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CHAPTER 9

God's Uses of the Law and the Effort to Establish a Constitutional Right to the Means to Live

Marie A. Failing and Patrick R. Keifert

Therefore, it would be very proper to place in a coat-of-arms of every pious prince a loaf of bread instead of a lion, or a wreath of rue, or to stamp it upon the coin, to remind both them and their subjects that by their office we have protection and peace, and without them we could not eat and retain our daily bread.

*The Book of Concord*¹

To the state of Maryland, Jeanette and Junius Gary were merely welfare recipients who had too many children.² After a number of miscarriages that led her to despair of her barrenness, Jeanette bore Junius eight children in less than seven years. Unfortunately, her health was compromised by these pregnancies, resulting in high blood pressure, arthritis, and maybe diabetes. Junius, a hard-working man with an engineering bent, who was honorably discharged from the Army after severe injuries, was employed during these years as a truck driver and chauffeur until he was in an automobile accident. He became unable to work because of dizzy spells, blackouts, and seizures, and then unexpectedly died at the age of forty-five.

Faith and family were the center of the Garys' lives. But they had to seek assistance from the state of Maryland to survive due to their disabilities. To

1. Lutheran Confessions, The Lord's Prayer, Fourth Petition, *Book of Concord: The Symbols of the Evangelical Lutheran Church*, trans. and ed. Theodore G. Tappert (St. Louis: Concordia, 1957), p. 202.

2. The facts recounted about the Gary family are taken from Julie Nice, "A Sweeping Refusal of Equal Protection: *Dandridge v. Williams* (1970)" in the forthcoming book *The Poverty Law Canon*, ed. Ezra Rosser and Marie A. Failing (2016).

God's Uses of the Law

discourage welfare recipients from having more children, the state capped Aid to Families with Dependent Children assistance to families at \$250 per month, well below the poverty line and even below the rock-bottom basic needs even the state recognized that large families had. That cap was the most any family on welfare could receive, regardless of the actual number of persons in a family, and the Garys struggled just to eat every day.

Today, many national constitutions recognize a constitutional right to the means to live. This right is even written into international law: Article 11 of the International Covenant on Economic, Social and Cultural Rights provides that “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”³ Yet, the United States has refused to ratify this Covenant, or to acknowledge any affirmative right of human beings to government assistance in meeting basic survival needs.⁴ That refusal to recognize a basic right to the means to live does not distinguish between a healthy adult who has available work and others, such as children or elderly or disabled persons, their caretakers, or those who want to work but are unemployable or underemployed in changing markets.

To be sure, both federal and state governments have created numerous programs to assist low-income citizens and residents of the United States: Temporary Assistance to Needy Families (TANF) for families; Supplemental Security Income (SSI) for aged, blind, and disabled individuals; and the SNAP program (formerly Food Stamps) are among these. Some have argued that these programs are more generous than those in some countries

3. Article 11, Sec. 1, International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, art. 12, 993 U.N.T.S. 3, 8 (entered into force Jan. 3, 1976), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed March 14, 2014). This covenant also recognizes the right of people to self-determination, the right of the family to protection, and the rights to work, to health, education, and to cultural participation.

4. The United States signed the covenant in 1977, but Congress has refused to ratify or make accession to it since then. See United Nations Treaty Collection, Chapter 4 part 3, Covenant on Economic, Social and Cultural Rights, https://treaties.un.org/pages/view_details.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty (accessed March 14, 2014). As of March 2014, there were 161 parties to this treaty.

that have signed on to the International Covenant on Economic, Social and Cultural Rights, but they are not as generous as those in many industrialized nations, even those with less national wealth than the U.S.

Despite the existence of these programs, many of which date back to the Depression of the 1930s, American courts and legislatures have turned back attempts to declare that these or any programs are enforceable human rights. Perhaps most dramatically, in the Garys' lawsuit to overturn the \$250 family cap on welfare benefits, which became the Supreme Court case of *Dandridge v. Williams*, Justice Potter Stewart famously responded, "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."⁵ Accordingly, since the 1970s, the Supreme Court has consistently proclaimed that there is no constitutional right to the basics for survival. While the Supreme Court's refusal to recognize a right to the means to live can be explained in part by constitutional concerns such as separation of powers, federalism, and the limits of judicial competence to construct social programs, the fact is that none of the three federal branches of government has recognized such a right, nor have state governments.

While a key constitutional value in the United States is the "separation of church and state" embodied in the Establishment Clause of the First Amendment, one may wonder why the United States has refused to recognize a right to the means to live, despite the fact that most of its citizens continue to identify themselves as Christians, Jews, and Muslims, religions that all emphasize our duties to protect the most vulnerable in society. We suggest that, at least in part, this failure may be traced to theological confusion over the ways in which God uses the law, including secular law promulgated by individuals and human institutions for the sake of human community. This chapter assumes a consistent and thoroughgoing theocentric realism.⁶ As we consider God's uses of the law, we will especially focus on God's uses of human law, as sin, death, and the Evil One profoundly and systemically distort it. Despite these distortions, God's primal agency in human law remains, often hidden, yet very real.⁷

Though early Western medieval literature often focused on providing for

5. *Dandridge v. Williams*, 397 U.S. 471 (1970), p. 487.

6. Michael Welker, *God the Spirit*, trans. John F. Hoffmeyer (Minneapolis: Fortress Press, 1994), pp. 46-49 (providing a more sustained description of "realistic theology").

7. For a good discussion of this theme in recent Lutheran theology, see Stephen D. Paulson, *Lutheran Theology* (New York: T. & T. Clark International, 2011), pp. 24, 42, 54-55, 67, 86, 151, 211.

the poor as a form of “works-righteousness,” a way of meriting grace, early welfare law literature concerned itself primarily with the “receiving” side of welfare efforts, concentrating on the moral worthiness of recipients, describing wealth transfers as undeserved “charity” or “gift” rather than a deserved “right.”⁸ Individuals and families who demonstrated piety and conformed to social standards such as hard work and proper parenting were most likely to be fed and housed at public expense.⁹ In some jurisdictions, the poor were consigned to “poorhouses,” their children sometimes removed from their care to be apprenticed or brought up by persons who would teach them the proper moral behavior their parents had not.¹⁰

After the advent of the Reformation, however, social reformers had other theological paradigms to draw from, including the Lutheran views about the uses of the law. Most Lutheran scholars agree that this tradition has taught two uses of the law, the so-called civil use of the law, and the spiritual or theological use of the law.¹¹ The second, theological use is sometimes described as a mirror that accuses sinners, holding up their sins to them incessantly and comprehensively so they can come to see that their only salvation is through the grace of God, and not their own merit or works.¹²

8. Larry Cata Backer, “Medieval Poor Law in Twentieth Century America: Looking Back toward a General Theory of Modern American Poor Relief,” *Case Western Reserve Law Review* 44, no. 3-4 (1995): 871-1061, at 871 (noting that “the benefits of status and property, however, carried with them a spiritual and quasi-legal duty of charity. In time of necessity all people were expected to share their superfluous wealth with those in need; otherwise the wealthy were under no *obligation* to donate their wealth for charitable purposes”).

9. Backer, “Medieval Poor Law,” p. 1029 (noting that “in the medieval period . . . [w]hile the poor were thought inferior, only the able-bodied who refused to work, and thereby violated the class and status norms of medieval society, were despised as deviants and punished as beggars, thieves, and vagabonds”).

10. Joel F. Handler, “The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context,” *New York University Review of Law & Social Change* 16 (1987-88): 457-534, at 468 (noting, “The goal of nineteenth-century welfare policy, therefore, was to distinguish the worthy poor from the pauper and to prevent the poor from passing over that line”).

11. Although these uses are described somewhat differently in theological writings and confessions, we will follow the distinction between the first or civil use of the law in this earthly kingdom, and the second or spiritual use. We do not mean to avoid the continuing debate on a third use but rather to propose a theological warrant for the right to the means to live that is more irenic and can even be shared across theological traditions.

12. Edward Engelbrecht, *Friends of the Law: Luther's Use of the Law for Christian Life* (St. Louis: Concordia, 2011), p. 9. For a longer discussion of the second use, see William H. Lazareth, *Christians in Society: Luther, the Bible and Social Ethics* (Minneapolis: Fortress

Regrettably, the first, civil use of the law is often described as only preventative and punitive, established by God to deter “the wicked” from harming the earthly creation and to provide appropriate earthly retribution for them if they do. There is also a significant literature debating whether Martin Luther, or the Lutheran tradition that follows Luther, recognized a third use of the law.¹³ Those modern Lutheran theologians who have advocated for a more robust third use of the law have often reverted to the traditional argument that “Gospel without Law” leads to antinomianism, i.e., the likelihood that Christians, who continue as sinners, will understand Christian freedom from the law as a license to ignore the commands of the law, deluding themselves that their freedom purchased by Christ permits everything, even those actions condemned by the Decalogue and biblical teaching. On the other side, Lutheran theologians who have resisted recognition of a third use of the law have been concerned about “Law without Gospel,” i.e., about the use of the law to justify oneself through one’s own holiness, the very works-righteous theology at the heart of Luther’s criticism. Some modern Lutheran theologians have also argued that a third use of the law distorts the actual existence and experience of a Christian, by recasting the constant direct (which some critics describe as existential) encounter between God and the Christian into a primary relationship between the Christian and the law, separate from God.¹⁴ The main concern of this chapter is not to settle the debate about whether Luther, or the authentic Lutheran tradition, has recognized a third use of the law. Rather, we suggest that employing the traditional first use Lutheran imagination of how God continues to use law to engage human beings in the world throughout history is a more solid basis on which Lutherans and other Christians can engage and challenge modern governments and lawmakers on issues such as the constitutional right to welfare. By contrast to more modernist, nontheological frames, this consistently theocentric frame allows for a justification for these rights that can be shared with Jews and Muslims.

Many Christians today employ an imagination about the uses of the law that bears a faint resemblance to that espoused by some of the Deist founders of the American constitutional system. In the common portrayal of the

Press, 2001), pp. 116-20 (noting the exposure of human sinfulness, and human discharge from the law once “the regenerate appropriate God’s grace through faith”).

13. See, for example, the third use description in Engelbrecht, *Friends of the Law*, pp. 79-81.

14. The work of Robert Bertram, Gerhard Forde, and Edward Schroeder, teachers and friends, has been instructive to our argument.

constitutional founders' imagination, God has given the natural law, with its foundation in the Ten Commandments, to human beings.¹⁵ Then, while God may be continuing to create in the "natural world," God has stepped back from the human community, expecting that humans will found legal institutions and execute laws that carry out the basic contours of those commandments. This legal imagination emphasizes restraining sinners from violating the natural law and punishing those individuals who have transgressed it, thus restoring equilibrium in the secular world through retribution, among other reasons to equalize the situation of wrongdoer and victim, as death penalty proponents argue is necessary by taking a life for a life.¹⁶ In this imagination, the law of God, in its first use, provides a minimalist order to the secular world, but does not instruct or govern most human affairs. At the same time, in this view, those who are redeemed are instructed and empowered, through the separate sanctifying action of the Holy Spirit, to live holy lives in this world, and to fill the social emptiness left by the minimalist first use of the law with more robust, charitable, and life-giving action on behalf of the neighbor. (We might note how this understanding of the Holy Spirit's action separates the persons and the work of the Trinity to reinforce the great modern divide between public and private.¹⁷)

This dual understanding of law, roughly corresponding to what has been called the first use and the third use of the law, has its parallel in the American imagination on the role of law in meeting the needs of the neighbor, certainly at least until the Great Depression and New Deal. In that imagination, governments chiefly operate to provide some minimal order to our "public" interactions in daily life by dictating rules of restraint for governments, institutions, and individuals — rules against violence, theft, slander, etcetera punishable by fines, imprisonment, or civil judgments. These rules, while founded on key natural law expectations, are largely developed by self-regulating human beings as they encounter changing conditions and

15. Recent research has debunked the claim that "the God of the Enlightenment deists was a remote, uninvolved, watchmaker God that generated no love or warmth in people." Joseph Waligore, *Introduction to Deism*, http://www.enlightenmentdeism.com/?page_id=25 (accessed December 12, 2014).

16. See Linda E. Carter, Ellen S. Kreitzberg, and Scott W. Howe, *Understanding Capital Punishment*, 2nd ed. (Newark: Matthew Bender, 2008), pp. 11-13.

17. Many secular philosophers have raised these same questions regarding what has been called "the modern dogma," which accepts the fact-value split. See Wayne C. Booth, *Modern Dogma and the Rhetoric of Assent* (Chicago: University of Chicago Press, 1974), pp. 13-24.

new ways in which sinful persons engage in wrongdoing. Thus, criminal laws against theft of property from the person can be reimagined through human ingenuity to produce embezzlement laws and even prohibitions against insider trading and theft of intellectual property. Meanwhile, other “private” social needs are filled by the generosity of the charitable act, the voluntary largesse of individuals, social institutions such as the church, and even governments. Yet, much like the medieval conception, “givers” are expected to give out of their abundance, not to the extent that their own personal needs or desires are jeopardized. Thus, for example, modern tax schemes assume that individual taxpayers are legally and morally entitled to “keep” the income they have “earned,” unless government determines that social welfare will be significantly enhanced by government collection of taxes to fund a common project that will increase community economic success, including for the “givers,” e.g., the highways taxpayers use to get to work, or a football stadium that will bring employment. Even if Americans are motivated by a variety of other reasons to create social programs such as TANF and SNAP, including compassion for the needy, few of them would accede to the claim that these programs create a legal right in needy recipients to the means to live.

In constitutional terms, this imagination has been captured in the distinction between “negative rights” against government interference with personal freedom and “affirmative rights” to government assistance in order to flourish on one’s freedom. The Constitution has been read by American courts and legislatures as a “negative rights” document, with some few exceptions. *Dandridge v. Williams* is a prime example of this “negative rights” understanding; the Supreme Court holds that the Gary family has no legal claim on government to perform a duty to provide for their basic subsistence needs.

We would suggest that the Lutheran tradition teaches a richer and more nuanced understanding of God’s uses of the law that can better inform our human responsibilities to respond to the neighbor’s need through government and secular social organizations. We will explore how five interrelated errors in the modern thinking about the relationship between God, the church, and secular law and legal institutions can be challenged by the Lutheran tradition. First, in the Lutheran understanding, God is no watchmaker who starts the world turning and then lets us fend for ourselves. Rather, God is the primal agent in our efforts; God continues to create in and with the human community, including in our creation of secular law.¹⁸ That

18. Lazareth, *Christians in Society*, p. 66.

God's Uses of the Law

is to say, when human beings write and enforce law, God is there, moving by the power of the Holy Spirit through our work, whether we understand and acknowledge and heed or rebel against God's presence.

Second, God's uses of the secular law — God's demands on human persons and institutions — are not simply retributive, setting forth minimalist expectations to be met with punishment when we refuse to heed those demands. Rather, God works in the world of this age with us to create new human institutions, to preserve and enrich human community through our service to the neighbor, and to repair the world's brokenness. That work of repair is not only for the world's spiritual brokenness (God's second use of the law) but also its material and social brokenness, from environmental destruction and family violence to eradication of social discrimination against vulnerable groups.

Third, God moves through the law, teaching, encouraging, demanding, and punishing not just Christians but all persons. God is instructing and inspiring not only redeemed Christians to work toward "God's preferred and promised future" for us all; indeed, the law calls every human being to this task.¹⁹ Similarly, both Christians and non-Christians fall short of God's expectations for a world that is trustworthy for all; and both Christians and non-Christians are exhorted to make the needs of the human community their own through secular law. We may anticipate failure in this task due to sin, death, and the Evil One, but that does not end God's desire, preference, command, indeed, demand on us to work for that future.

Fourth, an exclusive emphasis on the third use of the law in creating a trustworthy world risks reinstating the error of theocratic perfectionism that has characterized America's civil religion. Finally, such an emphasis can construct a wall of separation between God's work in using law to create a civil society and God's work in forming Christian community to serve that society. For the Christian, in the Lutheran view, no such wall of separation exists.

We elaborate on these points starting with the first key error that both lawyers and political activists, including Lutherans, make as they attempt to

19. On God's preferred and promised future, see generally Patrick R. Keifert, *We Are Here Now* (St. Paul, MN: Church Innovations Publishing, 2006). This expression is a development of the law/promise distinction building on Dietrich Bonhoeffer's reworking of that classic formulation through the language of penultimate and ultimate. This formulation follows Philip Melancthon's in *Apology of the Augsburg Confession*, IV, *The Book of Concord*, pp. 32-42. One summary of Article IV for our purposes might be, "How to promote good works without losing the free promise."

shape the legal rules for the secular world on difficult issues such as abortion and same-sex marriage out of natural law understandings. That is, it is easy to proceed as if the natural law is *sui generis*, a static set of legal or value principles that exists “out there” rather than the ongoing will and work of God in human history. Or, to play with the title of this chapter, God’s uses of the law may become “the” or “our” uses of the law, whether they are two or three or many. Even those who, if challenged, would concede that law is God’s work in the world tend to reason as if this were not so. They — we — then commit a common idolatrous sin: we begin to interpret the natural law from a “thoroughly anthropomorphic” perspective, creating our own image of God and God’s will for the world instead of recognizing our status as recipients of God’s law, as first and foremost the creatures rather than creators of law.²⁰

From this perspective, it is easy to begin to unhook philosophy of law from the ever-present intervention and command of God that emanates from and is responsive to the ever-changing nature of the creation.²¹ Even humanity itself is constantly undergoing change, both biological and social. Yet, once jurisprudence and law-making are relationally unhooked from the continuously creating Trinity, and lawyers and political activists think that they can depend only on human rationality to structure secular law, their work becomes a perversion of God’s will for the world. That amnesia about God’s ongoing participation in our fate results in rigidified and theologically problematical assumptions about human nature that structure our views, whether conservative or liberal, on providing for our fellow human beings in need, e.g., human beings are naturally corrupt and lazy, and will never exert effort to care for themselves and their families without coercion, so families should be refused help with the means to live in order to force parents to provide for their families. Or, we might incorrectly assume, poor people like the Garys are incapable of managing their own lives, so a humane government or society must step in to provide for their basic needs, help them address their pathologies, and conform their lives in ways that let them participate effectively in mainstream societies. While each of these arguments is seemingly grounded

20. Johannes Heckel, *Lex Charitatis: A Juristic Disquisition on Law in the Theology of Martin Luther*, trans. Gottfried G. Krodel (Grand Rapids: Eerdmans, 2010), p. 27.

21. For example, in his lectures on Genesis, Luther pointed out, “God did not therefore in the seventh day cease to work in every sense, but he works still, not only in preserving his whole creation, but also in altering and new-forming the creature.” John N. Lenker, *Luther on the Creation: A Critical and Devotional Commentary on Genesis 1–3* (Minneapolis: Lutherans in All Lands Co., 1904), p. 67.

God's Uses of the Law

in human reason and experience, they not only oversimplify the human story of vulnerable families like the Garys but do not even pretend to consider how God is working in the world to provide for the Garys' material and spiritual needs through their callings to each other and others' callings to them.

Because Lutherans recognize that human beings are co-creators of this secular world, including secular law, we are not excused from making law even though law-making necessarily relies, in part, on our own flawed and sinful experience and reasoning. Most certainly, our human understanding of secular natural law will be corrupted because, as Johannes Heckel claims that Luther argued, human understanding of the experience of true love for God and the neighbor becomes "weak, dim and crude" as a result of sin.²² Luther, Heckel notes, emphasizes that human beings will constantly misuse the very search for the principles of secular natural law as a true search for God's will, and become arrogantly confident of their ability to "re-think God's thoughts."²³ Secular human laws will inevitably reflect the sin of human beings advocating for laws that favor themselves or their own righteousness before God, under the guise of their "discovery" of "the will" of God for creation.²⁴

Therefore, Lutheran theology would counsel, pronouncements about secular natural law, and attempts to govern human communities through the positive laws that embody those understandings, must always be viewed with skepticism. They must be met with continual efforts to probe the self-justification that may be at the heart of those descriptions, and with attention to how secular positive laws that claim to reflect natural law actually operate in the real, empirical world. Visible evidence that legislation and enforcement of particular positive laws are causing damage to the environment or to intimate human relationships such as marriage is evidence that human beings may well "have it wrong" in their understanding of secular natural law, whether from human sin or simply human limitation. Thus, the "discovery" and pronouncement of what secular natural law requires must always be attended by humility, self-criticism, and the willingness to probe all claims about natural law.

People of faith, in particular, need to be asking the question, "What is God up to here? What is God's preferred and promised future for our community?" And people of faith, along with those who are not, are called to

22. Heckel, *Lex Charitatis*, p. 55, citing Luther's First Disputation against the Antinomians 1537; The Formula of Concord II, *Book of Concord*, pp. 218-19.

23. Heckel, *Lex Charitatis*, p. 56.

24. Heckel, *Lex Charitatis*, p. 56.

be continually attentive to the dynamic relationship between human beings and the wider ongoing creation of God, and to embrace the opportunity to make and remake the secular law in ways that, as best as possible, seem to contribute to the flourishing that God demands for all persons in the world.²⁵ This calling requires not only our best thinking from reason and experience, but also constant immersion in, and listening to, the lives and experiences of others, listening for God's Word for the world, and being certain that we will never be certain of it. Neither tradition nor idealism, which put human beings at the center of the law-making process, can serve as an ultimate good or principle if the recognition of God's ongoing work in the world is to be honored.

A second key error that Lutheran interpreters can make is to conflate Luther's teaching about the uses of God's law with the kingdoms in which God operates. In one reading, the first or "negative" use of the law is conflated with the secular, or left-hand kingdom, so that deterring or punishing evildoers becomes the secular world's only legitimate use of the law. The affirmative or positive uses of the law in structuring human community to enable it to flourish are forgotten in this discourse about the secular kingdom; they come in only as a third use of the law, a call to Christians to be holy.

Heckel, a lawyer interpreting Luther's understanding of law, described the contrast that Luther saw between divine natural law and secular natural law, two distinct though complementary ways in which God employs law in the two kingdoms, "God's kingdom under Christ" and "the kingdom of the world under the governing [secular] authority."²⁶

Heckel argues that in the Lutheran tradition, divine natural law is not a set of commands about right conduct, but exclusively spiritual — the Word and the Spirit — and directed only to believing hearts. For Luther, God's commandments are radically spiritual; "God does not command anything external."²⁷ Divine law's only objective is to create "a God-formed will," to form a heart "seized by God's spirit." The very definition of divine natural law is uncoerced, joyful love that both binds the whole person in complete

25. Luther, speaking on secular authority, argued "[i]f it is God's work and creation, then it is good, so good that everyone can use it in a Christian and salutary way," and urged Christians to "serve God in government if the needs of his neighbor demands. For those who punish evil and protect the good are God's servants and workmen." "Temporal Authority: To What Extent It Should Be Obeyed" (1523), in *Martin Luther's Basic Theological Writings*, 2nd ed., ed. Timothy Lull (Minneapolis: Fortress Press, 2005), pp. 441-42.

26. Heckel, *Lex Charitatis*, p. 41.

27. Heckel, *Lex Charitatis*, p. 45.

surrender to God and also assures him or her of God's love. Divine natural law is universal because it emanates from the Creator of law; it addresses all of humankind "in the status of the incorrupt nature"; it grasps the human being in his or her totality; it lasts eternally; and it is exhaustive of, and the model for, all law valid before God.²⁸ Law is legislated as the divine will in the form of the Word of God that penetrates the human will as it is "resting" or "being drowned" in the will of God.²⁹ While the divine law demands a work from the Christian, paradoxically, that work is love for the Creator that only God can make possible, not the person.³⁰ The instantiation of divine natural law, the divine positive law, which God instituted after creation to order the communal life of persons in relationship to God through the institutions of marriage and the church, is not divine unless used spiritually, i.e., to transform the will into one characterized by perfect love for God and others. Notably, Heckel argues, Luther rejected the idea that the Golden Rule was an expression of the divine natural law, "first, by its content: it demands an external 'work' ('do also to them'); and second, by reference to the *I* as the standard of conduct ('*you want people to do to you*')."³¹ Divine natural law is not appropriate for the governance of the secular world, because love — God — provides law with its ontological basis, and "is binding only if the will of the recipient of this law affirms it as being binding," that is, only in the spiritual kingdom.³²

Secular natural law represents the divine intervention into the affairs of human beings living their daily lives on earth, the commandment that they reject the self-involvement and self-interest that drives the world into chaos to live a life for the sake of others.³³ Secular positive law, intended to carry out the moral power of secular natural law, is that law which human beings institutionalize in government and political power (which, in Luther's view, includes the commands of the Decalogue that are borrowed into positive law).³⁴

Stated another way, remembering God's agency, we might describe secular human laws as a reflection of God's mediation between the dynamics of creation and the tendencies of human agency to destroy it. Theologian Edward Schroeder reminds us that the law as Luther understood it was not

28. Heckel, *Lex Charitatis*, p. 48.

29. Heckel, *Lex Charitatis*, p. 49.

30. Heckel, *Lex Charitatis*, p. 50.

31. Heckel, *Lex Charitatis*, pp. 50-51.

32. Heckel, *Lex Charitatis*, p. 47.

33. Heckel, *Lex Charitatis*, pp. 56-57.

34. Heckel, *Lex Charitatis*, at pp. 57-58.

a set of rules about lawful behavior but “nomos” or *Gesetz Gottes* in German, God’s “way of operating in the world,” reflecting human solidarity, the membership of each in the human community, and the mutual responsibility of all to serve each other for the common good.³⁵ God’s law is a demand for life-giving behavior from human beings. It is a description of God’s preferred future for us, a description of behavior that can create a world that human beings can trust, and in that trust, can flourish and help other living beings, human and nonhuman, to flourish. *It is a demand for more than negative rights, or a minimalist state.* And it warrants itself both in the present demands of the law and the unconditional free promise of life in Jesus Christ.

Said another way, civil law, in this case welfare law, is an example of how human beings can cooperate with the ongoing creation to stem the chaos of sin that threatens the very right to life, by responding to human need and securing lives. Or, it can be an example of how human beings and institutions can use the law to create chaos, destroy human relationships, and deny some or all of us the overwhelming bounty of creation.

To give just an example of how the law can work to order or disorder creation, the Decalogue’s commandment against stealing (a negative right, or a prohibition) recognizes the fact that sinners are tempted to steal, whether through a simple burglary or complex financial transactions. Each theft creates uncertainty about what human beings can expect. Working with and obeying God, we can craft legal constraints for sinful thefts that make it possible for human beings to entrust their property to each other for purposes ranging from community uses to investment.

But the law of property (an affirmative right) also gives sinful human beings the power to destroy a trustworthy world for others, when property owners “stand on their rights” as an excuse to ignore the neighbor’s need for use of that property. Thus, in the United States, homeless people are constantly being arrested for camping on doorsteps or breaking into buildings that are empty, just to find a warm place to sleep. God’s law for the secular world demands more than protection against interference with property rights; it demands that government cooperate with other human agents and the divine Agent in the project of creating legal rights that can guarantee a trustworthy world for these homeless people.

35. Email from Edward Schroeder to Marie Failinger, August 13, 2013. See also Heckel, *Lex Charitatis*, pp. 56-57 (noting Luther’s view that the moral basis for the law “is the awareness of mankind’s solidarity and mutual responsibility as a body whose members are called to serve one another, according to their respective talents; its goal is the common welfare”).

God's Uses of the Law

The third and related error that can arise from conflating secular natural law and what Heckel calls divine natural law is that Christians may incorrectly believe that God's demands to order the *saeculum* (secular world) are addressed only to them. Introducing back a third use of the law directed at Christians not only risks a misunderstanding of how salvation operates in the life of a Christian. It also may imply that the heavy demands of the secular natural law — what we should be doing to others, as we would have them do to us — apply only to Christians in their status as saved persons. But if the purpose of the secular natural law is to order the secular world so that human beings and others can live in a trustworthy world in this life, then we should expect these heavy demands to be addressed to the activity of all persons, whether or not they accept the accusation of the law in its theological use, and whether or not they accept that their only recourse is salvation of God through Christ.

In this way, the narrow description of a first use as the magistrate's use of the law to punish wrongdoers in this earthly life is much too cramped, and the third use as the instruction of the Holy Spirit only to Christians to do good works potentially misleading. God's first use secular natural law as embodied in secular positive law functions to instruct, to exhort, to compel, to guide, to judge, and to punish those in this earthly life. It tells us what our duties are — e.g., to meet the daily needs of our neighbor. It encourages us that in doing so, we will be carrying out the will of God. It even expects and demands that we will do so, and that the judgment of God for our failure to do so will hang over us.

Thus, the demands of God's law on all human beings for God's ordering of our earthly world cannot be reduced to a minimalist interpretation of the Ten Commandments literally read as "negative" commands. Rather, the demands of God's law are demands upon all living persons to care for our world and to give our lives for it, as we find in Luther's Small Catechism explanations to the Ten Commandments, which are addressed to all persons as the law written on their hearts, minimalist prescriptions with maximalist demands:

The Fourth Commandment

Thou shalt honor thy father and thy mother [that it may be well with thee and thou mayest live long upon the earth].

What does this mean? We should fear and love God that we may not despise nor anger our parents and masters, but give them honor, serve, obey, and hold them in love and esteem.

The Fifth Commandment

Thou shalt not kill.

What does this mean? We should fear and love God that we may not hurt nor harm our neighbor in his body, but help and befriend him in every bodily need [in every need and danger of life and body].

The Sixth Commandment

Thou shalt not commit adultery.

What does this mean? We should fear and love God that we may lead a chaste and decent life in words and deeds, and each love and honor his spouse.³⁶

To return to the Garys for a moment, a crabbed, negative first use view of the law suggests that the “secular” state of Maryland has no obligation under the secular natural law to actually meet the Garys’ true needs, even the most critical of those needs, because the state’s welfare programs are “supererogatory and voluntary,” not obligatory responses to human need.

These issues raise a fourth error that tempts Americans, including Lutherans, in a nation whose civil religion has strong theocratic perfectionist strains: it is very easy for Lutherans who rightly seek to affirm the teaching of God’s law within the church to conflate it with the belief that we have the innate ability to sanctify ourselves. In the simplest form of this error, the church suggests that Christians are morally superior to non-Christians. This error confuses the righteousness of God and of his Word with the idea that our own works make us righteous, a problem that also circles back to Luther’s argument about the second use of the law.

While surely no Lutheran would admit to this error, subtler but nonetheless equally egregious moves are often made by those emphasizing the third use of the law in the care of the world. For example, this error occurs regularly when the church presumes that its holiness, grounded in the work of the Holy Spirit, grants it a morally superior stance from which to teach the rest of the world on questions of theological anthropology. Here it is very important to recognize the enduring power of sin, death, and the Devil and Lutherans’ suspicion of their best moral judgments. We are *simul justus et peccator* (at once righteous and sinners) to our dying day. What holds for

36. *Book of Concord*, p. 160.

the individual Christian in this regard also holds for the moral teaching of the church.

In the context of the right to welfare, this error toward perfectionism leads the church to pronounce to state officials that Christians have a morally better answer to questions of proper public policy, or that some system of social welfare benefits is the morally right system to legislate. Instead, the church should be engaging policy-makers in public conversation about the moral principles at stake, and we suggest that the appropriate place to have this conversation is under the first use of the law. Here, we can learn from conversations with legal scholars like Michael Perry and Kent Greenawalt about what kinds of public arguments that take into account faith's convictions are appropriate.³⁷ To our mind, these would include appeals to common sense, common law, and the heritage of natural law.

Christians should also be clear about the proper use of the scriptures in this conversation with other citizens. In America, arguments from scripture are a part of the civil religion and it is hard to imagine any reasonably nonreductive public argument that would ignore them. Yet, how they will function in these diverse audiences is, after all, hardly within Christian control. We can only faithfully argue from scripture; we cannot determine how the Word of God falls upon human consciences. This is, after all, the work of the Spirit. However, unlike some uses of scripture, which consist of pronouncements about the sure will of God, Lutherans have always taken seriously the Isaiah passage, "Come now, let us reason together."³⁸ In this understanding, scripture functions as enthymeme, as content, and as ethos for the Christian's participation in public discourse. In some cases, we can presume a common heritage around some passages of scripture, even among citizens who are not Christian. In other cases, the scripture will function as a raw proclamation and prophetic truth-telling. In still other cases, it will reveal the character of the Christians making the witness.

In such conversations, the church cannot ignore the real possibility that Christians will be among those making policy, and this conversation may have a different effect upon their souls than for those who do not share this faith. The Holy Spirit acts upon the sinner-saint as she chooses, and in keeping with God's law and promises. In democratic public policy

37. See for example Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (New York: Oxford University Press, 1991), pp. 83-127; Kent Greenawalt, *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995), pp. 39-95.

38. Isaiah 1:18, RSV.

discourse, the coin of the realm will always be votes, as Lutherans will pay careful attention to in their arguments. For Lutherans, democracy is not a corruption of the public conversation, but an acknowledgment of the way in which community participation brings forth good fruit to the world. This is God's law at work, compelling the citizen to ask about God's preferred and promised future, and to get to the task of co-creating a trustworthy world.

A fifth error that can result from the first use/third use battle is that Christians may try to construct a wall of separation between God's work in using the law to create a civil society and God's formation of Christian community to serve that civil society. This separation or wall-building loses the focus upon our common work of forming a trustworthy community for the sake of the creation. When God cast Adam and Eve from the Garden of Eden, he did not cast them into a world where it was impossible to form community with others: in their fall, they gained the knowledge of good and evil; and although they could not truly fear, love, and trust in God above all things, they were capable of creating, with God, a world in which human need could be met. Though their toil in rock and soil would exhaust, and ultimately kill them, it also could sustain the basics of life for all. This fundamental gift of survival is the voice of God, the divine subwoofer, saying, "good, very good." As the Formula of Concord reiterates, like the rest of creation, the human person was "originally created by God pure and holy and without sin."³⁹ Whatever the powers of sin, death, and the Devil, they cannot end this goodness or eradicate this Word that calls every descendant of Adam and Eve to co-create a trustworthy world with God.

Conclusion

A Lutheran approach to the problem of the right to welfare, simply put, would make an appeal to God's command, "Feed the poor." All persons can understand this aspect of the Word of God as law, as written on their hearts, Christians no differently than non-Christians. Luther tells us that non-Christians, as well as Christians (who are still sinners), are likely to exercise a stubborn will, by saying, "No, I don't want to" and "I don't choose to see what you are telling me to see" or "Who, after all, really is my neighbor?"

39. Formula of Concord I, *Book of Concord*, p. 216.

God's Uses of the Law

Or, they will obey, but only because they reason that “something worse will happen to me if I don’t.”⁴⁰

To argue that the world will be created as trustworthy primarily through the instruction of the third use of the law is to suggest that Christians forget everything they knew about this word of God as law once they have been redeemed, and they have to relearn it once again. Instead, we suggest, Christians still know the law as, in its first use, it has been written on their hearts. What is different is how they respond to the word of God as law — not stubbornly resisting but freely and happily responding, “Why not feed the poor? I can’t imagine why we wouldn’t. What else is God calling us to do if not to do this?” That is, grace operating with the power of the Holy Spirit in their lives should not be described as recovering a lost knowledge about the need of the neighbor and the law’s demand for response to it. Rather, we should recognize that the gospel has opened Christians’ eyes and hearts to the freedom they have been given in Christ’s sacrifice to do otherwise than what they will do as sinners, refusing or denying the will of God, or obeying it grudgingly and fearfully.

If Christians have been freed from the bondage of their stubborn will, what is left for them to do with the secular law of human welfare? It is to think with others, Christian and non-Christian, who have all received God’s good gift of reason, about *how* to feed the poor. Some of that reasoning will be in the church; Christians will exhort each other to look within the moral traditions of church and world to interpret that “how” for a modern world. Some of the church’s contribution will be in forming community with the poor, creating relationships of trust, love, and respect that are not available or even realistically expected from government bureaucracies. Some of that contribution will be in partnerships with civil society, which have as their aim faithfulness to God’s mission in the world.

Such community is grounded in the way that we are all created, compelling us to be in solidarity with all others, because the alternative to solidarity is the death of the world. Our calling to solidarity with those like the Garys who are also at once saints and sinners is the church’s obligation to articulate and to carry out in cooperation with our fellow citizens. We might also describe the work of the law of God as this: the Spirit compels from the past

40. See Luther’s sermon for New Year’s Day on Galatians 3:23-29 (noting three attitudes toward the law — bold opposition to the law through a dissolute life, outward obedience based on a fear of death and hell, and external and inward obedience, “with the heart”). Engelbrecht, *Friends of the Law*, p. 80.

an emerging new reality and from the future breaking-in of a prophetic word that opens a space for innovation that results in solidarity. Even if we do not currently recognize a right to the basic means to live, our past and our future come to meet at a new present, a new moment for a new possibility of a right to survive. The very nature of God is this kind of creative emergence, so we should not be surprised if this perduring interest in creating a trustworthy world takes on new forms and new compelling forces and reasons, including the emerging idea of an international right to life.