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The journal is published by the Edmund Plowden Trust in honour of the distinguished Elizabethan lawyer who was Master Treasurer of the Middle Temple where his bust is still to be seen in the magnificent Hall which he built. He published the first series of modern law reports but above all he was a lawyer of great integrity who, as a Roman Catholic, refused all offers of professional advancement as to do so would mean denying his faith.

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Casebook
These casenotes were contributed by Frank Cranmer and Elijah Granet.

LAW AS THE CALLING OF HUMAN NATURE: THE THEOLOGY OF LAW OF DAVID W. OPDERBECK

DAVID MCILROY

Abstract: *David Opderbeck presents a wide-ranging Christian vision for law, rooted in Scripture, reason, and tradition, in his books 'Law and Theology: Classic Questions and Contemporary Perspectives' (2019) and 'Law, Theology, and Neuroscience' (2021). Opderbeck defends a classical account of the objective moral order of natural law, which calls us to live in relationships of love with God and with other people. He claims that a key feature of this order is that human beings are free to respond (or not) to God's law and have the capacity to make and to respond freely to positive laws. The natural law should inform the content of positive law, to the extent that doing so is consented to by the governed. Positive law is always a pragmatic approximation to natural law, containing and controlling injustice, providing some measure of peace, and helping to create the conditions for freedom, equality, and human flourishing. Opderbeck applies this impressive theoretical framework to the pressing questions of the day, offering an anti-integralist reading of law as a relative instrument that ought to be guided by prudence and pragmatism in the search of a tolerable peace.*

Introduction

David Opderbeck is a major new voice in the field of theology of law. After having practised commercial and insolvency law in New Jersey, he is now Associate Professor of Law at Seton Hall Law School. He adds to his legal expertise the theological credentials of a doctorate in systematic and philosophical theology from the University of Nottingham.

Opderbeck is a Presbyterian, but (as one would expect given his doctoral supervisor and examiners)[1] his theological approach to law is rooted in an analysis of the mediaeval period and in Patristics as well as in Reformation thought. His work is a timely reminder of how Scripture, reason and the broad tradition of the one, holy, catholic and apostolic church are all essential to giving engagement with contemporary questions of law both depth of vision and focus on the issues which really matter.

[1] Conor Cunningham was his doctoral supervisor; John Milbank and Robert Song the internal and external examiners respectively.

Opderbeck has published two books in close succession, *Law and Theology: Classic Questions and Contemporary Perspectives* (Fortress Press, 2019) and *The End of the Law? Law, Theology, and Neuroscience* (Cascade Books, 2021). Together the two books present the outlines of a wide-ranging Christian vision for law, rooted in the Scriptures and tradition, but brought to bear on key presenting and cutting edge issues in society and legal theory.

Law and Theology

Opderbeck's first book, *Law and Theology* is a work of two halves. In the first half, Opderbeck sets out and defends a classical (what Opderbeck refers to as a "premodern" (p.4))[2] account of the theology of law. In the second half, Opderbeck applies that classical account to contemporary problems.

Opderbeck claims that "a concept of 'law' requires metaphysical justification if we're really interested in a stable, peaceable society" (p.5). We are most likely to restrain ourselves from self-interested violence and insurrection if we have a philosophical commitment to the common good and acknowledge "higher principles of freedom, democracy, and commitment to the rule of law" (p.6).

Opderbeck covers the biblical material briskly in a lengthy opening chapter "that highlights the role of law in the narrative arc of Scripture from creation to consummation" (p.9). He argues that Christian readers can recognise that narrative arc because "the inspiration of the text as Scripture inheres finally in its witness to the life, death, and resurrection of Christ" (p.9). This means that "the Bible can be read [as] an overarching story involving creation, 'fall,' Israel, Jesus, and the church and the coming consummation." (p.19).

Opderbeck interprets the Genesis narratives as revealing the natural law, that "when human beings are living in right relationship with God, each other, and the rest of creation, we possess a natural, innate sense of what is good, beautiful, and true." (p.23). The natural law embedded in creation reveals that "Some things are inherently right and good, and some things are inherently wrong and harmful." (p.140). Chief among the things that are inherently good are relationships with other people and, above all, our relationship with God. "The truly 'natural' law – the law of love, the law of the Garden - is the receipt of the gift of life from God who creates, redeems, and fulfils human 'being' in Christ." (*The End of the Law?* p.219).

[2] In this section of the article, page references in the text are to *Law and Theology* unless otherwise indicated.

Opderbeck's account of the natural law is therefore theological rather than purely philosophical. He does not address the New Natural Law school of Germain Grisez, John Finnis, Robert George and others in *Law and Theology,* but he does engage with their work in *The End of the Law?* Opderbeck does not think that it is possible, as Finnis asserts it is, to provide a self-contained natural law theory "without needing to advert to the question of God's existence or nature or will".[3] Opderbeck argues that Robert George and Patrick Lee's attempt to develop an account of human nature in *Body-Self Dualism*,[4] describing human beings as animals with a capacity for rational agency, depends on a metaphysic of nature, and mistakenly assumes that "human rationality is a neutral arbiter among competing truth claims" (*The End of the Law?* p.188). After MacIntyre,[5] it is clear that what counts as reasonable depends on one's presumptions and the tradition which informs one's thinking, but even faith in reason logically depends on having reason to believe that one's thoughts can connect reliably with reality rather than being "no more than epiphenomena of contingent processes" (*The End of the Law?,* p.189).

In *Law and Theology*, Opderbeck skips over such discussions, moving instead from the natural law given in creation to the positive law necessitated by the fall. Opderbeck sees law as having a role that goes beyond merely preserving some degree of civic order (p.27). Israel is a distinctive society, liberated from slavery, called to be governed by law, and to demonstrate holiness and justice. It fails in that mission, both in the period recounted in the book of Judges where there is no rule of law (p.39) and, by and large, under its kings (pp.40-45). "The entire Torah [as well as the historical books] therefore represents a theological history leading to the possibility of an ideal society under God's law that was never fully realized in practice" (p.44). Idolatry and "the failure to live by the law's requirements for justice" (p.45) were proclaimed by the prophets as the reasons for Israel's exile. Jesus reiterates these requirements of justice as he "interprets the Torah through the foundational law of love" in his Sermon on the Mount (p.51). The early Church understood Jesus to be a law-giver greater than Moses, the fulfilment of the Torah's requirement of sacrifice for sins, a perfect example of what it means to live according to the law of love, and the one who calls both Jews and Gentiles to become part of God's people. He is also the one who will come again as the perfect judge to establish the "ideal political community in the heavenly city embodying the law of love" (p.65). Opderbeck navigates through the maze of contemporary Pauline and

[3] John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford, Oxford University Press, 2011), 48-49.

[4] Patrick Lee and Robert P. George, *Body-Self Dualism in Contemporary Ethics and Politics* (Cambridge: Cambridge University Press, 2009).

[5] Alasdair MacIntyre, *Whose Justice?*, *Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988).

apocalyptic scholarship with the surefootedness of a mountain goat, though he could have said more about how Paul sees the Holy Spirit as the one through whom Christians participate in Christ and the power by which they come to demonstrate the justice of God.

In chapter 2 Opderbeck attempts to summarise the Christian intellectual tradition relating to the nature and purpose of law. That tradition recognised, from the outset, that "Positive law … does not *define* the church's mission" (p.71). Called to witness to Christ, the Church should be more concerned with advocating on behalf of the oppressed than it is with asserting its own institutional "rights" (p.73, *quotes original*).

Opderbeck explores the turning points in patristic thought, as the arguments for toleration advanced by Tertullian and Lactantius are overtaken by Augustine's comprehensive vision. Augustine stresses the coercive nature of positive law, accepts that it must be practical in what it permits and what it prohibits, but holds rulers accountable to God's justice. Aquinas, by contrast, emphasises that good laws are "directed toward the proper end of reason: the 'common good'" (p.95), thus granting positive law a more constructive role. Law is a way in which rational creatures participate in the eternal law, which is the providence of God.

Opderbeck's primary aim is to show continuities in the Christian tradition from the patristic period through the Middle Ages to the magisterial and even the radical Reformers. For him, the continuities are seen most clearly in the enduring questions: is there a natural law in creation?, is there an overarching purpose to history?, what is the relationship of the Church to government?, what is the nature of a good society?, what are the goals of positive law, and what is the relationship between the positive law and the natural law? (p.102).

On these foundations, Opderbeck seeks to defend a classical account of God's attributes, from which flows the natural law. "The truth that God is good, just and beautiful all at once, without change or remainder, means that there is a stable, universal source of the goodness, justice, and beauty in creation." (p.111). While some divine commands are contextual in nature (for example, most of the Torah), and there are even considerations about how the Ten Commandments are to be applied, Opderbeck insists that "The natural law does not change … because God himself does not change." It would be interesting to know how Opderbeck would defend that claim against Jonathan Crowe's recent argument in *Natural Law and the Nature of Law* (Cambridge University Press, 2019) that natural law can develop because it is historically extended, socially embodied and dependent on contingent facts about human nature.

Opderbeck's contextualisation of some divine commands paves the way for his claim that the rules of positive law "are always relative to a very particular context" (p.116). "Positive law … is always removed at some distance from natural law." Whereas natural law is *ideal*, positive law is "*a pragmatic approximation of the ideal*" (p.117, italics original). Such pragmatism results from the necessity for positive law to command the passive consent of the governed if it is to be enforceable and effective (p.141).

Obedience to the natural law or to the moral law (which Opderbeck treats as synonyms or near-synonyms) is the authentic human response to the grace which God has shown us (p.115). God's love for human beings, received and responded to in reciprocating love expressed in obedience to the divine command, leads to participatory union with Christ. Because positive law can never be perfect and no earthly commonwealth will ever love God as it should, "The best the church can hope for and seek in the earthly city is some measure of peace" (p.120), enforced through the threats of coercive force which necessarily underlie all positive law (p.138). Despite, and because of, its limitations, Opderbeck offers a hopeful vision for positive law as an instrument which "can help create the conditions for freedom, equality, and human flourishing" (p.11).

Opderbeck seeks to restore the visibility of the procedural aspects of the Christian political vision, as Jonathan Chaplin's *Faith in Democracy: Framing a Politics of Deep Diversity* (London: SCM, 2021) has also sought to do. The rule of law is a good in its own right, even if some of the laws enforced in a given system are unjust. Classical Western legal theory, in both its Roman and Christian forms, laid importance on the question of consent (p.7), now expressed in the democratic processes in the USA and other Western countries. Freedom is a key social value, because it is both a guard against tyranny and a protection of a space for the exercise of personal conscience, even if some will abuse it. These three values: the rule of law, the principle of consent by the governed, and the importance of freedom are not unconnected. Only where the rule of law is reliable is freedom secure. Dissent against laws perceived to be unjust should consider very carefully whether protest can be made non-violently against particular injustices without destroying the peace secured by the rule of law. Nonetheless, "the rule of law is not absolute because only just laws are legitimately enforceable" (p.181). As the Church lives out its mission, it should support legal change on behalf of the oppressed, using civil disobedience as a weapon if other routes to change are blocked. Rev Dr Martin Luther King Jr offers, in Opderbeck's view, an important historical precedent for how this

can be done.

Positive law maintains the stable social conditions in which obedience to the natural / moral law can be expressed and ought not to impose demands which conflict with such obedience. Opderbeck argues, however, that the Church should seek greater congruence between positive law and natural law where to do so would lead to "liberation" (p.121) and where there is sufficient public support for such developments (p.129). "Law can help keep people free from infringements of right, and it can also help liberate people so that they are free to live in right relation with each other." (p.122).

Having established both the permanence of the natural law, and the important but relative role that positive law can play in defending freedoms and promoting flourishing, Opderbeck turns to the application of those principles to his setting in the fractious USA. In the introduction to the second half of *Law and Theology*, Opderbeck eschews two temptations: the temptation to claim that the USA is exceptional and the temptation to assume that its experience can be applied elsewhere without accounting for context.

Opderbeck's book is a significant corrective to integralist and fundamentalist calls for theocracy, to fear-mongering and to calls for separation. The first chapter of the second half of the book (chapter 4) is entitled "Praxis of Law in Ordinary Time". This inspired title highlights what Christians fighting culture wars using scorched earth tactics overlook to their peril: the considerable blessings and possibilities for human flourishing secured by impartial laws, fairly applied, and reliably enforced. Where a legal system delivers such a framework, business disputes do not become blood feuds, families can grow in safety, and the church can witness without fear. Despite what Opderbeck acknowledges to be the deep scar of racism, the USA enjoys, he claims, the benefits of "a flawed yet robust system through which daily life usually functions reasonably well without descending into chaos" (p.146). This, rather than the "hot button" issues which so exercise the Religious Right, is "what the rule of law looks like in everyday life" (p.147).

The Church's task is to witness to Christ, it is "not a temporal nation", and its mission "is not to establish temporal political power". "This means that the church's *first* interest concerning the positive law in any historical context is simply to support the structures and institutions of a functioning legal system in which there is at least some restraint on grave violence, some principle of consent of the governed, some commitment to the flourishing of creation, including created humanity, and some space for the church's institutional life." (p.145).

Turning to particular political questions, Opderbeck reminds his readers of how the explicit biblical injunction against lending money at interest has been "modified for practical reasons", in recognition of the fact that "there is simply no way the modern world could function without lending at interest." (p.151).[6] Having stated this view, Opderbeck moves on, without engaging either with the question of whether the Islamic ban on interest is mere casuistry (form over substance) or whether it would be possible to re-configure modern societies toward co-operative, risk-sharing, steady state economics as the Jubilee Centre,[7] the Cambridge Papers[8] and others[9] have argued. His argument here, and a further argument about pharmaceutical regulation, is that although natural law and Christian principles should inform law-makers, it is usually the case that no "single policy outcome *defines* the *missio Dei*." (p.157).

In chapter 5, Opderbeck confronts "America's national original sin: black slavery" (p.161). Opderbeck looks at the arguments advanced by Christians on both sides of the debate regarding slavery. He draws out how the complaint of the Southern States about over-reach by the federal government underlies or at least parallels the complaints about "big government" made by the Religious Right today (pp.184-185).

In chapter 6, Opderbeck addresses the pressing questions of abortion and LGBTQ rights. He highlights eschatology as a feature of some American conservative evangelicalism which drives its "culture war" stance. Contemporary American conservative evangelicalism has, unlike its Puritan and eighteenth-century predecessors, combined "a dispensationalist expectation of imminent doom with an incongruous belief that the apocalypse can be delayed through political action." (p.13, pp.223-227). There has been a failure to grasp, in the case of abortion, that "at any moment in history, many things that would be consistent with the natural law cannot be imposed by the positive law" (p.204) or to understand, in the case of gay marriage, that "there is obviously nothing to gain by manipulating political power in an effort to impose temporal laws that most of society rejects." (p.205).

Opderbeck concludes that right wing Christian advocacy for particular

6 David Bentley Hart argues, in 'Mammon Ascendant', (2016) *First Things*, that the current capitalist order is deeply malformed, and that the promotion of self-interested choice in both neoliberalist economics and in people's private lives is of a piece.

7 M. Schluter and J. Ashcroft (eds.), *Jubilee Manifesto* (Leicester: IVP, 2005).

8 Paul Mills, 'The Ban on Interest: Dead Letter or Radical Solution' (1993) 1(4) *Cambridge Papers,* 'The Divine Economy' (2000) 9(4) *Cambridge Papers*, 'The Great Financial Crisis: A biblical diagnosis', *Cambridge Papers* (March 2011).

9 J.E. Bergida, 'Towards Islamo-Christian business ethics? A case study on the prohibitions of riba and usury and the morality of interest', (2020) available online at https://ora.ox.ac.uk/objects/uuid:28443b2c-7ec9-4902-b541-36f210a92f52.

policy outcomes "raises serious concerns about practical wisdom, intellectual consistency, and missional focus" (p.200). Winning political arguments at all costs has trumped the primacy of witnessing faithfully and winsomely to the love of Jesus Christ for all. Virtue-signalling through obtaining preferred policy outcomes has replaced an acknowledgment that laws, to be effective, need to be acceptable to most of those who are subject to them. The cutting edge of Opderbeck's first book lies in its conclusions that many American evangelicals have fallen prey to bad theology, and that this, in combination with their insistence that the character of rulers matters, has seriously eroded the rule of law. (p.13, p.206-207). He calls, instead, for a desperately needed "theology and praxis of patient presence and engagement" (p.228).

The End of the Law?

Opderbeck's second volume, *The End of the Law?* arises out of his doctoral work. The presenting question with which Opderbeck begins the book is: if scientific naturalism is true, and the mind and the will are simply epiphenomenal processes (p.2),[10] what are the implications for law? Reductionist neurolawyers assert that jurisprudence can be reduced to sociobiology (p.3), so that law is not an objective source of obligation and trials are a mistaken means of enquiring into human motivations and actions.

Against such a dismissal of the positive law and its implicit anthropology, Opderbeck seeks to defend the classical Christian claim that "positive law points beyond itself to its source of truth and justice in God" (p.3). Opderbeck's vision quickly broadens out to argue that law (understood in Aquinas's sense as a category encompassing God's eternal law, the natural law, the divine law, and the positive law (p.103)) is a mediating structure between physics and metaphysics (p.5). "Law is in some sense a given property of the universe and is in some sense a constituent element of the human soul, present in our created goodness, prevenient in our fallenness, perfected in our resurrection with Christ." (p.214). Just as creation as a whole finds its fulfilment in God, so "Law is embedded in our material nature but also transcends it and points to something beyond ourselves." (p.221). Opderbeck's big claim is that humans' ability to respond freely to God's law and our ability to make and to respond freely to positive laws are key aspects of the *imago Dei*. Like Alain Supiot[11] (though apparently independently), Opderbeck has concluded that we are *homo juridicus* (*Law and Theology*, p.104). Humanity stands before, under, and within the law

[10] Page references in this section of the article are, unless otherwise stated, to *The End of the Law?*

[11] Alain Supiot, *Homo Juridicus: On the Anthropological Function of the Law* tr. S. Brown (London: Verso, 2007).

(p.221), and is rescued and restored through Christ's fulfilment of the law of love.

Opderbeck develops his account through a survey of ancient Western legal thought (in chapter 1). In chapter 2, he retraces the Straussian account[12] that the seeds of modernity were decisively sown in the fateful turn towards nominalism and voluntarism in the mediaeval scholastics. He nuances the account slightly, emphasising the subtlety in Scotus' views (pp.26-33) and resisting the simplistic suggestion that the Reformers wholly rejected the patristic synthesis of faith and reason. He nonetheless demonstrates that the result of univocity regarding being (treating God as the ultimate representative in the category of being, rather than as the Ground of Being) was Hobbes's equivocity regarding justice (p.37). If right and wrong are not rooted in objective goodness but solely in the command of a superior, then their content can change at any moment.

Armed with those historical resources, Opderbeck addresses the claims of neurolaw directly in chapters 3 and 4. He sets out the startling claims of reductive neurolaw scholars in some detail: 'free will' is an illusion, the notion of 'responsibility' is a social construct (p.41), "'blameworthiness' should be removed from the legal argot" (p.42), and "criminals should always be treated as incapable of having acted otherwise" (p.44). He then points out that reductive neurolaw (like all forms of reductive naturalism) is self-refuting: if the human mind and will are determined by our biology, then "right" and "wrong" have no reality beyond the way in which such signals trigger epigenetic responses in our neural biochemistry. Reductive neurolaw cannot prove its scientific credentials because, if it is true, the very notion of proof is meaningless.

However, despite the absurdity of reductive neurolaw, an adequate philosophical response implies and requires a theological framework (p.53, p.90). Such a theological response, in Opderbeck's view, cannot be the crude opposition of fundamentalism or youth earth creationism (pp.54-61) nor should accommodation to evolutionary theory lead to abandoning the tenets of classical theism in favour of a process theology (pp.61-63). Instead, Opderbeck seeks to draw from Protestant critical realism (McGrath) and the approaches of Reformed presuppositionalism (Cornelius Van Til) and Reformed epistemology (Plantinga and Wolterstorff) as well as Catholic *fides et ratio* models (p.92) to affirm "the irreducible importance of the doctrines of Trinity, creation, incarnation, and resurrection" (p.94) and of "law as an irreducibly transcendent and unique component of human 'nature'" (p.95). Human beings stand before the natural law, as creatures

[12] Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953).

capable of responding to it in obedience or rejecting it (p.102).

Opderbeck recognises that to make such a claim about 'human nature' requires an account of human nature, which wrestles with how the Fall and the doctrine of original sin are to be understood in the context of the scientific evidence for human evolution. Christianity must make such claims, because "If there *are* no transcendentals of human nature – if each person just is, as a particular person – then there does not seem to be any way in which Christ can be savingly related to *humanity*." (p.168). In chapter 5, Opderbeck reviews the fossil record and the findings of palaeoanthropology before concluding that "positive law is a cultural product unique to modern humans." (p.7). Law arises when the human species developed or activated "the cognitive connections that facilitated art, science, and religion" (p.123). The claims of reductionist neurolawyers have brought to light the Christian, humanist, and natural law anthropology which underlies law as a social phenomenon: laws are only worth making and litigation leading to trials only sensible and meaningful if human beings are moral agents who act intentionally and are responsible for their actions (save in limited cases such as being too young or too insane).

Law's anthropology is incompatible with many of the currently fashionable approaches in philosophy of mind. What is at stake in claims that our brain chemistry wholly determines our choices is this: "Without some concept of human freedom, there is no concept of justice" (p.142). Opderbeck highlights, in chapter 6, the intractability of the mind-body problem and the conundrum of consciousness. He rejects, however, dualist responses to these problems. For Opderbeck, dualism depends on an argument from mystery. Such "God of the gaps explanations create theological distortions that undermine the causal integrity of creation." (p.153). Instead, Opderbeck argues that the role of theology is to supply "a metaphysical scaffolding and a narrative structure for the reality and goodness of moral concepts and of related human cultural phenomena such as positive law." (p.156).

In chapter 7, Opderbeck surveys the field of philosophy of mind and approaches to the problem of divine action. His solution is a return to an Aristotelian understanding of causation: as well as the material cause (the *what?,* e.g. the marble from which a sculpture is carved) and the efficient cause (the *how?*, e.g. sculptor carving the marble) which the sciences of physics and chemistry explore, Aristotle argued that there were the formal cause (the *what shape?*, e.g. the shape of the statue found within the block of marble)[13] and the final cause (the *why?* and *for what purpose?* questions).

[13] Opderbeck notes that for Aquinas, it was the "system-level dynamic configuration [which] was the 'form' that gave the thing its 'function'." (p.182).

To understand 'law' therefore, we need to ask not only what laws there are, but also "where 'law' comes from, what it means for 'law' to be 'law', and of the ends or purposes of 'law'. That is, we must speak of 'law' as having some transcendent *telos,* some *source* that also implies its ends." (pp.172-173). This neo-Aristotelian approach allows us to think of "the 'laws of nature' [as] not so much deterministic rules as powers and potentialities [so that] the neurochemistry of the brain empowers and enables but does not *determine* the capacity of 'mind'." (pp.175-176). The natural law is written into the "dispositions, powers, and capacities" of creatures which "participate in the being of the living Triune God" who created all things and are "finally oriented towards a *telos* in God, who is not part of creation." (p.181). Law is given to created things by God, who calls and draws all created things back to Godself.

In chapter 8, Opderbeck seeks to develop his "account of human uniqueness in relationship with the transcendent source of the law of love." He argues that if creation is understood as God's very good creation, if Christ is the logic of creation and the one in whom we see humanity as it was meant to be (p.200), then we can recognise that "Freedom is living in accord with the goodness of the life we are given as creatures" and that "Law is not an arbitrary restriction imposed from above, but rather is a dynamic aspect of establishing a community that is able to live authentically human lives in a community of love." (p.201).

In chapter 9, Opderbeck addresses the obvious objection to his eirenic account of law: isn't law inescapably violent? (p.203). He readily accepts that coercive power is indispensable to systems of positive law (p.205). He argues that such coercion is necessary because human beings have, as the story of the Garden of Eden tells us, fallen away from the law of love and the grace of reason (pp.214-217). "To act in accordance with the law of love is to act in a way that is authentically and freely human." (p.219). This was achieved by Christ, who "fulfilled the law of love through his incarnation, life, and atoning death on the cross" (p.223). In Christ's reign of love inaugurated by his resurrection, we see the *telos* of law, "the culmination of the powers and potentialities of creation, including those of human persons, in the embrace of God's eternal perichoretic love." (p.223).

Conclusion

Opderbeck's books have announced him as an important interlocutor in the theology of law. His work shows the value of theological reflection grounded in Scripture and drawing on the Christian tradition. Because Opderbeck is attempting to cover such a large amount of ground, there are points at which his claims are asserted rather than argued or where he does not unpack

their implications fully. Readers are likely to wonder what exactly are the principles of natural law Opderbeck derives from the "law of love",[14] how those principles of natural law cash out in terms of content for positive law, and whether Opderbeck can offer any rules of application for his prudential judgments about contemporary flashpoints.

Opderbeck's work will be enriched by bringing it into closer conversation with the political theologies of Oliver O'Donovan. Although Opderbeck draws on O'Donovan's historical sourcebook, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* and is familiar with O'Donovan's work on natural law in *Resurrection and Moral Order,* he does not engage with *The Desire of the Nations or The Ways of Judgment,* in which O'Donovan offers a systematic account of political authority and a methodology for making the judgments which are at the core of the legislative, executive, and judicial tasks.

There are important criticisms which could be raised against Opderbeck's approach: is the moral law really simply co-extensive with the natural law as Opderbeck appears to suggest?, does he flatten creation ethics and kingdom ethics, giving too little weight to the radical nature of Christ's teaching and the way in which it illuminates the natural law in areas where the ancient world had been blind?, is his view of the relationship between Church and State too quietist, expecting too little of governments in countries where the Gospel has penetrated?, does his view that the Church and Christian organisations have no right to expect tax rebates and government funding on an equal footing with those non-governmental organisations prepared to sign up to civic morality codes without reservation, concede too much to the historically unprecedented taxation demands of modern governments? Would the ideas of principled pluralism, sphere sovereignty, and subsidiarity (each of which can be grounded in natural right(s)) enable us to co-exist more peaceably despite the depths of our disagreement?[15]

Despite the areas in which his ideas can be further tested and developed, Opderbeck's two books offer both an accessible introduction and a panoramic survey of the importance of issues in theology, philosophy and anthropology to the way in which pressing issues in our time should be approached. Opderbeck is indispensable reading for anyone interested in the theology of law.

[14] He opens *Law & Theology* with the claim that "Natural law is composed of rights and related responsibilities that are inherent in the natural law" (p.2), but he never offers his account of what those rights and responsibilities might be.

[15] Jonathan Chaplin, *Faith in Democracy: Framing a Politics of Deep Diversity* (London: SCM, 2021).

News from the Governmental and Parliamentary world

This feature is intended to alert readers to contemporary developments which bear on a Christian view of the law and what it ought to be. As such it aims to cover some issues which have a direct bearing on Christian concerns, such as legislation on assisted dying, and those which may be somewhat under the radar for some readers but which, perhaps, ought not to be. Readers should note that, especially in the case of current legislative proposals passing through the UK Parliament the information is correct at the time of writing (early November 2022) but may be overtaken by subsequent developments by the time that this issue appears in print.

Humanist Marriage

The All Party Parliamentary Humanist Group has published its second report into humanist marriages in England and Wales. It calls for immediate legal recognition of humanist marriages in England and Wales and says that:

> According to a recent YouGov survey, one in five of those who do not want to get married cite the religious connotations of marriage. Legal recognition could well prove vital to revitalising the institution of marriage in England and Wales. Evidence from Scotland indicates as much. We see no new reasons why humanists should not be afforded the same responsibility to conduct their own marriages as religious groups have long enjoyed. With the release of this update, we are once again calling for the immediate legal recognition of humanist marriages under the Marriage Act 2013.

Genocide Determination Bill [HL].

The Genocide Determination Bill had its Second Reading on 28 October 2013. The short title is: 'A Bill to provide for the High Court of England and Wales to make a preliminary finding on cases of alleged genocide, crimes against humanity or war crimes; and for the subsequent referral of such findings to the International Criminal Court or a special tribunal.'

Opening the debate the sponsor of the Bill, Lord Alton said;

> Next year will mark the 75th anniversary of the UN Convention on the Prevention and Punishment of the Crime of Genocide, but we are nowhere near having clear mechanisms to help us deliver on the duty contained therein to prevent the very core of the convention—"never again"—happening all over again.

> These are not theoretical debates. As we will hear from Members of your Lordships' House—the noble Lord, Lord Collins, indicated in an earlier debate that places such as Tigray will no doubt be referred to during our proceedings here—these challenges are current and contemporary. When we do not face the same existential realities, the pain, suffering and human consequences may sometimes seem too abstract or remote. However, when we attached this nation's signature to the genocide convention, we accepted a solemn and binding duty to use our voice and place among the nations to prevent constant recurrence of this crime above all other crimes.

The Public Order Bill 2022 and Buffer Zones round abortion clinics.

MPs have voted by 297 votes to 110 in support of the amendment to the above Bill to introduce 'buffer zones' around abortion clinics nationwide.

During the debate Sir Edward Leigh MP expressed his surprise at debating buffer zones again stating that it was only in 2018 when the Home Office concluded there was no need for them. Sir Edward said that buffer zones were disproportionate in the restrictions they imposed on freedom of expression, and unnecessary in that there remains a lack of evidence that they are needed. Bishop Sherrington, the RC Lead Bishop for Life Issues at the Bishops' Conference, expressed his dismay about the amendment stating that it raised larger concerns about freedom of religion, belief, expression and association. He vowed to continue to oppose the amendment to the Bill and continue to pray for and offer support to pregnant women and their unborn children.

Meanwhile Bournemouth, Christchurch and Poole Council has made a by-law which draws red lines around an abortion provider and designated the area a safe zone so that it is now a crime to even 'advise or persuade, or otherwise express an opinion' within a certain distance of the abortion clinic. It is suggested that anyone caught even crossing themselves, reciting Scripture, or sprinkling holy water behind these red lines could as result be fined £100. Meanwhile it is fairly clear that somehow or other these restrictions will be challenged under Art. 9 of the ECHR.

Seeking a second opinion in end of life cases

There has been much publicity over recent cases involving possible withdrawal of treatment to terminally ill patients, especially children, where there has been a conflict between the views of their parents and the hospital.

Baroness Finlay in a House of Lords debate on March 16th 2022 on the Health and Social Care Bill and speaking in the context of cases like that of Archie Battersbee[1] referred to 'the very real problem that relates to the power differential between a doctor and the parents of a sick child'. She went on to say:

> When parents are worried, they can come across as angry or difficult in their attempt to get information or get something done. All too often, they are labelled as overanxious. Yet, it is normal to be out of your mind with worry if your child, whom you adore, looks as if they might die.

She went to say that:

> When staff become aware of a difference of opinion, the clinicians need to listen to the parents, and others concerned with the child's welfare, who may have important information to inform thinking.

She therefore proposed that a new clause 164 be inserted in the Bill which would apply where there is a difference of opinion between a parent of a child with a life-limiting illness and a doctor responsible for the child's treatment about the nature (or extent) of specialist palliative care that should be made available for the child.

In either of these two cases the health authority would have a number of duties. These would include a requirement to ensure that the views of the parents, and of anyone else concerned with the welfare of the child, are listened to and taken into account; to make relevant medical data available to them; and to allow the provider of an alternative treatment that is being advocated by the parent to provide evidence. In addition there would be a duty to allow for a mediation process where the two parties were unable to resolve their difference of opinion.

These proposals would, had they become law, have taken a great deal of heat out of tragic situations such as those of Archie Battersbee and Charlie Gard and would have provided a sensible way of managing extremely difficult cases. However, although this amendment was passed by the House of Lords it failed in the Commons and instead the government inserted a somewhat anodyne clause into the Bill which has now become s.177 of the Act.

This merely states that

[1] This received wide publicity and is reported at *Dance and Battersbee v Barts Health Trust* (2022) EWCA Civ. 1055.

> The Secretary of State must arrange for the carrying out of a review into the causes of disputes between (on the one hand) persons with parental responsibility for a critically ill child and persons responsible for the provision of care or medical treatment for the child as part of the health service in England. In addition a report on the outcome of the review must be published within one year of the Act coming into force.

We now await the publication of the review.