

# *Nemo iudex in causa sua* as the Basis of Law, Justice, and Justification in Luther's Thought

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In the wake of the investiture struggle and against the background of burgeoning humanist thought, Martin Luther's affirmation of the secular realm as a discrete area of divine activity may be lauded as a judicious recovery of the thought of Augustine and perhaps of Gelasius I. In light of subsequent developments in sociopolitical theory, however, this progressive aspect of the reformer's thought appears to be immediately undercut by its seemingly unbending social conservatism. Instituted by God (Rom 13; 1 Pet 2:13–14), the "law of [the] temporal sword has existed from the beginning of the world," Luther writes.<sup>1</sup> And while he asserts that "God cannot and will not permit anyone but himself to rule over the soul,"<sup>2</sup> he does, nevertheless, forbid Christians to resort to violence to defend their cause: "For the governing authority must not be resisted by force, but only by confession of the truth. If it is influenced by this, well and good; if not, you are excused, you suffer wrong for God's sake."<sup>3</sup>

It was especially in the twentieth century, with its enslaving totalitarian regimes, that Luther's alleged quietism came under a barrage of criticism. Some interpreters of Luther have responded by arguing for a rigorously gospel-centered, rather than a prescriptive, construal of the reformer's insights about temporal authority. According

<sup>1</sup> Martin Luther, "Temporal Authority: To What Extent It Should Be Obeyed," *Luther's Works* [LW] (ed. Jaroslav Pelikan, Hilton C. Oswald, and Helmut T. Lehmann; 55 vols.; St. Louis: Concordia, 1955–1986) 45:86; trans. of *Dr. Martin Luthers Werke* [WA] (69 vols.; Weimar: Böhlau, 1883–1993) 11:247.

<sup>2</sup> Luther, LW 45:105; WA 11:262.

<sup>3</sup> LW 45:124; WA 11:277.

to Gerhard Ebeling, the “two kingdom doctrine . . . calls for a decision” with the conscience being the theater of the doctrine’s unfolding.<sup>4</sup> The more conservative Paul Althaus, in comparison, does ascribe positive ethical content to natural law, which he takes to underlie society’s legal system, but he reduces this content to the neighborly love expressed in the Golden Rule (Matt 7:12; Luke 6:31).<sup>5</sup> In light of Luther’s view of sin, I shall show, however, that the Golden Rule is transformed within civil law into a negative principle.<sup>6</sup> When considered in itself, the law has little to do with love. Sensing this, Althaus is eventually compelled to distinguish two modes of love: one strictly reciprocal, based on the Golden Rule, and one that is fully Christian.<sup>7</sup> Thus, while Ebeling bypasses the positive, external, dimension of Luther’s doctrine of temporal authority in favor of an interiorized law-gospel dialectic, Althaus’s interpretation risks becoming incoherent and ultimately falls short of clarifying why rebellion against tyrannical authority is usually not an option.<sup>8</sup> In much the same vein, it has recently been proposed that Luther’s doctrine is to be read in terms of irony.<sup>9</sup> In an attempt to make Luther’s insights relevant, all these interpretations are forced to overlook or to disregard some of the more troubling aspects of the reformer’s views and to dismiss them as little more than naïve biblicism.

By contrast, this article will seek to uphold a consistently *legal* reading of Luther’s conception of temporal authority. Far from a premature dismissal or milieu-motivated relativization of the reformer’s precepts, it will be shown that such an analysis need degenerate neither into casuistry nor naïve pre-Enlightenment authoritarianism. Rather, I argue that what drives Luther’s esteem for temporal authority—which he views primarily in light of its social and vocational expression in civil law—is the ancient legal maxim that no one be judge in one’s own case, *nemo iudex in causa sua*.<sup>10</sup> On this basis Luther proposes a noncasuistic theory

<sup>4</sup> Gerhard Ebeling, “The Necessity of the Doctrine of the Two Kingdoms,” *Word and Faith* (trans. James W. Leitch; Philadelphia: Fortress, 1963) 400.

<sup>5</sup> Paul Althaus, *The Ethics of Martin Luther* (trans. Robert C. Schultz; Philadelphia: Fortress, 1972) 28–30.

<sup>6</sup> E.g., “All rebels deserve death” (Luther, “Whether Soldiers, Too, Can Be Saved,” *LW* 46:101; *WA* 19:630).

<sup>7</sup> Althaus, *Ethics of Martin Luther*, 34.

<sup>8</sup> It is undoubtedly true that love unites both the Christian’s willingness to suffer in matters pertaining to one’s own person and the Christian’s exercise of a public office in service to the neighbor. Here by suffering and there by employing force, the Christian obeys God. It is likewise true that the temporal authority oversteps its prerogative if it seeks to bind the Christian’s conscience; here again, should the Christian find no justice, the Christian is called to suffering (Althaus, *Ethics of Martin Luther*, esp. 70–78, 124–30). What Althaus fails to account for is how, *on the basis of civil law*, these are viable postures, not to mention cases when obedience to authority and love for the neighbor appear mutually exclusive.

<sup>9</sup> Vitor Westhelle, “The Word and the Mask: Revisiting the Two-Kingdoms Doctrine,” *The Gift of Grace: The Future of Lutheran Theology* (ed. Niels Henrik Gregersen et al.; Minneapolis, Minn.: Fortress, 2005), 167–78. See n. 53 below.

<sup>10</sup> See *Codex Iustinianus* (534 C.E.) 3.5, where further, older references can be found.

of the law and, in so doing, destabilizes the relation between the Christian and temporal authority while at the same time keeping at bay the threat of self-serving individualism and anarchy. I argue, moreover, that the maxim underlies Luther's conception not only of the political use of the law (*civilis/politicus usus legis*) but also, by exposing its shortcomings, of the law's theological, accusatory, function (*usus theologicus*).<sup>11</sup> As such, to push the argument further still, I also propose that the maxim may be viewed as the very foundation of Luther's mature understanding of justification and Christian life. God reveals that he is a righteous judge by consistently not being judge in his own case and so being free to justify humanity. In keeping with the maxim, this in turn makes the believer, as a justified sinner, uniquely able to uphold civil law with a view to according the neighbor justice. In doing so, the believer actually justifies God, who has first justified the believer.

In short, I submit, the principle that no one ought to be a judge in one's own case has a decisive role for all the realms of reality and may profitably be taken as a unifying interpretive key to Luther's view of interhuman, as well as divine-human, relationships. It affords a way of more closely integrating the reformer's social ethic (however outmoded it might appear) and his theology of justification. Contrary to the classical theological interpretation of Luther, my exposition will proceed in this very order: from the political to the theological.

## ■ Setting the Scene: The Two Governments and the Two Kingdoms

In his 1526 treatise, *Whether Soldiers, Too, Can Be Saved*, written in the wake of the peasants' revolt, Luther reiterates the distinction between the spiritual and worldly governments (understood as modes of governing) that he first introduced in his 1523 writing, *Temporal Authority: To What Extent It Can Be Obeyed*.<sup>12</sup> The spiritual government (*das geistliche Regiment*) employs no coercive power, "but it has the [preached] word, by means of which men are to become good and

<sup>11</sup> For a discussion of the development of Luther's terminology, see Gerhard Ebeling, "Doctrine of the *Triplex Usus Legis*," *Word and Faith*, 62–78, esp. 69–78. In this article, I implicitly take issue with Ebeling's existentialist (*existential*) view of the law in Luther, according to which, far from being "an aggregate of principles," the law is a "category which [merely] sums up the theological interpretation of man's being as it in fact is" (75). As will be seen, in drawing attention to the one principle, *nemo iudex in causa sua*, I seek to underscore the social and vocational character of the law in its political and theological dimensions and thus also in its positive, material aspect. Only when so embodied can the law be simultaneously affirmed and transcended.

<sup>12</sup> To present a comprehensive overview of what has come to be known as Luther's doctrine of the two kingdoms and the two governments is beyond the scope of this article. See, e.g., Althaus, *Ethics of Martin Luther*, 43–82; John R. Stephenson, "The Two Governments and the Two Kingdoms in Luther's Thought," *Scottish Journal of Theology* 34 (1981) 321–37; W. D. J. Cargill Thompson, *The Political Thought of Martin Luther* (Brighton, Sussex: Harvester, 1984) 36–61; and Bernhard Lohse, *Martin Luther's Theology: Its Historical and Systematic Development* (ed. and trans. Roy A. Harrisville; Minneapolis, Minn.: Fortress, 1999) 151–59, 314–24.

righteous, so that with this righteousness they may attain eternal life.”<sup>13</sup> Because this righteousness is one of faith and faith is a matter of the heart, all who are under the spiritual government are equal, “whether they be outwardly male or female, prince or peasant, monk or layman.” More importantly, as righteous through faith, “they do of their own accord *much more than all laws and teachings* can demand.”<sup>14</sup> They live out the Golden Rule in all its loving selflessness. Consequently, Luther underscores, “among Christians there shall and can be no authority; rather all are alike subject to one another.”<sup>15</sup> This harks back to the reformer’s dialectical adage from his 1520 treatise, *The Freedom of a Christian*: “A Christian is a perfectly free lord of all, subject to none. A Christian is a perfectly dutiful servant of all, subject to all.”<sup>16</sup> However, as Luther observes regretfully, not all people are “real Christians.”<sup>17</sup> The worldly government (*das weltliche Regiment*) must, therefore, seek to “bring about external peace and prevent evil deeds.”<sup>18</sup> To this end it is entrusted by God with the coercive power of the sword, “so that those who do not want to be good and righteous to eternal life may be forced to become good and righteous in the eyes of the world.”<sup>19</sup> This government finds its expression not in spontaneous service but in responsibility exacted through various relationships of social and vocational dependence: one is father, child, master, servant, judge, citizen, or subject, etc. Much as one might be tempted to manipulate these relationships to one’s own advantage, one’s role in them is clearly understood by reason, since, aside from the variety of positive laws pertaining to them, these offices (*Ämter*) are all founded on natural law: do to others as you would have them do to you.<sup>20</sup> Note that as it now takes the form of positive laws to preserve the structures of society, the Golden Rule is transformed into a transactional and retributive principle: the worldly government operates on the basis of reward and, more often than not, of punishment, by paying back what is due.<sup>21</sup> In sum, righteousness either arises out

<sup>13</sup> Luther, “Whether Soldiers,” *LW* 46:99; *WA* 19:629.

<sup>14</sup> “Temporal Authority,” *LW* 45:88; *WA* 11:249, 250 (emphasis added).

<sup>15</sup> *LW* 45:117; *WA* 11:270.

<sup>16</sup> *LW* 31:344; *WA* 7:21, 49.

<sup>17</sup> “Temporal Authority,” *LW* 45:88; *WA* 11:249.

<sup>18</sup> *LW* 45:92; *WA* 11:252.

<sup>19</sup> “Whether Soldiers,” *LW* 46:99; *WA* 19:629.

<sup>20</sup> “This also agrees with the natural law that Christ teaches in Matthew 7, ‘Whatever you wish that men would do to you, do so to them’” (*LW* 46:110–11; *WA* 19:638); “For nature teaches—as does love—that I should do as I would be done by” (“Temporal Authority,” *LW* 45:127; *WA* 11:279).

<sup>21</sup> “The emperor or prince . . . should not tolerate useless people, who neither feed nor defend, but only consume, are lazy, and live in idleness, and drive them out of the land” (“Whether Soldiers,” *LW* 46:128; *WA* 19:654); “the kingdom of the world, which is nothing else than the servant of God’s wrath upon the wicked and is a real precursor of hell and everlasting death, should not be merciful, but strict, severe, and wrathful in fulfilling its work and duty. Its tool is . . . a naked sword; and a sword is a symbol of wrath, severity, and punishment. It is turned only against the wicked, to hold them in check and keep them at peace, and to protect and save the righteous” (“An Open Letter on the Harsh Book against the Peasants” [1525], *LW* 46:70; *WA* 18:389).

of faith, whereby it becomes the foundation of a person's whole being before God and before the world, or is maintained externally by means of the sword. Still, regardless of the difference, "God himself is the founder, lord, master, protector, and rewarder of both kinds of righteousness. There is no human ordinance or authority in either, but each is a divine thing entirely."<sup>22</sup> The spiritual and worldly modes of government are both established by God.<sup>23</sup>

It is not simply because the worldly government is a mode of God's activity that Christians are to participate in its operation after all. The motivation is deeper. To begin with, the spiritual regiment benefits from the existence of the worldly regiment<sup>24</sup> because external peace maintained by temporal authority enables the church to carry out its divine mandate: to call people from outward righteousness to the righteousness of faith and from temporal life to eternal life. Christians' participation in the structures of temporal authority assures, therefore, that the preservation of those structures, self-contained as they are, will not become an end in itself. Luther's scathing criticism of heavy taxes levied by compassionless, unchristian, princes or of their attempts to rule over their subjects' souls is a case in point.<sup>25</sup> More importantly, the Christian life is social and vocational existence par excellence, and for this reason Christians cannot refrain from submitting to, and supporting, temporal authority. It is the unbeliever who is the arch individualist. To appreciate the weight of this distinction, we must invoke Luther's understanding of sin and with it his doctrine of the two *kingdoms*.

The central issue underlying Luther's Reformation breakthrough concerns no less than the identity of the human being, as such, and thus also before God. Am I

<sup>22</sup> "Whether Soldiers," *LW* 46:100; *WA* 19:629–30. See "the hand that wields this sword and kills with it is not man's hand, but God's; and it is not man, but God, who hangs, tortures, beheads, kills, and fights. All these are God's works and judgments" (*LW* 46:96; *WA* 19:626).

<sup>23</sup> Antti Raunio notes correctly, *contra* Althaus, that Luther's concept of the law involves no dualism, as if there were two Golden Rules, one self-interestedly and coercively reciprocal, applicable to unbelievers, and the other, motivated by love, pertaining to Christians. Both the spiritual and worldly governments proceed from God's love and seek nothing but a loving response. What Raunio seems to overlook, however, is that the Golden Rule, *when translated* into the worldly government's legal system, inevitably becomes transactional and prohibitive in character. With no dualism involved, this transformation shows only that ultimately love cannot be legislated, as evidenced by Christians, who "do of their own accord *much more than all laws and teachings* can demand" (see n. 14). I shall speak to this in more detail below. See Antti Raunio, "Natural Law and Faith: The Forgotten Foundations of Ethics in Luther's Theology," *Union with Christ: The New Finnish Interpretation of Luther* (ed. Carl E. Braaten and Robert W. Jenson; Grand Rapids, Mich.: Eerdmans, 1998) 96–124.

<sup>24</sup> "The temporal power is but a very small matter in the sight of God, and too slightly regarded by him for us to resist, disobey, or become quarrelsome on its account, no matter whether the state does right or wrong. But on the other hand the spiritual power is an exceedingly great blessing and much too precious in his sight for the very least of Christian men to suffer silently when it deviates one hairsbreadth from its proper function" (Luther, "Treatise on Good Works" [1520], *LW* 44:93; *WA* 6:259–60).

<sup>25</sup> "Temporal Authority," *LW* 45:104, 105; *WA* 11:261, 262.

simply the sum of my works, as Aristotle would have it?<sup>26</sup> Even more pointedly, do I create myself through my works? Or do I receive my being—am I justified—from the outside and only as such perform works?<sup>27</sup> Luther believes that a person can either receive her<sup>28</sup> identity or else may, indeed must, attempt to construct her own identity. In the former case, what one is, as a creature, is determined by the love of God, who provides for all the needs of body and soul.<sup>29</sup> In the latter case, believing herself to be a free and autonomous shaper of her destiny, the person embarks on a pursuit of sources of security, which could underwrite her being and provide her with a bargaining position before God.<sup>30</sup> She defines herself through her actions and commitments. But, according to Luther, human beings can never be the locus of their own identity. To believe otherwise means, first, to overlook God's providential care of creation, which includes the provision of worldly government. No work is simply one's own. Second, this posture is idolatrous, in that it seeks to influence God through God's own gifts, which one has deceitfully ascribed to oneself alone. Worse still, a blind search for sources of security<sup>31</sup> turns humans into slaves of their own self-justificatory activity, for to refrain from it would be tantamount to allowing one's being to disintegrate. Luther describes this enslaving pursuit of self-justification as being turned in on oneself (*homo incurvatus in se ipsum*)—sin.<sup>32</sup>

Instead of trusting in God, sinners trust in themselves. Consequently, instead of loving the neighbor, they love themselves. They are inexorably compelled to direct their works not to the neighbor but ultimately to themselves. In practice this means that the sinner's works, however good they may appear, are ultimately

<sup>26</sup> See Aristotle, *Nicomachean Ethics* 2.1103b.

<sup>27</sup> As a Christian, "A doer does not get this name on the basis of works that have been performed; he gets it on the basis of works that are to be performed. For Christians do not become righteous by doing righteous works; but once they have been justified by faith in Christ, they do righteous works. In civil life the situation is different; here one becomes a doer on the basis of deeds, just as one becomes a lutenist by often playing the lute, as Aristotle says. But in theology one does not become a doer on the basis of works of the Law; first there must be the doer, and then the deeds follow" (Luther, "Lectures on Galatians" [1535], *LW* 26:256; *WA* 40:402).

<sup>28</sup> Throughout this article, where it is necessary to use singular pronouns, I shall use feminine pronouns to refer to people in a gender-nonspecific sense.

<sup>29</sup> See Luther, "Small Catechism" [II.2], in *The Book of Concord: The Confessions of the Evangelical Lutheran Church* (ed. Theodore G. Tappert; Philadelphia: Fortress, 1959) 345; trans. of *Die Bekenntnisschriften der evangelisch-lutherischen Kirche* [*BSLK*] (Göttingen: Vandenhoeck & Ruprecht, 1930, 1991) 510–11.

<sup>30</sup> "Human nature is so blind that it does not know its own powers, or rather diseases, and so proud as to imagine that it knows and can do everything"; "Scripture . . . represents man as one who is not only bound, wretched, captive, sick, and dead, but in addition to his other miseries is afflicted, through the agency of Satan his prince, with this misery of blindness, so that he believes himself to be free, happy, unfettered, able, well, and alive" ("De servo arbitrio" [1525], *LW* 33:121, 130; *WA* 18:674, 679).

<sup>31</sup> See "Large Catechism" I.2; *BSLK* 560.

<sup>32</sup> See "Lectures on Romans" (1515–1516), *LW* 25:291, 313, 345; *WA* 56:304, 325, 356.

only a modality of self-interest: works that appear good to fellow humans and would by no stretch of the imagination be regarded as crimes may actually be mortal sins if, at bottom, they are used to serve one's selfish goals and if God's agency is not explicitly, humbly, and prayerfully recognized in them.<sup>33</sup> Whatever the appearance may be, the reality is that, if left to themselves, sinners either abuse their socio-vocational roles or, constrained by the law, discharge their duties disgruntledly, selfishly, and without much regard for others. Small wonder then that Luther writes, "Where temporal government or law alone prevails, there sheer hypocrisy is inevitable, even though the commandments be God's very own."<sup>34</sup> For the reformer, the sinner is the arch individualist, and that in spite of all of the sinner's activism.

Works, Luther insists, are by definition social: they are not self-serving but neighbor serving. Therefore, it is the Christian, not the self-justifying sinner, who, by allowing God through faith to define her spiritual and worldly identity, is alone free to work for others' sake—free to love. Defined by God and open to the neighbor, the Christian exists simultaneously before God (*coram deo*) and *only as such* also in the world (*coram mundo*). Standing "before God in the Spirit,"<sup>35</sup> with her sins forgiven and her good works forgotten, the "Christian is a person to [herself]; [she] believes for [herself] and for no one else."<sup>36</sup> All that matters in this kingdom of the Spirit (*das geistliche Reich*) is the cross of Christ and its re-creative impact upon the justified sinner, who in turn boasts only in Christ. But complementary to this sphere is the kingdom of the world (*das weltliche Reich*), which is the realm where the Christian serves others. For here she is "not a person to [herself], but on behalf of others"<sup>37</sup>—precisely because, *coram deo*, she already has God on her behalf. It is, therefore, on account of their freedom to participate disinterestedly in the kingdom of the world, in the larger human—and not only Christian—community, that believers cannot refrain from involvement with worldly government (note, however, that in principle there is no strict correlation between the kingdom of the world and its actual, temporal, mode of government). If the Christian were to withdraw from the world and refrain from exercising temporal offices, "[she] would be acting not as a Christian but even contrary to love; [she] would also be setting a bad example to others who in like manner would not submit to authority, even though they were not Christians. In this way the gospel would be brought into disrepute, as though it taught insurrection and produced self-willed people unwilling to benefit or serve others, when in fact it makes a Christian the servant of all."<sup>38</sup> Hence Luther makes the admonition that Christians must pay taxes and

<sup>33</sup> "Heidelberg Disputation" (1518), [esp. Theses 3, 5, 7], *LW* 31:43–46; *WA* 1:356–58.

<sup>34</sup> "Temporal Authority," *LW* 45:92; *WA* 11:252.

<sup>35</sup> "Whether Soldiers," *LW* 46:104; *WA* 19:634.

<sup>36</sup> *LW* 46:122; *WA* 19:648.

<sup>37</sup> *LW* 46:122; *WA* 19:648. In this particular context, Luther is speaking of the princes.

<sup>38</sup> "Temporal Authority," *LW* 45:94; *WA* 11:254.

assist the sword by whatever means they can “with body, goods, honor, and soul.” Although they themselves have no need of temporal authority, its continuance is both beneficial and essential for one’s fellow human beings.<sup>39</sup>

To summarize, Christians’ participation in the socio-vocational structure of society is motivated not only by temporal authority’s divine sanction but, first and foremost, by the law of Christian love. Freed from debilitating self-justification by the justifying act of God, Christians alone can afford to be selfless and are truly able to love. I shall now address how crucial this love is for the exercise of the worldly government.

### ■ Beyond Casuistry

Freedom is the fundamental defining characteristic of Christian engagement in the worldly government. Even though no believer may refrain from this engagement, the believer’s identity does not depend on it. Rather, it crucially precedes it. This freedom has far-reaching consequences pertaining both to the Christian herself, as a being placed in socio-vocational structures, and to the Christian’s relation to the neighbor within these structures. Briefly put, when it comes to themselves and what is theirs, Christians, according to Luther, must not resort to worldly means but must be ready to suffer evil and injustice, while for the neighbor’s sake they will actually punish evil and injustice. As themselves, they must not resist evil, and yet at the same time, as persons placed in offices, they will resist it, if need be by force. “In what concerns you and yours,” Luther sums up, “you govern yourself by the gospel and suffer injustice toward yourself as a true Christian; in what concerns the person or property of others, you govern yourself according to love and tolerate no injustice toward your neighbor.”<sup>40</sup> Let us look at these two dimensions in more detail beginning with the believer’s actions on behalf of others.

The Christian’s chief concern, as a figure in a socio-vocational position, is not with authority structures as such but consistently with the neighbor. That means not only with the (potential) victim but also with the (apparent) lawbreaker. Mere enforcement of the law will not do. Without regard for the person, enforcing the law may, in fact, subvert the very commitment of love, which led the Christian to be involved with civil matters in the first place. Luther cites the example of the peasants’ revolt, in which some individuals were implicated either against their will or in the hope of restraining the mob. Although “innocent in their hearts,” he writes, they were punished with death by the nobles, who acted thoughtlessly, unjustly, and in an altogether unchristian manner out of an overblown sense of self-preservation or greed,<sup>41</sup> and so in a self-justificatory manner. This consideration, as well as the impossibility, for example, to account for all the situations in which a Christian may legitimately bear arms, led Luther to conclude that no law “can [ever] be

<sup>39</sup> *LW* 45:95; *WA* 11:254.

<sup>40</sup> *LW* 45:96; *WA* 11:255.

<sup>41</sup> “Whether Soldiers,” *LW* 46:101; *WA* 19:631.



formulated so certainly and so justly that cases do not arise which deserve to be made exceptions.” In fact, he warned, *it is imperative that one make exceptions—the very character of the law demands it*. What Luther means is, first of all, that the law ought to be kept brief and simple, so that its precepts may be easily understood. Otherwise, it would hardly serve its purpose, not only first because of lack of clarity, but second because a loving concern for the lawbreaker—so essential to the law’s application—cannot rise out of it regardless of the law’s complexity. Contrary to what might be expected, casuistry—the multiplying of laws to provide for endless eventualities—merely obscures the law and increases its impersonal dimension. It either prevents or excuses one from exercising one’s responsibility to love the law-breaking neighbor. Thus, Luther insists, “If we do not make exceptions and strictly follow the law we do the greatest injustice [*unrecht*] of all.”<sup>42</sup> That is why the law should be applied not only by persons authorized to do so—be they judges, lords, or heads of households—but, preferably, by those in authority who are also wise and pious, so that, in meting out justice, they may judiciously determine the extent of the law’s enforcement. “[A]ll laws,” Luther underscores, “that regulate men’s actions must be subject to justice [*Billichkeit*], their mistress, because of the innumerable and varied circumstances which no one can anticipate or set down.”<sup>43</sup>

Since no ulterior motives, such as desire for revenge or for mere punishment of sin, may underlie the Christian’s exercise of an office—instead only efforts to maintain the neighbor’s welfare, property or honor—for their own sake Christians may neither seek vengeance nor disobey the authorities.<sup>44</sup> The Christian’s only weapon is a confession of the truth or a move to another territory if her spiritual well-being is imperiled.<sup>45</sup> To understand Luther’s position, one must keep in mind two things. First, as has already been indicated, the Christian is free from dependence

<sup>42</sup> LW 46:100; WA 19:630.

<sup>43</sup> LW 46:103; WA 19:632. Luther’s provision for love-motivated exceptions was not, of course, new to the situation after the peasants’ revolt. Already in *Temporal Authority* Luther regards the law and love as inseparable: “For when you judge according to *love* you will easily decide and adjust matters without any lawbooks. But when you ignore *love and natural law* you will never hit upon the solution that pleases God, though you may have devoured all the lawbooks and jurists. Instead, the more you depend on them, the further they will lead you astray. A good and just decision must not and cannot be pronounced out of books, but must come from a free mind, as though there were no books. Such a free decision is given, however, *by love and by natural law*, with which all reason is filled; out of the books come extravagant and untenable judgments” (LW 45:128; WA 11:279, emphasis added).

<sup>44</sup> “You would be entering entirely into the service and work of others, which would be of advantage neither to yourself nor your property or honor, but only to your neighbor and to others. You would be doing it not with the purpose of avenging yourself or returning evil for evil, but for the good of your neighbor and for the maintenance of the safety and peace of others” (“Temporal Authority,” LW 45:96; WA 11:255).

<sup>45</sup> “The governing authority must not be resisted by force, but only by confession of the truth” (“Temporal Authority,” LW 45:124; WA 11:277); “we ought to suffer wrong, and if a prince or lord will not tolerate the gospel, then we ought to go into another realm where the gospel is preached” (“Whether Soldiers,” LW 46:105; WA 19:634).

on the worldly government for identity. The resources of worldly government are for the Christian only a vehicle of love for the neighbor. More importantly, unlike the Christian's actions on behalf of others in which, by *judiciously* applying the law, she acts as an impartial and loving judge, in the latter case—irrespective of how much she may see herself as unjustly wronged—she would be setting herself up as the judge of her own case. Note that the judge's role, by acquitting or, indeed, condemning, is to underwrite the being of the victim, and at times also of the lawbreaker by refraining from condemnation. Acting out of love, the judge recognizes—beyond the impersonal and depersonalizing instrumentality of the law—a person in need of vindication and justification. Even when the sentence is one of condemnation, the judge must not hide behind the law but see in the lawbreaker a person hopelessly entwined in evil. In this way, temporal authority foreshadows the spiritual government, with the latter's gratuitous justification unto eternal life.<sup>46</sup> I shall address the precise character of justification in the final section of this article. At this point it will suffice to say that for the Christian to place herself in the role of her own judge would, therefore, be to relinquish her justification by God in favor of self-justification. To judge oneself would be to question the trustworthiness of God, who asserts, "Vengeance is mine, I will repay" (Rom 12:19),<sup>47</sup> and who promises to justify the sinner.

This said, the discharge of her office on others' behalf notwithstanding, the Christian may, in certain situations, submit her own case to the judgment of another person or even use force against a recalcitrant lawbreaker. According to Luther, she may do so, in the first place, when the exercise of her office is interrupted and endangers those entrusted to her care. This path is, in effect, open only to the nobles or to those in public authority, who act on behalf of their subjects or citizens against an antagonist, who is their equal, their inferior, or of a foreign government.<sup>48</sup> This is not to say that ordinary Christians, as victims, may not oppose their neighbors and even seek their judicial punishment, but they may do so not out of "vindictiveness or malevolence" but only "out of a genuine love for righteousness" solely in the interest of the lawbreaking neighbor and the community. On the one hand thus, Luther can deny, "a Christian may go to court or defend [herself]. . . . A Christian is the kind of person who has nothing to do with this sort of secular existence and law. [She] belongs to a kingdom . . . where . . . only mutual love and service should prevail, even toward people who do not love us, but who hate us, hurt and harm us." On the other hand, he affirms, "we are not compelled or obliged to let every insolent person run rampant all over the place and to take it silently without doing anything about it—not if we can *follow orderly procedure* in defending ourselves.

<sup>46</sup> "God has a double blessing, a physical one for this life and a spiritual one for eternal life" ("Lectures on Galatians," *LW* 26:251; *WA* 40:395).

<sup>47</sup> "Temporal Authority," *LW* 45:87; *WA* 11:249; "Whether Soldiers," *LW* 46:107, 113; *WA* 19:636, 641; "Admonition to Peace: A Reply to the Twelve Articles of the Peasants in Swabia" (1525), *LW* 46:25, 28; *WA* 18:304, 308.

<sup>48</sup> "Temporal Authority," *LW* 45:124–25; *WA* 11:277.

Otherwise, however, all we can do is to suffer if someone treats us unjustly and violently.”<sup>49</sup>

In light of the foregoing, we may conclude that Christian engagement in worldly government is meant to underscore the fact that, for all its social benefits, the law cannot underwrite human identity. To define oneself through one’s (actual or desired) socio-vocational position is to enslave oneself to its perpetuation and defense by means of the law, as was done by the rebellion-quelling princes. In strictly applying the letter of the law, one is more often than not moved not by love but by a desire for retribution. One becomes nothing but an instrument of the legal self-expression of one’s position; one depersonalizes oneself. For a Christian, this is tantamount to rejecting the re-creative, or personhood-creative, love of God in favor of self-justification, as if one’s constitution could really gain from vindictive, and hence only seemingly righteous, acts. But casuistry, as the positive outcome of reducing the law to purely transactional terms, has perilous consequences not only for the judge but, more egregiously, also for the judged party. One’s self-preserving depersonalization inevitably also depersonalizes the neighbor for whose sake one’s position exists. To grant the neighbor strictly, and thus merely, legal recognition is to fail to do justice to her personal uniqueness. Briefly put, one’s identity must be established apart from the law. Christian freedom means precisely freedom from the law.

What the foregoing says further about the nature of the law is that, broadly understood as positive civil laws and customs, the law cannot by itself go beyond transactionally construed *ius talionis*: it does to one as one does to others especially given its *actual* restraining and deterring function. Still, to leave it at that would be grossly to misconstrue the law’s character. *Ideally*, the law is meant to express the Golden Rule: do to others as you would have them do to you. What accounts for and effects this difference is love. Recall that, for all its independence, temporal authority exists for the sake of the spiritual government as an expression of God’s love, in that God does not allow sin to have its way. Those who exercise the worldly government, therefore, are likewise called to do so out of love. Love, with its power of justifying the person, precedes the depersonalizing law, even though, under temporal authority, it never leaves the law behind. The worldly government is founded on the law. One might say that love fulfills the law: it brings out its true character by showing that the law is not an end in itself but exists for the sake of all those it involves in its workings, however difficult this might be for the punished offender to understand.<sup>50</sup> Luther’s emphatic conjunction of natural law, the Golden Rule, with love, together with the resultant dismissal of casuistry, must be well

<sup>49</sup> “Commentary on the Sermon on the Mount” (1532), *LW* 21:108, 111; *WA* 32:389–90, 393 (emphasis mine).

<sup>50</sup> “Faith and love are always to be mistresses of the law and to have all laws in their power. For since all laws aim at faith and love, none of them can be valid, or be a law, if it conflicts with faith or love” (“Preface to the Old Testament” [1523, 1545], *LW* 35:240; *WA Deutsche Bibel* 8:18).

noted. In sum, although it frames, regulates and, in a sense, betters interhuman relationships, the law alone cannot make them genuinely interpersonal. The multiplication of laws will not do. The law points to a solution but cannot provide one. It cannot make a person free, which is precisely what it requires for its proper, loving application. Christian freedom means being *free from the law* in order *freely* (that is, judiciously and lovingly) *to apply it* for the sake of another person.

■ “*Niemand sol sein selbs richter sein*”

Luther’s insistence that Christians are uniquely equipped to participate in the worldly government and his admonition that they do not use the law on their own behalf but rather obey those in authority, even if they be tyrants, together with his apparent casuistic exceptions noted above, are in fact all reducible to one and the same principle: one ought not to be the judge in one’s own case. This principle constitutes the genuine foundation of the law *as it both is and ought to be*—it comprehends the law’s true character. Note that the Golden Rule is merely an ideal summary of natural law’s capacity for social organization. Within the retributive structures it actually generates, human beings are of secondary importance, even though without them the structure would be impossible. They essentially remain the sinful mass compelled to order only outwardly and for ultimately selfish reasons out of a self-preservation instinct. In comparison, the principle *nemo iudex in causa sua*<sup>51</sup> is not a summary of natural law [*das naturliche recht*] alone but also of natural justice [*billicheit*].<sup>52</sup> Although it comprehends the law in its exactitude and rigidity as a curb against self-serving behavior, it does not stop here but points to the law as a vehicle of justice, which does not regard persons in an instrumental way.<sup>53</sup> The principle thus anticipates the law’s fulfillment by showing that the law’s end does not reside in the law itself, as a mere outward framework, but beyond the law in its being inscribed within justice and so also in love.<sup>54</sup> By calling for impartiality

<sup>51</sup> It does not appear that Luther ever used *this* particular Latin formulation of the principle; I shall use it here as a convenient label because of its long established tradition.

<sup>52</sup> “The natural law that Christ teaches in Matthew 7, ‘Whatever you wish that men would do to you, do so to them;’” “. . . contrary to all natural law *and justice*. This is the meaning of the proverbs, ‘No man ought to judge his own case,’ and, ‘The man who hits back is in the wrong’” (“Whether Soldiers,” *LW* 46:111, 108; *WA* 19:638, 636, emphasis added).

<sup>53</sup> I do not share Vitor Westhelle’s view—expressed in a recent essay where he attempts to make Luther’s doctrine of the two kingdoms relevant in terms of irony—that “Justice . . . begins not by fulfilling the requirements of the prevailing régimes, but by setting other conditions, other parameters, which indeed sound foolish or inane.” Westhelle does not specify what parameters these might possibly be. Still, in light of our discussion, it does not seem that these parameters are either something other or foolish. In fact, there is only one such parameter, *nemo iudex in causa sua*, which both epitomizes and transcends the law; see Westhelle, “Word and the Mask,” 178.

<sup>54</sup> See Matt 5:17, 7:12, 22:40, where “the law and the prophets” are said to find their fulfillment not only in the Golden Rule but also in the commandment to love and so, paradigmatically, in Christ’s love. Luther flatly denies that the law is fulfilled through casuistic self-righteousness and depersonalizing obedience to its formal aspect: “[Christ] intends, rather, to preach [the law], to emphasize it, to show its real kernel and meaning, and to teach them what the Law is and what

for both the lawbreaker's and the victim's sake, by recognizing their personhood, the principle raises the critical question, "Who will vindicate me?" Let us examine this further. I begin with an overview of Luther's use of the maxim and then show that it underlies both the civil and theological functions of the law.

In *Temporal Authority* Luther only reminds his readers that God has reserved judgment to himself. He implies that they ought, therefore, to refrain from acting as judges on their own behalf. By comparison, in his treatise on the soldier's vocation, the reformer states explicitly and emphatically, "No man ought to judge his own case [*Niemand sol sein selbs richter sein*]." He quotes this maxim in the context of considering whether subjects may rebel against their rulers. This question he answers in the negative. First, rebellion against the ruling authorities not only transgresses God's command but actually constitutes an encroachment upon God's prerogative, whereby God "reserves to himself the authority to pass judgment and administer punishment in these matters." All authority is God's alone: only he is in a position to assign offices and to take them back to himself; he has also determined a time, "when he will abolish all authority [and] when he himself shall reign and return all things to himself." The Christians' business is love, not the bringing about of the *eschaton*. Moreover, Luther points out, even apart from faith's reasons, "no one can deny that when subjects set themselves against their rulers, they avenge themselves and make themselves judges."<sup>55</sup> This argument essentially repeats what Luther has already communicated to the Swabian peasants in *Admonition to Peace: A Reply to the Twelve Articles of the Peasants in Swabia* (1525). In this latter treatise, while acknowledging the despicable behavior of the nobles, Luther first warns the peasants that they must seek a resolution to their case "justly and with a good conscience [*mit gutem gewissen vnd recht*]. If you have a good conscience, you have the comforting advantage that God will be with you, and will help you."<sup>56</sup> He then reminds the peasants of the divine institution of civil authority for the punishment of evil and notes that in the actions of the worldly government is embodied "the natural law of all the world, which says that no one may sit as judge in his own case or take his own revenge."<sup>57</sup> Only after acknowledging in principle *the possibility of a just search for redress*, does Luther proceed to question the peasants' actual motivation. Rebellion, like any form of vengeance, involves the peasants in such a way that they inevitably make themselves their own judges and avenge themselves.

For fear of creating the impression that Luther invokes the principle *nemo iudex in causa sua* only against the emancipatory aspirations of the peasants, we also briefly note the reformer's appeal to it in his discussion of, for example,

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it requires, in antithesis to the glosses which the Pharisees have introduced, the shells and husks which they have been preaching" (Luther, "Commentary on the Sermon on the Mount," *LW* 21:70; *WA* 32:357).

<sup>55</sup> "Whether Soldiers," *LW* 46:108, 126–27; *WA* 19:636, 653.

<sup>56</sup> "Admonition to Peace," *LW* 46:23; *WA* 18:300.

<sup>57</sup> "So gibts auch das naturliche vnd aller welt recht, Das niemand solle noch muge seyn eygen richter seyn noch sich selbs rechen" (*LW* 46:25; *WA* 18:303–4).

willful marital desertion<sup>58</sup> or the extent of episcopal authority.<sup>59</sup> In connection with the latter, noteworthy is Luther's condemnation of the judicial murder of Hans Schönitz perpetrated in 1535 by Archbishop Albrecht of Mainz (although here far more than the limits of episcopal authority were overstepped). Much as Schönitz, a merchant in Halle, might have illegally profited from the financial operations he carried out for Albrecht, his death was clearly a result of the archbishop's greed for money. Albrecht claimed he had been wronged by Schönitz's financial dishonesty. Nonetheless, his hasty decision to have his official executed, without granting him a fair hearing and with the case still pending before the imperial court, exposed Albrecht's true motivation, contrary to the archbishop's protestations.<sup>60</sup> In a pamphlet denouncing Albrecht's machinations, Luther emphatically denies the archbishop the right to have decided Schönitz's case, since Albrecht was a party to it. Again Luther appeals to the rationality of the maxim that no one be judge in one's own case: "Wie man nu solche that sol nennen, wissen nicht allein die Juristen, Sondern auch alle vernuenfftige Leute, Das niemand sol sein eigen Richter sein, Et sententia lata a non Iudice est nulla."<sup>61</sup>

For Luther human proneness to act as judge in one's own case is a direct corollary of sin. Sin, as I have noted, is a state of being in which, much as they might "believe" in God (this false faith is what Luther calls the theology of glory), humans ultimately doubt that their entire being is underwritten by the love of God in Christ or that it is only out of this justification of the sinner through the cross that truly good works proceed. Sin is a condition of blind self-justification, of being turned in on oneself. It directs all of a person's works to the inside. Consequently, one's seemingly good works are all marred with self-interest, and more often than not they are downright selfish and abusive. Nonetheless, if the whole being of the doer depends on these works, people will continue to justify them and, in so doing, to justify themselves. They have no other choice if they do not wish their being to disintegrate. In the state of sin, there is no question, "Who will vindicate me?" The sinner's whole existence is an incessant attempt at self-vindication. In short, to be one's own judge it to be inexorably turned in on oneself.

Sin, of course, is not a category recognized by civil law. The law deals with actions and, to some extent, attitudes, rather than ontic states. Nevertheless, insofar as being turned in on oneself (i.e., sin) manifests itself as self-vindication, the law has no need for the theological concept of sin in order to target the latter. Proceeding from the principle *nemo iudex in causa sua*, the work of the law in the civil realm may be described as one of intervention. The law interrupts the self-

<sup>58</sup> "On Marriage Matters" (1530), *LW* 46:295; *WA* 30<sup>III</sup>:228.

<sup>59</sup> "Unsers teils Juristen und alle Vernunft sagen, Es solle niemand sein selbs Richter sein, wie das viel hoehrer unser Buch, die heilige Schrifft, verbeut" ("Exempel, einen rechten christlichen Bischof zu weihen. Geschehen zu Naumburg Anno 1542, 20. Januar," *WA* 53:245).

<sup>60</sup> For more details, see Martin Brecht, *Martin Luther: The Preservation of the Church 1532–1546* (trans. James L. Schaaf; Minneapolis, Minn.: Fortress, 1993) 84–87.

<sup>61</sup> Luther, "Wider den Bischof zu Magdeburg, Albrecht Kardinal" (1539), *WA* 50:401.

referential movement of the sinner's existence: it comes between the sinner and the sinner's self and splits the sinner's being. For the sinner to act on her selfish desire, to catch up with herself in her self-coiling—in other words, to become what the sinner wishes to become—means, therefore, inevitably to expose herself to the punishment of the law. In this divisional opening up of the sinner, the law assumes the form of an outward force and framework that, in an impersonal and mechanical fashion, not only seeks to assure but actually promises that as one does to others, so will they do to one. It forcefully and cajolingly turns the sinner to the outside. *As it thus keeps sinners from themselves and maintains their focus on others, the law preserves peace and order within society.*

But because 1) the law has only this depersonalized and outward form, and because 2) the sinner's Golden-Rule-like focus on others is actually a modality of self-focus, the law must inevitably fall short. Failing the person in its grip, it gives rise to the question, "Who—if I focus on others—will vindicate *me*?" The law allows this question to arise because it is powerless to justify the person as person. Reduced to transactionality and retribution, the law by itself, as Luther demonstrates, will lead only to injustice. In this way the law reveals itself as essentially unjust, regardless of how much it may try to cover up this truth through casuistry. As an outward framework, it can only deal with outward appearances. It can, therefore, go no further than giving the impression of being concerned with the person, who in turn gives the impression of being concerned with fellow humans. In reality, sinners—at times unbeknownst to themselves—are left to their self-justifying devices. Consequently, out of an ongoing desire (and need) to justify themselves, which is a matter of being or nonbeing, sinners must and will seek to manipulate the law to their own advantage: they will either apply the law in this purely instrumental way, as some of the princes did in quashing the peasants' revolt, or will attempt to take the law in their own hands, as was done by the rebellious peasants. Or they will violate it, even as they pretend to keep it, as did Archbishop Albrecht. In sum, the strengths of the law as a political instrument are at the same time its weaknesses. In its upholding of order, it falls prey to its own instrumentality. Instruments require that someone use them. But who can wield the law without inflicting even more damage than the law seeks to prevent? Luther's question is essentially as old as that of Plato in *The Republic*.

#### ■ *Nemo iudex in causa sua* as the Law's Accusation

The strategies for misapplying the law identified here are all founded on self-deception and self-preserving blindness to the fact that no person is ultimately in a position to justify herself. This self-deception and blindness may be either deliberate or not. In the latter case, the person truly believes that, as she seeks to justify herself through the law, it is actually the law that justifies her. This, no doubt, may have been the situation of some of the peasants who believed they had the law on their side in their armed rebellion against the unjust nobles. After all, they

saw themselves as only acting in accordance with its reciprocal character. When self-deception is deliberate, it appears explicitly to take the form of escapism into the letter of law: strict enforcement of the law becomes a vehicle of vengeance in the full realization that one is acting as judge in one's own case. Deliberate or not, both postures pervert the law.

However, precisely because the law cannot justify a person, it is eventually bound to expose humans' self-justifying attempts. The weakness of the law is thus also its strength. At this point we are moving from the civil and political role that the law plays in human communities (*politicus/civilis usus legis*) to what Luther calls the theological function of the law (*usus theologicus*). The law is not only a deterrent; it also accuses. The accusatory function arises from the fact that the law appears to involve one in a contradiction: on the one hand, it seeks to prevent one from acting as judge in one's own case and, if functional, punishes one for doing so; on the other, it leaves one no choice but self-justification. Specifically, when the Golden Rule is taken to hold out a promise that as one does to others *outwardly*, so will they do to one, it is inevitably bound to bring with itself the horrifying realization that as one has done to others *inwardly*, so will they do to one. In this form, the Golden Rule is incapable of overcoming inward self-seeking but actually appears to fuel it. Recall here Luther's admonition to the Swabian peasants that they should act out of a clear conscience, which immediately led him to denounce their cause as tainted with self-interest. Thus what is disclosed through the sinner's own approach to the law is that, in reality, the whole formal, legal, structure of society is driven by self-justifying pursuits. The sinner, too, is exposed as a being relentlessly driven by a quest for self-justification. In particular, the law accuses the sinner of attempting to underwrite her own identity by exploiting various relationships in which the sinner finds herself and whose existence is not the sinner's own doing. More than that, the law accuses the sinner of exploiting the very law that seeks to prevent this exploitation. As a result, the sinner is confronted with the ineluctable reality that it is not so much the law that involves her in a contradiction but rather the sinner herself exists in and out of an inner contradiction in which, as a social being, she involves the law.<sup>62</sup> In sum, through the law comes the knowledge of sin and of the sinner's desire to be judge in her own case and to her own advantage—an attitude that is not only morally but logically reprehensible. In Luther's words, "The presence of the sword shows the nature of the children under it: people who, if they dared, would be desperate scoundrels."<sup>63</sup>

In consequence of it all, the question, "Who will vindicate me?" is raised with even more urgency, as to the realities behind the law's political function are added

<sup>62</sup> Luther calls the law "the most salutary doctrine of life" which—because sinners misuse "the best in the worst manner"—brings the wrath of God, kills, reviles, accuses, judges, and condemns everything that is not in Christ" ("Heidelberg Disputation," [Theses 1, 23, 24], *LW* 31:42, 54–55; *WA* 1:355, 363).

<sup>63</sup> "Whether Soldiers," *LW* 46:112; *WA* 19:640.



those disclosed in the process of the law's accusation. The law cannot justify because 1) it is a mere outward framework, insensitive to persons *qua* persons, and justification necessarily concerns the self; because 2) for the very same reason it is powerless to do away with humans' manipulative self-concern. Neither can it justify because, 3) if used for this purpose, it actually fuels sinners' manipulative self-concern and simultaneously encloses them more and more within themselves and indicts them of acting as judges on their own behalf. Finally, 4) the law cannot justify because, even if it were possible for it not to increase self-seeking, other humans actually use it not with a view to justifying another but to justifying themselves.<sup>64</sup>

We may conclude that, even as the law remains ambiguous on the political front, subject to constant exploitation, it succeeds theologically by not allowing the sinner to remain in a state of self-deception and by exposing the sinner's invariable self-oriented bias. Nonetheless, it affords no answer to the question, "Who will vindicate me?" but makes even more obvious the painful absence of one. Thus, as it intervenes in the self-referential movement of the sinner and tears the sinner apart, the law can do no more than leave the sinner open and estranged from herself. This is an altogether intolerable state, and the sinner cannot remain in it, for in this state there is no more being but only disintegration. Neither can the sinner overcome it and catch up with herself without either incurring the law's punishment or purposely, and thus even more painfully, involving herself in a contradiction, which can no longer be ignored. Luther could not be clearer: being indicted by the law is hell because when the accusation is that one has acted as one's own judge, one can no longer even attempt to decide one's case. In all one's guilt, one finds oneself at the mercy of another. The law kills.<sup>65</sup>

## ■ Justification

At this point the sinner, fully aware of her sin, can only be rescued, and in fact has already been rescued, by God himself. In Christ God has bestowed on the sinner the gift of justification, "redeemed [her], a lost and condemned creature, delivered and freed [her] from all sins, from death and from the power of the devil . . . in order that [she] may be his, live under him in his kingdom [*in seinem Reich*], and

<sup>64</sup> In connection with this last point, one ought to note that the law is not an abstraction—the law is as it is used and misused, even though it might lend itself better to some uses and, if misused, produce unexpected results. Thus the law that is thought to justify is essentially no different from civil law in all its impersonalism and misapplication. By the same token, when Luther refers to the *nemo iudex in causa sua* as a principle of natural law he does not mean that this principle exists somewhere in the world of nature apart from human communities, as if *in abstracto*, only to be brought in to mitigate society's positive laws; what he means, rather, is that the very fact there is no society without a system of civil law means that *nemo iudex* is a principle of natural law.

<sup>65</sup> "Where the law exercises its office alone . . . there is only death and hell" (Luther, "The Smalcald Articles" [1537], III.iii.7 [Tappert, *Book of Concord*, 304]; *BSLK* 437); see also "De servo arbitrio," *LW* 33:62; *WA* 18:633).

serve him in everlasting righteousness, innocence, and blessedness.”<sup>66</sup> This passage from the *Small Catechism* (1529) shows that justification consists in the divinely *accomplished* transfer of the sinner from the rule of the devil (*regnum diaboli*) to the rule of Christ (*regnum Christi*).<sup>67</sup> *To be justified, therefore, is to have one’s being underwritten by another who acts on one’s behalf, by God in Christ, who judges the sinner worthy of his love and so recognizes her as a unique person.* As a result, the justified person’s being is now righteous, blessed, and innocent. This identity one receives from the outside, not, however, by means of a mechanical application of an outward legal structure, but through the personal, loving, and just judgment of God, which, as it were, precedes the structure by not allowing it to be an end in itself.<sup>68</sup>

The judgment reaches the sinner through the “spoken word” of the gospel as a declaration of forgiveness for Christ’s sake.<sup>69</sup> It is, first and foremost, a pronouncement which gratuitously acknowledges the sinner and thereby relates her back to God. In doing so, it brings her out of death and nonexistence, out of insufferable self-estrangement and vulnerability effected by law. As a word of address, the divine verdict accords her a new place, in Christ, whose righteousness is now imputed to the believing sinner; it accords her a new purpose underpinned by a likeness to Christ, which is now to inform her life. In short, the divine judgment transfers the sinner from the immediacy of, and deadly dependence on, the law and inscribes the believer into the realm of God’s re-creative activity.<sup>70</sup>

With her identity underwritten by the divine judge, the believer is now the lord of all, no longer slavishly dependent on anything or anyone for self-justification. As such the believer, therefore, is free to be a servant of all, both as a private and public individual. Liberated from debilitating and exploitative self-concern, she possesses the capacity likewise to act on others’ behalf, to recognize them as persons and lovingly to justify them through a judicious application of the law always preceded and framed by loving justice. “Therefore all the duties of Christians,” Luther affirms, “such as loving one’s wife, rearing one’s children, governing one’s family, honoring one’s parents, obeying the magistrate, etc., which they regard as secular and fleshly — are fruits of the Spirit.”<sup>71</sup> Now, if this concerned commitment to fellow humans arising out of freedom from self-concern should spell suffering at the hands of the self-justifying world, the Christian is also prepared to suffer in

<sup>66</sup> “Small Catechism,” II.4 (Tappert, *Book of Concord*, 345); *BSLK* 511.

<sup>67</sup> See Luther’s use of the quasi Augustinian analogy which depicts the human being as a beast ridden either by God or the devil (“De servo arbitrio,” *LW* 33:65–66; *WA* 18:635).

<sup>68</sup> See “Lectures on Galatians,” *LW* 26:387; *WA* 40:589.

<sup>69</sup> “The Smalcald Articles,” III.iv (Tappert, *Book of Concord*, 310); *BSLK* 449.

<sup>70</sup> “By faith . . . we get a new and clean heart and . . . God will and does account us altogether righteous and holy for the sake of Christ, our mediator. Although the sin in our flesh has not been completely removed or eradicated, he will not count or consider it” (“The Smalcald Articles,” III. xiii.1 [Tappert, *Book of Concord*, 315]; *BSLK* 460).

<sup>71</sup> “Lectures on Galatians,” *LW* 26:217; *WA* 40:348.

the divinely guaranteed assurance that, as Luther writes, “take they our life, goods, fame child and wife . . . the kingdom [*das Reich*] ours remaineth.”<sup>72</sup>

Christ is, of course, the archetype of this conjunction of law and justice that culminates in the law’s fulfillment through love. With his own being underwritten by the Father, Jesus commits himself to sinful humanity. But he does more than judge it with equity; his love does not merely precede the law’s structure. As judge Christ takes upon himself the sin of the judged, which could hardly be more obvious or indisputable. And he dies condemned by the self-justifying casuistry of his fellow men who have no justification for him. In other words, in Jesus’ self-sacrifice, love precedes the law to such an extent that it exposes the self-preserving nature of the legal system and swallows up the law’s depersonalizing misuse. Luther comments: “In His conflict with the Law He suffered its extreme fierceness and tyranny. By performing and bearing the Law He conquered it in Himself. And then, when He rose from the dead, He condemned the Law, our most hostile enemy, and abolished it, so that it can no longer condemn or kill us.”<sup>73</sup> As a result, not only is there no one left to be judged but there is no more law to judge those who are in Christ. All that remains is love—God’s justifying love for humanity and the believers’ justifying love for the neighbor, which leads the Christian to embrace temporal authority. And love always comes first, for to be a person is, first of all, to be loved. “The love of God does not find, but creates, that which is pleasing to it.”<sup>74</sup> This is the Gospel. When faith embraces this love, it “first makes the person”—the beloved—“who afterwards performs good works.”<sup>75</sup>

Christ’s assumption of the sin of the judged and his gratuitous bestowal of righteousness and innocence upon believers form the two components of Luther’s doctrine of the fortunate exchange. “By this fortunate exchange [*feliciter commutans; fröhliche Wechsel*] with us He took upon Himself our sinful person and granted us His innocent and victorious Person.”<sup>76</sup> Let us now spell out the implications of this salvific act in terms of *nemo iudex*. First, the believers’ power lovingly to justify the neighbor is here shown as actually rooted in the fact that in their justification they receive Christ, who becomes the force of their being. As a result, their justification of fellow humans conveys Christ’s own coming in humanity’s midst<sup>77</sup>—and that regardless of whether they act as public or private individuals. Specifically, to embrace the law, to embrace temporal authority, for

<sup>72</sup> These are lines from the last stanza of Luther’s hymn “A Mighty Fortress” (“Eyn Feste Burg,” WA 35:455–57).

<sup>73</sup> “Lectures on Galatians,” LW 26:373; WA 40:569.

<sup>74</sup> “Heidelberg Disputation,” [Thesis 28], LW 31:57; WA 1:365.

<sup>75</sup> “Lectures on Galatians,” LW 26:255; WA 40:402.

<sup>76</sup> LW 26:284; WA 40:443.

<sup>77</sup> “Although the Christian is thus free from all works, he ought in this liberty to empty himself, take upon himself the form of a servant, be made in the likeness of men, be found in *human* form, and to serve, help, and in every way deal with his neighbor as he sees that God through Christ has dealt and still deals with him” (“Freedom of a Christian” LW 31:366; WA 7:65).

the sake of the neighbor is nothing more than to acknowledge the neighbor as a fellow human being, to inscribe her life in one's own, and to accord her a personal place within it. The sheer instrumentality of the law, so embraced, is overcome by prior regard for the person, self-giving, by love. Thus to involve oneself in the life of another, *for the other's sake*, is to justify her *in persona Christi*.<sup>78</sup> In one's earthly freedom from compulsive self-regard and from self-serving and instrumental treatment of the other, one demonstrates the efficacy of divine justification.

Second, as Christ-figures to the neighbor, believers also justify God's own act in Christ, and with their new identity, vindicate him, who for their sake became the sinner of sinners condemned by the law. Out of their God-given being, Christians justify God as God indeed and the only giver of an enduring identity. In acknowledging God as the author and giver of every good, faith, insists Luther, "consummates the Deity . . . it is the creator of the Deity, not in the substance of God but in us." This I take to be a reference to the fortunate exchange. Luther continues, "For . . . God has none of His majesty or divinity where faith is absent"; and further on he adds, "If you believe, you . . . justify and praise God. In short, you attribute divinity and everything to Him."<sup>79</sup> This does not mean, of course, that God is not righteous in himself. He is. Nowhere is God's righteousness more evident than in Christ's bearing the world's sin. But even in, or better, on account of, his righteousness God does not wish to remain his own judge.<sup>80</sup> In this, the Galatians commentary of 1535 departs from *De servo arbitrio* (1525), where Luther stated, "This is the highest degree of faith, to believe [God] merciful when he saves so few and damns so many, and to believe him righteous when by his own will he makes us necessarily damnable." *De servo arbitrio* depicts God's justice as incomprehensible, hidden in the recesses of his unpreached will—for this reason it is God's alone. With all future things uncertain to *us*, even faith in God's unyielding control over all things begets trust only through uncertainty.<sup>81</sup> But incomprehensibility and uncertainty need not be the *sine qua non* of faith. In locating God's justice in the cross and having humans ratify it in their own exercise of Christ-like justice, Luther in *Lectures on Galatians* does not abolish the need for faith. For it still takes faith to recognize the agency of God behind the civil and theological functions of the law, just as it does take faith to see in the sentence of

<sup>78</sup> Luther speaks of "giving away one's righteousness," so that it might serve the sinful neighbor: "das groest [werck der liebe] ist das, wenn ich mein gerechtigkeit hyn gib und dienen lassz des nechsten sünde" ("Predigt am 3. Sonntag nach Trinitatis" [1522], WA 10<sup>III</sup>:217).

<sup>79</sup> "Lectures on Galatians," LW 26:227, 233; WA 40<sup>I</sup>:360, 369.

<sup>80</sup> It is frequently pointed out in legal theory that the principle *nemo iudex in causa sua* "is not confined to actual cases of bias—which are relatively rare in practice" (and out of the question, I might add, when it comes to God). Rather, the maxim relates to "the maintenance of public confidence." It is not only the doing of justice that counts but also the perception—clear and indubitable—that justice is being done. See Hilary Delany, "Recent Developments in Relation to the *Nemo iudex in causa sua* Principle," *Dublin University Law Journal* 21 (1999) 66.

<sup>81</sup> Luther, "De servo arbitrio," LW 33:62; cf. 138–39, 232, 290, 292; WA 18:633; cf. 684, 747, 784, 785.

crucifixion the law's fulfillment. In sum, the fortunate exchange, in that it takes seriously the person of the beloved, is not a self-justification of God but an ongoing justification of God by humans through their Christ-like service.

Now, because in the exchange Christ's person is bestowed on the believer not as an abstraction but in the execution of Christ's saving act, to the imitation and propagation, although not replication, of which the believer is called, the believer may be considered both justified and in need of final, eschatological, justification. Insofar as her being is now of and in Christ, the believer is justified, "already sufficiently avenged [*gerochen*],"<sup>82</sup> as Luther puts it in the treatise on the soldiers. Insofar as her existence consists in the ongoing Christ-like justification of fellow humans, and as such still awaits both completion and reception by God, the believer is in need of justification. In other words, in this life the believer remains a split *persona* existing in the divine now and not yet, but she is no longer a person hopelessly torn apart. Recall that the law, both in its political and accusatory functions, interrupts the self-referential movement of the sinner turned in on herself. By doing so it splits the person, dividing her from her self-justifying desires, and so preventing her from acting on them. This state of personal disintegration the sinner finds unbearable while ever attempting to catch up with the image of herself that her sinful desires conjure up. Now, in justification the sinner's identity is recreated in (the image of) Christ. But living in the world, the Christian descends from her "divine" form for the sake of the sinful world.<sup>83</sup> In other words, the Christian not only "understand[s] the deed of Christ . . . receive[s] and preserve[s] it" but above all "imparts it to others, increases and extends it."<sup>84</sup> To do this, the believer submits to the law—not as an abstraction but as the worldly, abused law—in order to overcome it in justice and love. The believer must, therefore, wrestle with the world's manipulations and injustice, always being tempted to engage in a theology of glory, in self-justification on the world's terms, rather than patiently to impart Christ-like justification. Thus, even as she lovingly embraces the world, a member of the spiritual and worldly governments, the Christian must also run away from her old sinful self. The old sinful self still clings to her nature with all its desires, sustained through the self-serving misuse of the law by the world, which has no justification for the Christian.<sup>85</sup> In this running away from the flesh, the Christian's goal is to catch up with oneself, as one is in Christ, to conform to the eschatological, vindicated self that beckons to her as a present reality in faith, *coram deo*. The Christian desires to act fully on her heart's longing, but she is thwarted in this by the reality in which she is called to minister and which, although overcome, is still

<sup>82</sup> "Whether Soldiers," *LW* 46:108; *WA* 19:636.

<sup>83</sup> See n. 77, where Christ's self-emptying (Phil 2:5–8) is presented as the model and possibility of the believer's self-emptying.

<sup>84</sup> Luther, "Confession Concerning Christ's Supper" (1528), *LW* 37:366; *WA* 26:506.

<sup>85</sup> "After faith there still remain remnants of sin in the flesh" ("Lectures on Galatians," *LW* 26:229; *WA* 40:364).

very much her reality. This makes the Christian “righteous and a sinner at the same time [*simul iustus et peccator*].”<sup>86</sup> Note that this distinction can in no way be aligned with the two kingdoms and the two governments, which are all areas and modes of God’s activity, but rather with the Christian’s salvation from the rule of the devil and her being sent to confront it on behalf of Christ. Consequently, as she catches up with herself, the Christian daily mortifies the flesh and increases in faith, which, in turn, is perfected through the ongoing imputation of Christ’s righteousness. Faith is eschatologically sustained remembrance: through faith in Christ the sinner already is fully righteous because the victory of Christ’s rule is unassailable, even though it is still in the process of unfolding itself out of its resurrection fullness. Thus, even as I run to meet myself in Christ—weak as my faith might be<sup>87</sup>—“Christ protects me under the shadow of His wings and spreads over me the wide heaven of the forgiveness of sins, under which I live in safety.”<sup>88</sup>

This is not to suggest that the process of catching up with oneself-in-Christ is in any way self-absorbed. Christian life is not a theology of glory in action, whereby the Christian suppresses sin and so withdraws more and more from the world. On the contrary, one becomes more human than as an unbeliever. Because one’s self-in-Christ is the cruciform self, the catching up can take place only, as I have said, by turning away from oneself, by actually descending into, and offering oneself to, the neighbor. It is a patient awaiting of the believer’s final justification in the course of which the believer justifies God with her Christ-like life.<sup>89</sup> Here we have again a similarity with the law. Just as the *sinner* was in no position to come to herself through the law, that is, through deceiving herself that it was the law, and not herself, that justified her, neither can the *Christian* come to herself, not even by means of Christ. The Christian can only justify God and share her God-given and Christ-filled self with others by acting as a loving judge in their case. It is God, who already has justified and, therefore, will justify the Christian.<sup>90</sup> To accomplish the believer’s eschatological wholeness belongs to God. “Vengeance is mine, I will repay, says the Lord”—for no one, not even God it seems, can be judge in one’s own case. Luther himself has summed this up best: “a Christian lives not

<sup>86</sup> LW 26:232; WA 40:368.

<sup>87</sup> “Barely a little spark of faith [*scintilla fidei*]”; “Christ . . . is present in faith itself [*in ipsa fide Christus adest*]” (LW 26:230, 129; WA 40:364, 229).

<sup>88</sup> LW 26:231–32; WA 40:367.

<sup>89</sup> “The holy Christian people are externally recognized by the holy possession of the sacred cross. They must endure every misfortune and persecution, all kinds of trials and evil from the devil, the world, and the flesh . . . in order to become like their head, Christ. They must be pious, quiet, obedient, and prepared to serve the government and everybody with life and goods, doing no one any harm. . . . No one has compassion on them” (“On the Councils and the Church” [1539], LW 41:164–65; WA 50:641–42).

<sup>90</sup> A discussion, in light of my argument here, of the nature and relationship of what are often dubbed the forensic and participatory elements of Luther’s doctrine of justification is beyond the scope of this article. The question definitely merits consideration but, because of its caliber, will have to be dealt with separately.

in himself, but in Christ and in his neighbor. Otherwise he is not a Christian. He lives in Christ through faith, in his neighbor through love. By faith he is caught up beyond himself into God. By love he descends beneath himself into his neighbor. Yet he always remains in God and in his love, as Christ says in John 1, ‘Truly, truly, I say to you, you will see heaven opened, and the angels of God ascending and descending upon the Son of man.’<sup>91</sup>

## ■ Conclusion

As the foregoing has shown, Luther views the law, especially as it relates to the exercise of temporal authority, neither as the essence and sum total of the sinner’s existence nor as directly reducible to the Golden Rule given the latter’s actual retributive and transactional reversal. Rather, the law, whatever positive civil form it may assume, is encapsulated in the principle *nemo iudex in causa sua*. This principle, on the one hand, preserves its actual interventional function and, on the other, while exposing the self-defeating nature of casuistry, shows that the law’s true fulfillment is in its loving and just—and, therefore, personal—application on another’s behalf. This principle then underlies Luther’s admonitions that temporal authority be obeyed, unless society itself can provide vehicles (“orderly procedure”) for deciding cases between the authorities and those subject to them in such a way that *nemo iudex* is abided by. Those mechanisms were mostly absent in Luther’s day. If they are present in ours, then Luther’s doctrine—with its anticasuistic bias and especially its prevention of self-serving individualism and anarchy—may be constructively reappropriated without simply dismissing its most disquieting aspects.

In addition to Luther’s conception of the political use of the law, I have argued further that the rule, that no one be judge in one’s own case, also forms the basis of the law’s theological use.<sup>92</sup> In this use it uncovers the sinner’s self-justifying strategies, and then—given the law’s inability to justify—it painfully poses the question of the sinner’s justification.

Only divine justification can rescue the sinner by underwriting the sinner’s personhood, which has been coiled by sin and split by the law. In consequence, the sinner is freed to justify fellow humans and in so doing to vindicate God. Now, because this freedom to justify others is rooted in Christ’s actual bestowal of his person on the believer, the Christian life is one of descent into the world, governed by the sword, whereby the justification of the world, which has no justification

<sup>91</sup> Luther, “Freedom of a Christian,” *LW* 31:371; *WA* 7:69.

<sup>92</sup> I have argued elsewhere, although along somewhat different lines, that the political use of the law, rather than the accusatory one, is also the foundational use for the so-called *tertius usus legis*, first put forth by Melancthon and then appropriated by the *Formula of Concord* (1577). See Piotr J. Malysz, “The Third Use of the Law in Light of Creation and the Fall,” in *The Law in Holy Scripture: Essays from the Concordia Theological Seminary Symposium* (ed. Charles A. Gieschen; St. Louis: Concordia, 2004) 211–37.

for the Christian, takes place through imitation and propagation of Christ's own humility. Christian life is thus one of being justified in Christ and of catching up with oneself by justifying the neighbor and awaiting God's own justification of one's life (in the same way that God the Father and the Christian have justified Christ's completed act).

In sum, in his complex involvement with the world through temporal and spiritual governments, God reveals that he is a righteous judge by consistently not being judge in his own case and so being free to justify humanity. This defines the life to which humans are also called: they must be removed from the immediacy of the law, whereby they seek to act as judges on their own behalf, into an identity bestowing presence of Christ, which will lead them freely to embrace the law for the sake of another's justice. While allowing for an incredibly rich interpretation of the relationship between God and humanity in Luther's theology, the principle *nemo iudex in causa sua* at the same time discloses that in his entire sphere of action—in the kingdoms and realms where God is present—God acts in a manner that is astonishingly self-consistent. Thus, through a thoroughgoing application of the maxim, which Luther originally discerned in his discussion of temporal authority, we have been able to capture the central themes of the reformer's theology of interhuman, as well as divine-human, relationships.<sup>93</sup>

<sup>93</sup> My thanks go to Rev. R. Michael Hintze, Ronald Thiemann, and the anonymous reviewers whose comments have been most helpful in revising my earlier draft.