodore de Bary and Tu Weiming eds. 1998); RELIGIOUS DIVERSITY AND HUMAN RIGHTS (Irene Bloom, J. Paul Martin, and Wayne L. Proudfoot eds. 1996).

¹³ See, e.g., HERSCHEL BAKER, *THE IMAGE OF MAN: A STUDY OF THE IDEA OF HUMAN DIGNITY IN CLASSICAL ANTIQUITY, THE MIDDLE AGES, AND THE RENAISSANCE* (1961); CHARLES TRINKHAUS, "IN OUR IMAGE AND LIKENESS": HUMANITY AND DIVINITY IN ITALIAN HUMANIST THOUGHT, 2 VOLS. (1970); JUERGEN MOLTSMANN, *ON HUMAN DIGNITY, POLITICAL THEOLOGY AND ETHICS* (M. Douglass Meeks trans. 1984); GLENN TINDER, *AGAINST FATE: AN ESSAY ON PERSONAL DIGNITY* (Notre Dame, IN: University of Notre Dame Press, 1981).

Martin Luther's *Freedom of a Christian* (1520) was one of the defining documents of the Protestant Reformation. It remains one of the classic tracts of the Protestant tradition still today.¹⁴ Written on the eve of his excommunication from the Church, this was Luther's last ecumenical gesture toward Rome before making his incendiary exit. Much of the tract was written with a quiet gentility and piety that belied the heated polemics of the day and Luther's own ample perils of body and soul. Luther dedicated the tract to Pope Leo X, adorning it with a robust preface addressed to the "blessed father." He vowed that he had to date "spoken only good and honorable words" concerning Leo, and offered to retract anything that might have betrayed "indiscretion and impiety." "I am the kind of person," he wrote in seeming earnest, "who would wish you all good things eternally."¹⁵

Luther was concerned, however, that the papal office had saddled Leo with a false sense of dignity. "You are a servant of servants" (*servus servorum*) within the Church, Luther wrote to Leo, citing the classic title of the Bishop of Rome.¹⁶ And as a "servant of God for others, and over others, and for the sake of others," you properly enjoy a "sublime dignity" of office.¹⁷ But the "obsequious flatters" and "pestilential fellows" of your papal court do not regard you as a humble servant. Instead, they treat you as "a vicar of Christ," as "a demigod [who] may command and require whatever you wish." They "pretend that you are lord of the world, allow no one to be considered a Christian unless he accepts your authority, and prate that you have power over heaven, hell and purgatory." Surely, you do not believe any of this, Luther wrote to Leo, tongue near cheek. Surely, you can see that "they err who ascribe to you alone the right of interpreting Scripture" and "who exalt you above a council and the church universal." "Perhaps I am being presumptuous" to address you so, Luther allowed at the end of his preface. But when a fellow Christian, even a pope, is exposed to such "dangerous" teachings and trappings, God commands that a fellow brother offer him biblical counsel, without regard for his "dignity or lack of dignity."¹⁸

In later pages of the *Freedom of a Christian* and in several other writings in that same crucial year of 1520, Luther took aim at other persons who were "puffed up because of their dignity."¹⁹ He inveighed at greatest length against the lower clergy, who, in his view, used the "false power of fabricated sacraments" to "tyrannize the Christian

¹⁴ DE LIBERTATE CHRISTIANA (1520), in 7 D. MARTIN LUTHERS WERKE: KRITISCHE GESAMTAUSGABE 49-73 (1883-) [hereafter WA], translated in 31 LUTHER'S WORKS 327-77 (Jaroslave Pelikan, et al. trans. and ed. 1955-68) [hereafter LW]. A shorter German edition, DIE FREIHEIT EINES CHRISTENMENSCHEN, appears in WA, supra, 7:20-38.

¹⁵ LW, supra note __ at 31:334-336.

¹⁶ Ibid., 31:341.

¹⁷ Ibid., 31:341, 342. The quote is from LUTHER: LECTURES ON ROMANS 8 (Wilhelm Pauck, trans. and ed. 1961), 8. Many of the teachings from these *Lectures*, prepared in 1515-16 are repeated in Luther's *Freedom of a Christian*, prepared in 1520.

¹⁸ LW, supra note __, at 31:341-342. See similar sentiments in Martin Luther, ADDRESS TO THE CHRISTIAN NOBILITY OF THE GERMAN NATION CONCERNING THE REFORM OF THE CHRISTIAN ESTATE (1520), reprinted in LW 44:123-217, at 136.

¹⁹ Quotation is from MARTIN LUTHER, LECTURES ON GENESIS (1544), reprinted in LW, supra note __, at 7: __-__, at 182.

conscience" and to "fleece the sheep" of Christendom.²⁰ He criticized jurists for spinning the thick tangle of special benefits, privileges, exemptions, and immunities that elevated the clergy above the laity, and inoculated them from legal accountability to local magistrates.²¹ He was not much kinder to princes, nobles, and merchants -- those "harpies," as he later called them, "blinded by their arrogance," and trading on their office, pedigree, and wealth to lord it over the languishing commoner.²² What all these pretentious folks fail to see, Luther wrote, is that "there is no basic difference in status ... between laymen and priests, princes and bishops, religious and secular."²³ Before God all are equal.

Luther's *Freedom of a Christian* thus became, in effect, his *Dignitatis Humanae* -- his bold new declaration on human nature and human freedom that described all Christians in his world regardless of their "dignity or lack of dignity," as conventionally defined. Pope and prince, noble and pauper, man and woman, slave and free -- all persons in Christendom, Luther declared, share equally in a doubly paradoxical nature. First, each person is at once a saint and a sinner, righteous and reprobate, saved and lost -- *simul iustus et peccator*, in Luther's signature phrase.²⁴ Second, each person is at once a free lord who is subject to no one, and a dutiful servant who is subject to everyone. Only through these twin paradoxes, Luther wrote, can we "comprehend the lofty dignity of the Christian."²⁵

Every Christian "has a two fold nature," Luther argued in expounding his doctrine of *simul iustus et peccator*. We are at once body and soul, flesh and spirit, sinner and saint, "outer man and inner man." These "two men in the same man contradict each other" and remain perennially at war.²⁶ On the one hand, as bodily creatures, we are born in sin and bound by sin. By our carnal natures, we are prone to lust and lasciviousness, evil and egoism, perversion and pathos of untold dimensions.²⁷ Even the best of persons, even the titans of virtue in the Bible -- Abraham, David, Peter, and Paul -- sin all the time.²⁸ In and of ourselves, we are all totally depraved and deserving of eternal death. On the other hand, as spiritual creatures, we are reborn in faith, and freed from sin. By our spiritual natures, we are prone to love and charity, goodness and sacrifice, virtue and

²⁰ See esp. LW, supra note __, at 44:126-155; MARTIN LUTHER, THE BABYLONIAN CAPTIVITY OF THE CHURCH (1520), reprinted in LW, supra note __, at 36:11-126; id., *Treatise on Good Works* (1520), LW, supra note __, at 44:21-114, at 87-94, with expansion in ID, THE KEYS (1530), reprinted in LW, supra note __, at 40:321-370. In LW 44, supra note __, at 58, Luther recommended that a new imperial law be passed against papal appointments of clergy so that "no confirmation of any dignity whatsoever shall henceforth be secured from Rome." In *ibid.* 36:117 at 44:129, Luther attacked the notion that the clergy were special because of the "indelible mark" of their ordination, terming this "a laughingstock."

²¹ *Ibid.*, 44:157ff., 202ff.

²² *Ibid.*, 7:182ff.; 4:203ff. See also Luther's fuller statement in MARTIN LUTHER, TEMPORAL AUTHORITY: TO WHAT EXTENT IT SHOULD BE OBEYED (1523), reprinted in LW, supra note __, at 45:75-129.

²³ *Ibid.*, 44:129.

²⁴ *Ibid.*, 31:344-347, 358-361. The theme recurs repeatedly in Luther's later writings: *Ibid.*, 12:328, 27:230ff., 32:173; WA, supra note __, at 39/1:21, 492, 552.

²⁵ LW, supra note __, at 31:355.

²⁶ *Ibid.*, 31:344.

²⁷ *Ibid.*, 31:344, 358-361; see further *ibid.*, 25:120-130, 204-213.

²⁸ *Ibid.*, 19:47-48; *ibid.*, 23:146.

peacefulness. Even the worst of persons, even the reprobate thief nailed on the next cross to Christ's, can be saved from sin. In spite of ourselves, we are all totally redeemed and assured of eternal life.²⁹

It is through faith and hope in the Word of God, Luther argued, that a person moves from sinner to saint, from bondage to freedom. This was the essence of Luther's doctrine of justification by faith alone. No human work of any sort -- even worship, contemplation, meditation, charity, and other supposed meritorious conduct -- can make a person just and righteous before God. For sin holds the person fast, and perverts his or her every work. "One thing, and only one thing, is necessary for Christian life, righteousness, and freedom," Luther declared. "That one thing is the most holy Word of God, the gospel of Christ."³⁰ To put one's faith in this Word, to accept its gracious promise of eternal salvation, is to claim one's freedom from sin and from its attendant threat of eternal damnation. And it is to join the communion of saints that begins imperfectly in this life and continues perfectly in the life to come.

A saint by faith remains a sinner by nature, Luther insisted, and the paradox of good and evil within the same person remains until death. But there is "a difference between sinners and sinners," Luther wrote. "There are some sinners who confess that they have sinned but do not long to be justified; instead, they give up hope and go on sinning so that when they die they despair, and while they live, they are enslaved to the world. There are other sinners who confess that they sin and have sinned, but they are sorry for this, hate themselves for it, long to be justified, and under groaning constantly pray to God for righteousness. This is the people of God," the saints who are saved, despite their sin.³¹

This brought Luther to a related paradox of human nature -- that each Christian is at once a lord who is subject to no one, and a priest who is servant to everyone. On the one hand, Luther argued, "every Christian is by faith so exalted above all things that, by virtue of a spiritual power, he is [a] lord."³² As a redeemed saint, as an "inner man," a Christian is utterly free in his conscience, utterly free in his innermost being. He is like the greatest king on earth, who is above and beyond the power of everyone. No earthly authority -- whether pope, prince, or parent -- can impose "a single syllable of the law" upon him.³³ No earthly authority can intrude upon the sanctuary of his conscience, can endanger his assurance and comfort of eternal life. This is "the splendid privilege," the "inestimable power and liberty" that every Christian enjoys.³⁴

On the other hand, Luther wrote, every Christian is a priest, who freely performs good works in service of his or her neighbor and in glorification of God.³⁵ "Christ has

²⁹ *Ibid.*, 31:344-354, 368-377.

³⁰ *Ibid.*, 31:345.

³¹ *Lectures on Romans*, supra note ___, at 120; LW, supra note ___, at 23:146; 12:328-330; 8:9-12.

³² *Ibid.*, 31:354.

³³ *Ibid.*, 36:70; 31:344-346.

³⁴ *Ibid.*, 31:355-358.

³⁵ *Ibid.*, 31:355-356. Luther returned to this theme repeatedly in his later writings: *Ibid.*, 36:112-116, 138-140; 40:21-23; 13:152, 39:137-224.

made it possible for us, provided we believe in him, to be not only his brethren, co-heirs, and fellow-kings, but also his fellow-priests," Luther wrote. And thus, in imitation of Christ, we freely serve our neighbors, offering instruction, charity, prayer, admonition, and sacrifice even to the point of death.³⁶ We abide by the law of God so far as we are able so that others may see our good work and be similarly impelled to seek God's grace. We freely discipline and drive ourselves to do as much as good as we are able, not so that we may be saved but so that others may be served. "A man does not live for himself alone," Luther wrote, "he lives only for others."³⁷ The precise nature of our priestly service to others depends upon our gifts and upon the vocation in which God calls us to use them.³⁸ But we are all to serve freely and fully as God's priests.

"Who can then comprehend the lofty dignity of the Christian?" Luther wrote. "By virtue of his royal power he rules over all things, death, life, and sin." The person is entirely free from the necessity of doing good works and fully immune from the authority of any one. But by virtue of "his priestly glory, he is omnipotent with God because he does the things which God asks and requires."³⁹ He devotes himself entirely to doing good works for his neighbor, he submits himself completely to the needs of others.

Such are the paradoxes of the Christian life in Luther's view. We are at once sinners and saints; we are at once lords and servants. We can do nothing good; we can do nothing but good. We are utterly free; we are everywhere bound. The more a person thinks himself a saint, the more sinful in fact he becomes. The more a person thinks herself a sinner, the more saintly she in fact becomes. The more a person acts like a lord, the more he is called to be a servant. The more a person acts as a servant, the more in fact she has become a lord. This is the paradoxical nature of human life. And this is the essence of human dignity.

Luther intended his *Freedom of a Christian* to be a universal statement for his world of Christendom -- a summary of "the whole of the Christian life in a brief form," as he put it in his preface to Leo.⁴⁰ He grounded his views in the Bible, liberally peppering his tract with all manner of biblical citations and quotations. He wove into his narrative several strong threads of argument pulled selectively from a number of Church Fathers and late medieval Christian mystics. He published his tract both in Latin and in simple German, seeking to reach both the scholar and the commoner alike. He wrote with a pastoral directness and emotional empathy, convinced that if he could point out the Jekyll and Hyde in everyone, his readers would find both ample humility and ample comfort. So convinced was Luther of the veracity and cogency of his views that he believed even the Jews, the one perennial sojourner in his world of Christendom, would convert *en masse* to the Gospel once they heard it in this simple form.⁴¹ Though this latter

³⁶ Ibid., 31:355; 36:241.

³⁷ Ibid., 31:364-5; 51:86-87.

³⁸ Ibid., 38:188; 28:171-172.

³⁹ Ibid., 31:355; 17:209ff.

⁴⁰ Ibid., 31:343.

⁴¹ See MARTIN LUTHER, THAT JESUS CHRIST WAS BORN A JEW (1523), reprinted in LW, supra note ___, at 45:129-___. Notoriously, Luther in his life turned on the Jews in later life, and published a vituperative tract against them: MARTIN LUTHER, CONCERNING THE JEWS AND THEIR LIES (1543), in LW, supra

aspiration proved fanciful, Luther's views on human dignity did command an impressive readership among Christians. *Freedom of a Christian* was a best seller in its day -- going through twelve printings in its first two years, and five editions by 1524. It remained a perennial favorite of commentaries and sermons long after Luther's passing, and well beyond the world of Lutheranism.⁴² It is no small commentary on the enduring ecumenical efficacy of Luther's views of human nature, dignity, and freedom that they lie at the heart of the "Joint Declaration on the Doctrine of Justification," signed by Catholic and Evangelical leaders on October 31, 1999.

What all this elegant dialectic theology meant for the nature of freedom of the Christian in this world, Luther's little tract did not so clearly say. Luther did make clear that all Christians have the freedom and duty to follow the Bible conscientiously and to speak out against human ideas and institutions that conflict with the Bible. The Bible was for Luther the great equalizer of Christians -- to the remarkable point of allowing Luther, a lowly Augustinian monk from an obscure German town, to address His Holiness Leo X as if he were the pope's equal. Luther also made clear that clergy and laity are fundamentally equal in dignity and responsibility before God. The traditional assumption that the clergy were superior to the laity, and entitled to all manner of special privileges, immunities, and exemptions was anathema to Luther. Luther at once laicized the clergy and clericized the laity, treating the office of preaching and teaching as just one other vocation alongside many others that a conscientious Christian could properly and freely pursue.⁴³

Luther's *Freedom of a Christian*, however, was no political manifesto on freedom. Spiritual freedom may well coexist with political bondage, Luther insisted. The spiritual equality of persons and vocations before God does not necessarily entail a social equality with all others.⁴⁴ Luther became doubly convinced of this discordance after witnessing the bloody Peasants' Revolt in Germany in 1525, and the growing numbers of radical egalitarian and antinomian experiments engineered out of his favorite theological doctrines of the priesthood of all believers and justification by faith alone. In the course of the next two decades, Luther defended with increasing stridency traditional social, economic, political, and ecclesiastical hierarchies as a necessary feature of this earthly life.

Luther came to defend this disparity between the spiritual and temporal dimensions of human freedom, dignity, and status with his doctrine of the two kingdoms. God has ordained two kingdoms or realms in which humanity is destined to live, Luther argued, the earthly or political kingdom and the heavenly or spiritual kingdom. The earthly kingdom is the realm of creation, of natural and civic life, where a person operates primarily by reason, law, and passion. The heavenly kingdom is the realm of redemption, of spiritual

note __, 47:121-306. See analysis in HEIKO OBERMAN, *THE ROOTS OF ANTI-SEMITISM IN THE AGE OF RENAISSANCE AND REFORMATION* (J.I. Porter trans. 1984).

⁴² MARK U. EDWARDS, JR., *PRINTING, PROPAGANDA, AND MARTIN LUTHER* (1981), 39, 64, 100-101; id., "The Reception of Luther's Understanding of Freedom in the Early Modern Period," *Luther-Jahrbuch* 62 (1995): 104.

⁴³ See further Martin Luther, *Concerning the Ministry* (1523), in LW 40:21ff.

⁴⁴ LW 31:354-356, 364-365.

and eternal life, where a person operates primarily by faith, hope, and charity. These two kingdoms embrace parallel forms of righteousness and justice, truth and knowledge, but they remain separate and 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 jurisdiction of each kingdom. As a heavenly citizen, the Christian remains free in his 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 structures and strictures of ecclesiastical, political, and parental authority, even if they are sometimes hard and abusive.

III. Protestant Instincts About Human Dignity, Equality, and Freedom Today

A century ago, most Protestants viewed Martin Luther as the faithful David who felled the papal Goliath with the single stones of sacred Scripture. Most Catholics viewed Luther as the seven-headed demon who destroyed Western Christendom with his heretical ranting. For most Protestants, Luther was the great prophet of modern liberty who freed Western law and culture from the oppressive rule of the Catholic Church. For most Catholics, Luther was the grim priest of secularism, who cut Western law and culture from their essential religious roots.⁴⁵

Today, such confessional caricatures of Luther and the Reformation are happily fading. Most Protestants have now begun to recognize that the Lutheran Reformation was part and product of a whole series of late medieval reform movements, and that Luther and his followers depended upon Catholic theology and canon law for many of their cardinal ideas and institutions. Most Catholics have now begun to recognize Luther as a loud but inspired prophet for an alternative Christian view of law and politics, a shrill but shrewd architect of a new biblical theology of human nature, social pluralism, and religious liberty, a good deal of which the modern Catholic Church now embraces.⁴⁶

That said, it must also be said that Luther's *Freedom of a Christian* still gives a distinctive orientation to many contemporary Protestants' instincts about human dignity and human freedom.

First, Luther's doctrine of *simul iustus et peccator* renders many Protestants today instinctively skeptical about too optimistic a view of human nature, and too easy a

⁴⁵ On various images of Luther, see, e.g., PETER N. BROOKS, ED., SEVEN-HEADED LUTHER (Oxford, 1983); MARK U. EDWARDS, JR., PRINTING, PROPAGANDA, AND MARTIN LUTHER (Berkeley/Los Angeles, 1994); JACQUES MARITAIN, THREE REFORMERS: LUTHER – DESCARTES – ROUSSEAU (New York, 1947); Robert Scribner, FOR THE SAKE OF SIMPLE FOLK: POPULAR PROPAGANDA FOR THE GERMAN REFORMATION (Cambridge, 1981); JAMES STAYER, MARTIN LUTHER, GERMAN SAVIOUR: GERMAN EVANGELICAL THEOLOGICAL FACTIONS AND THE INTERPRETATION OF LUTHER, 1917-1933 (Montreal, 2000).

⁴⁶ See sources and discussion in my *A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective*, WILLIAM AND MARY LAW REVIEW 42 (2001): 707-70, at 726ff. and my *The Goods and Goals of Marriage*, NOTRE DAME LAW REVIEW 76 (2001): 1019-71.

conflation of human dignity and human sanctity. Such views take too little account of the radicality of human sin and the necessity of divine grace. They give too little credibility to the inherent human need for discipline and order, accountability and judgment. They give too little credence to the perennial interplay of the civil, theological, and pedagogical uses of law, to the perpetual demand to balance deterrence, retribution, and reformation in discharging authority within the home, church, state, and other associations. They give too little insight into the necessity for safeguarding every office of authority from abuse and misuse. A theory of human dignity that fails to take into account the combined depravity and sanctity of the human person is theologically and politically deficient, if not dangerous.

This cardinal insight into the two-fold nature of humanity was hardly unique to Martin Luther, and is readily amenable to many other formulations. Luther's formula of *simul iustus et peccator* was a crisp Christian distillation of a universal insight about human nature that can be traced to the earliest Greek and Hebrew sources of the West. The gripping dramas of Homer, Hesiod, and Pindar are nothing if not chronicles of the perennial dialectic of good and evil, virtue and vice, hero and villain in the ancient Greek world. The very first chapters of the Hebrew Bible paint pictures of these same two human natures, now with Yahweh's imprint on them. The more familiar picture is that of Adam and Eve who were created equally in the image of God, and vested with a natural right and duty to perpetuate life, to cultivate property, to dress and keep the creation.⁴⁷ The less familiar picture is that of their first child Cain, who murdered his brother Abel and was called into judgment by God and condemned for his sin. Yet "God put a mark on Cain,"⁴⁸ Genesis reads, both to protect him in his life, and to show that he remained a child of God despite the enormity of his sin.⁴⁹ One message of this ancient Hebrew text is that we are not only the beloved children of Adam and Eve, who bear the image of God, with all the divine perquisites and privileges of Paradise. We are also the sinful siblings of Cain, who bear the mark of God, with its ominous assurance both that we shall be called into divine judgment for what we have done, and that there is forgiveness even for the gravest of sins we have committed.

Luther believed that it is only through faith and hope in Christ that a person can ultimately be assured of divine forgiveness and eternal salvation. He further believed that it was only through a life of biblical meditation, prayer, worship, charity, and sacramental living that a person could hold his or her depravity in check and aspire to greater sanctity. I happen to believe that, too, as do many Christians today. But this is not to say that, in this life, Christians have the only insights into the two fold nature of humanity, and the only effective means of balancing the realities of human depravity and the aspirations for human sanctity. Any religious tradition that takes seriously the Jekyll and Hyde in all of us has its own understanding of ultimate reconciliation of these two natures, and its own methods of balancing them in this life. And who are Christians to say how God will ultimately judge these?

⁴⁷ Genesis 1:26-30; 2:7, 15-23.

⁴⁸ Genesis 4:1-16.

⁴⁹ This is but one of numerous interpretation of the story of Cain and Abel. For alternatives, see RUTH MELLINKOFF, *THE MARK OF CAIN* (1981); CLAUS WESTERMANN, *GENESIS 1-11: A COMMENTARY* (repr. ed. 1990).

Luther also believed that the ominous assurance of the judgment of God is ultimately a source of comfort not of fear. The first sinners in the Bible -- Adam, Eve, and Cain -- were given divine due process: They were confronted with the evidence, asked to defend themselves, given a chance to repent, spared the ultimate sanction of death, and then assured of a second trial on the Day of Judgment, with appointed divine counsel. The only time that God deliberately withheld divine due process, Luther reminds us, was in the capital trial of His Son -- and that was the only time it was and has been necessary. The political implications of this are very simple: If God gives due process in judging us, we should give due process in judging others. If God's tribunals feature at least basic rules of procedure, evidence, representation, and advocacy, human tribunals should feature at least the same. The demand for due process is a deep human instinct, and it has driven Protestants over the centuries, along with many others before and with them, to be strident advocates for procedural rights.

Second, Luther's doctrine of the lordship and priesthood of all believers renders many Protestants instinctively jealous about liberty and equality -- but on their own quite distinct theological terms. In the modern liberal tradition, liberty and equality are generally defended on grounds of popular sovereignty and inalienable rights. The American Declaration of Independence (1776) proclaimed it a "self-evident truth" "that all men are created equal [and] ... are endowed with certain unalienable rights."⁵⁰ The Universal Declaration of Human Rights (1948) proclaimed "[t]hat all men are born free and equal in rights and dignity."⁵¹ Protestants can resonate more with the norms of liberty and equality in these documents than with the theories of popular sovereignty and inalienable rights that generally undergird them.

The heart of the Protestant theory of liberty is that we are all lords on this earth. We are utterly free in the sanctuary of our conscience, entirely unencumbered in our relationship with God. We enjoy a sovereign immunity from any human structures and strictures, even those of the church when they seek to impose upon this divine freedom. Such talk of "sovereign immunity" sounds something like modern liberal notions of "popular sovereignty." And such talk of "lordship" sounds something like the democratic right to "self-rule." Protestants have thus long found ready allies in liberals and others who advocate liberty of conscience and democratic freedoms on these grounds. But, when theologically pressed, many Protestants will defend liberty of conscience not because of their own popular sovereignty, but because of the absolute sovereignty of God, whose relationship with his children cannot be trespassed. Many Protestants will defend certain unalienable rights, like freedom of conscience, not in the interest of preserving their personal privacy, but in the interest of discharging their divine duties.

The heart of the Protestant theory of equality is that we are all priests before God. "You are a chosen race, a royal priesthood, a holy nation, God's own people."⁵² Among you, "[t]here is neither Jew nor Greek, there is neither slave nor free, there is neither male

⁵⁰ [supply]

⁵¹ BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note ___, at ___.

⁵² | Peter 2:9; cf. Revelation 5:10, 20:6.

nor female; for you are all one in Christ Jesus."⁵³ These and many other biblical passages, which Luther highlighted and glossed repeatedly, have long inspired a reflexive egalitarian impulse in Protestants. All are equal before God. All are priests that must serve their neighbors. All have vocations that count. All have gifts to be included. This common calling of all to be priests transcends differences of culture, economy, gender, and more.

Such teachings have led a few Protestant groups over the centuries to experiment with intensely communitarian states of nature where life is gracious, lovely, and long. Most Protestant groups, however, view life in such states of nature as brutish, nasty, and short, for sin invariably perverts them. Structures and strictures of law and authority are necessary and useful, most Protestants believe. But such structures need to be as open, egalitarian, and democratic as possible. Hierarchy is a danger to be indulged only so far as necessary. To be sure, Protestants over the centuries have often defied these founding ideals, and have earnestly partaken of all manner of elitism, chauvinism, racism, antisemitism, tyranny, patriarchy, slavery, apartheid, and more. And they have sometimes engaged in outrageous hypocrisy and casuistry to defend such shameful pathos. But an instinct for egalitarianism -- for embracing all persons equally, for treating all vocations respectfully, for arranging all associations horizontally, for levelling the life of the earthly kingdom so none is obstructed in access to God -- is a Lutheran gene in the theological genetic code of Protestantism.

Third, and finally, Luther's notion that a person is at once free and bound by the law has powerful implications for our modern understanding of human rights. For Luther, the Christian is free in order to follow the commandments of the faith -- or, in more familiar and general modern parlance, a person has rights in order to discharge duties. Freedoms and commandments, rights and duties belong together in Luther's formulation. To speak of one without the other is ultimately destructive. Rights without duties to guide them quickly become claims of self-indulgence. Duties without rights to exercise them quickly become sources of deep guilt.

Protestants have thus long translated the moral duties set out in the Decalogue into reciprocal rights. The First Table of the Decalogue prescribes duties of love that each person owes to God -- to honor God and God's name, to observe the Sabbath day of rest and holy worship, to avoid false gods and false swearing. The Second Table prescribes duties of love that each person owes to neighbors -- to honor one's parents and other authorities, not to kill, not to commit adultery, not to steal, not to bear false witness, not to covet. Church, state, and family alike are responsible for the communication and enforcement of these cardinal moral duties, Protestants have long argued. But it is also the responsibility of each person to ensure that he and his neighbors discharge these moral duties.

This is one important impetus for Protestants to translate duties into rights. A person's duties toward God can be cast as the rights of religion: the right to honor God and God's name, the right to rest and worship on one's Sabbath, the right to be free from

⁵³ Galatians 3:28; cf. Colossians 3:10-11; Ephesians 2:14-15)

false gods and false oaths. Each person's duties towards a neighbor, in turn, can be cast as a neighbor's right to have that duty discharged. One person's duties not to kill, to commit adultery, to steal, or to bear false witness thus gives rise to another person's rights to life, property, fidelity, and reputation. For a person to insist upon vindication of these latter rights is not necessarily to act out of self-love. It is also to act out of neighborly love. To claim one's own right is in part a charitable act to induce one's neighbor to discharge his or her divinely-ordained duty.

* * * *

The great American jurist Grant Gilmore once wrote: "The better the society the less law there will be. In Heaven, there will be no law, and the lion will lie down with the lamb. In Hell, there will be nothing but law, and due process will be meticulously observed."⁵⁴ This is a rather common Protestant sentiment, which Luther did much to propound in some of his early writings. But a Protestant, faithful to Luther's most enduring insights, might properly reach the exact opposite projection. In Heaven, there will be pure law, and thus the lamb will lie down with the lion. In Hell, there will be no law, and thus all will devour each other eternally. Heaven will exalt due process, and each will always receive what's due. Hell will exalt pure caprice, and no one will ever know what's coming.

⁵⁴ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110-111 (1977).