

## Lutheran Theology and Secular Law

This collection brings together lawyers and theologians in the U.S. and Europe to reflect on Lutheran understandings of the political use of the law by secular governments. The book furthers the intellectual conversation about how Lutheran insights can be used to develop jurisprudence and specific solutions to legal issues in which there is strong conflict. It presents the basic theological and interpretive assumptions of the Lutheran tradition as they may inform the creation of legislation and judicial interpretation at local, national and international levels. The authors explore Luther's conception of the foundations of modern secular law and understanding of vocation. The work discusses the application of Lutheran theological principles to contemporary issues such as the war on terror, native land rights, property law, family law, church and state, medical experimentation, and the criminal law of rape, providing ethical insights for lawyers and lawmakers.

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# Lutheran Theology and Secular Law

The Work of the Modern State

Edited by  
**Marie A. Failinger and Ronald W. Duty**

 **Routledge**  
Taylor & Francis Group  
LONDON AND NEW YORK

First published 2018  
by Routledge  
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge  
711 Third Avenue, New York, NY 10017

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

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*British Library Cataloguing-in-Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloguing-in-Publication Data*

Names: Failinger, Marie A., author. | Duty, Ronald W., author.  
Title: Lutheran theology and secular law: the work of the modern state /  
edited by Marie A. Failinger and Ronald W. Duty.  
Description: Abingdon, Oxon [UK]; New York, NY: Routledge, 2018. |  
Series: ICLARS series on law and religion | Includes bibliographical  
references and index.  
Identifiers: LCCN 2017059731 | ISBN 9781138245136 (hardback)  
Subjects: LCSH: Religion and law. | Religion and state. | Law—Christian  
influences. | Secularism. | Church and state—Lutheran Church. | Lutheran  
Church—Doctrines.  
Classification: LCC K3280.F35 2018 | DDC 340/.11—dc23  
LC record available at <https://lccn.loc.gov/2017059731>

ISBN: 978-1-138-24513-6 (hbk)  
ISBN: 978-1-315-27634-2 (ebk)

Typeset in Galliard  
by codeMantra

But it is the work of the temporal power to protect its subjects, and to punish thievery, robbery, and adultery, as St. Paul says, Romans xiii: "It beareth not the sword in vain; it serves God with it, to the terror of evil doers, and to the protection of the good."

Martin Luther: A Treatise on Good Works (1520)

Marie Failinger dedicates this book to the many lawyers and pastors of faith who have taught her about her vocation as a lawyer and a person of faith, most especially her teachers at Valparaiso University and its School of Law and her colleagues from the Journal of Law and Religion Editorial Board/Council on Religion and Law. Steeped in many different faith traditions, they have served the community as lawyers and pastors interested in issues of law and justice from a religious perspective, and have powerfully influenced her own thinking.

Ronald Duty dedicates this book to his former colleagues on the Studies team in Church and Society at the Evangelical Lutheran Church in America: Karen L. Bloomquist, John R. Stumme, Kaari Reiersen, Victor Thasiah, and Roger Willer. It was his pleasure to work with them as they helped the ELCA to discern, formulate, and adopt its official positions on a variety of ethical and social issues. Working with them, he learned the value and importance of doing Lutheran ethics as a corporate effort of the moral deliberation of the church by means of task forces working on specific issues, regular conversation among Lutheran ethicists and theologians, and the extension of that conversation digitally in the *Journal of Lutheran Ethics*.

### 3 Antinomianism—the “Lutheran” heresy

Paul R. Hinlicky

Is Edward Snowden a hero or a villain? Is disclosure of the secrets of the National Security State an act of conscience or an act of treason? Where can ethical conscience stand in the “plane of immanence” described by Deleuze,<sup>1</sup> which seems to allow no appeal to a higher court than the political sovereignty which de facto presides in this region or that? We debate these questions today. I mention them at the outset and without prejudice to indicate the *kind* of questions about Christian theology and positive law that are under scrutiny in what follows. What follows is a theological study, which does not directly intervene in the contemporary question in that it instead forces reflection on matters usually taken for granted as settled in “secular” regimes, though I will indicate in conclusion the posture which in my own judgment follows from the presentation.

#### The Lutheran heresy

The classical idea of a “heresy” is of a deviation in Christian doctrine that thinks outside of the theological circle of revelation and faith and so leads faith away from its abiding source in God’s Word. To speak of a “heresy” in this classical way is a serious matter, to be sure, but the concern in what follows is a distortion internal to developments within Christian theology in Luther’s tradition. Antinomianism—rejecting the law as God’s law or demoting its role in teaching and preaching as superseded by the gospel—is an exaggeration of the distinction of law and gospel at the heart of Lutheran theology. It is a subtle but ultimately injurious distortion that not only does a disservice to civic life but undermines the gift nature of the gospel. To be sure, Lutheranism, as an historical phenomenon, is a *conflicted* tradition, such that what “antinomianism” is or could be as a Lutheran “heresy” is itself a hotly disputed matter, usually formulated as contestation over a so-called third use of the law. But it is a fact that Luther himself acknowledged the “heresy” of Lutheran antinomianism and this fact can orient our deliberations.

A prefatory comment. Simply put, Augustine’s idea of “ordered love” (*ordo caritatis*) is that the love owed supremely to the Creator norms the loves owed to the range of fellow creatures, so that creatures are loved fittingly and not idolatrously. Such love can thus take the strange form of a word of judgment against them, as well as the proper form of a word of blessing and approbation. I will defend *ordo caritatis* in what follows as the backbone of Luther’s own doctrine of law against critics like Anders Nygren who have influentially argued that in Christian understanding, love for creatures is to be unconditional.<sup>2</sup> But in speaking of the law of love as, first of all, *God’s* law, “You shall have no other gods before me,” law in Luther’s usage is not to be equated either with secular law or autonomous conscience, as we conceive of these today.

Just because of this possible confusion in our minds, appropriation of Luther’s doctrine of law today requires a genealogy that does not shrink from the fact that law, even the law of love, is, qua law, a reflex of a *fallen* creation, always then a *coercive* mechanism enforced by a regime that in principle *exempts* itself from the very ethical behavior it requires of those under its protection—as Giorgio Agamben has acutely analyzed.<sup>3</sup> An illustrative anecdote: when Roland Bainton, Luther biographer of *Here I Stand* fame,<sup>4</sup> heard criticism of the magisterial reformers for sanctioning violence on religious grounds to preserve the status quo, he pointed out that contemporary national security regimes do not hesitate to sanction violence on secular grounds to preserve the status quo. The state of exception is operative in either case. Recognition of this painful paradox is at the heart of Luther’s Christian realism. *Quis custodiet custodes?* Luther’s answer: the divine law of love in the custody of the prophetic Church of the Word. This custodianship, let alone its urgent political work in public theology, is forfeited, however, by antinomian Lutheranism for which everything is grace and blessing. But let us look and see.

In his antinomian writings from later in life, Luther conceded that what I am calling a “Lutheran heresy” based itself on his own writings from early in the Reformation period. Responding to the antinomian thesis that “not the law, but the Gospel must be taught. For the law, by terrifying us, does not bring about anything other than the hatred of God[,]” Luther replies, “It is true, at the beginning of this matter, we began to teach the Gospel vigorously and we also used the very words the Antinomians are now using.” These “charming theologians retain our words, our doctrine, that joyful promise concerning Christ ...” But they have not noticed the change in times and audience. In the beginning, “it was not necessary to inculcate or teach further the law to those consciences which were thus already oppressed, utterly terrified, miserable, anxious, and afflicted.” But now “we have become and are secure and evil, inconsiderate, unjust robbers, indeed, also Epicureans who respect neither God nor men ...”<sup>5</sup> Note well: Luther’s theology is rhetorically oriented to particular, hence shifting audiences in the fog and friction of social life, even if the ultimate audience is the judgment of God.

Thus in the place of first principles or abstract ideas of the philosophers, Luther’s reference is to conscience, to a culture of responsibility to God for the world as opposed to a culture of irresponsibility to God, or a culture of responsibility to this world *in place of* God—which would be a *conscientious* idolatry. This is the problem I wish to get at. So far as law functions in this way as responsibility to God for the world, it presupposes an ethical culture which can subsequently defend but hardly generate. Let me explain.

The issue is not only the pastoral one, then, of discerning one’s audience so that Christian teaching knows to comfort the afflicted conscience and afflict the comfortable one. Such discernment depends on clarity about the “justification” in “justification by faith.” The very words of the early Luther that the Antinomians are using have materially to do with the nature of justification, whether by works or by faith. Justification denotes satisfaction or fulfillment of God’s justice; it speaks of God in the office of judge prosecuting the whole world as Luther depicts, as we shall see, by His law of love. It is true that the early Luther wrote that his soul “hates the word, satisfaction.”<sup>6</sup> It is also correct to understand that his reference there was to the idea that by natural human powers one could satisfy God’s contract with creation by doing one’s little part—(1) as if this minimal effort truly satisfied the law of love, and (2) as if satisfying the law of love were in the power of a fallen humanity. In the first case, thinking in terms of one’s natural and self-interested effort to acquire reward and avoid punishment, conscience is anesthetized; in the second case, awareness of being trapped in a subjectivity of self-seeking, conscience is tortured. Self-justification leads either

to pride or despair. But this hardly means that either conscience or the doctrine of justification is to be abolished from theology.

For the good news of the gospel of the grace and glory of God, according to Luther, is that Christ in the power of God has satisfied the law of love, indeed, so to say, over-satisfied it by loving the loveless in loving obedience to God's uncanny will that led Him to their place on the cross. Moreover, this satisfaction of the law by Christ's obedience is vindicated by God and given as a gift to the penitent; it is the very righteousness of Christ, won by his obedience to death on the cross on behalf of the conscience stricken before God with its real, not fictitious, guilt of irresponsibility to God for the world, beginning with one's own self. This righteousness is given by imputation or attribution or credit, so that it becomes the believer's own, not by virtue of having performed this work of satisfaction as one's own performance but by virtue of having received it as a genuine gift. This reception of a putative gift communicated in language is thus possessed solely by faith. It is not money you can put in your hands, but a promise you can have—as in “having not” (cf. 1 Cor. 7:29–31)—in your “heart,” the seat of conscience, for Luther.

So by faith the penitent believer unites herself to Christ in His gift and so entrusts herself to God. And further, given as a genuine gift and received as one's own by faith, this satisfaction of the law by Christ for us becomes in us by the Holy Spirit the believer's own satisfaction of the law by Christ active in us, purging sinful desire and cultivating conscience in the new relation of responsibility to God for the world that Augustine named the *ordo caritatis*.

The basic idea of Luther's anti-antinomianism can now be sketched immediately. There are constructions or developments of the chief article of justification by faith alone that can undercut the doctrine itself by destroying in our understanding the very need for *justification* before God, *whether* it be by works *or* by faith *or* by anything else. How will you answer to God for your stewardship of His world, beginning with your own body-and-soul? That is the question of justification. It is the question of conscience. When this specific question of conscientious responsibility to God for the world is eclipsed, however, the teaching on justification by faith in Christ transforms into general ideas of divine acceptance and ethical permissiveness. This subversion occurs when in the name of *unconditional* grace—that is, a grace *not* conditioned by the cross of Christ where the Son of God took conscientious responsibility for sinners before His God and Father, that is, *not* conditioned as accountability to the law of God by which, in Paul the Apostle's words, God “*judges* the world” (Romans 3:6)—it is dispensed with on principle.

In tandem with this subversion, the theological diagnosis of our root human predicament shifts away from the radical sinfulness of irresponsibility before God. In its place, new enemies are depicted: outmoded ideas of society, or culturally retrograde moral codes, or legalistic logic-chopping casuistry, or ecclesiastical authoritarianism, or the Old Testament with its representations of a wrathful deity, or pharisaical self-righteousness. But these new enemies, real and imagined, at their worst are but symptoms of the radical, that is, root irresponsibility before God that is sinfulness.

There is a further irony to antinomianism. The retooling of the gospel *without* the law and the prophets that bear witness to it makes the event of divine grace in Christ into a new idea of God or ideal of divine justice, that is, *into a new law* standing in judgment over such bad old ideas or ideals as enumerated above. But for Luther, it does not help the loveless one to hear that God is love, true though it is. If I am to be helped in the sense of being changed into a loving person, the God of love must find the way to love me, the loveless sinner who has learned to justify himself in order to fend off God's call to responsibility, “Adam, where art thou?”<sup>7</sup>

Truly to help Adam who flees just judgment in this way, and so misses the very possibility of the mercy of love, God must—conscientiously, so to say—fulfill His own law of love in a surpassing and surprising way, precisely on behalf of the one judged unworthy by that same law of love that summons us to responsibility to the God of love for the blessing of His creation. The Christian message, in Luther's understanding of Paul, is just this right kind of help: at the right time, Christ died for the ungodly (Romans 5:6) so that, incorporated into His death, believers might die to sin and rise to walk in newness of life (Romans 6:4). So they are liberated both from the guilt of irresponsibility by imputation of Christ's obedience and the power of self-justifying desire by Holy Spirit purification.

Key concept: in Christ the law is fulfilled *for us* and then also by His Spirit *in us*. Antinomianism as a “Lutheran heresy” undercuts this key theological concept by denying the need for justification, that is, the need for fulfilling or satisfying the law by representing God the judge as a terrorist, as a human idea, then, unworthy of God who should instead be represented as an indulgent father welcoming home all his prodigal children.

One final remark on Luther's anti-antinomianism. For Luther, the faith which justifies does not merely keep an outward observance of the law out of servile fear of punishment or calculating hope for reward. That is mere civil righteousness and social conformity. But justifying faith *fulfills* the law inwardly out of new-born filial love of God above all and all creatures in and under God. Antinomianism as a “Lutheran heresy” undercuts this unitive and transformative understanding of faith as Christ in us by keeping Christ and His righteousness extrinsic to the believer, ever alien and only imputed. As such, believers may sin on the calculation that grace abounds.

But for Luther, what is alien and imputed becomes really our own by faith which personally appropriates it, not of course in the first place as the doer who did righteousness but as the receiver of righteousness given as a gift. Just so, however, in the second place, the receiver, being loved by God in her state of lovelessness, is therewith recreated and arises to walk in newness of life. Faith, for Luther, is this Spirit-wrought new birth, a new subjectivity such that sin has no more dominion over believers now led by the same Spirit who led Jesus to the cross for them. Consequently, in them the just requirement of the law is satisfied step by often painful step on the way to the hope of righteousness.

So the law is not abolished but fulfilled in several senses. First, in Christ, it is more than satisfied in His extraordinary obedience in the place and for the sake of the disobedient. Second, it is being satisfied by His Spirit in the new lives of the just who live by this faith. The terror of law as condemnation is ended because the claim of the law on conscience is not cancelled but rather fulfilled.

I wish now to return to my opening comment that historically Lutheranism is a conflicted tradition. From the very beginning, it is not only the heresy of antinomianism but the predominant response to the heresy of antinomianism in Lutheranism that puts an obstacle in the way of our understanding and re-appropriation of the doctrine of law embedded in Luther's doctrine of justification as a culture of conscientious responsibility to God for the world. This obstacle is Melancthon's understandable, but all the same flawed, attempt to impose socially with the backing of the state what can only be received freely and joyfully as a gift. His was an attempt to secularize Luther's inalienably theological account of divine law. Secularism in older or new forms has prevailed since Luther's time as a moral and legal ideology that holds conscience responsible to this present world in place of God—even when the ideology sounds oh-so-religious, but in fact is using God to sanction the exceptional authority of the self-seeking state. My disturbing suggestion in conclusion will be that retrieval of Luther's anti-antinomian doctrine of justification puts the believer

into a state of profound and conscientious objection to secularism's conscientious disavowal of responsibility to God in its idolatrous demand on conscience to love this age instead of the promised age to come.

### Witte on Melancthon's Protestant political theory

John Witte's marvelous study, *Law and Protestantism*, tells how the sixteenth century Reformation turned to secular society as the place of sanctification, and to law as ordered there toward serving the neighbor, and how this turn profoundly and for the good effected the future. "A good deal of our modern Western law of marriage, education, and social welfare, for example, still bears the unmistakable marks of Lutheran Reformation theology."<sup>8</sup> Moreover, we learn from it, Witte claims, that

the state has a role to play not only in fighting wars, punishing crime, and keeping peace, but also in providing education and welfare, fostering charity and morality, facilitating worship and piety ... law has not only a basic use of coercing citizens to accept a morality of duty but also a higher use of inducing citizens to pursue a morality of aspiration.<sup>9</sup>

Witte calls this early Lutheran project for the reform of society "Christian republicanism." He traces this project of a Protestant theology of culture and jurisprudence back to Melancthon's role as *praeceptor Germaniae*, especially in the years after Luther's death.

To understand Witte's argument, however, we have first to step back to the way Luther negotiated untenable claims to institute Old Testament law in a theology that claimed to work by Scripture alone. For Luther, the civil, religious and ceremonial legislation of Moses for ancient Israel has, qua positive law, no abiding significance for Gentile Christians. Not only is it outmoded, it was never addressed to them and so does not speak to them as law, although historically and critically interpreted, it may have heuristic value illuminating how positive law can be informed by the moral law of love. It is the law of love, as the law of creation itself, which abides for Luther. In his writings against the Antinomians, indeed, we find the statement, *Solus decalogus est aeternus*—a claim that is intelligible when we take the Decalogue, as Luther did with Augustine, as the *ordo caritatis*. Otherwise, one wonders, why should the moral law of Moses in the Decalogue transcend its historical context unlike the other forms of Mosaic law?

In his formative work, *On Christian Doctrine*, Augustine had identified the double-love commandment of Jesus in the gospels as the heart of Christian doctrine. In keeping with this tradition of theology, Luther takes the Decalogue as "natural" law spelling out the dimensions and scope of love in the Creator's intended world. We should not be misled by the language of "natural" law, however, to imagine an autonomous human thinker discerning, by reason alone and unaided, the rational and universal moral core behind the manifold formulations of positive law. Luther is not a Thomist, let alone Kantian. His theology of law as epitomized in the double love commandment, understood with Augustine as an *ordo caritatis*, holds by faith that it is written universally on the human heart. It is not an empirical generalization. Although platitudes like, "Do no harm," or, "Don't treat others as you would not be treated," can be found in the *ius gentium*, crucially what is lacking there, following Augustine, is the *crucial* ordering of love so that creatures are loved in and under God their creator, never above or in place or instead of the love which is owed to the Creator. It is the first table of the Decalogue that is decisive for understanding the proper

sense of the second table. This understanding of "natural" law is revealed *theology*, doctrine of the living Creator who actively, albeit hiddenly, governs the world by the law of love. This hidden governance is known from revelation (Romans 1:18ff).

Moreover, God's law as "natural" works as governance in the dark experience of retribution. It is to be sought and found in the actual unfolding of events, in human experience of karma, so to speak, or nemesis, the exceedingly rough justice of experience. Here faith affirms that all things work together for good to them that love God, that is, to those who are called *according to God's purposes*. But to make this affirmation, faith brings to experience its knowledge of God's calling to God's purpose in the ordering of love. The Decalogue is thus needed for Luther as the clearest formulation of natural moral law just because it grounds the second table in the first. As such, it works as a hermeneutic of actual human experience. As clear divine instruction, it works to interpret experience, both political and spiritual, as blessing or curse, as God creating, preserving, punishing, healing, re-creating so that believers may know sin and cease to collaborate with it but rather know righteousness and come to cooperate with the cause of God. In other words, the Decalogue works to inform judgment.

So, arguably, in American history Lincoln used the law of God to interpret the catastrophe of the Civil War and discern in it the hidden purpose of God in ending slavery. As he concluded with the psalmist, "so still it must be said "the judgments of the Lord are true and righteous altogether." Following upon this affirmation of divine judgment on the nation's original sin of a race-based slave system now required by the shed blood of the fallen of both North and South, Lincoln was thus able to summon the judged to mercy:

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.<sup>10</sup>

This, I think, illustrates how Luther conceives of the Decalogue working as a hermeneutic, clarifying the actual lawfulness of chaotic events under God's governance of a fallen world.

To be sure, Luther universalized and radicalized the Decalogue. He dispensed with the biblical preface regarding the Exodus. He omitted the commandment against images, spiritualized the Sabbath commandment and generalized the promise of prosperity in the land of Canaan to all life on the earth. As per the Sermon on the Mount, he looked through external action to the motives of actors, anchoring obedience in fear, love and trust in God above all things. All nations, he asserted, with their religions know that God is to be honored and that society is to be governed in structures of accountability. Yet such governance cannot adequately be prescribed in a written code and left to its impersonal application, as in the notion of "blind justice." Indeed, such ideals of "blind" justice working like an algorithm appeal when confidence in God's seeing, as Jesus proclaims in the Sermon on the Mount, has been lost. It is rather the conscience formed by the moral law which can judge wisely, applying the written code with equity amid a virtual infinity of unique and complex circumstances.

Wisdom is the humane understanding of happy creatures, not the cunning of unhappy gods. This understanding of our ineradicable finitude, and its goodness, includes the insight that human circumstances are unlimited in variety and complexity and that multiplying law in a vain attempt to cover all cases only multiplies the rule of the bureaucrats, legal

and otherwise. In the process, the application of law is depersonalized where personhood is fundamentally at stake in matters of guilt or innocence, that is, of responsibility and conscience. What would repair of an offender mean other than restoration of the ability to respond truthfully? Instead of the multiplication of laws, then, what is needed for Luther is wise judges using the rational insight of imagination that comes about as a judge puts herself into the place of the judged. This is a practical principle of equity provided by the Golden Rule of loving others as ourselves, alike creatures of the same Creator, of equal value though otherwise diverse in talent, opportunity and need. It works to temper the written law's strict logic by the reparative and sometimes also retributive purposes of love. For love is the fulfillment of the law according to the Creator's intention, as the Sermon on the Mount makes unmistakably clear. So the wise judge judges the letter of the law by the spirit of the law. But the Spirit of the law is known from the first table of the Decalogue.

So the Decalogue is needed. For not only is God's governance hidden. The law has been obscured by sinfulness whenever law is used for one's own advantage and at the expense of others. The law without knowledge of God is vulnerable to self-justifying abuse, even tyrannical abuse. *Quis custodiet custodes?* asked the early Marx. Abuse of the legal system solely for the assertion of one's own rights in turn undercuts the moral authority of law in a downward cultural spiral of conscienceless litigation, barely disguised bribery and partisan contests for power. Conscience and the sustenance of a culture of conscience thus become decisive—which is one way of formulating the unique and indispensable political work of the church as creature of the gospel. Checking the danger of caprice and abuse in commending honest but risky reliance on the wisdom of judges is the further principle for Luther, as Piotr Malysz has acutely argued, *nemo iudex in sua causa*.<sup>11</sup> The one who is justified by the gracious intervention of Another, who believes that Other's promise of grace even against the testimony to his own guilt resounding in his own conscience, knows this principle best of all. From this ecclesial center laying out social structures of mutual accountability, radicalized by the Sermon on the Mount's preaching of the heavenly Father who sees in secret and knows in secret so that actors are made transparent before God as the person who acts in the world, Luther's Decalogue serves to expose the universal lawfulness of human society and to clarify and purify it by resituating law and its performance within the Creator's purpose of a good world intended for blessing, not curse. In such a social organization, the fear of the Lord is the beginning of wisdom, binding the conscience of judges to God's ultimate judgment. Thus, the guards are guarded.

Although Luther said all these things about law and justice and conscience, in his lifetime he could and did dodge the question of the institutional reform of jurisprudence because of his conviction that the world was about to end. Melanchthon, left with the task of reforming society on a new Protestant basis, could not and did not dodge that problem. He followed Luther's lead. He solved the problem of the reform of jurisprudence "by subordinating the natural law that is discerned but distorted by reason to the biblical law that is revealed and understood by faith" above all, in the Decalogue.<sup>12</sup> Following Luther's Christianization of the Decalogue, he wrote that it is not enough to grasp negatives, the prohibitions in which the Decalogue is largely formulated.

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 ... so that we know that they are not only our thoughts but that they are God's law ... human reason, without God's word, soon errs and falls into doubt ... about what God is, who He is, about what is right and wrong, what is order and what is disorder.<sup>13</sup>

So the full-blown *ordo caritatis* is even more pronounced than in Luther, if that is possible. Witte rightly observes that

Melanchthon, building on Luther, transformed traditional legal theory by making not reason but the Bible, and more particularly the Ten Commandments, the basic source and summary of natural law in the earthly kingdom .... a model for the positive law enacted by the earthly rulers.<sup>14</sup>

The Decalogue becomes the model of positive law in the new Protestant regime. Melanchthon, in Witte's reading, grasped the pedagogical meaning of Torah, indeed to such an extent that he virtually

folded the civil use of the law into the pedagogical use .... [T]he multitude must be instructed, ruled, and coerced in this manner even now by laws and by certain offices ... This political pedagogy, which is justice, forms morals and includes both religious rites and human and civil offices. Through teaching and exercise it accustoms children [of God] to the proper public worship of God, and it restrains foolish people from vices.<sup>15</sup>

As a preacher and theological teacher by vocation, Luther thought pastorally about his political interventions. He restricted himself to counseling the consciences of Christians, whether rulers or ruled, instructing them in divine law and advising them in conduct that pleases God. But Melanchthon's idea—undoubtedly necessary in his circumstances, after Luther, of rebuilding a reformed Christendom—went further than Luther in commending a "divinely imposed task of Christian magistrates to promulgate what he called 'rational positive laws' (*rationes iuris positivi*) for the governance of the earthly kingdom."<sup>16</sup>

Melanchthon started from the position that the Christian magistrate is the "custodian" of both tables of the Decalogue, "a voice of the Ten Commandments" within the earthly kingdom ...

[M]agistrates must pass laws against idolatry, blasphemy, and violations of the Sabbath—offenses that the First Table prohibits on its face. Magistrates are also, however, to 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."<sup>17</sup>

Needless to say, as Witte too points out, this move toward institutionalizing reform moves a long way beyond the early Luther's emphatic teaching on the freedom of faith and its correlate about the incompetence of secular rulers to decide matters of faith. With Luther, it was the theologians of the gospel who instructed rulers and ruled in their responsibility to God; but now, after Melanchthon, it is the rulers who determine what theology will prevail in their fiefdoms. Biblical theology becomes the ideological instrument of court theology on the grounds that the rulers are the custodians of the Decalogue. But that means the rulers can decide which religion fulfills the first table. Thus with Melanchthon, we witness the first movement in principle towards the *cuius regio eius religio* doctrine; Witte goes so far as to say that "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<sup>18</sup>—that being, again, whatever version of Christianity the ruler decrees. In sum:

the Ten Commandments, instead of the seven sacraments, [were used] to organize the various systems of positive law. And [Melanchthon] looked to the state, instead of the Church, to promulgate and enforce these positive laws on the basis of the Ten Commandments.<sup>19</sup>

The reform of jurisprudence was a change—but a change *from within*—the centuries-long European project of Christendom, of a *holy* Roman Empire, going back to Leo III's coronation of Charlemagne as emperor.

I take it for granted, and will not further argue it here, that this project is kaput today and that we have a new and unprecedented cultural situation in the West for theology and law in post-Christendom.

### Christian conscience under secularism

The flaw in Melanchthon's reform of society was the theocratic turn, as Witte laconically observes in conclusion: "Ever since, Germany and other Protestant nations have been locked in a bitter legal struggle to eradicate state establishments of religion and to guarantee religious freedom for all ..." <sup>20</sup> It is no accident, in the light of this history, that the achievements in human equality attained by modern secular law which derive from the Lutheran Reformation's turn to equity in secular life as the place of sanctification have had to kick away the ladder on which they climbed to this enlightened place. Ironically, as I will now conclude, this loss of the Decalogue puts the secular state in the self-absolutizing posture that Thomas Hobbes first theorized, when he supposed that the rule of law is always instituted, not by God for the sake of a conscientious obedience according to His purposes, but rather by a violent "state of exception" described by Agamben.<sup>21</sup> What an irony! Having given the princes the authority to determine how the first table of the Decalogue is to be fulfilled, the princes took the authority but abandoned the first table. Or rather, they consumed it. They became Hobbes' Leviathan, the early modern state as the incarnate god on the earth.

Abandoning the Decalogue, however, the secular state cannot acknowledge any higher power to which it is accountable; it become the judge of its own case without exception. Coupled with the disestablishment of religion under the principle of equity, the perception of the pluralism of religions emerged in secular modernity which ipso facto permits no social consensus on what higher power might require accountability or sustain a culture of conscience. The ad hoc adaptation to this state of affairs is the return in the churches to the antinomianism according to which all is grace, as H. Richard Niebuhr captured in the nineteenth century preaching in mainline American churches (and which today again predominates) of a "God without wrath who brings men without sin into a kingdom without judgment through the ministrations of a Christ without a cross."<sup>22</sup> A sharper sketch of the Lutheran heresy could not be drawn. Judgment is abandoned. Justice, however passionately advocated, reduces to intense fighting over rules of procedure—as if equal opportunity in a secular culture of greed were the righteousness of God!

If the case I have been building succeeds, then it will have put theology in the tradition of Luther on the horns of a dilemma. I hope I have shown that Luther's view of "natural" moral law as *ordo caritatis* cannot be secularized coherently, beginning with Melanchthon's

own fatally flawed attempt to enforce the Decalogue. The reason for this is not simply social tolerance. But also, on Lutheran terms itself, faith in God, if it is to be justifying faith, can in no sense be coerced without falsifying it. It must be filial, free and joyful, not servile, forced and fearful. To this extent, the rise of secularism against Protestant religious establishment is theologically justified and indeed a piece of poetic justice. Religious freedom is the first of all freedoms, the one higher principle to which secularism still (pretends to) bow.

The law that must be fulfilled theologically is the law of love, first by Christ for us and then by Christ in us. This is the message of the church regarding justification also today, and it is the only message which can subvert the self-absolutizing temptation of the secular state of modernity and *force* it—I used the word advisedly, thinking of Romans 12:20 and Martin Luther King's ministry of non-violent resistance—to a posture of responsibility to God for that piece of His creation entrusted to its care. If that is so, the urgent theological task is for the church to regain confidence in just this gospel message which does not "take sides" in the partisan politics of the secular state, but "makes sides" by cultivating a culture of conscience. It does this just by showing forth the fulfillment of God's law in Christ's obedience to death on the cross when He took responsibility for us while we were yet sinners. On this basis, a public theology of a public church demands a conscientious response in turn—call it Luther's lifelong repentance. It is by proclaiming the gospel in this way, that is, on its own theological terms of justification before God, that the church makes a true and helpful contribution to secular political life and the performance of law in it. With conscience bound to this word of God revealing righteousness in Christ, Christian living satisfies the justice of God in the hope of righteousness. What this witness of conscience means for life under secularism, and for law according to secularism, I leave for others to imagine. But I suspect it means, as it meant in Luther's own time, *resistance*.

### Notes

- 1 For a discussion of this term, see "4.3 What Is Philosophy, Gilles Deleuze," *The Stanford Encyclopedia of Philosophy*, ed. Daniel Smith and John Protevi (2012). Accessed November 5, 2017. <https://plato.stanford.edu/entries/deleuze/>.
- 2 See, e.g., Anders Nygren, *Agape and Eros*, trans. Philip S. Watson (New York and Evanston, IL: Harper & Row, 1969), 92.
- 3 See generally Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. D. Heller-Roazen (Stanford, CA: Stanford University Press, 1998).
- 4 See Roland Bainton, *Here I Stand: A Life of Martin Luther* (New York: Meridian Books, 1995).
- 5 The quotations in this paragraph are taken from *Solus Decalogus est Aeternus: Martin Luther's Complete Antinomian Theses and Disputations*, ed. Holger Sonntag (Minneapolis, MN: Lutheran Press, 2008), 356–357.
- 6 See, e.g., Martin Luther, *Preface to Latin Writings* [1545], American edition of *Luther's Works*, ed. Jaroslav Pelikan and Helmut T. Lehmann, 55 vols. (Philadelphia, PA: Fortress Press and St. Louis, MO: Concordia Publishing House, 1955–1986), 34, 336–337.
- 7 For an example of this reference see, e.g., Martin Luther, *Two Sermons upon the Fifth Chapter of Luke* ("Here you see how poor and miserable conscience is when it really begins to feel its sins. How it trembles! How it runs to escape from God when he draws nigh, as if it would run across a hundred worlds! Thus Adam in Paradise thought to hide himself when God kindly asked: "Adam, where art thou?"). Accessed November 5, 2017. [www.covenanter.org/reformed/2015/7/27/martin-luthers-two-sermons-upon-the-fifth-chapter-of-luke](http://www.covenanter.org/reformed/2015/7/27/martin-luthers-two-sermons-upon-the-fifth-chapter-of-luke).
- 8 John Witte Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), 295.
- 9 *Ibid.*, 296.
- 10 Abraham Lincoln, Gettysburg Address. Accessed November 5, 2017. [www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm](http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm).



- 11 Piotr J. Malysz, "Nemo iudex in causa sua as the Basis of Law, Justice, and Justification in Luther's Thought," *Harvard Theological Review* 100: no. 3 (2007): 363–386.
- 12 Witte, *Law and Protestantism*, 125.
- 13 Ibid., 126 quoting Phillip Melancthon, *Corpus Reformatorum*, 28 vols. *Philippi Melancthonis Opera Quae Supersunt Omnia* (Halle and Brunswick: C. A. Schwetschke, 1834–1860). (Hereafter, CR.) CR 22, 256–257.
- 14 Ibid., 127. Melancthon "defined a good deal of the content and character of Lutheran theories of law, politics and society ... 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." Ibid., 139.
- 15 Ibid., 129, quoting Philip Melancthon, CR 1, 706–708.
- 16 Ibid., (referring to Melancthon's views).
- 17 Ibid., 131, quoting Philip Melancthon, CR 22, 617–618.
- 18 Ibid., 132.
- 19 Ibid., 133.
- 20 Ibid., 296.
- 21 See discussion of Hobbes in Agamben, *Homo Sacer*, 106–109.
- 22 H. Richard Niebuhr, *The Kingdom of God in America* (New York, Evanston, IL and London: Harper Torchbooks, 1959), 193.