

Draft

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### **Abstract**

*This preface introduces a volume in a 50-volume series on “Great Christian Jurists,” presenting the interaction of law and Christianity through the biographies of 1000 legal figures of the past two millennia. This volume presents 26 major German legal scholars from Albert the Great and Eike von Repgow in the Middle Ages to Konrad Adenauer and Stephan Kuttner in the twentieth century. Each chapter analyzes the influence of Christianity on their lives and legal work and sketches their enduring influence on the laws of church and state. Featuring freshly written chapters, this is the first overview in English of the relationship of Christianity and German law in the second millennium. Included are studies of both famous and long forgotten Catholics and Protestants, and both martyrs and collaborators with Nazism and earlier forms of state autocracy.*

**Keywords:** Germany; legal history; Christian jurists; secularization; Catholicism; Lutheranism; Calvinism; Friederich Carl von Savigny; Erik Wolf

### **Preface**

Since 1520, the German territories have lived with a mixture of confessional Christian traditions – primarily Catholic and Lutheran (Evangelical) at first, but also Reformed, Anabaptist, and Jewish groups, each subdivided into various denominational and regional forms. Small pockets of Orthodox Christians and a few Muslims could also be found in early modern eastern territories, and the eighteenth-century Enlightenment unleashed new forms of free thinkers and their associations, particularly in the larger university cities. But the German territories remained largely Protestant and Catholic in confession until the twentieth century. After the Second World War, the large migration within and from outside Germany enhanced the presence of larger confessional minorities in all parts of Germany, and religious pluralism within and across the territories became the new normal.

Until the 1980s, there were still plenty of formally required and voluntary indications of a person’s religious identity and affiliation, but today it is generally much harder to recognize these distinctions. Previously, religious diversity sometimes produced various tensions, not only between competing forms of faith but also within religious groups — from being called a heretic to being excluded from some groups altogether. Today, however, the question of religion is often deliberately ignored, in part to avoid such tensions within and between faiths. In the last few decades, even biographies of earlier figures in German history have intentionally neglected discussion of their subjects’ confession in order to overcome

the remaining religious tensions and ignore the conflicts.<sup>1</sup> Recently, some politicians have even denied the existence of a specific Christian tradition in Germany to include a longstanding Muslim or Turkish influence, symbolized for them by the presence of coffee and croissants.

While such political attempts to deprecate religion might help to reduce social conflict, they are and cause serious and conscious misrepresentations of history. Yet these fashions are now common in today's academic study of history, too. Most German scholarly texts in legal history, political history, and related fields outside the formal fields of theology—and apart from some more or less restricted chapters on canon law and on Luther—tend to ignore the influences of the church or Christian tradition.<sup>2</sup> Moreover, even recent histories of theology and religion are narrowly focused on the history of one Christian tradition or topic, rather than offering comparative and interdisciplinary studies of the lasting influence of the different Christian confessions on various aspects of German thought, culture, politics, or law.

But German legal history, on the Protestant as well as on the Roman Catholic side, cannot deny the influence of the Roman Catholic Church and the Protestant Reformation. European law has been transformed at least three times over by a dominating Christian influence: first, by the Church Fathers in late antiquity, who gradually Christianized prevailing Roman law and legal and political thought; second, by the Scholastics of the High Middle Ages, who produced a massive new system of canon law and civil law and accompanying learned theological jurisprudence and political theory, taught in the newly established European universities; and finally, by the sixteenth-century Protestant Reformation and Catholic Counter-Reformation, which created a major gap in the European legal order until at least the end of the eighteenth century, with these two confessions taking vastly different approaches to the technical problems posed by scientific jurisprudence.<sup>3</sup>

A century and more ago, this historical interaction of law and Christianity was a scholarly commonplace in Germany. Indeed, great German scholars led the world in producing critical editions of thousands of historical texts of law and theology, establishing pathbreaking journals like the *Zeitschrift für Rechtsgeschichte*, and producing vast historical studies of the interaction of law and Christianity over the prior two millennia. German universities were home to such scholarly legal giants as Friedrich Carl von Savigny, Otto von Gierke, Roderich von Stintzing, Ernst Landsberg, Theodor Muther, Adolf von Harnack, Theodor Mommsen, Rudolph Sohm, Wolfgang Kunkel, Eduard Schmidt, Emil Sehling, and so many others. And German scholars in other fields, such as Wilhelm Dilthey, Max Weber, Ernst Troeltch, and many others, also offered compelling accounts of the interactions of law, religion, society, and politics in German history.

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<sup>1</sup> This is true, e.g., for the *Handwörterbuch zur Deutschen Rechtsgeschichte*, the *Dtv-Lexikon*, and the *Deutsche Biographische Enzyklopädie*, unless the individual author refers explicitly to the confession.

<sup>2</sup> Stephan Meder, *Rechtsgeschichte*, 6th ed. (Köln/ Weimar/ Wien: Böhlau, 2017), 147–70, refers to canon law and the medieval struggle between the pope and the emperor, but there is no reference to theology in the chapters on the rediscovery of Roman law, on legal humanism, or on the modern tradition of natural or rational law.

<sup>3</sup> See Mathias Schmoeckel, *Das Recht der Reformation: Die epistemologische Revolution der Wissenschaft und die Spaltung der Rechtsordnung in der Frühen Neuzeit* (Tübingen: Mohr Siebeck, 2014).

Today, by contrast, most German scholars and students lack a deep understanding or appreciation of this history of law and Christianity. Not since Erik Wolf's classic text, *Grosse Rechtsdenker der deutschen Geistesgeschichte* (4th ed. 1963) has there been a thorough investigation into the influence of Christian theology on German legal thinkers through the centuries. While some scholars of late, animated in part by the five-hundredth anniversary of Luther's Reformation in 2017, have studied Protestant influences on law and politics, the scholarly study of the millennium-long canon law tradition in German history, or the influence of Christianity on discrete areas of public, private, penal, and procedural law, has become almost irrelevant for all but specialists. Ironically, Germany, once the world's leader in the scholarly study of law and Christianity, has now largely lost its capacity to research even its own Christian traditions and their legal influence. And the few bold attempts to do so of late have garnered little public interest, sympathy, or funding, and sometimes have met with considerable opposition.

This volume on *Great Christian Jurists in German History* aims to restore and expand on this tradition of scholarly study of law and Christianity. This volume is part and product of an ongoing project on Great Christian Jurists in World History. The project is directed by the Center for the Study of Law and Religion at Emory University, where the lead editor of this volume, Mathias Schmoeckel, serves as a center fellow, and where coeditor John Witte Jr. serves as center director. Each volume in this global Great Christian Jurists series focuses on a specific country, region, or era, and samples the life and work of a score or more of its greatest legal minds over the centuries. These legal minds include not only civil and canon lawyers and judges but also theologians, philosophers, and church leaders who contributed decisively to legal ideas and institutions, or who helped create landmark statutes, canons, or cases. Thus, familiar Christian jurists like Gratian, Grotius, Blackstone, Kuttner, and Scalia appear in this subseries, but so do Augustine, Isidore, Aquinas, Calvin, Barth, and Romero. This biographical approach is not intended to deprecate institutional, doctrinal, or intellectual histories of law, nor will it devolve into a new form of hagiography or hero worship of dead white males. It is instead designed to offer a simple common method and heuristic to study the interaction of law and Christianity around the world over the past two millennia. In due course, we hope to produce some fifty volumes and one thousand biographical case studies all told.

Columbia University Press opened this series in 2006 by publishing a three-volume work titled *Modern Christian Teachings on Law, Politics, and Human Nature*, divided into case studies of nearly thirty modern Catholic, Protestant, and Orthodox Christian figures. Cambridge University Press has in print or in press commissioned studies on great Christian jurists in the first millennium, as well as in English, Spanish, French, Lowlands, and American history. Routledge will publish major new volumes on Great Christian Jurists in Italian, Russian, Welsh, and Latin American history. Federation Press is taking up the Australian story. In due course, the Center for the Study of Law and Religion aims to commission similar studies for other parts of the world, particularly other countries in Europe and discrete regions and eras in the Middle East, Eurasia, Africa, and the Pacific Rim.

We are delighted to have the leading press in Germany, Mohr Siebeck, publish this volume on *Great Christian Jurists in German History*, featuring a score of leading scholars, mostly from German universities. It proved hard to press this vast

topic into a single volume, and the editors and contributors had to work out the parameters of this study:

- “Christian,” of course, includes all confessions, but Roman Catholics, Lutherans, and Calvinists dominate German legal history, and that is reflected in this volume. We did not look for the most pious lawyers in German history, but rather for those who reflect religious influences in their work. We did not try to find representatives of all confessional divisions within these three main traditions, but focused on those who proved most legally innovative and influential.
- With regard to the category of “jurists,” our chosen lawyers are not necessarily the most famous and best of their age. At least some differences had to be illustrated between a Roman Catholic and a Protestant, a practitioner and a professor, a martyr and a less open dissenter, although these biographies do not prove that a particular reaction was typical for any particular confession. The various reaction of Christian jurists to momentous events like the Reformation and Counter-Reformation, the rise of Prussian absolutism, and the outbreak of National Socialism and Nazism had to be shown. Regrettably, however, since our focus is not primarily on the twentieth century, it was impossible to find female jurists for a case study or two.
- With regard to the “greatness” of these jurists, we decided not to focus on law professors alone. We did not even ask for a lasting visible influence of the life and teaching of each selected figure. Some became interesting for their capacity to resist dominating influences of their time thanks to their religious conviction, while some demonstrated how important their Christian confession could become even in more recent centuries.
- “German” lawyers are not necessarily authors who wrote in German. As Latin remained the dominant academic and diplomatic language until the nineteenth century, most of our lawyers wrote in Latin. Instead of focusing on the language, we chose instead to select lawyers from territories which belong to Germany today. This does not imply, certainly, that these lawyers felt “German” in their time. Those working in the Saxon tradition might have been aware of their Germanic heritage, but they tended to view themselves primarily as member of the great Saxon legal tradition. In this respect, “German” as a criterion is less apt to describe the way these authors regarded themselves.

With those criteria in mind, the editors and contributors made their selections of biographical case studies for this volume. Of course we had to choose some medieval authors who can be regarded as jurists or at least legal minds. No German legal history could omit Eike von Repgow, who gained his expertise in his position as a judge. Fortunately, we have a chapter on Johannes Teutonicus, too, as an early example of the learned tradition, particularly on canon law. We were fortunate to be able to include a chapter on Albertus Magnus who, while not trained as a jurist, established main ideas of natural law theory and others that led to the establishment of legal professionalization in Germany. Johann von Buch, by contrast, is an early example of a medieval German lawyer trained at the University of Bologna. While it was easy to take Johann Oldendorp as one early example of a leading Lutheran lawyer, it was more complicated to find a suitable Catholic counterpart, and we settled on Andreas Gaill. Authors from the seventeenth and eighteenth centuries, particularly of the Saxon tradition take up a substantial place in the middle of the this volume: Dominicus Arumaeus, Samuel von Pufendorf, Benedict Carpzov, Gottfried

Wilhelm Leibniz, and Christian Thomasius [Boehmer] just could not be omitted, even though they constitute a dominating Lutheran block. With the crypto-Calvinist Johannes Wesenbeck, from Wittenberg, and the more outspoken Calvinist Johannes Althusius, we have at least a Reformed counterpart. Although we find distinguished Roman Catholic lawyers in all ages, it is hardly a coincidence that no example of this tradition from the seventeenth and eighteenth centuries appears in this collection. The new, predominant Prussian tradition is represented by Carl Gottlieb Svarez, Friedrich Karl von Savigny, Karl Friedrich Eichhorn, Moritz August von Bethmann-Hollweg, and Friedrich Julius Stahl, while Sylvester Jordan and Max von Seydel represent Roman Catholic counterparts. The reaction to Nazism is reflected in the biographies of a Protestant martyr like Eugen Bolz, Roman-Catholic lawyers like the politician Konrad Adenauer, the jurist Hans Nawiaski, and the great canonist and émigré scholar Stephan Kuttner.

Plenty more eminent legal scholars in German history, devout Christians among them, could have been included in this volume. And not all criteria for selection apply equally to those whom we selected. Nobody can doubt the importance of Savigny, for example, in German legal history, but he certainly was not known until recently for his specifically Christian perspective; even his confessional identity was hardly known in his own day.<sup>4</sup> Many of our authors could be replaced by even more celebrated lawyers or more famous Christians. We had to make judicious selections of illustrative figures over a millennium, knowing that a single collection like this can never represent German history of law and Christianity in all its multifold perspectives in a systematic or comprehensive manner. In this respect, this collection is a first attempt, which will be successful if it results in encouraging more research along these lines.

While we deliberately included less famous lawyers, some of them, we hope, will become better known through this volume. Most German readers will hardly know Sylvester Jordan, but might realize now why the law faculty of Munich recently put his name on its award for the best dissertation. Other lawyers are famous in Germany but unknown by English and American historians. With regard to the politics of Emperor Louis IV, for example, William of Ockham and Marsilius of Padua of his court in Munich are well known, but the great and original lawyer Johann von Buch, the leading lawyer of Brandenburg in the service of the emperor's eldest son, has been ignored, although he had highly original views on the topics of the day. This publication may help, therefore, to point toward some historic figures who deserve a more general recognition.

We are grateful for those colleagues who took part in this project — however out of step with current German academic fashions — and delivered such inspiring chapters. In September 2018, most of the contributors convened on the beautiful premises of the medieval Maria Laach Abbey in the Eifel region of Germany, with the organizational help of the team in the Institut für Deutsche und Rheinische Rechtsgeschichte at the University of Bonn, especially Julius Schwafferts and Malte Becker. Many of the collaborators in Bonn agreed to present a chapter for this project, while others helped to organize, translate, or correct the chapters. Gary S.

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<sup>4</sup> Mathias Schmoeckel, “Schleiermacher und Savigny: Von der ‘intellektuellen Anschauung’ zum historischen System (1795–1817),” in Uwe Niedersen (ed.), *Reformation in Kirche und Staat. Von den Anfängen bis zur Gegenwart* (Dresden: Torgau, 2017; 2nd ed. Berlin: Duncker & Humblot, 2019), 197–224.

Hauk, senior editorial consultant for the Center for the Study of Law and Religion at Emory University, improved the quality of the texts tremendously with his exacting editorial work. The cooperation of his colleagues Anita Mann, Amy Wheeler, and other members of the Center enabled us to carry out our plans from the first initiative to its realization. And this volume would not have been possible without the generous underwriting of the McDonald Agape Foundation, and its principal officers, Ambassador Alonzo L. McDonald and his wife, Suzie McDonald, and their son and now new foundation president, Peter McDonald. We give thanks to all these friends and colleagues for their support, and to our friends at Mohr Siebeck for applying their usual high standards of excellence to the timely publication of this volume.

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