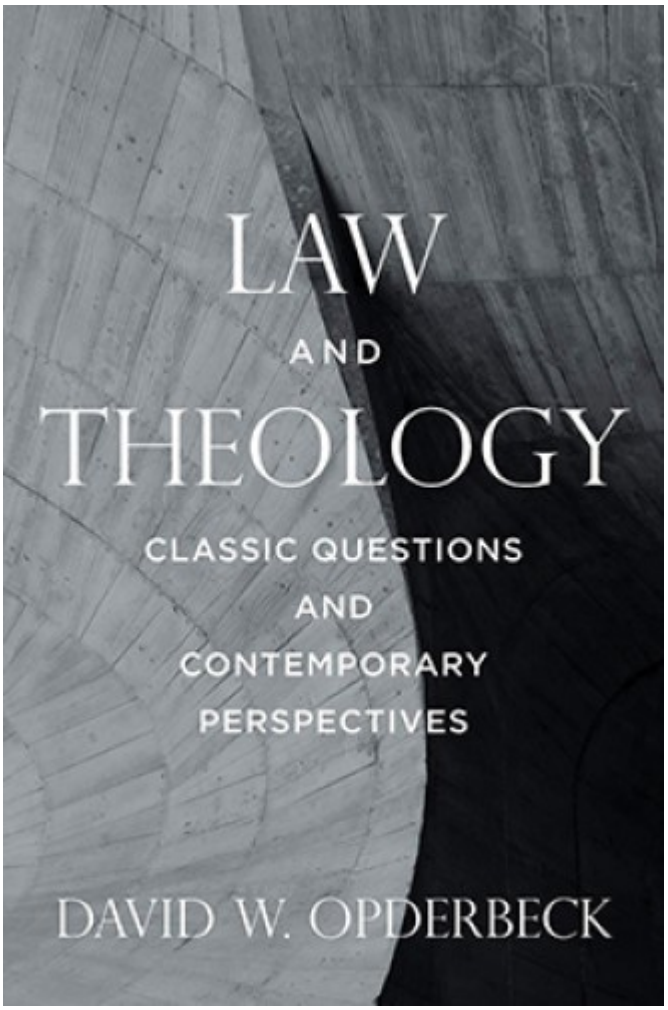
The law in our lives

David Opderbeck’s book about theology, the law, and how we engage with both

by Chris Hammer in the September 23, 2020 issue

In Review



Law and Theology

Classic Questions and Contemporary Perspectives

By David W. Opderbeck
Fortress Press
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The law is all around us, in many different forms: constitutions and statutes, rules and regulations, executive orders and court decisions. Together, these different pieces of the law—what lawyers and legal theorists call “positive law”—govern our everyday life by balancing the rights we hold as individuals with the responsibilities we have toward one another.

Positive law, as the lawyer-theologian David Opderbeck explains in *Law and Theology*, is a multifaceted human creation that governs a particular place at a particular time. And how does it govern? Force. Someone who disobeys positive law—for example, by breaching a contract, driving while intoxicated, or killing another human being—is subject to a wide range of state-sanctioned consequences: loss of money, loss of liberty, and even loss of life.

Our place in the midst of positive law frequently changes, and much of the time we barely notice when these changes occur. But sometimes positive law’s changes require a substantial reordering of our lives.

For instance, as I write this during the COVID-19 pandemic, emergency state and local executive orders limit my home church in New York City from worshiping in person together. Unimaginable just a few months ago, these orders demonstrate the ever-changing balance of right and responsibility.

All too imaginable were the killings of George Floyd in Minneapolis, Breonna Taylor in Louisville, and Rayshard Brooks in Atlanta, violence committed in the name of law enforcement. Their deaths have sparked a long-overdue reckoning that calls White Americans to dismantle generations of systemic racism.

The end of the US Supreme Court’s term each year also brings about newsworthy statements about positive law, and this year was no exception. The court recently decided several cases that touch upon hot-button issues, including abortion, contraception, and LGBTQ rights.

Opderbeck’s book describes the theological underpinnings of positive law and helps Christians situate our contemporary circumstances as we engage with positive law—both the headline-grabbing and the more mundane. Opderbeck surveys how

the narrative arc of scripture and the Christian intellectual tradition implicate “the law,” and he frames a constructive theology of law in which “the nitty-gritty of the law is almost never a matter of simple absolutes” but is still a tool that “can help create the conditions for freedom, equality, and human flourishing.”

Contingency is an essential feature of Opderbeck’s study. He understands creation as a contingent act of divine love and explains the Eden allegory as “God entrust[ing] to humanity the *purpose* of engaging in fruitful, creative activity that will make the Earth into something even more beautiful than it was in the beginning.” God’s commands are in service to natural law, that is, “principles of right relationship built into creation,” because “life contrary to those principles tends toward disorder, chaos, and violence.”

Because “God relates to humanity in history . . . divine commands to humanity also exhibit a significant degree of contingency.” God’s commands are “given to particular people or forces acting within time, in history,” and they “*facilitate* his mission, but *the command is not the mission*.” Rather, the commands aim to structure “relationships among people, between people and other parts of creation, and between people and God until all the purposes of creation are fulfilled and the union of these relationships is repaired.”

Consider the hundreds of divine commands contained in the Torah, among which is the command that a “stubborn and rebellious son who will not obey his father and mother” be stoned to death by the men of the town (Deut. 21:18–21). Commands such as these, taken literally, are quite easily a stumbling block to our understanding of divine love. But context matters. Talmudic scholars have interpreted this command as intending to limit the otherwise unilateral power of the head of a family by requiring a kind of trial before the elders of the town. Understanding the contingent nature of this command and others like it is essential to understanding our right relations with others, as well as with the divine.

What does this theological narrative have to do with positive law nearly three millennia later? It illustrates contingency. If God’s commands to the people of Israel are contingent, then positive law—the commands of civil authorities—must likewise be contingent. Opderbeck explains: “Positive law is a human cultural product . . . expressed in human language,” and it “addresses specific human circumstances involving competing ultimate values.” As a result, “*no* dispute over a specific legal rule is *ever*, in itself, a dispute about ‘absolute truth.’”

This is a bold claim, and Opderbeck is quick to qualify it. While disputes about specific legal rules often ultimately implicate questions of absolute truth, “including very important moral truths embedded in the natural law,” the specific legal rules “are always relative to a very particular context.” In understanding that context, it is often the case that “a set of legal rules will relate to competing, seemingly contradictory higher principles,” requiring “a kind of compromise, not only with other people who have differing ideas” over how to balance those principles “but also with the reality of our circumstances.”

How are we to balance various values? Although Opderbeck does not quote Micah 6:8, the prophet’s words are difficult to improve upon: “What does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?” Each of these values is embedded within Opderbeck’s praxis of law.

Positive law, as a human creation, can never be perfect, but Opderbeck draws on liberation theology to understand that “if resources and opportunities are distributed within a society in ways that fundamentally limit some people’s ability to function as human beings, there might be a failure”—one that political action can mitigate by moving positive law toward justice. Opderbeck draws on kindness or mercy shared by God’s covenantal love, “not merely a superficial acknowledgment of the law” to love one another “but the internalization of its principles.” The contingent nature of positive law also requires that we regard it with humility, naming the possibility that we perpetuate or exacerbate oppression.

Where does this leave us today? Most of our interactions with positive law are what Opderbeck describes as “the praxis of law in ordinary time”—the unglamorous material that occupies most lawyers and judges. Because the church is not a temporal nation and does not seek temporal power,

> 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.

In today’s moment, however, these minimal requirements of positive law come into conflict with what Opderbeck describes as the first “big question” of American law:

institutionalized racism. It first took the form of slavery, and Opderbeck focuses not only on the legal structures embedded into the United States Constitution and the slave codes of southern states but also on the theological arguments made to justify and prolong this system of oppression. These theological arguments—what historian Mark Noll calls the Civil War's "theological crisis"—are appallingly devoid of humanity for Black Americans. They were exactingly constructed to converge with slaveholding interests to erect and perpetuate systems of oppression. One lesson here, in Opderbeck's telling, is of humility, "a cautionary tale about how social, political, theological, and biblical views can converge into a system that justifies oppression."

After the Civil War, many White Americans undermined the dismantling of slavery and the newly amended Constitution's guarantees of racial equality by enacting Jim Crow discrimination into positive law. While Opderbeck recognizes this in describing the "separate but equal" doctrine of the Supreme Court that upheld racial segregation, he does not connect these legal structures to the systematic disenfranchisement of Black Americans in the South that took the form of poll taxes, grandfather clauses, literacy tests, and voter intimidation. By design, those subject to the law were prevented from consenting to it.

Such a connection would have made Opderbeck's close reading of Martin Luther King Jr.'s "Letter from Birmingham Jail" even more powerful. King wrote the public letter to "moderate" Whites, including fellow ministers, after engaging in peaceful civil disobedience: public protest in defiance of an injunction that segregationist sheriff Bull Connor obtained from a compliant local court. King rejected the moderates' calls for patience as being "more devoted to 'order' than to justice." He observed that "it is easy for those who have never felt the stinging darts of segregation to say, 'Wait.' . . . There comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into the abyss of despair." Struggles for liberation, in Opderbeck's words, "can only be understood through the experience of the oppressed."

This experience echoes down to the present day because of what followed the end of formal legal segregation: not racial equality but what legal scholar Michelle Alexander calls the New Jim Crow, the continuation of a caste-like system that subjects Black and Brown Americans to unequal criminal enforcement, social control, violence, and death. The experience of the oppressed continues to highlight where positive law requires change. And in Opderbeck's words, "the church cannot sit on

the sidelines of legal change if it truly loves the oppressed."

Opderbeck closes his section on race not with an example of the church loving the oppressed, but with the long-standing policy of Bob Jones University that prohibited, on threat of expulsion, the practice or promotion of interracial dating or marriage. A Nixon-era Internal Revenue Service regulation caused the university's tax-exempt status to be revoked because of the policy, and the university challenged the IRS decision to the Supreme Court.

While Bob Jones University was not forbidden from enacting the policy (and, indeed, did not reverse its policy until 2000), neither was the federal government forced to subsidize donations made to a racist institution. Opderbeck uses this case to illustrate the tension between church and state that can allow both to exist alongside one another: the church's right to be countercultural—and, yes, wrong—on fundamental moral issues.

Nevertheless, the church's involvement in grave wrongs perpetuated in Christ's name on the first "big question" of American law should also point us humbly toward the witness of the oppressed when answering the second and third, abortion and LGBTQ rights. Opderbeck challenges Christians to think "about the historically enormously disproportionate burdens women have borne in pregnancy and child rearing," as well as to "sit at the table with your LGBTQ neighbors and try to hear their stories."

Many churches not only listen to this witness but also work to dismantle structures of misogyny, homophobia, and transphobia. But not all do, and much of this section reads as a challenge to convince Christians not to stake their identity as Christians with their opposition to abortion and LGBTQ rights.

Several of this year's Supreme Court cases—decided after Opderbeck's book was published—point to a consistent theme contained in Opderbeck's praxis of law: the uneasy balance between individual rights that positive law recognizes and the rights of religious institutions and believers to oppose those rights.

This year's groundbreaking LGBTQ rights decision came in *Bostock v. Clayton County, Georgia* and its companion cases, which were brought by individuals (or their estates) who were fired because of their sexual orientation or gender identity. The complainants argued that Title VII of the Civil Rights Act of 1964, by prohibiting discrimination "because of . . . sex," encompasses sexual orientation and gender

identity. As Justice Neil Gorsuch explained on behalf of the Court's 6–3 decision, an employer who discriminates against employees for being homosexual or transgender "intentionally discriminate(s) against individual men and women in part because of sex," which is prohibited by Title VII's "plain terms."

Many religious institutions and faith leaders cheered the results of the decision as advancing human dignity and allowing people to flourish by being fully themselves in the workplace. Other faith leaders were not so positive.

Archbishop José Gómez of Los Angeles, president of the United States Conference of Catholic Bishops, decried the decision as "redefining human nature" and "erasing the beautiful differences and complementary relationship between men and women." *First Things* editor R. R. Reno wrote that *Bostock* "puts our law on a collision course with human nature" and suggested that the case was "the twenty-first-century analogue to *Dred Scott*, the Supreme Court decision that imposed the Southern slave regime on the entire country and contributed to the intolerable contradictions that led to the Civil War."

Opderbeck's praxis of law would suggest otherwise. Comparing rhetoric across our nation's history, Opderbeck describes "a grim history in which conservative Christians in America sided with an oppressive, dominant culture in the name of religious freedom." He explains:

> At every turn in the history of civil rights in America—from slavery, to the black codes of the Reconstruction era, to desegregation and the modern civil rights movement—conservative Christians argued that their religious views about the proper place of black people should be preserved against the encroachment of laws designed to promote racial equality. Conservative Christians today respond that sexual orientation is different than race. Whether or not this is so, or to whatever extent it might be so, this history should sorely chasten us.

Even Justice Brett Kavanaugh's dissenting opinion acknowledged "the powerful policy arguments" raised by LGBTQ Americans in fighting "for many decades to achieve equal treatment in fact and in law" and in exhibiting "extraordinary vision, tenacity, and grit" during that time. While he applied a different method of interpreting the text of the Civil Rights Act, his rhetoric did not suggest the parade of horribles made by some critics of the opinions.

Moreover, religious freedom was arguably stronger than ever during this past court term, even in the realm of employment discrimination. Another pair of cases, *Our Lady of Guadalupe School v. Morrissey-Berru* and *St. James School v. Biel*, involved teachers at Catholic schools who were fired, they claimed, because of age discrimination and a medical disability, respectively. In a 7–2 decision, the court applied a broad “ministerial exception” to employment discrimination laws when the duties of employees included the teaching of religious doctrine.

When Opderbeck describes a previous case involving the ministerial exception, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, he writes that it “strikes at least some kind of workable balance between the rights of religious organizations and broader society’s beliefs about LGBTQ rights,” and it “means that churches and church organizations possess freedom to express moral views that the broader society might consider wrong.”

These decisions suggest that this will indeed be the path of accommodation between the competing values embedded in these issues for the near future. A pluralistic society is messy. Within such a society, Opderbeck argues for a theology and praxis “of patient presence and engagement,” one that listens, as Jesus did, to the voices of the marginalized in our society and joins them in the “great banquet” both on earth and as it is in heaven.

The last word should go to Aimee Stephens, who was fired from her job at a suburban Detroit funeral home because she came out to her boss as transgender. In her coming-out letter to her boss, she wrote about feeling “imprisoned in a body that does not match my mind, [causing] me great despair and loneliness” and pledged to “return to work as my true self.” Stephens, who was the complainant in a companion case to *Bostock*, died five weeks before her vindication in the Supreme Court. The epitaph on her tombstone, chosen by her wife and childhood friend, will read: “Civil Rights Leader.”

A version of this article appears in the print edition under the title “The law in our lives.”