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Canon Law in Lutheran Germany: A Surprising Case of Legal Transplantation

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Introduction

"Transplantation has been the major mode of legal development in virtually all Western states," Alan Watson writes in *Legal Transplants*.[1] Legal transplantation often occurs when a community's law becomes outmoded, ossified, arbitrary, or abusive and in need of reform. It also occurs when a community comes upon a new problem or subject matter which local law does not address properly. In those instances, communities will look to other laws for edification -- often to ancient and authoritative sources such as Roman law or to the laws of a people with whom the community shares "an inner spiritual or psychic relationship."[2] Legal transplantation also occurs through colonization and conquest. In those instances, both the colonizer and the colonized, the conqueror and conquered, will inevitably absorb some of the legal rules, procedures, structures, and customs of the other.

Legal transplantation, Professor Watson argues, is "extremely common," "very fertile," and often "socially easy."[3] It is especially common in new or less sophisticated communities that look to established legal systems for edification. Early Rome looked to earlier Greek laws, early Scotland and Germany to classical Roman law, colonial Massachusetts and Connecticut to ancient Mosaic law, New Zealand and Canada to English common law.[4] The transplantations of foreign law that ensued could be incremental or immediate, "partial" or full, sophisticated or simplistic. This method of legal change occurs regularly still today, even in highly advanced legal cultures. Think of the many modes of legal transplantation instigated in the past two decades by the unification of Western Europe, the democratization of Eastern Europe, or the constitutional transformations of Canada, South Africa, or Latin America.

This Article -- dedicated to Professor Watson in admiration and friendship -- explores the legal transplantation of the medieval Catholic canon law into the new Protestant civil law of Lutheran Germany. This might seem a rather fanciful application of Professor Watson's learned thesis. After all, Martin Luther's most memorable contribution to law was that he burned the canon law books in a brash public ceremony in 1520; several times thereafter, he condemned jurists, particularly canonists, as "bad Christians" (*Juristen böse Christen*).[5] Moreover, legal historians know early modern Germany for its reception of *Roman law*, not canon law, and for

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its cultivation of *legal humanism*, not Lutheran jurisprudence. The thought that German Lutherans would have much interest in law at all, let alone in transplanting the very same canon law that they had just spurned and burned, seems rather counterintuitive.

It is testimony to the power of Professor Watson's thesis, however, that the canon law was transplanted into Lutheran Germany -- already within a decade after Luther's book burning. As Harold Berman's contribution to this *Festschrift* and several earlier works have demonstrated, canon law rules of marriage, education, doctrine, liturgy, holidays, oathswearing, slander, defamation, church administration, poor relief, moral discipline, criminal law, and much else were readily transplanted into the new constitutions and ordinances of Protestant polities, and into the opinions of treatises of jurists throughout Germany and beyond.[6] Indeed, it is now widely accepted that "the medieval canon law continued to have considerable significance in the post-Reformation Protestant world" altogether.[7]

The hard questions remaining are why and how this legal transplantation of the canon law occurred in early Lutheran Germany. Why would Luther in 1520 burn the canon law books but in 1530 write a commendatory preface to a canon law textbook for use at his own University of Wittenberg?[8] Why would German magistrates ban the study and use of canon law texts in the 1520s, only to import canon lawyers and to transplant canon law rules in the 1530s and thereafter? Why would neophyte Lutheran jurists be content to rely on the Bible and custom in their early writings, only to turn again to canon law authorities later in their careers?

"Inertia" is part of the answer. Prior to the Reformation, the canon law had ruled effectively and efficiently in Germany for centuries. The canon law not only governed the internal doctrinal, liturgical, and administrative life of the Church. It also reached broadly into the temporal life of Germany, and had widespread appropriation and application in the sundry imperial, territorial, urban, manorial, and feudal polities that comprised the state. Indeed, the canon law, along with Roman law and customary law, was part of an integral *jus commune* of Germany. Most of the jurists and theologians who had joined the Reformation cause were trained in the canon law; several in fact held the *doctor iuris canonici* or *doctor iuris utriusque*.[9] In the heady days of revolutionary defiance of Pope and Emperor in the 1520s, it was easy for Protestant neophytes to be swept up in the radical cause of eradicating the canon law and establishing a new evangelical order. When this revolutionary plan proved unworkable, however, theologians and jurists invariably returned to the canon law that they knew. Theologically offensive ecclesiastical structures and legal provisions, such as those directly rooted in notions of papal supremacy or spurned sacraments, were still avoided. But what remained was

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put to ready use in service of the new Protestant theology and law. After all, there did remain "an inner spiritual and psychic relationship" between Catholicism and Protestantism.[10]

"Innovation" is also part of the answer. This evangelical transplantation of the canon law depended on considerable theological and jurisprudential ingenuity. *Theologians* after 1530 offered an innovative theory of the church, grounded in the evangelical theory of the two kingdoms. The invisible church of the heavenly kingdom, they argued, might well be able to survive on the Scripture alone, free from the accretions of the canon law. But the visible church of the earthly kingdom, filled with both sinners and saints, required both biblical and canonical rules and procedures to be governed properly. Medieval canon law, insofar as it extended biblical norms, was a proven norm for the governance of the visible church, and should be used. *Jurists*, in turn, offered an innovative theory of the state and the sources of civil law. The magistrate, as God's vice-regent and *Landesvater* of the community, was required to attend to both the civil and spiritual needs of his subjects. He was to rule using Christian and equitable laws. Again the canon law, as a quintessentially Christian and equitable law, was an appropriate prototype on which to call. This new ecclesiology and jurisprudence, together, provided a sturdy rationale for the transplantation of the canon law into Lutheran Germany.

The Canon Law Background

To appreciate the power of legal inertia, one must appreciate the prominence of the canon law in the legal life of pre-Reformation Germany.[11] The Roman Catholic Church was a formidable legal and political corporate body that ruled throughout Germany. The land of Germany was divided among three papal territories, seven archbishoprics, forty-three bishoprics, and some 500 archdeaconries. The archbishoprics of Cologne, Mainz, and Trier, and thirty of the bishoprics -- collectively comprising nearly a quarter of the land of Germany -- were ecclesiastical principalities, where ecclesiastics ruled without strong local civil rivals. The remaining archbishoprics and bishoprics overlapped with civil territories and cities, and ecclesiastical and civil officials ruled concurrently.[12]

Hundreds of monasteries and cloisters, many supported by substantial endowments and foundations, had been established in Germany. The Church operated most of the schools, hospices, almshouses, and charities through its monasteries, chantries, and ecclesiastical guilds. Thousands of spiritual and secular clergy served in the Church, many of them trained in theology and canon law in one of the dozen German universities that had been chartered by the Church, or abroad in Italy, France, Spain, or the Lowlands.[13] In 1500, canon law dominated the law faculties of the new German universities: the majority of

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chairs were occupied by canonists, and the majority of students pursued canon law studies.[14]

Ecclesiastical Jurisdiction. With this elaborate ecclesiastical structure, the Church was able to exercise a vast *spiritual* jurisdiction in Germany.[15] The Church claimed exclusive personal jurisdiction over clerics and monastics, over Jews, Muslims, and heretics, over transient persons like pilgrims, students, crusaders, sailors, and foreign merchants, and over such *personae miserabiles* as widows, orphans, and the poor. It also claimed subject matter jurisdiction over religious doctrine and liturgy; ecclesiastical property, patronage, benefices, and tithes; clerical ordination, appointment, and discipline; marriage, divorce, and family relations; wills, testaments, and intestacy; oaths and pledges of faith; and a host of moral offenses against God, neighbor, and self -- blasphemy, heresy, sacrilege, iconoclasm, Sabbath-breaking, sorcery, witchcraft, defamation, homosexuality, sodomy, prostitution, concubinage, abortion, infanticide, and other offenses. The Church repeated its claims of spiritual jurisdiction in numerous concordats and letters from the later thirteenth century onward.

The Church also claimed *temporal* jurisdiction over subjects and persons that also fell within the competence of civil authorities. Through prorogation or choice-of-law provisions in contracts or treaties, or through prorogation agreements executed on the eve of trial, parties could mutually agree to litigate their civil disputes in accordance with canon law. Through removal procedures invoked unilaterally by one party, or occasionally by a civil judge, cases could be transferred from a civil court to a church court if the civil relief or procedures available were adjudged unfair or unfit.[16]

These jurisdictional claims rendered the Church both legislator and judge in Germany. From the twelfth century onward, the Church issued a steady stream of papal decretals and bulls, conciliar decrees and edicts that were to prevail throughout Christendom. These legislative documents circulated singly and in heavily glossed German editions of the books that would later comprise the *Corpus iuris canonici*.[17] A formidable body of supplementary legislation promulgated by German prelates and synods also circulated widely both in original form and in glossed local collections and pastoral handbooks. Bulky confessional manuals by Johannes von Freiburg, Johannes von Bruder Berthold, Angelus de Clavasio, and others provided elaborate summaries and illustrations of canon law rules.[18] Handsomely decorated handbooks, such as *The Decretal Pearls*,[19] *The Golden Report*,[20] and *The Abridged Decretum and Decretals*,[21] provided provocative introductions to canonical legislation. More seasoned readers could turn to the learned commentaries and opinions of Johannes Andreae,[22] Sebastian Brant,[23] and scores of other canonists whose writings circulated in late medieval Germany.[24]

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Church courts adjudicated cases in accordance with the substantive and procedural rules of the canon law. Most cases were heard first in the court of the archdeaconry, generally called the consistory court, presided over by the archdeacon or a provisory judge. Through a variety of delegations and ad hoc agreements, however, minor spiritual and temporal disputes often came to be adjudicated by rural deans, parish priests, or monastic superiors. Major disputes involving annulment of putative marriages, heresy, or felonies committed by or against clergy were generally heard by the consistory court of the bishop, presided over by the bishop himself or by his principal official. Periodically, the pope or an archbishop would also deploy itinerant ecclesiastical judges, usually called inquisitors, with original jurisdiction over discrete questions that would normally lie within the competence of the consistory courts. Appeal (from all but the inquisitor's judgments) generally lay first with the consistory court of the archdeacon, then with the courts of audience of the bishop and the archbishop, and then with the papal court. Cases raising particularly serious or novel questions of canon law could, at any stage, be referred to distinguished canonists or law faculties called assessors, whose learned opinions (*consilia*) on the questions were often taken by the Church court as binding.[25]

The Church's jurisdictional claims rested on several arguments, three of which circulated prominently in Germany on the eve of the Reformation.

First, the Church predicated these claims on its authority over the sacraments. Since the twelfth century, the Church had recognized seven liturgical sacraments -- baptism, confirmation, eucharist, extreme unction, marriage, ordination, and penance. These liturgical sacraments, unlike other sacred symbols and rituals, were considered to be both "signs" and "causes" of God's grace, which Christ had instituted for the sanctification of His Church.[26] If properly administered, sacraments transformed the souls of their participants and conferred sanctifying grace upon the Christian community. The administration of such solemn ceremonies could not turn simply on the predilections of parish priests or the preferences of individual believers. Christ had vested authority over the sacraments in St. Peter and, through apostolic succession, in the papal and other ruling offices of the Church. The pope and his prelates thus had authority to promulgate and enforce canon law rules (literally to "speak the law" -- *jus dicere*) that would govern sacramental participation and procedure.[27]

The Church had exercised this jurisdiction, this law-making power, over the sacraments with considerable alacrity in the centuries following the Papal Revolution. By the eve of the Reformation, each of the sacraments had drawn to itself numerous canon law rules. Certain sacraments undergirded whole systems of law that prevailed throughout much of Christendom. The sacrament of marriage supported an intricate canon law of

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marriage, divorce, and annulment. The sacrament of penance supported, directly, an elaborate canon law of crimes and torts and, indirectly, a canon law of contracts, oaths, charity, and inheritance. The sacrament of ordination became the foundation for a refined canon law of professional and corporate rights and duties of the clergy. The sacrament of baptism (and confirmation) provided at least a partial basis for a constitutional law of natural rights and duties of Christian believers.[28]

Second, the Church predicated its jurisdictional claims on Christ's famous delegation to the Apostle Peter: "I will give you the keys of the kingdom of heaven, and whatever you bind on earth shall be bound in heaven, and whatever you loose on earth shall be loosed in heaven" (Matthew 16:19, RSV). According to conventional canonical lore, Christ had conferred on St. Peter two keys -- a key of knowledge to discern God's word and will, and a key of power to implement and enforce that word and will throughout the Church. St. Peter had used these keys to help define the doctrine and discipline of the apostolic church. Through apostolic succession, the pope and his prelates had inherited these keys to define the doctrine and discipline of the contemporary Church. This inheritance, the canonists believed, conferred on the pope and his prelates a legal power, a power to make and enforce canon laws.[29] "In deciding cases the authority of the Roman pontiffs prevails," wrote the thirteenth-century canonist Huguccio, "for . . . not only knowledge is needed, but also power is needed . . . power, that is jurisdiction."[30]

This argument of the keys readily supported the Church's claims to subject matter jurisdiction over core spiritual matters of doctrine and liturgy -- the purpose and timing, and the form and function of the mass, baptism, the eucharist, confession, and the like. The key of knowledge, after all, gave the pope and his prelates access to the mysteries of divine revelation, which, by use of the key of power, they communicated to all believers through the canon law. The argument of the keys, however, could be easily extended. Even the most mundane of human affairs ultimately have spiritual and moral dimensions. Resolution of a boundary line dispute between neighbors implicates the commandment to love one's neighbor. Unaccountable failure to pay one's civil taxes or feudal dues is a breach of the spiritual duty to honor those in authority. Printing or reading of a censored book is a sin. Strong German clergy, therefore, readily used the argument of the keys to extend the subject matter jurisdiction of the Church to matters with more attenuated spiritual and moral dimensions.[31] A 1435 declaration by the Archbishop of Mainz reads: By the power of the keys I have "jurisdiction over all and individual cases, criminal and civil, spiritual and temporal, beneficial and profane . . . and [over] all matters [involving] prelates, chapters, assemblies, corporations, universities, as well as individual persons, clerics and

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laymen, of whatever status and grade, dignity and preeminence, by reason of orders or condition."[32]

Third, the Church predicated its jurisdictional claims on the belief that the canon law was the true source of Christian equity.[33] Canon law, in the words of the early sixteenth century jurist Nicolaus Everardus, was rooted in "the teachings of the Bible, the Church Fathers, and the seven ecumenical councils, and inspired by the Holy Spirit." Civil law, by contrast, was of "pagan origin" and inspired by "secular reason." In the minds of many canonists, therefore, canon law was perforce superior in authority and in sanctity. Civil law was perforce "secondary, subordinate, and subsidiary."[34]

The canon law was considered not only a Christian law but also an equitable law. Late medieval canonists referred to it variously as "the mother of exceptions," "the epitome of the law of love," and "the mother of justice."[35] As "the mother of exceptions," canon law was flexible, reasonable, and fair, capable either of bending the rigor of a rule in an individual case through dispensations and injunctions, or punctiliously insisting on the letter of an agreement through orders of specific performance or reformation of documents.[36] Canon law thereby "smoothed the hard and coarse edges of strict Roman [i.e., civil] law," in Everadus' words.[37] As the "epitome of love," canon law afforded special care for the disadvantaged -- widows, orphans, the poor, the handicapped, abused wives, neglected children, maltreated servants, and the like. It provided them with standing to press claims in Church courts, competence to testify against their superiors without their permission, methods to gain succor and shelter from abuse and want, opportunities to pursue pious and protected careers in the cloister. As the "mother of justice," canon law provided a method whereby the individual believer could reconcile himself or herself at once to God and to neighbor. "Herein lies the essence of canonical equity," Eugen Wohlhaupter maintains, and perhaps the principal reason why litigants would tend to be drawn to Church courts over civil courts.[38] Church courts treated both the legality and the morality of the conflicts before them. Their remedies enabled litigants to become "righteous" and "just" not only in their relationships with opposing parties and the rest of the community, but also in their relationship to God. "Judgments rooted in church law are good," wrote a Bohemian nobleman in 1356, "for the judge and the advocate are pious," and attend to both the "body and the soul" of the parties.[39]

This belief in the canon law as a unique source of Christian equity was not merely theoretical. In fifteenth-century Germany, Church courts were the only formal courts of equity available to litigants. Unlike England, which by this time had established the royal Chancery courts (staffed in part by canonists), Germany had no separate civil courts of equity. To be sure, the *Schöffen* courts and even the *Oberhöfe* in certain cities employed procedures that were sufficiently

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informal and open that equity could be done in an individual case. But neither the *Schöffen* courts nor the *Oberhöfe* had authority routinely to circumvent statutes, to liberalize standing requirements for the disadvantaged, or to deal with both the legal and spiritual dimensions of the disputes before them. Parties who sought equity, in the full sense of the term, had to take their claims to Church courts.[40] Hence their considerable attraction to litigants.

Canon Law and Civil Law. These arguments for the validity and utility of ecclesiastical jurisdiction gave the canon law currency not only within the Church, but also within the state. By the eve of the Lutheran Reformation, canon law was not a foreign law that stood juxtaposed to civil law, but an integral source of the general common law (*jus commune*) of Germany. "The notion of a separation of the civil law and the canon law," Giuseppe Ermini writes, "is as much a modern caricature as the notion of a complete separation of church and state."[41] Civil jurists and judges regularly used the canon law in their treatises and opinions to complete, to complement, and (if necessary) to correct the civil law.[42] "The sanctity of the canon law is sublimely decorated with the civil law," wrote the great Italian jurist Baldus de Ubaldis. "Conversely, the majesty of the civil law is strengthened by the authority of the canon law. Each is made brighter and more binding on account of the other."[43] In their territories and cities, Justin Göbler wrote, "Germans used both the general canon law and the written civil law, allowing one to help the other. . . . In the case where the civil law was unclear . . . and the canon law was clear, men would believe and follow the canon law."[44] Baldus wrote similarly: "Where the civil law is contrary to the canon [law], the canons ought to be preserved and not the civil law."[45] This secular appropriation and application of the canon law in medieval Germany contributed greatly to its survival after the Reformation.

The German civil authorities generally respected and protected the *spiritual* jurisdiction of the church -- at least until the mid-fifteenth century. The emperors generally guarded the spiritual privileges and prerogatives of the pope and his prelates. Dozens of imperial statutes, as well as concordats between German princes and prelates, dukes and archdeacons, confirmed the persons and subjects over which the Church claimed spiritual jurisdiction. These same instruments guaranteed the clergy their immunities from civil taxes, services, and prosecution -- though strong princes and dukes sometimes exacted a high price for their acquiescence.[46] They also obligated ecclesiastical and civil officials to aid and accommodate each other. When Church courts condemned heretics, civil authorities were to torture and execute them. When Church courts encountered contumacious defendants or witnesses, civil authorities were to punish them. When the clergy or property of the Church needed protection, civil authorities were to supply the troops. When ecclesiastical goods were stolen or misplaced, the civil authorities were to retrieve

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them. Ecclesiastical officials, in turn, were to support and protect the civil authorities. When civil authorities sought to execute felons, a ranking ecclesiastic was required to give his acquiescence. When a prince sought to discipline or depose a lower official, the bishop was expected to lend his suasion and sanction. When a city or territory faced a natural calamity or military emergency, local churches were to open their doors and coffers freely.[47]

These statutes and concordats did not, however, prevent civil authorities from seeking to govern matters at the edges of the church's spiritual jurisdiction -- particularly where local ecclesiastics were delinquent in their responsibilities, or inclined to overreach. The 1438 Reformation of Emperor Sigismund, for example, after decrying the swollen ranks and dockets of the church courts, ordered cryptically that "[m]atters of jurisdiction and punishment are to be observed according to the old imperial law."[48] A 1440 statute of Ulm, in an effort to curb exploitative betrothals and secret marriages, authorized the local civil court to order a man who had seduced a virgin either to marry her or pay her dower; to fine a secretly betrothed couple and order them to seek parental and clerical approval of their marriage; and to enforce the canon law of marital impediments.[49] The 1498 City Reformation of Worms, after citing the corruption of the Church courts and the complexity of canon law procedures, set forth a series of simple procedures for gaining relief from defamation, for preparing and probating last wills and testaments, and for disposing of an intestate estate.[50] The 1520 statute of Freiburg im Breisgau prohibited a number of "immoral acts" that the Church had not adequately punished -- sacrilege, slander, breach of faith, oath-breaking, blasphemy, and unconscionable contracts.[51] The same statute, though it deferred to the canon law of marital formation and dissolution, carefully delineated the "secular matters" of marriage and family life that were subject to civil law -- dowries, prenuptial contracts, wife and child abuse, child support after separation, and the like. The same statute simply supplanted altogether the traditional canon law of guardianship, adoption, and inheritance with new civil rules.[52] By the mid-fifteenth century, a number of city councils came to exercise considerable control over the operation of schools, charities, guilds, poor relief, and family life.[53]

German civil authorities dealt more harshly with the temporal jurisdiction and privileges of the Church. The formal grievances (*Gravamina*) presented by the princes and nobles at the imperial diets of the 1400s and early 1500s complained constantly that "much legal business that, according to law, may be settled either in ecclesiastical or civil courts has in fact been usurped" by the clergy through spurious threats of interdict and excommunication.[54] The preambles of many contemporaneous civil statutes castigated the Church for its greed and opulence -- its excessive court fees, high tithes and taxes, indulgence trafficking, self-interested laws of testate

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and intestate succession, vast holdings of tax exempt realty and personalty, and luxurious clerical and monastic livings.

Long before Luther's rallying cry of reform, the German civil authorities took steps to restrict the Church's temporal prerogatives, privileges, and properties. The 1438 Reformation of Sigismund, for example, ordered that "secular and spiritual justice must be kept separated. If a clerical person has a claim to press against a secular man, let the case be tried before a [civil] magistrate. In the same way, if a secular person has litigation with a cleric, they should go before a spiritual judge."[55] At the same time, the Reformation provided, ecclesiastical judges and bishops should restrict the use of the ban and the interdict to instances of true injustice in spiritual matters, and civil judges must resist attempts at removal of simple civil cases to the ecclesiastical courts.[56] The 1438 Reformation also sought to curb abuses among clerics and monks. Priests who persisted in the sin of concubinage and "despoiling women" were ordered simply to marry their concubines, to desist from sexual activity on Sabbath and holy days, and to provide shelter and support for their illegitimate children.[57] Mendicant monks were ordered to stay in their cloisters and cease their begging; almsgivers were forbidden to support them. Rich monasteries were ordered to curb their sumptuousness, to cease their commerce, to limit the income of their abbots and the size of their endowments, and to return to their original tasks of prayer, contemplation, education, and poor relief.[58] Similar provisions were introduced in the various legal "reformations" of the German cities.[59] The City Reformations of Nürnberg (1479) and Frankfurt am Main (1509), for example, both included stern restrictions on the use of prorogation clauses in private contracts and treaties and strict prohibitions against judicial removal of cases from civil to Church courts. Civil courts were required to remove to Church courts "purely spiritual cases," but only so long as Church courts would remove to civil courts "purely temporal cases."[60] A number of cities passed ordinances that limited gifts and legacies of property to the church, regulated the amortization of church property, and controlled the disposition of income from church endowments.[61] These growing instances of civil control of the Church's temporal jurisdiction were storm signals of what was to come.

The Battle over the Canon Law

Attack. The Lutheran Reformation began as a frontal attack on the canon law of the Roman Catholic Church. If this was not already clear in Luther's 95 Theses of 1517,[62] it was certainly clear by 1520, when, before a group of professors and students of the University of Wittenberg assembled by his colleague Philip Melanchthon, Luther consigned to the flames the books of the *Corpus iuris canonici*, the confessional book of Angelus de Clavasio, and the bull *Exsurge Domine* by which he

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was excommunicated. In defense of his actions, Luther declared:

> The canon law, particularly the decretals should be completely expunged, from the first letter to the last. There is a plethora of material in Scripture to govern our conduct in all circumstances. Yet the Gospel lies buried in the dust in schools and courts, while the pope's scandalous laws alone are in force. [The pope] has taken the whole church captive and oppressed it with his law. . . . This holy canon law of unrighteousness has brought dreadful plagues and sufferings into the heavenly kingdom of holy Christendom, and has effected nothing thereby except to destroy men's souls or to hinder their faith. . . . Unless the pope and all his papalists will abolish their laws and ordinances, restore to Christ's churches their liberty, and have it taught among them, they are guilty of all the souls that perish under this miserable captivity, and the papacy is truly the Kingdom of Babylon and the very Antichrist.[63]

According to Luther, the canon law had become an instrument of clerical arbitrariness, abuse, and avarice.[64] The pope and his prelates, he charged, had no obligation to abide by Scripture, tradition, or conciliar decree. They had power "to break up, change, or eliminate" any rules of law as they saw fit. They passed laws and cast judgments for all of Christendom, yet they neither subjected themselves to law nor submitted to the judgments of others. "Nowadays," Luther complained, "the canon law is comprised not of what is written in books but of the arbitrary choices of the pope and his lickspittles. Even if your case is firmly established at canon law, the pope still retains a superior law written in his heart by which he will settle what is legal and rule the world." Moreover, the church courts in Germany had become repositories of abuse and corruption. Ecclesiastical judges were too isolated from Rome to be adequately supervised and too insulated by canon law to be challenged or disciplined by civil authorities. They were thus prone to bribery and grave inconsistency of judgment. Using threats of ecclesiastical sanction, they extracted excessive fees from their subjects or "compelled them to buy themselves off for gold." Finally, to support the enormous administrative bureaucracy of the canon law, the church had imposed annates, servitudes, tithes, and other taxes on the people, charged inordinately high court fees, and relaxed any number of canon law rules when the price paid was high enough. "[T]he Romanists of today have become market-stall holders," Luther charged. "These man-made regulations [of canon law] seem to have come into existence for

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no other reason than raking in money and netting in souls to serve these greedy and rapacious hunters."[65]

The canon law was not only fraught with abuse but devoid of authority. In Luther's view, God has vested all legal authority in the prince, not the pope. The prince and other civil magistrates are God's vice-regents called to appropriate and apply God's law in governing human society. The pope and all clerics, by contrast, are called to preach the Word, to administer the sacraments, to admonish the sinful, and to guide men's consciences. This is the true meaning of "the power of the keys" described by St. Matthew.[66] By promulgating and enforcing canon law, the pope and his bishops had usurped the prince's authority and "obscured the gospel, faith, grace, and true divine service." "Neither pope nor bishop nor any other [clerical] man has the right to impose a single syllable of law upon a Christian. . . ."[67]

Moreover, the canon law opposed both the teaching and the authority of the Bible. The Bible, as Luther understood it, teaches that (1) each person stands in direct relation to God when confessing his or her sin and receiving God's grace; (2) is justified not by works but solely by faith in God's grace; and (3) is commanded to lead life in all its aspects in accordance with the Bible. By conferring on clerics the authority to dispense God's grace and to intercede for the souls of the laity, the canon law had intruded upon the Christian's personal relation with God. It had made clerics indispensable mediators between God and humanity and accorded them greater sanctity and greater accessibility to God. By defining an hierarchy of meritorious works, the canon law had sanctioned a salvation by works, not by faith. It had also elevated spiritual acts and vocations and deprecated those of the secular, earthly life. By governing every step of the Christian walk with mandatory rules and regulations, the canon law had "tyrannized the Christian's conscience," "Judaized Christianity," and "destroyed the spiritual love and freedom of the Gospel."[68]

The most flagrant distortion of the Gospel was the complex system of sacraments which supported much of the canon law. In Luther's view, the church had fabricated the sacraments of ordination, confirmation, extreme unction, and marriage to augment their power.[69] They had misconstrued the remaining three sacraments of baptism, the eucharist, and penance.[70] "Nowhere in all of the Holy Scriptures is this word *sacramentum* employed in the sense in which we use the term today; it has an entirely different meaning. For whenever it occurs it denotes not the sign of a sacred thing, but the sacred secret thing itself." The Gospel, the word of Christ, Luther believed, is the "only true sacrament." The promises of the Gospel are manifested through the "three sacramental signs" of baptism, eucharist, and penance.[71] Moreover, the church had unnecessarily complicated the sacraments with legalistic and liturgical accretions. The simple sacramental procedures

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mandated by Scripture were all that was required.[72] The vast system of canon law rules that governed sacramental participation and procedure were, in Luther's view, "diabolical and distorting inventions."[73]

On the strength of these criticisms, Luther urged that all legal authority be removed from the clergy and consigned to the magistracy. The church is a community of faith and love, not a corporation of law and politics. The consciences of its members are to be guided by Scripture and the Spirit, not governed by human traditions and priestly injunctions. All its members are priests and stand equal before God; they are not divided into a higher clergy and a lower laity. The church is called to serve society, not to rule it. All rule and government belong to the Christian magistrate. He is called to govern the secular affairs of all persons, to maintain public order, peace, and justice, and to facilitate the growth of the church and the moral improvement of civil society.

Luther's radical remarks were the opening shots in what Roderich von Stintzing has aptly called "the battle over the canon law."[74] To be sure, many of Luther's remarks simply echoed the sentiments of more than a century of dissent in Germany, and they may, similarly, have come to nought had the Diet of Worms completed its assignment. Luther's critique of the canon law, however, proved more resilient, in part because of its deeper theological moorings, in part because of its widespread appeal among theologians and legislators in the early years of the Lutheran Reformation.

Theologians newly converted to the evangelical cause echoed and elaborated Luther's critique of the canon law. "We would dearly love to live by God's Word," Argula von Grumbach grumbled in a 1523 pamphlet, "but [canon law] jurists and advocates are against it, for their law contradicts the Lord's command to 'do unto others as you would have them do unto you'."[75] Philip Melanchthon wrote similarly in 1521 that the clergy "have passed laws for themselves concerning immunities of churches, their own revenues, etc. which are both godless and tyrannical to an outstanding degree . . . and founded contrary to the principles of love."[76] Justus Jonas, a jurist appointed in 1521 to a chair in canon law at the University of Wittenberg, soon became so convinced that the canon law "reeked of self-service" and "reeled on fallacious ground," that he abandoned his canon law chair and instruction and moved to the theology faculty at Wittenberg, from which he issued a steady volley of lectures and sermons against the canon law.[77]

Several evangelical theologians urged the expulsion of discrete canon law rules that worked the greatest injustices in Germany. The Strassburg reformer Martin Bucer, for example, argued that canon law prohibitions of clerical marriage were "contrary to both spiritual and imperial law" and must be removed.[78] The Nürnberg reformer Wenceslaus Linck and the Strassburg reformer Wolfgang Capito advocated the abolition of

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clerical immunities from civil prosecution and clerical exemptions from taxes, services, and other civic duties. They viewed such privileges as "against God, against the love of one's neighbor, against all sense of fair play, against human nature and reason, and detrimental to the community at large."[79] Clergy should discharge the duties of citizenship like all everyone else in the community, they believed. The Constance reformer Ambrosius Blarer, an ex-monk, urged reform of canon law provisions governing monasticism. On the one hand, he urged that the canon law should carefully restrict monastic vows only to the mature, stable, and well-informed. "I have learned very well . . . what anxious insecurity and spiritual death are brought by lightly taken vows and eternal pledges," he wrote. On the other hand, the monastic life should itself be governed more by Scripture and the spirit than by the "sundry, serpentine, strangulating strictures of the canon law."[80] The ex-Franciscan Johann Eberlin von Günzburg complained that Germany was beset "by false and bad faith, from which there is no escape because it is upheld by Roman law and canon law. No one can now be certain of his case given the loopholes that can always be found in it, through which the common people are chased from pillar to post." Günzburg traced these abuses to several canon law rules and policies which he urged the emperor to expunge -- the constant appeals to Rome, the dispensations from canon law rules, the spurious use of excommunication and the ban, and the hefty augmentation of the staff and the finances of church offices and courts. Moreover, to remove other abuses created by the canon law, he urged the emperor to outlaw payment of papal annates, taxes, and indulgences, to authorize clerical marriage, to remove most canon law impediments to lay marriage, to limit the property accumulations of the cloisters and charities, to outlaw mendicancy and begging, and to allow for the good faith breach of monastic and clerical vows.[81]

Such antipathy toward the canon law and supporting ecclesiastical structures did not remain confined to the pulpit and the pamphlet. In the early years of the Lutheran Reformation, civil magistrates rapidly translated these anti-canonical sentiments into new civil laws and policies. By 1530, new city laws were passed for Leisnig, Elbogen, Magdeburg, Nordlingiacensis, Stralsund, Wittenberg, Halle, Bern, Basel, Hamburg, Zürich, Meiden, Braunschweig, Frankfurt am Main, Göttingen, and Rostock. New territorial laws were passed for Prussia, Halle, Brandenburg-Ansbach, Hesse, Lüneburg, and Saxony.[82] Viewed as a whole, these laws accorded to civil magistrates new control over religious doctrine and liturgy, over the selection and supervision of local parish clergy, and over the use and maintenance of chapels, cloisters, charities, and church schools. Many such church properties became subject to regular civil taxes, and, in several instances, were simply confiscated for use by the state. Payments of annates, indulgences, and other forms of ecclesiastical taxes and fees were curtailed. Appeals to Rome were curbed. Removal of cases from local church courts to

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local civil courts became increasingly common. Clerics began to lose their prized exemptions and immunities at civil law. Civil councils and courts began to claim principal jurisdiction over marriage, education, inheritance, charity, and other matters previously within the Church's domain. The law faculties began to replace chairs and courses in canon law with those in civil law.

In a few instances, these new civil laws explicitly outlawed the canon law. The 1526 Church Reformation of Hesse, for example, commanded bluntly that "we prohibit all provisions of the canon law."[83] The 1535 Church Ordinance of Pomerania ordered citizens not to conduct marital matters in accordance with "the inequitable and unlawful (*unrecht*) papal law."[84] The Hannover Church Ordinance likewise declared: "The canon law forbids too much and then dispenses its restrictions for money. Our magistrate will not have this."[85] Most of these early civil laws, however, simply sidestepped and supplanted the canon law without comment.

Crisis and Criticism. By the early 1530s, however, Luther's radical goal of a complete eradication of the canon law proved unworkable both for the church and for the state. On the one hand, the Lutheran reformers had drawn too great a contrast between spiritual freedom and disciplined orthodoxy in the church. Young evangelical churches were treating their new liberty from the canon law as a license for doctrinal and liturgical laxness. "Pastorates are declining and going to ruin," Luther lamented already in 1529. "The common people . . . have no knowledge whatsoever of Christian doctrine, and, alas, many pastors are altogether incapable and incompetent to teach. . . . [T]hey do not understand and cannot even recite the Lord's Prayer, or the Creed, or the Commandments. They live like dumb brutes and irrational hogs; and yet, now that the Gospel has come, they have nicely learned to abuse all liberty like experts."[86] Other reformers decried the widespread confusion over prayers, the sacraments, funeral rituals, festivals, and the division of responsibility among pastors, deacons, and other officers of the church. Still others were shocked to find how quickly pastors and theologians had misinterpreted the Scriptures, twisted cardinal evangelical doctrines, or reverted to an abridged Roman Catholicism. Traditionally, a system of canonical and penitential rules had governed such doctrinal and liturgical matters in copious detail.[87] The rudimentary civil laws on religion now in place proved incapable of defining and preserving religious order and orthodoxy.

On the other hand, the reformers had driven too deep a wedge between the civil law and the canon law, the magistrate and the cleric. They had vested in the civil magistrate plenary authority over law, removing the canon law as a legitimate source of civil law and removing the clergy as a legitimate resource for the formation and enforcement of civil law. Many subjects and persons over which civil authorities

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had claimed jurisdiction from the Roman Catholic Church -- poor relief, charity, marriage, education, public morality, inheritance, and the like -- remained without effective civil regulation.[88] Many civil magistrates lacked the will or the means to implement effective reforms of these subjects. Many evangelical clerics lacked the license to intervene into such civil affairs. By the early 1530s, chroniclers complained regularly of the erosion of public morality and sumptuousness, pervasive prostitution, concubinage, gambling, drunkenness, usury, and avarice; the widespread confusion over marriage and divorce requirements; the callous neglect of widows, orphans, the poor, the sick, and the young; and the precipitous drop in school attendance.[89] Luther himself noted with alarm the "great disagreement among the princes and the estates" which had ground civil administration to a halt. "[U]sury and avarice have burst in like a flood, and have become lawful," he wrote. Germany is racked with "wantonness, lewdness, extravagance in dress, gluttony, gambling, idle display, various bad habits and wickedness, insubordination of subjects, of domestics, and of laborers, of every trade."[90] The reformers' radical ideal of a pure church governed only by the Gospel and of a pure state governed only by the Christian magistrate's civil law had soon plunged Germany into an more acute legal and social crisis.

The leading jurists of the day, despite their sympathies with the evangelical cause, blamed much of this crisis on Luther and other theologians who had attacked the canon law. The reaction of Luther's Wittenberg colleague and friend Hieronymous Schürpf was typical. Schürpf had been among Luther's closest friends and supporters in the early years of the Reformation. He stood by when Luther burned the canon law books in 1520, accompanied Luther to the Diet of Worms in 1521 and spoke on his behalf, and served as an official witness at Luther's wedding to a former nun in 1525. It was Schürpf's example, most of all, Luther wrote late in his life, "that inspired me [in 1517] to write of the great error of the Catholic Church."[91] Nonetheless, Schürpf rejected Luther's call for the eradication of canon law and for the confiscation of church property. He viewed the state's usurpation of the church's spiritual jurisdiction over doctrine, liturgy, and moral offenses as "blasphemous and scandalous." He regarded the state's abolition of canon law as "unchristian" and "sinful." He styled the state confiscation and taxation of church properties as blatant acts of "thievery, robbery and iconoclasm" and the prince's control over clerical appointments and benefices as "barbarous."[92] "Clerics must be free from all jurisdictional claims of the laity, and all civil taxes, as a matter of divine right," Schürpf wrote in a later opinion. "In spiritual matters, [local religious] leaders are the bishops of their benefices. The canon law prohibits any lay person from possessing and controlling these benefices. . . . The civil law must submit to this canon law."[93]

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The distinguished Freiburg jurist Ulrich Zasius, who was initially supportive of the Reformation, likewise regarded Luther's anti-canonicalism as both unprincipled and unfair.[94] "Luther calls the canon law insipid and frigid," Zasius wrote, but this charge rests on "too gross and general a view" of the canon law. Luther "seems to think that all of canon law has equal authority," though obviously some provisions are more authoritative than others. Luther seems to think that canon law provisions always rival civil law provisions, though in reality "the two laws often run in the same course" and are thoroughly intermixed. "How, then, can [he] say that the whole canon law must be outlawed?"[95] "[W]e think it is wrong to overturn an arrangement that has for so long been accepted as right." "[I]t is not only imprudent, but also unfair, to spurn a source of law that for centuries has been valid." It leaves legislators without "an ancient, equitable, and tested" source of law. It leaves citizens without a fair and honorable standard by which to conduct their affairs. It leaves civil judges with too wide a discretion to work injustice and abuse, since they can now "simply ignore one part of the law."[96] It leaves the church and the faith without a central authority -- save Luther and his followers in Wittenberg. "You assert evangelical liberty," Zasius wrote to Luther's supporter Thomas Blaurer, "but you do not tell us of what this liberty must consist. . . . Is Luther's opinion alone to be preferred to all the doctors in the last thousand years? Tell me why?"[97]

Luther's opinion on sundry spiritual and temporal matters had, in fact, become highly coveted in many quarters of Germany during the legal crisis of the 1520s and early 1530s. In 1529, Luther complained that "each day, I am inundated with so many letters that my table, chair, footstool, desk, chests, bookshelves, and everything else are covered with letters, inquiries, disputes, complaints, pleas, and so on."[98] Luther was not at all comfortable with his role as *de facto* Protestant pope, nor with Wittenberg's role as *de facto* Protestant Rome. He prefaced the 1528 *Instruction to Saxon Visitors* with the caveat that "these are not new papal decretals."[99] He prefaced the new Wittenberg ordinance on the German mass with the caveat that "it is not my intention that the whole German nation must adopt this Wittenberg ordinance."[100] He prefaced his 1530 treatise on various marriage questions with the strong caveat: "I want to do this not as a judge, official, or regent, but by way of advice, such as I would in good conscience give as a special service to my good friends."[101] He objected strongly when a colleague painted him and his Pomeranian co-religionist Johannes Bugenhagen as "the pope of Germany and the Cardinal of Pomerania."[102] But, with the abolition of the canon law and the pope, the evangelical church and state were left with no other final authority.

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Compromise: The Transplantation of the Canon Law

From the 1530s to the 1560s, evangelical theologians and jurists forged a innovative compromise on the relationship of canon law and civil law, and of church and state. Evangelical theologians developed a theory of the church that struck a new balance between order and liberty, orthodoxy and innovation, and that accorded both civil law and canon law a place in the definition of ecclesiastical polity and religious liberty. Evangelical jurists developed a theory of the state that struck a new balance between divine law, canon law, and civil law, and that accorded both magistrates and clerics a responsibility for law and order. Both theories served to support the transplantation of the traditional canon law into Lutheran Germany.

Theological Compromise. The evangelical theory of the church was rooted in the reformers' two kingdoms theory.[103] According to conventional Lutheran lore, God has ordained two kingdoms or realms in which humanity is destined to live, the earthly or political kingdom and the heavenly or spiritual kingdom. The earthly kingdom is the realm of creation, of natural and civic life, where a person operates primarily by reason, law, and passion. The heavenly kingdom is the realm of redemption, of spiritual and eternal life, where a person operates primarily by faith, hope, and charity. These two kingdoms embrace parallel temporal and spiritual forms of justice and morality, truth and knowledge, order and law, but they remain separate and distinct. The earthly kingdom is fallen, and distorted by sin. The heavenly kingdom is saved, and renewed by grace -- and foreshadows the perfect kingdom of Christ to come. A Christian is a citizen of both kingdoms at once, and invariably comes under the structures and strictures of each.[104]

The Lutheran reformers distinguished between the pure invisible church of the heavenly kingdom, and the sin-tainted visible church of the earthly kingdom. The *invisible* church, in their view, is a perfect community of saints, where all stand equal in dignity and sanctity before God, all enjoy perfect Christian liberty, and all govern their affairs in accordance with the commandments of love and the Gospel. The invisible church remains an ideal form for the current fallen world, hidden from full view and obstructed from full realization until the eschaton.[105]

The *visible* church is the actual church of this sinful world. It embraces saints and sinners alike -- true believers and spiritual imposters; Christians whose piety at times renders them capable of living by the Gospel alone, but whose sinfulness at other times renders them in need of structures of government and strictures of law.[106] As in the invisible church, so in the visible church, members still stand directly before God and are individually accountable for their lives. They still are justified by faith alone, not by works. They

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still enjoy liberty of conscience -- including the liberty to leave the visible church itself.[107] But, unlike the invisible church, the visible church uses law together with the Gospel to govern its members' relationships with God and with fellow believers. Compliance with this law does not merit salvation for its members. It merely protects the individual parishioner and the church as a whole against the distortion and confusion introduced by sin.[108] As the Württemberg reformer Johannes Brenz put it: "[Church law] is created not in the belief that by the observance of its good works men repent of their sin and earn God's grace, for only Christ can redeem man's sin, and he has already earned God's grace for us. Rather this church order is prescribed in the belief that a true and orderly discipline of the congregation of the church provides both the occasion and the motivation to attend the preaching of God's word more diligently and to receive the sacrament more earnestly."[109]

The visible church of the earthly kingdom has, from its apostolic beginnings, therefore, governed itself and its members by canon laws -- both as adumbrated in the Scriptural canon and as elaborated in human canons. The Scriptural canon teaches basic norms and forms of Christian living. It prescribes respect for the Bible, observance of the Sabbath Day and holy days, faithful payment of tithes, obedience of authorities, and like. It proscribes blasphemy, false swearing, idolatry, and other sins that offend God and erode ecclesiastical discipline. Such Scriptural norms are to be obeyed no matter what form the visible church takes. The Bible does not, however, furnish a complete handbook for proper Christian living.[110] From the beginning, therefore, the Church made canons that translated Biblical principles into ecclesiastical precepts. "We know that the Fathers had good and useful reasons for instituting ecclesiastical discipline in the manner described in the ancient canons," the 1531 Augsburg Apology reads. Such canons must and do have currency in the contemporary evangelical church as well.[111] "We gladly keep the old traditions set up in the church, for they are useful and promote tranquility. . . . Our enemies falsely accuse us of abolishing good ordinances and church discipline. We can truthfully claim that in our churches . . . we are more faithful to the ancient canons than our opponents are."[112]

This was not idle theological rhetoric. In the 1530s and thereafter, evangelical theologians and churches in Germany came to view the early canon law as a valuable source for contemporary church law and discipline. They looked with particular favor on Gratian's *Decretum* of 1140, which had collected and integrated numerous passages from the apostolic canons, the Church Fathers, and the early Church Councils. In 1530, Melanchthon collected and published "some odds and ends from Gratian," principally the "acts and decrees of the old church, . . . so that the [contemporary evangelical] church might have an authoritative statement of [religious] dogma and ecclesiastical order."[113] The booklet enjoyed wide circulation

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in evangelical parishes and schools throughout Germany and Scandinavia. Luther was sympathetic with this effort: "There are many things in the *Decretum* of Gratian, gathered from the Church Fathers, which are of outstanding value," he commented. "For in them can be perceived the state of the old and primitive church."[114]

Also in 1530, Lazarus Spengler of Nürnberg published his own selection of canon law texts -- from the *Decretum* as well as the *Decretales* -- for use in the local evangelical churches. Eight years before, Spengler had offered a crisp fourteen page primer on the essentials of evangelical theology, entitled *A Short Concept and Instruction on the Whole Truth of Christianity*.[115] Despite wide circulation, this theological text had not had its desired effect. In an effort to offset the widespread doctrinal and liturgical confusion he continued to encounter, Spengler thus published his 69 page legal tract, with a similar design, entitled: *A Short Extract From the Papal Laws of the Decretum and the Decretales, Which Set Forth the Articles of the Word of God and Gospel Which are Unalterable or About Which There Should be no Further Strife*.[116] "It has become clear that our clergy have established a number of Christian articles that are actually false heresy and error, when judged in good faith and conscience against the Holy Scripture," Spengler wrote in his foreword. It seems expedient to demonstrate this error on the basis "not only of God's revelation but also the authoritative order of the [apostolic] church, the learning and example of the Holy Fathers, and the statutes of the old Councils." Spengler thus proceeded to select from the canon law texts ancient provisions as well as more recent promulgations that in his view "were consistent with the Word of God and Holy Scripture, and compatible with human justice and equity."[117]

Spengler's selection was quite spare -- comprising some 49 folio pages total. From Gratian's *Decretum* (1140), he excerpted 39 of the 101 *distinctiones* in Part I, 21 of the 36 causa in Part II, and the 5 distinctions on consecration in Part III.[118] In most instances, Spengler cryptically summarized only that part of the canon law text that quoted, or confirmed, apostolic, patristic, or conciliar authorities, citing the original texts in the margins. Much of the nuance of the earlier texts, and much of the integration achieved by Gratian, was lost in these cryptic selections. For example, in Part II of his *Decretum*, Gratian had devoted 9 long cases (filling some 154 folio columns) to difficult questions of marriage, divorce, celibacy, annulment, impediments, rape, and the like, integrating an array of widely discordant authorities.[119] Spengler distilled all this into a one and half page paraphrase of patristic and conciliar authorities that upheld favorite evangelical teachings on the equal spiritual status of marriage and celibacy and the prohibition of divorce or desertion without cause.[120] From Gregory's *Decretales*, Spengler extracted a few sentences from 21 titles, most of them dealing with proper clerical life and church

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governance.[121] On the strength of these titles, he issued a sharp attack on clerical corruption, papal primacy, and mandatory celibacy within the medieval Catholic Church, and a firm warning against the recurrence of such "abuses" in the budding evangelical churches.[122]

Luther was so pleased with Spengler's treatise that he had it republished in Wittenberg, and commended its use at the University of Wittenberg.[123] He added his own preface to the tract, beginning with the comment: "I myself should have long ago drawn such a book from the *Decretum* and the spiritual laws."[124] Luther even offered an uncharacteristically charitable interpretation of the papal law promulgated after Gratian's *Decretum*: "[T]here is much that is Christian and good under the papacy; indeed, everything that is Christian and good is to be found there and has to come to us from this source. For instance, we confess that in the Papal Church there are the true Holy Scriptures, true baptism, the true sacrament of the altar, the true keys to the forgiveness of sins, the true office of the ministry, the true catechism in the form of the Lord's Prayer, the Ten Commandments, and the articles of the creed."[125]

It was theological sentiments such as these that provided the basis for the ready transplantation of the medieval canon law into the doctrinal, liturgical, and administrative life of the evangelical churches of Germany. Occasionally, the churches were quite overt about their reception of canon law. A 1543 Consistory Ordinance of Kurbrandenburg, for example, ordered that "the members of the consistory must practice and adjudicate in accordance with both the canon and the civil law."[126] A 1543 Church Ordinance of Wolfenbüttel required that at "least two canonists be among the principal jurists on the consistory" to ensure the church's compliance with the "ancient canon law."[127] Joachim a Beust's frequently reprinted handbook on marriage, commissioned for use in the evangelical churches in Saxony, simply rolled together into one body of authority some 140 Lutheran and Catholic, civil law and canon law sources. Where there was conflict, Beust would place side-by-side quotes from each the authorities, generally preferring Protestant voices over Catholic, and theologians over jurists.[128]

In the more usual case, the later sixteenth century evangelical churches simply followed the rules, structures, and procedures of the canon law with little fanfare. As many writers have shown, in their regulation of doctrine, liturgy, ritual, and holy days, their use of spiritual sanctions to enforce moral and ecclesiastical discipline, their division and distribution of parishes and benefices, their organization of courts and administrators, their selection and supervision of bishops, pastors and other clergy, their collection of tithes and church rates, their maintenance of cemeteries, schools, almshouses, and the like -- in all these aspects of

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ecclesiastical life, the evangelical churches drew readily on canon law antecedents and analogues.[129]

Jurisprudential Compromise. This new theological theory of the church and the sources of church law, went hand-in-hand with a new legal theory of the state and the sources of civil law. This new legal theory, too, made ample room for the transplantation and use of the canon law.

Many sixteenth century German jurists began with Luther's basic theory of the Christian magistrate. As God's vice-regent in the earthly kingdom, the magistrate governed with divine authority and in accordance with the natural law revealed in the Bible and in the reason and conscience of each person. As *Landesvater*, the magistrate was to protect peace, punish crime, and to govern the multiple relationships among persons and their collective relationship with God through civil laws and processes. Absent his traditional clerical rival, the magistrate had plenary jurisdiction over all matters spiritual and temporal within his domain.[130]

Philip Melanchthon's elaboration of this political theory was particularly influential. For Melanchthon, as for Luther, political rulers were called to be God's "mediators" and "ministers" in the earthly kingdom, and their subjects were called to render to them the same obedience that they rendered to God.[131] Melanchthon went beyond Luther, however, in articulating the divinely imposed task of political authorities to promulgate "rational positive laws" for the governance of both the church and the state in the earthly kingdom.[132] To be rational, Melanchthon stated, positive laws have to be based on both the general principles of natural law and practical considerations of social utility and the common good.

In elaborating these criteria, Melanchthon started from the position that it is the office of political rulers to be the "custodians of the first table and the second table of the [Decalogue]."[133] As such, they are responsible for defining and enforcing by positive laws both the right relationship between persons and God, as reflected in the three commandments of the first table of the Decalogue, and the right relationships among persons, as reflected in the seven commandments of the second table.[134]

As guardians of the first table of the Decalogue, political rulers were to proscribe and punish all idolatry, blasphemy, and violations of the Sabbath -- offenses that the first table prohibits on its face. In translating these general principles into specific precepts, they were to pass laws that served "to establish pure doctrine" and right liturgy, "to prohibit all wrong doctrine . . . [and] punish the obstinate," and to root out the heathen and the heterodox. Thus Melanchthon laid a theoretical basis for the welter of new religious establishment laws that were promulgated in Lutheran cities and territories, many of which contained comprehensive

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compendia of orthodox confessions and doctrines, songs and prayers, and liturgies and rites.[135] The principle of *cuius regio eius religio* ("the religion of the prince is the religion of the territory"), which was set forth in the Religious Peace of Augsburg (1555) and again in the religion clauses of the Peace of Westphalia (1648), rested ultimately on Melanchthon's theory of positive law as defining and enforcing the first table of the Decalogue.[136]

As guardians of the second table of the Decalogue, political rulers were responsible for governing "the multiple relationships by which God has bound men together."[137] Thus, on the basis of the Fourth Commandment ("Honor thy parents"), officials were obligated to prohibit and punish disobedience, disrespect, or disdain of authorities such as parents, political rulers, teachers, employers, and others; on the basis of the Fifth Commandment ("Thou shalt not kill") -- unlawful killing, violence, assault, battery, wrath, hatred, mercilessness, and other offenses against one's neighbor; on the basis of the Sixth Commandment ("Thou shalt not commit adultery") -- unchastity, incontinence, prostitution, pornography, obscenity, and other sexual offenses; on the basis of the Seventh Commandment ("Thou shalt not steal") -- theft, burglary, embezzlement, and similar offenses against another's property, as well as waste or noxious use or sumptuous use of one's own property; on the basis of the Eighth Commandment ("Thou shalt not bear false witness") -- all forms of dishonesty, fraud, defamation, and other violations; and, finally, on the basis of the Ninth and Tenth Commandments ("Thou shalt not covet") -- all attempts to perform these or other offensive acts against others.[138] Many of these aspects of religious life and social intercourse had traditionally been governed by the canon law and ecclesiastical authority. Melanchthon's legal philosophy provided a rationale for political officials to bring these subjects within the province of the state and civil law.

In discharging this new authority for the spiritual and social lives of their subjects, Christian magistrates were to look to both Roman law and canon law precedents as sources of state positive law. Melanchthon placed special emphasis on the Roman law, praising the *Corpus Iuris Civilis* of the Christian emperor Justinian for its sophistication, detail, and written character. Though some of the provisions of this Roman law may have been of "heathen origin," Melanchthon wrote, they nonetheless "are pleasing to God," for they "stem not from human cleverness [but] rather they are beams of divine wisdom," "a visible appearance of Holy Spirit" in the world.[139] Melanchthon also viewed the canon law as a legitimate source of the new civil law. The medieval canon law not only provided many examples of insightful interpretation of certain provisions of the classical Roman law.[140] It also provided the best example of a Christian and equitable interpretation of the natural law. "The secret wisdom which God has revealed to his Church through his Word is vastly different from the wisdom

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which comes through reason," Melanchthon wrote. The Church, over the centuries, has captured much of this wisdom in the canon law.[141] Melanchthon thus repeated several times the medieval commonplaces that the canon law was "a Christian law," "a law of equity," "the epitome of justice," a "rule of Christian love."[142] Though he continued throughout his career to point out "the many errors which the papists enact into their laws," he also pointed to this source as a "a great font of learning" for the Christian magistrate.[143]

Melanchthon's theory of the Christian magistrate and the sources of civil law had a great influence. A whole generation of Germany's leading jurists -- Johann Oldendorp, Johannes Apel, Conrad Lagus, Melchior Kling, and many others -- came under Melanchthon's direct influence as students, colleagues, and correspondents, and they expounded and expanded his basic insights in dozens of tracts.[144]

Following Melanchthon's lead, these jurists viewed canon law, alongside Roman law, as a valid and valuable source of the new civil law. Their basic assumption was that "the canon law contains both good and bad provisions, but in general was useful."[145] "We must be like a spider," Lazarus Spengler exhorted his colleagues, "and suck, draw, and discard from the books of canon law that which is opposed and repugnant to divine and human truth, Scripture, virtue, and fairness."[146] Thus theologically offensive provisions in the canon law, such as those rooted in papal supremacy or spurned sacraments, had to be discarded. Politically offensive provisions, such as those guarding clerical privileges or episcopal dispensations and appeals, also could have little place. But a great deal of the remaining provisions of the canon law could be put to ready use.[147]

A number of jurists echoed Spengler's sentiments, emphasizing the great utility of the canon law for civil legislatures and civil courts.[148] "Some have declared the canon law to be a sentence of iniquity and impiety," Johann Oldendorp wrote. "But they ascribe these features to those things [in the canon law] which are of no use."[149] Much in "the canon law ought properly and licitly to prevail [and] to be taught and observed . . . by reason of its social utility and human necessity."[150] Jacob Omphalius wrote similarly of the *Decretales*: "There are many that contain sound [legal] doctrine and are of great value and should be established and retained in the state."[151] Hieronymous Schürpf emphasized the traditional interdependence of canon law and civil law, and urged that the alliance continue among evangelical magistrates: "When some matter is found decided by the Church, then it should be preserved in the secular forum, because one law aids the other, just as one power aids the other. For if recourse is had to custom in some case where doubt remains, even more so should recourse be had to canon law, which is of greater authority and which prevails in force over custom." Again, "where the civil law fails to dispose of the matter, or where

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there are various opinions [among the civilians], then the canon law is to be kept in each forum."[152] Chancellor Rehus of Basel declared similarly at the Reichstag at Worms: "In human affairs, there is nothing better than to hold to the statutes and laws of old, for the commonwealth cannot long endure without statutes. Where our predecessors did not maintain salutary [civil] laws, however, there is nothing wrong with applying canon laws so as to maintain the highest peace and continuity."[153]

The 1543 *Tract on Matrimonial Cases* by Melchior Kling, Luther's colleague at the University of Wittenberg, illustrates and explains this appetite for traditional canon law forms. Kling opened his tract by sifting through available sources for the new marriage law of Germany -- Mosaic law, the New Testament, Roman law, customary law, and canon law among them. He stated several times that he accepted the "new [evangelical] theology of marriage." But, he said: "I have generally followed the canon law in this writing, which at the time of the Empire was used to frame opinions in matrimonial cases. For even though other laws may have been extant, which might seem more worthy and outstanding -- customs and examples both predating and following the time of Moses, the law of Moses itself, the New Testament, and Roman law -- these are not completely sufficient or comprehensive for our time."[154] The canon law, Kling believed, had appropriated the most valuable parts of the Old and New Testaments, Roman law, and local custom, and had refined its doctrine for centuries. "Surely, we could not go back to the simple Mosaic rules of marital impediments" or "return to the pre-Mosaic customs of concubinage and polygamy," he reasoned. "Nor could we easily follow both the Mosaic [and] . . . New Testament laws of divorce," let alone try to "observe the multiple causes for divorce [recognized at Christian] imperial law." The canonists had worked through all these conflicting authorities, and had systematized a "Christian and equitable" source of law. Modern evangelicals should not, and could not, simply cast this work aside. To begin on a biblical tabula rasa was foolish, Kling concluded. "We should begin with tradition," and amend and emend it as the Bible and new theological doctrines compel.[155]

Kling practiced what he preached. Though he cited most frequently to the Bible, the Digest, the "doctors," and the "theologians" (presumably of Wittenberg), his tract is peppered throughout with references to the *Decretum*, the *Decretales*, and the tracts of Panormitanus, Hostiensis, Johannes Andreae, and several other canonists.[156] Ten years later, Kling prepared a lengthy commentary on various parts of the canon law, including its provisions on marriage. This commentary was thereafter usually bound with his *Tract on Matrimonial Causes*, and the sources used together in Protestant law faculties.[157]

The devout Lutheran jurist Johann Oldendorp -- whom a fellow jurist once described as "the one person for whom the maxim 'a jurist is a bad Christian' does not apply"[158] -- made

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similar use of the canon law. In his oft-reprinted legal handbooks, *Dictionary of the Law*,[159] *Collection of Canon and Civil Laws*,[160] and *Topics of Law*,[161] Oldendorp set out in detail prevailing canon law and civil law rules and maxims arranged alphabetically under topics -- from "absence," and "accusations" to "usucapion" and "usury." All three sources mixed ancient and contemporary, canonist and civilian, Catholic and Protestant authorities -- making heavy use of Gratian, Hostiensis, Panormitanus, and Johannes Andreae, among other canonists.[162]

Particularly in his *Collection of Laws* and his *Topics of Law*, Oldendorp sought to demonstrate the substantial compatibility of canon and civil law sources on many points. In a series of entries on "marriage," "divorce," and "parent and child," for example, he brought together a wide range of civil law and canon law authorities to show that marriage was the natural union of one man and one woman, formed by mutual consent and for the purpose of love, procreation, and avoidance of evil. All other sexual unions were per se unnatural, and thus illegal. Sexual activity within this institution was licit; sexual activity outside it was improper. Children born of this union were legitimate; those born outside of this union were illegitimate. The paterfamilias was the leader of the household, the wife and children subordinate to his authority. Improper conduct by either party could lead to dissolution of the union, with heavy obligations of care falling on the guilty party. In all these positions, the canonists and civilians largely agreed. Oldendorp recognized the conflicts between these sources as well, and in such instances, he preferred modern civil law over medieval canon law, and biblical law in preference to both. Canon law allowed for clandestine marriages; Roman law and Protestant theology demanded parental consent and witnesses to unions. Oldendorp preferred the latter. Canon law prohibited divorce and remarriage, granting only separation from bed and board; modern civil law allowed for it on proof of the adultery, desertion, or quasi-desertion of one of the parties.[163] Again, Oldendorp preferred the civil law rule, though this was still inferior to the rule of the Gospel: "What God hath brought together, let no man put asunder." "[W]e must constantly be on guard that the canons we use . . . not contradict divine law and natural law," he later wrote.[164]

Jurists at the University of Wittenberg translated these favorable impressions of the canon law into pedagogical practice.[165] Johann Apel, despite his earlier conviction at canon law, and ultimate excommunication, for breaching oaths of celibacy and holy orders, offered lectures on the *Decretales* after 1528, together with fellow Lutheran jurist Kaspar von Teutleben.[166] Lazarus Spengler's tract, already discussed, came to be used as a text in the faculties of both law and theology. Melchior Kling began to offer lectures on the *Decretales* in 1532, and later added lectures on the *Liber sextus* as well.[167] A 1536 revision of the constitution of the

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University of Wittenberg required the establishment of three chairs in civil law, but also a chair in canon law, whose occupant was to offer regular courses and also to advise and occasionally sit on the *Hofgericht*. Kling first held the chair, followed by Johannes Schneidewin, a friend of Luther and Melanchthon (and a frequent guest in Luther's home), and Matthäus Wesenbeck, a supporter of the Reformation throughout his life.[168] Civil law instruction clearly predominated at the University of Wittenberg after the Reformation, but canon law retained a formidable influence.

Other evangelical universities made their own gradual accommodations to the canon law. The founding charters of the evangelical universities of Marburg (1527), Königsberg (1544), and Jena (1548) made no provision for canon law chairs or instruction. Within a generation of their founding, however, canon law texts and lectures found their way into each of these law faculties; by the later sixteenth century, Königsberg and Jena each had a chair in canon law as well.[169] The norm at other German evangelical universities was similar: to retain one of its three to five chairs in law for a canonist, and to retain lectures, courses, and degree program based on the *Decretum*, *Decretales*, and later canonical legislation.[170]

Luther was sympathetic with much of this new legal theory, save the retention of later medieval papal legislation. "I could put up with you [jurists]," he wrote with exasperation near the end of his life, "if you kept to your imperial laws and let go of the papal laws. But all you doctors of both [civil and canon] laws are partisans of the pope and his canons." He was particularly galled that his colleagues at the University of Wittenberg insisted on teaching the *Decretales* and later canonical legislation. "These jurists have the impudence to give public lectures to our young men on that papal filth, the canon law," he wrote near the end of his life. "So much for our efforts to banish it from the church! . . . We see them bloated with pride as they now reintroduce this stinking filth."[171]

Luther's late-life railings against the canon law, which three decades before had revolutionized German society, now rung feeble and false. The new leaders of the German Reformation had created a new ensemble of legal ideas and institutions, which could accommodate both the old legal order and the new revolutionary ideals. This new ensemble provided the theoretical basis for the ready transplantation of canon law rules into new civil ordinances and juridical opinions of sixteenth century Germany. As a number of writers have shown, the new German laws on marriage and family life, poor relief and vagabondage, sumptuousness and public morality, criminal law and procedure, and many other subjects retained ample adherence and coherence with the medieval canon law.[172]

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Conclusions

The Reformation erupted in 1517 with a loud call for religious freedom -- freedom of the church from the tyranny of the pope, freedom of the laity from the hegemony of the clergy, freedom of the conscience from the strictures of canon law. "Freedom of the Christian" became the rallying cry of the early Reformation. It drove theologians and jurists, clergy and laity, princes and peasants alike to denounce canon laws and ecclesiastical authorities with unprecedented alacrity. "One by one, the structures of the church were thrust into the glaring light of the word of God and forced to show their true colors," Jaroslav Pelikan writes.[173] Few canonical structures survived this scrutiny. The *Corpus Iuris Canonici* was burned. Canon lawyers were ostracized. Canon law chairs were discarded. Church courts were closed. Clerical privileges were removed. Monastic institutions were confiscated. Endowed benefices were dissolved. Administrative ties to Rome were severed. The German people were now to live by the Bible and Germanic custom alone.

This spare legal diet proved insufficient to sustain the Reformation in the long term. Doctrinal and liturgical confusion abounded within the evangelical churches. Laws governing marriage and family life, contracts and oaths, wills and testaments, charity and welfare, crime and punishment, and many other subjects which had previously been governed by the canon law, fell into massive disarray. Germany plunged into an increasingly acute social, political, and ecclesiastical crisis in the 1520s -- punctuated and exacerbated by the peasants' war, the knights' uprising, and an ominous scourge of droughts, plagues, and other forms of *force majeure*.

In response, Luther, Melanchthon, and other leading reformers came to embrace a wider array of sources of law than had initially been their wont. Much of the canon law came to be viewed as a valid and valuable source of Christian equity and justice, grounded in the Bible and the early Church constitutions. Lutheran theologians developed an ecclesiology that facilitated the importation of canon law structures into the doctrinal, liturgical, and administrative life of the evangelical churches. Lutheran jurists developed a political theory that facilitated the importation of canon law structures into the public, private, and criminal laws and procedures of the German state. By the mid-1550s, a good deal of the medieval canon law had returned to evangelical German society, but now largely under the control of civil authorities and under the color of civil law.

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College (1982); J.D. Harvard Law School (1985). The research assistance of Joel Nichols is gratefully acknowledged.

1. Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Charlottesville, 1975).

2. Ibid., 8, quoting F. Pringsheim, "The Inner Relationship Between English and Roman Law," in id., *Gesammelte Abhanlungen* (Heidelberg, 1961), 1:76, 78. On the transplantation of Roman law, see Alan Watson, *The Evolution of Law* (Baltimore, 1985), 3-42, 66-114; id., *Sources of Law, Legal Change, and Ambiguity* (Philadelphia, 1984), 51-76; *The Making of the Civil Law* (Cambridge/London, 1981), passim.

3. Ibid., 95-101.

4. Ibid., 21-27, 36-60, 65-81. See also Watson, *The Making of the Civil Law*, 14-22, 168-178; id., *Sources of Law*, 1-24, 51-92; id., *Rome of the XII Tables: Persons and Property* (Princeton, 1975).

5. Roderich von Stintzing, *Das Sprichwort "Juristen böse Christen" in seinen Geschichtlichen Bedeutung* (Gotha, 1873).

6. See Harold J. Berman, "The Interaction of Spiritual and Secular Law: An Historical Overview, With Special Reference to Sixteenth-Century Lutheran Germany," herein; Udo Wolter, *Ius Canonicum in Iure Civili* (Köln, 1975); Anneliese Sprengler-Ruppenthal, "Das kanonische Recht in Kirchenordnungen des 16. Jahrhunderts," in R.H. Helmholz, *Canon Law in Protestant Lands* (Berlin, 1992), 49-122; John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Chicago/Louisville, 1997), chaps. 2-4; id., "The Civic Seminary: Sources of Modern Public Education in the Lutheran Reformation of Germany," *Journal of Law and Religion* 12 (1996): 173-223. See also sources below notes 9, 49, 62, 70, 76, 102, 103, and 127.

7. Hector L. McQueen, Review of Helmholz, ed., *Canon Law in Protestant Lands*, in *Zeitschrift der Savigny-Stiftung (Kan. Ab.)* 111 (1994): 582, 583. Helmholz elaborates this thesis in *Roman Canon Law in Reformation England* (Cambridge, 1990).

8. See Lazarus Spengler, *Ein kurczer auszug auss den Bebstlichen rechten der Decret und Decretalen . . . mit einer schönen Vorrhede Mart. Luth.* (Wittenberg, 1530), Aii.

9. See *Luther und die Juristen: Zur Frage nach dem gegenseitigen Verhältnis des Rechtes und der Sittlichkeit* (Gotha, 1873); Karl H. Burmeister, *Das Studium der Rechte im Zeitalter des Humanismus im deutschen Rechtsbereich* (Wiesbaden, 1974).

10. See above note 2, citing Pringsheim.

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11. For Germany, see Winfried Trusen, *Anfänge des gelehrten Rechts in Deutschland. Ein Beitrag zur Geschichte der Frührezeption* (Wiesbaden, 1962), and sources cited therein. In general, see R.H. Helmholz, *The Spirit of the Classical Canon Law* (Athens, GA, 1996).

12. See Willy Andreas, *Deutschland vor die Reformation*, 5. Aufl. (Berlin, 1932), 61ff.; Lawrence G. Duggan, *Bishop and Chapter: The Governance of the Bishopric of Speyer to 1552* (New Brunswick, NJ, 1978), 3ff. For historical maps of Germany, see H.C. Darby and Harold Fullard, *The New Cambridge Modern History* (Cambridge, 1970), vol. 16 (Atlas), 66-67, 122-123.

13. The thirteenth German university, at Wittenberg, was not chartered by the Church. See generally Heiko A. Obermann, "University and Society on the Threshold of Modern Times: The German Connection," in James M. Kittelson and Pamela J. Transue, eds., *Rebirth, Reform, and Resilience: Universities in Transition, 1300-1700* (Columbus, OH, 1984), 19, 28. On the training of canon lawyers in Germany and abroad, see Adolf Stölzel, *Die Entwicklung des gelehrten Richtertums in den deutschen Territorien,* 2 vols. (Berlin, 1901-1910), 1:45-111; Rainer C. Schwinges, *Deutsche Universitätsbesucher im 14. bis 15. Jahrhundert. Studien zur Socialgeschichte des alten Reiches* (Stuttgart, 1986).

14. See generally Roderich von Stintzing, *Geschichte der deutschen Rechtwissenschaft, Erste Abteilung* (München/Leipzig, 1880), 21ff.; Otto von Stobbe, *Geschichte der deutschen Rechtsquellen*, 2 vols. (Leipzig, 1860-1864), 2:16ff.; Helmut Coing, "Die Juristische Fakultät und ihr Lehrprogramm," in Helmut Coing, ed., *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, 4 vols. (München, 1973-1977), 1:835-846. For a systematic study of individual law faculties in Germany, see Burmeister, *Das Studium der Rechte*, 31-57, 73-77, 181-193. Burmeister shows that in pre-Reformation Germany, on average, 60% of law faculty chairs were devoted to canon law study, and the vast majority of students pursued either the *doctor juris canonici* or *doctor juris utriusque*.

15. On the medieval concept of jurisdiction, see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA, 1983), 21ff., 260ff.; Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought, 1150-1650* (Cambridge, 1982), 30-39; Udo Wolter, "Amt und Officium in mittelalterlichen Quellen vom 13. bis 15. Jahrhundert: Ein begriffsgeschichtliche Untersuchung," *Zeitschrift der Savigny Stiftung (Kan. Ab.)* 78 (1988): 246.

16. Trusen, *Anfänge*, 63ff.

17. On the development of the *Corpus iuris canonici* (so named for the first time in 1671), see Knut Wolfgang Nörr, "Die Entwicklung des Corpus Iuris Canonici," in Helmut Coing, ed.,

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Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte (München, 1973-1977), 1:835-846; Hans Erich Troje, "Die Literatur des gemeinen Rechts unter dem Einfluss des Humanismus," in Coing, ed., *Handbuch*, 2/1:615, 664-667. According to Stintzing, German printers issued 15 of the 42 editions of the *Decretum*, 15 of the 39 editions of the *Decretals*, 13 of the 43 editions of the *Liber sextus*, 14 of the 38 editions of the *Clementiae* and the *Extravagantes* that circulated in Europe on the eve of the Reformation. See Roderich von Stintzing, *Geschichte der populären Literatur des römisch-kanonischen Rechts in Deutschland am Ende des fünfzehnten und im Anfang des sechszehnten Jahrhunderts* (Leipzig, 1867) 7-28, 38-50, 151-196. See also Stobbe, *Rechtsquellen*, 2:17.

18. For lists of confessional manuals, see Pierre Michaud-Quantin, *Sommes de casuistique et manuels de confession au moyen age XII-XVI siècles* (Louvain, 1962); Ludwig Hain, *Reportorium bibliographicum in quo libri omnes ab arte typographica inventa usque ad annum MD typis expressi ordine alphabetico vel simpliciter enumerantur vel adcuratius recensentur*, 4 vols. (Milano, 1948). See discussion in Stintzing, *Literatur*, 487ff.; Trusen, *Anfänge*, 135ff.; Thomas N. Tentler, *Sin and Confession on the Eve of the Reformation* (Princeton, NJ, 1977), 28ff.

19. *Margarita decreti seu tabula martiniana edita per fratrem Martinum ordinis praedicatorum domini papae penitentiarum et capellanum* (Erlangen, 1481).

20. *Reportorium aureum mirabili artificio contextum continens titulos quinque librorum decretalium, et concordancias materiarum eisdem in Sexto Clementinis Decreto et toto corpore juris civilis correspondentium* (Köln, 1495).

21. Paulus Florentinus, *Breviarium decretorum et decretalium* (Louvain, 1484).

22. See his *Lectura super arboribus consanguinitatis et affinitatis* (Basel, 1486) and *Summa de sponsalibus et matrimoniis* (Leipzig, 1494).

23. See his *Expositiones omnium titulorum legalium* (Brunnae, 1488); *Liber decretorum sive panormia Ivonis accurato labore summoque studio in unam redacta continens* (Basel, 1499). Brandt also prepared glossed editions of the *Decretum Gratiani* (Basel, 1493), *Decretales Gregor. IX* (Basel, 1494), *Liber sextus* (Basel, 1494), and *Decreta concilii Basilienis* (Basel, 1499). He also prepared commentaries on numerous texts of foreign canonists, including Johannes Baptiste Caccialupis de S. Severino, *Tractatus de modo studendi in utroque juris* (Basel, 1500) and Nicasii de Voerda, *Arborum trium consanguinitatis affinitatis cognationis spiritualis lectura*

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(Cologne, 1505). See discussion in Stintzing, *Literatur*, 451-462.

24. See lists in Stobbe, *Rechtsquellen*, 2:18-19.

25. See Helmholz, *Spirit*, 88-144; 339-393; id., *Marriage Litigation in Medieval England* (Cambridge, 1974); Rudolf Weigand, "Zur mittelalterlichen kirchlichen Ehegerichtsbarkeit: Rechtsvergleichende Untersuchung," *Zeitschrift der Savigny Stiftung (Kan. Ab.)* 67 (1981): 218-247.

26. *Petrus Lombardi quatuor libri sententiarum* (c. 1150), bk. 4, dist. 1:2. See discussion in Joseph Martos, *Doors to the Sacred: A Historical Introduction to Sacraments in the Catholic Church* (Garden City, NY, 1981), 65-96.

27. See generally, Paul Wilpert, ed., *Lex et Sacramentum im Mittelalter* (Berlin, 1969).

28. See generally, Berman, *Law and Revolution*, 165-254; Helmholz, *Spirit*, 200-228; Witte, *From Sacrament to Contract*, chap. 1.

29. See Brian Tierney, *The Origins of Papal Infallibility, 1150-1350* (Leiden, 1972), 39ff.; Thomas Aquinas, *Summa Theologiae*, III (Supp.), qq. 17-18.

30. Quoted by Tierney, *Religion, Law, and the Growth of Constitutional Thought*, 32.

31. See examples in Trusen, *Anfänge*, 45ff.

32. Quoted by G. May, *Die geistliche Gerichtsbarkeit des Erzbishofs von Mainz im Thüringen des späten Mittelalters* (Tübingen, 1950), 111.

33. See generally, L.J. van Apeldoorn, *Nicolaas Everaerts (1462-1532) en het recht van zijn tijd* (Amsterdam, 1935), 9-14; Eugen Wohlhaupter, *Aequitas canonica. Eine Studie aus dem kanonischen Recht* (Paderborn, 1931); Norbert Horn, *Aequitas in den Lehren des Baldus* (Köln, 1968); Pier Giovanni Caron, "Aequitas et interpretatio dans la doctrine canonique aux XIIIe et XIVe siècles," *Monumenta Iuris Canonici Series C* 4 (1971): 131.

34. Nicolaus Everardus, *Loci argumentorum legales* (Argentorati, 1603), locus 130. See also discussion in Stobbe, *Rechtsquellen*, 2:110ff.; Trusen, *Anfänge*, 22ff.

35. Respectively c. 13, X. 1, 29; quote from from Innocent III in *De claris Archigynasii bonoiensis professoribus a saeculo XI usque ad saeculum XIV*, 2 vols., 2d ed. (Bonn, 1888-1896), 1:434; c. 16, C. XXV, q. 1.

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36. See, e.g., Hostiensis, *Summa aurea* (Lugduni, 1586), lib. 5, tit. "De dispensationibus," n. 1, fol. 436.

37. Apeldoorn, *Nicolaas Everaerts*, 12.

38. Wohlhaupter, *Aequitas canonica*, 16-17.

39. Thomas von Stinty, *Allgemeinen christlichen Sachen* (1356), quoted by Trusen, *Anfänge*, 57. On the attraction of the church courts to litigants, see Adolf Stölzel, *Die Entwicklung des gelehrten Richtertums in den deutschen Territorien,* 2 vols. (Berlin, 1901-1910), 1:386ff.; May, *Die geistliche Gerichtsbarkeit*, 158ff.; Justus Hashagen, "Zur Charakteristik der geistlichen Gerichtsbarkeit, vornehmlich im späteren Mittelalter," *Zeitschrift der Savigny-Stiftung (Kan. Ab.)* 6 (1916): 206-292, 215ff.

40. See Stölzel, *Entwicklung*, 2:810ff.

41. Giuseppe Ermini, "Ius commune e utrumque ius," *Acta congressus Iuridica internationalis* 2 (1935): 523.

42. Wolter, *Ius canonicum*, 29-54

43. Baldus de Ubaldis, *In decretalium volumen commentaria* (1595), repr. ed. (Turin, 1971), proemium.

44. Göbler, *Der Rechten Spiegel*, fol. 17b.

45. *Baldi Ubaldi . . . in Institutiones, Digestum vetus/infortiatum/novarum, XII libros Codicis . . . commentaria* (Turin, 1576), quoted in Wolter, *Ius canonicum*, 43.

46. See examples in Trusen, *Anfänge*, 48ff.

47. Trusen, *Anfänge*, 42ff.; May, *Die geistliche Gerichtsbarkeit,* 143ff. See other sources in John Witte, Jr., "The Plight of Canon Law in the Early Dutch Republic," in Helmholz, ed., *Canon Law in Protestant Lands*, 135, 138ff.

48. Heinrich Koller, ed., *Reformation Kaiser Siegmunds [1438]* (Stuttgart, Anton Hiersemann 1964), 296-297.

49. Quoted in Walter Köhler, "Die Anfänge des protestantischen Eherechtes," *Zeitschrift der Savigny-Stiftung (Kan. Ab.)* 74 (1941): 271, 277.

50. Worms Reformation (1498), bk. 3, part 1, and bk. 4, parts 2-3, in Wolfgang Kunkel, Hans Thieme, und Franz Beyerle, eds., *Quellen der neueren Privatrechtgeschichte Deutschland*, 2 vols. (Weimar, 1936), 1:109ff., 150ff.

51. *Der Staat Freyburg im Brisgow Statuten und Stattrechten* (Basel, 1520), tract 5, xciii ("On Slander, Outrage, and Evil Deeds"), in Kunkel et al., eds., *Quellen*,

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1:276ff. On unconscionable contracts, see ibid., tract 2, part 9, reprinted in ibid., 1:261ff.

52. Ibid., tract 3, part 2 ("On Marriage and Preparations for Marriage"), tract 3, parts 3-7 ("On Inheritances and Other Solicitudes Between Married People and Their Children," "On the Settlement of Inheritances Between Children," "On Testaments and Wills," "On Adopted Children and Their Inheritance"), in Kunkel et al., eds., *Quellen*, 1:278-308.

53. See examples in Paul Kirn, "Der mittelalterliche Staat und das geistliche Gericht," *Zeitschrift der Savigny-Stiftung (Kan. Ab.)* 46 (1926): 162, 185ff.; Witte, "The Civic Seminary," 182ff.

54. Quotes from Gravamina to the Diet of Worms (1521), in Gerald Strauss, ed., *Manifestations of Discontent in Germany on the Eve of the Reformation* (Bloomington, IN, 1971), 52-62. See also Anton Störmann, *Die städtischen Gravamina gegen den Klerus am Ausgänge des Mittelalters und in der Reformationszeit* (Münster, 1916).

55. *Reformation Kaiser Siegmunds*, 298-299.

56. Ibid., 300-303. See also Lothar Graf zu Dohna, *Reformation Sigismundi: Beiträge zum Verständnis einer Reformschrift des fünfzehnten Jahrhunderts* (Göttingen, 1960), 102-106.

57. *Reformation Kaiser Siegmunds*, 152-157.

58. Ibid. 187-211, 230-234.

59. Inspired in part by Sigismund's Reformation of 1438, urban officials in several independent and imperial cities in Germany passed their legal "reformations." See Olav Moorman van Kappen, "Stadtrechtsreformationen des 16. Jahrhunderts in den Niederlanden," in Michael Stolleis, ed., *Recht, Verfassung und Verwaltung in der frühneuzeitlichen Stadt* (Köln, 1991), 141-149; R. Schulze, "Reformation (Rechtsquelle)," in *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin, 1990), 468.

60. Reprinted in Kunkel et al., eds., *Quellen*, vol. 1, 1, 221.

61. See Eugen Mack, *Die kirchliche Steuerfreiheit in Deutschland seit der Dekretalengesetzgebung*, repr. ed. (Aalen, 1965), 211-240.

62. Luther was well aware of the canon law system that supported the indulgence trafficking that he attacked in the 95 Theses. See Erdmann Schott, "Anfänge evangelischen Kirchenrechts in Luthers 95 Thesen," *Zeitschrift für evangelischen Kirchenrecht* 2 (1952/3): 113; Johannes Heckel,

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"Das *Decretum Gratiani* und das deutsche evangelische Kirchenrecht," *Studia Gratiana* 3 (1955): 483, reprinted in Johannes Heckel, *Das blinde, undeutliche Wort "Kirche". Gesammelte Aufsätze,* hrsg. S. Grundmann (Köln, 1964), 1.

63. Quotes are taken from Martin Luther, *An den christlichen Adel deutscher Nation von des christlichen Standes Besserung* (1520), in *D. Martini Luthers Werke: Kritische Gesamtausgabe*, repr. ed. (Weimar, 1964-68), 6:381, and translated in Jaroslav Pelikan and Helmut T. Lehman, eds., *Luther's Works* (St. Louis, 1955-1968), 44:115, 202-206. [hereafter WA and LW respectively]. For this paragraph, I am using the translation in John Dillenberger, ed., *Martin Luther: Selections from His Writings* (Garden City, NY, 1961), 403, 432-434, 454-456, 472.

64. Though many of Luther's charges were broadsides, his anti-canonical writings of 1519-1521 have more than three dozen citations, chapter and verse, to the canon law. See references in Heckel, "Das Decretum Gratiani," 512-514; Wilhelm Maurer, "Reste des kanonischen Rechtes im Frühprotestantismus," *Zeitschrift der Savigny-Stiftung (Kan. Ab.)* 95 (1965): 190, 192-195.

65. See cites in note 63.

66. See Martin Luther, *The Keys* (1530), in WA, vol. 30/2, 465-507; LW, vol. 40, 321-377.

67. Martin Luther, *The Babylonian Captivity of the Church* (1520), in WA, vol. 6, 504-505, 525, 536-537, 553 and LW, vol. 36, 23-24, 55, 70-72, 96. See also discussion in Jaroslav Pelikan, *Spirit versus Structure: Luther and the Institutions of the Church* (New York, 1968), 20-24.

68. See generally Rudolf Schäfer, "Die Geltung des kanonischen Rechts in der evangelischen Kirche Deutschland von Luther bis zur Gegenwart," *Zeitschrift der Savigny Stiftung (Kan. Ab.)* 49 (1915): 165, 169ff.

69. WA, vol. 6, 562; LW, vol. 36, 123.

70. In his early years, Luther betrayed considerable ambivalence about the sacramental quality of penance. This ambivalence is reflected in his lengthy tract on *The Babylonian Captivity of the Church* (1520). At the beginning of the tract, he elected "for the present [to] maintain that there are but three [sacraments]: baptism, penance, and the bread [i.e., the eucharist]." WA, vol., 6, 501; LW, vol. 36, 18. By the end of the tract, he was quite unsure that penance could be regarded as a sacrament, for "it lacks the divinely instituted visible sign, and is . . . simply a way to return to [the promise of] baptism." WA, vol. 6, 572; LW, vol. 36, 124. See generally, Johannes Heckel, "Initia iuris ecclesiastici protestantium"

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(1950), reprinted in Heckel, *Das blinde, undeutliche Wort "Kirche"*, 132, 208ff.

71. WA, vol. 6, 501, 551; LW, vol. 36, 18, 93. See further discussion in Paul Althaus, *The Theology of Martin Luther*, trans. Robert C. Schultz (Philadelphia, PA, 1966), 345-352.

72. See, e.g., Luther's statement on the Eucharist: "The more closely our mass resembles the first mass of all, which Christ performed at the Last Supper, the more Christian it will be. For Christ's mass was simple, without any display." WA, vol. 6, 523; LW, vol. 36, 52.

73. WA, vol. 6, 512ff.; LW, vol. 36, 32ff.

74. Stintzing, *Geschichte der deutschen Rechtswissenschaft*, 273.

75. Argula von Grumbach, *Ein christenliche schrifft einer erbaren frawen vom Adel. . . .* (1523), quoted by Gerald Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany* (Princeton, NJ, 1986), 6.

76. Philip Melanchthon, *Loci communes* (1521), in Wilhelm Pauck, ed., *Melanchthon and Bucer* (Philadelphia, PA, 1969), 62. See comparable sentiments in his 1519 Preface to Corinthians, in Robert Stupperich, ed., *Melanchthons Werke in Auswahl*, 6 vols. (Gütersloh, 1951), 3:170ff. [hereafter MW]. For a good discussion of Melanchthon's early antipathy to the entire canon law, see Maurer, "Reste des kanonischen Rechtes im Frühprotestantismus," 214-222.

77. See Jonas' remarks in Gustav Kawerau (hrsg.), *Der Briefwechsel des Justus Jonas* (Hildesheim, 1964), vol. 1, nos. 54, 65. See discussion in Hans Liermann, "Das kanonische Recht als Gegenstand des gelehrten Unterrichts an den protestantischen Universitaeten Deutschlands in den ersten Jahrhunderten nach der Reformation," *Studia Gratiana* 3 (1955): 539, 543-544.

78. Bucer, *Deutsche Schriften*, 2:154. For comparable arguments by Melanchthon and Erasmus, who both had a strong influence on Bucer in his early years, see MW, 4:8ff., 20ff. and quotations from Erasmus in Maurer, "Reste des kanonischen Rechtes im Frühprotestantismus," 199-214.

79. Wolfgang Capito, *Das die Pfaffhait schuldig sey Burgelichen Ayd zuthün. On verletzung jrer Eeren* (1525), A7, quoted by Steven E. Ozment, *The Reformation in the Cities: The Appeal of Protestantism to Sixteenth Century Germany and Switzerland* (New Haven, CT, 1975), 87. Wenceslaus Linck, *Ob die geystlichen auch schuldig sein Zinsze geschoss, etc. zuebegen und andere gemeyne bürde mt zutragen. Win Sermon auffs Evangelion Mat. 22. Ob sich getzymme Keyser Zinns geben*

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(Aldenburg, 1524); see also Jürgen Lorz, *Das reformatorische Wirken Dr. Wenzelslaus Lincks in Altenburg und Nürnberg* (Nürnberg, 1978).

80. See Ambrosius Blaurer, *Warhafft verantwortung Ambrosij Blaurer, an eynen ersamen/weysen Rat zu Constenz anzaygend/warub es auss dem kloster gewichen, und mit was geding er sich widerumb, hynein begeben wol* (Augsburg, 1523), E1b-E3a. See also discussion in Ozment, *The Reformation in the Cities*, 87-88.

81. Johann Eberlin von Günzburg, *Ein klägliche Klag an den christlichen römischen kayser* (1521), reprinted in Ludwig Enders, ed., *Johann Eberlin von Günzburg, Ausgewählte Schriften* (Halle, 1896), 1:107-131. See also discussion in Bernard Riggenbach, *Johann Eberlin von Günzburg und sein Reformprogram* (Tübingen, 1874); Susan G. Bell, "Johan Eberlin von Günzburg's Wolfaria: The First Protestant Utopia," *Church History* 36 (1967): 122.

82. Excerpts of these statutes are excerpted in Aemilius Ludwig Richter, ed. *Die evangelischen Kirchenordnungen des sechszehnten Jahrhunderts*, repr. ed., 2 vols. (Nieuwkoop, 1967); Emil Sehling, ed., *Die evangelischen Kirchenordnungen des 16. Jahrhunderts* (Leipzig, 1902-1913), vols. 1-5, continued under the same title (Tübingen, 1955-), vols. 6-16.

83. *Reformatio ecclesiarum Hassiae* (1526), art. 29, in Richter, *Kirchenordnungen*, 1:68.

84. *Kercken-ordeninge des ganzen Pamerlandes. . . .* (1535), art. "Van graden in eesaken," in Sehling, *Kirchenordnungen*, 4:328, 331.

85. *Kirchen Ordnung der Stadt Hannover* (1536), reprinted in Richter, *Kirchenordnungen*, 1:273, 276-277.

86. Preface to Small Catechism (1529), in TC, 532-533.

87. See discussion and sources in Steven Ozment, *Protestants: The Birth of a Revolution* (New York, 1992), 89-117.

88. See, e.g., discussion in Ulrich Bubenheimer, "Streit um das Bischofsamt in der Wittenberger Reformation 1521/2. Von der Auseinandersetzung mit den Bischöfen um Priesterehen und den Ablass in Halle zum Modell des evangelischen Gemeindebischofs," *Zeitschrift der Savigny Stiftung (Kan. Ab.)* 104 (1987): 155.

89. See, e.g., comments scattered throughout Martin Bucer, *De Regno Christi* (1550), bk. II and sources and discussion in Ozment, *Protestants*, 89ff.; Witte, "The Civic Seminary," 178ff., 196ff.

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90. Preface of Dr. Martin Luther, *The Smalcald Articles* (1537), reprinted in TC, 453, 459.

91. Quoted with discussion in Theodor Muther, *Aus dem Universitäts- und Gelehrtenleben im Zeitalter der Reformation* (Erlangen, 1866), 190-203; Philip Melanchthon, Melanchthon, *Oratio de vita clarissimi Hieronymi Schurffi* (1556), in G. Bretschneider, ed., *Corpus Reformatorum: Melanchthons Werke*, 29 vols. (Halle, 1864), 12:86 [hereafter CR]. See also Wiebke Schaich-Klose, *D. Hieronymous Schürpf: Leben und Werk des Wittenberger Reformationsjuristen, 1481-1554* (Tübingen, 1967).

92. Hieronymous Schürpf, *Consilia seu responsa* (1559), 1:87, 176, quoted by Köhler, *Luther und die Juristen*, 45.

93. Schürpf, *Consilia*, 1:79, 86, 108, 150, 151.

94. In the late 1510s and early 1520s, Zasius endorsed the evangelical cause, purchased the works of Luther, Melanchthon, and other reformers as late as 1530, and refused the call of the Freiburg faculty to burn Luther's tracts in symbolic retaliation of Luther's burning of the canon law books. See generally Steven W. Rowan, *Ulrich Zasius: A Jurist in the German Renaissance, 1461-1535* (Frankfurt am Main, 1987), 144-149. By the early 1520s, however, Zasius broke with Luther, in part over his views on canon law and marriage, in particular over his defiance of papal authority. "Here I must leave Luther," Zasius wrote at the end of 1522, "for I regard it as safer to remain here with the [Roman Catholic] Church, with its sacred institutions and the doctrines of the doctors." Ulrich Zasius, Letter to Thomas Blaurer, quoted in Rowan, *Ulrich Zasius*, 155. Zasius remained a loyal supporter of his fellow Freiburger Desiderius Erasmus, whose own initial reservations about Luther had hardened into open rejection by the mid-1520s. Ibid., 135-144, 149-162.

95. Ulrich Zasius, Letter of 1520, quoted by Roderich von Stintzing, *Ulrich Zasius: Ein Beitrag zur Geschichte der Rechtswissenschaft im Zeitalter der Reformation* (Basel, 1857), 224. See also discussion in Köhler, *Luther und die Juristen*, 35.

96. Ulrich Zasius to Martin Luther, reprinted in WA BR, vol. 2, No. 336, 182. See other similar quotes from Zasius in Stintzing, *Ulrich Zasius*, 234; Köhler, *Luther und die Juristen*, 35.

97. Ulrich Zasius, Letter to Thomas Blaurer (December 21, 1521), in Schiess, *Briefwechsel der Brüder Ambrosius und Thomas Blaurer*, vol. 1, no. 38.

98. WA Br, vol. 5, No. 100.

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99. *Unterricht der visitatoren an die pfarrherrn im kurfürstenthum zu Sachsen* (1528), Vorrede, reprinted in Sehling, *Kirchenordnungen*, vol. 1/1, 149, 151.

100. *Deudsche messe und ordnung gottis dienst* (1526), Vorrede Martini Luther, reprinted in Sehling, *Kirchenordnungen*, vol. 1/1, 10, 11.

101. WA, vol. 30/3, 206, 208; LW, vol. 46, 267-268. His advice, he said would be bolstered with references to the Bible, the civil law, and "the ancient canons and the best points of the spiritual [i.e., canon] law." Ibid.

102. A statement made by a Wittenberg colleague, Nuntius Vergerio (1535), quoted by Hans Liermann, *Der Jurist und die Kirche: Ausgewählte Kirchenrechtliche Aufsätze und Rechtsgutachten* (München, 1973), 183-184.

103. WA, vol. 31/2, 586-789; Melanchthon, *Loci communes* (1555), chaps. 27, 28, and 34, translated in Clyde L. Manschreck, ed., *Melanchthon on Christian Doctrine* (New York, 1965). Within the vast literature on Lutheran ecclesiology, see esp. Maurer, "Reste des kanonischen Rechtes im Frühprotestantismus," 223ff.; Gertrud Schwanhäusser, *Das Gesetzgebungrecht der evangelischen Kirche unter dem Einfluss des landesherrlichen Kirchenregiments im 16. Jahrhundert* (München, 1967), 15-31; Johannes Heckel, *Initia iuris ecclesiastici Protestantium* (München, 1950), reprinted in Heckel, *Das blinde, undeutliche Wort "Kirche"*, 132-242; Hans Liermann, *Deutsches evangelisches Kirchenrecht* (Stuttgart, 1933); id., *Grundlagen des kirchlichen Verfassungsrecht nach lutherischer Auffassung* (Berlin, 1954); Wilhelm Maurer, "Von Ursprung und Wesen kirchlichen Rechts," *Zeitschrift der evangelischen Kirchenrechts* 5 (1956): 1.

104. See sources and discussion in Harold J. Berman and John Witte, Jr., "The Transformation of Western Legal Philosophy in Lutheran Germany," *Southern California Law Review* 62 (1989): 1573, 1585-1595.

105. See WA, vol. 10/1, 140, where Luther writes: "The [true] church is a thing so deeply hidden that no one can see or know it but can only grasp and believe it in baptism, the Lord's Supper, and the Word." See similar sentiments in ibid., vol. 1, 639; 9, 196 and discussion in Martin Heckel, "Rechttheologie Luthers," in id., *Gesammelte Schriften: Staat, Kirche, Recht, Geschichte*, 2 vols. (Tübingen, 1989), 1:324, 327ff.

106. *Augsburg Apology*, Arts. 7/8. The Apology cites the canon law in support of this proposition: "And the Decretum of Gratian says that the Church in its wide sense embraces good and evil; likewise, that the wicked are in the Church only in

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name, not in fact; but that the good are in the Church both in fact and in name." Ibid., TC, 229.

107. See esp. *Augsburg Apology* Arts. 7/8 ("Of the Church"), in TC, 227ff., Art. 18 ("Of Free Will"); Melanchthon, *Loci communes* (1555), chap. 5 ("Of Human Strength and Free Will"), chap. 29 ("Of the Church").

108. *Augsburg Apology*, Art. 18, in TC 335-337. See also Melanchthon, *Loci communes* (1555), 306: "There are various grades and kinds of customs [i.e., laws]. Some are commanded by God [through] divine law. Some are for worldly authority, to establish general peace or morality. . . . Some are external manners and rules concerning special days and exercises [of worship] such as a bishop might order. . . . These human ceremonies . . . are serviceable in an external sense for discipline, for teaching, for guiding, for introducing virtue. But we should be careful about how highly we esteem them." Melanchthon went on to list "errors which the papists enact into their laws," especially their view that "compliance with these traditions merits forgiveness of sins." Ibid., 258, 308-309.

109. [Johannes Brenz,] *Kirchen Ordnung. In meiner genedigen Herrn der Margraven zu Brandenburg* (Nürnberg, 1533), Vorrede, in Richter, *Kirchenorndungen*, 1:176, 177. See also Schwanhäusser, *Das Gesetzgebungrecht*, 61ff.

110. See, e.g., Melanchthon, *Loci communes* (1555), 257, 307-8 and discussion of Luther in Paul Althaus, *The Theology of Martin Luther*, trans. Robert C. Schultz (Philadelphia, PA, 1966), 335ff.

111. *Augsburg Apology*, Art. 14 in TC 315; see also Art. 15, in TC, 319 ("Of Human Traditions in the Church"): "No tradition was instituted by the holy Fathers with the design that it should merit the forgiveness of sins, or righteousnesss, but they have been instituted for the sake of good order in the Church and for the sake of tranquility."

112. Ibid., Art. 15, in TC, 325. True to its teachings, the Apology cited the canon law thirteen times in support of its arguments. See esp. Arts. 7/8, 12, 23, with discussion in Heckel, "Das Decretum Gratiani," 517-519; Jaroslav Pelikan, "'Verius servamus canones'. Church Law and Divine Law in the Apology of the Augsburg Confession," in *Studia Gratiana* 11 (1967): 367-388.

113. See Philip Melanchthon, *Sententiae veterum aliquot scriptorum de coena domini*, in CR, vol. 23, 733-752, at 745.

114. WA, vol. 30/2, 219. Luther continued, however: "[H]ow different is the church that followed, especially the Roman [Catholic Church]. . . . Gratian, either more fawningly than those popes who converted the church into tyranny, or more

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obsequiously than was fitting, either kept pristine the best sayings and decrees of the Fathers, or turned them over to the mad judgment of the popes, motivated (apparently) by a pious intention, but setting a most foul example." See also WA TR 5, 6483: "Gratian, a man learned in the law, held this as his singular pursuit and as the final cause of the *Decretum*, that he might be able to reconcile canons and find the mean between good and bad canons. He meant well, but it happened to him that he rejected the better and approved the worse, because he . . . was terrified by the glossator who said this is not to be held because it is contrary to the pope." Similar sentiments appear in ibid., 6480-82; WA TR 3, 3877; WA TR 4, 4062; WA TR 6, 7023.

115. Lazarus Spengler, *Ain kurtzer Begriff vnd Underrichtung ains gantzen wahrhafften Christlichen wesens* (Wittenberg, 1522).

116. Lazarus Spengler, *Ein kurtzer auszug auss den Babstlichen recht der Dekret und Decretalen / Inn denn artickeln die ungeverlich Gottes wort un dem Evangelio gemetz seind/oder zum wenigstens nit wider streben* (Nürnberg, 1530)

117. Ibid., Aiii-Aiv.

118. From *Decretum*, Part I, Dist. VIII-XIII, XVIII, XX, XXI, XXIII, XXIIII, XXVI, XXVIII, XXXI, XXXII, XXXV-XXXVIII, XL, XLI, XLIII-XLVII, XLIX, LXIII, LXXIX, LXXXI-LXXXV, LXXXVII, LXXXVIII, LXXXX, LXXXXV, LXXXXVI. From *Decretum*, Part II, Causae I-III, V, VII, VIII, X-XIII, XVI, XXI-XXVII, XXX, XXXII, XXXIIII, Dist. I-III (Tractatus de Poenitentia), Causa XXXV. From *Decretum*, Part III, Dist. I-V.

119. C.XXVII-C.XXXVI; see Friedberg, *Corpus Iuris Canonici*, vol. 1, cols. 1050-1158, 1246-1292.

120. C. 27, q. 1; C. 30, q. 5; C. 32, q. 4; C. 33, q. 2. See further Witte, *From Sacrament to Contract*, chap. 2.

121. From the *Decretales*, the following titles: De consuetudine; De electione et electi potestate; De aetate et qualitate; De officio iudicis ordinarii; De truega et pace; De pactis; De procuratoribus; De Iureiurando; De vita et honestate clericorum; De cohabitione clericorum et mulierum; De censibus; De immunitate ecclesiarum; Ne clerici vel monarchi; Qui filii sint legitimi; De simonia; De magistris; De crimine falsi; De poenis; De poenitentiis et remissionibus; De regulis iuris.

122. Ibid., Jiiii-Kiiii.

123. Harold J. Grimm, *Lazarus Spengler: A Lay Leader of the Reformation* (Columbus, OH, 1978), 143.

124. Wittenberg edition, cited in note 9, at Aiii.

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125. Martin Luther, *Concerning Rebaptism* (1528; repr. 1531), in WA, vol. 26, 147-148; LW, vol. 40, 231-232.

126. Quoted by Schäfer, "Die Geltung des kanonischen Rechts," 187.

127. Richter, *Kirchenordnungen*, 2:56. See also discussion in Justus Henning Böhmer, *Jus ecclesiasticum protestantium,* 2d ed. (Halle, 1720), bk. 1, tit. 2, S. 61 and Schäfer, "Die Geltung des kanonischen Rechts," 187-188.

128. Joachim a Beust, *Tractatus de iure connubiorum et dotium ad praxin forensem accommodatus iudicibus tam ecclesiasticis, quam secularibus, nec non causarum patronis in utroq foro verstandibus apprime utlilis et necessarius praetera . . . tam iuris canonici et civilis, quam theologiae ordanatus atq* (Francforti ad moenum excudebat spies, 1591). Among canonists, Beust cited most frequently to Gratian, Hostiensis, Johannes Andreae, Paulus de Castro, Angelus Aretinus, Antonius Rosellus, Innocent III, Innocent IV, Johannes de Imola, and Lucas de Penna.

129. See sources cited in notes 9, 49, 62, 70, 76, 102, 103, and 127.

130. See sources and discussion in Berman and Witte, The Transformation of Western Legal Philosophy," 1602-1611.

131. CR, vol. 11, 69-70; vol. 21, 1011.

132. Ibid., vol. 16, 230; vol. 22, 611-612.

133. Ibid., vol. 16, 87, 615.

134. See secondary sources in Berman and Witte, "Transformation," 1611-1635.

135. CR, vol. 16, 85-105, vol. 22, 615-617

136. See Sidney Z. Ehler and John B. Morrall, eds., *Church and State Through the Centuries: A Collection of Historic Documents with Commentaries* (Westminster, MD, 1954), 164, 189.

137. CR, vol. 22, 610.

138. See esp. *Loci Communes* (1555), at 97-122. See also CR, vol. 12, 23; vol. 16, 70; vol. 21, 294-296, 387-392.

139. CR, vol. 11, 921-922. See discussion in Guido Kisch, *Melanchthons Rechts- und Soziallehre* (Berlin, 1967), 116-156 and a collection of Melanchthon's legal writings in ibid., 189-300.

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140. See generally Kisch, *Melanchthons Rechts- und Soziallehre*, 127ff. and 150-151n.

141. Melanchthon, *Loci Communes* (1555), 306.

142. See sources and discussion in Schäfer, "Die Geltung des kanonischen Rechts," 215ff.

143. Ibid. Quotes are from Melanchthon, *Loci Communes* (1555), 309 and CR, 16:118 respectively.

144. See generally Guido Kisch, "Melanchthon and die Juristen seiner Zeit," *Melanges Philippe Meylan* (Lausanne, 1963), 135ff.; id., *Melanchthons Rechts- und Soziallehre*, 51-76; Otto Krause, *Naturrechtslehrer des 16. Jahrhunderts. Ihre Bedeutung für die Entwicklung eines natürlichen Privatrechts* (Frankfurt am Main, 1982).

145. See Wolter, *Ius canonicum in iure civili*, 62.

146. *Ein kurtzer Auszuge* (Nürnberg edition), Aiii.

147. Ibid., Aiii.b.

148. See quotes in Schäfer, "Die Geltung des kanonischen Rechts," 203-208; Wolter, *Ius canonicum in iure civili*, 59-64.

149. Quoted by ibid., 62.

150. Eberhard von der Weihe, quoted in Schäfer, "Die Geltung des kanonischen Rechts," 208.

151. Jacob Omphalius, *De civilia politica libri tres* (Köln, 1563), cap. 17, n. 39.

152. Schürpf, *Consilia* (Basel, 1582), cons. 71, no. 18 and 20.

153. Quoted in Köhler, *Luther und die Juristen*, 36-37.

154. Melchior Kling, *Matrimonialium causaru tractatus, methodico ordine scriptus* (Franc. apud Chr. Egenolphum, 1543).

155. Ibid., proemium, A2-A3.

156. In this 44 folio page tract, Kling cited Hostiensis 14 times, Panormitanus 31 times, and Johannes Andreae 6 times.

157. *Clarissimi iureconsulti D. Melchioris Kling, Vitembergis Academiae Ordinarii Professoris, In praecipuos, & eos qui ad usum forensum prae caeteris faciunt. Secundi libri, Antiquarum Decretalium Titulos Commentaria* (Francforti apud Chr. Egnolphum, 1550).

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158. Jacob Spiegel, *Lexicon iuris civilis*, bound with *Quae Lexicon huic postrema editione recens arcessere* (Basel, apud Joan. Hervagium, 1554), col. 210, quoted by Merzbacher, "Johann Oldendorp und das kanonischen Recht," in Siegfried Grundmann, ed., *Fur Kirche und Recht: Festschrift für Joh. Heckel* (Köln, 1959), 223n.

159. Johann Oldendorp, *Lexicon Iuris* (Francforti, apud Chr. Egenolphum, 1553).

160. Johann Oldendorp, *Collatio iuris civilis et canonici, maximam afferens boni et aequi cognitationem* (Köln, 1541).

161. Johann Oldendorp, *Topicorum Legalium* (Marburg, 1545), in id., *Opera* (Basel, 1559), 1:83-256.

162. In his *Lexicon juris*, for example, which is quite spare on cites throughout, Oldendorp does mention the *Decretum* (58b, 248b.), the Four Doctors (286a, 73a, 242b, 415a), Hostiensis (203a), Gratian (194), Joannes Andreae (194), and Panormitanus (203b, 245).

163. See Oldendorp, *Collatio*, 38-40, 46-48, 77-79; *Lexicon Iuris*, 138-139, with further discussion of other sources in Merzbacher, "Johann Oldendorp und das kanonischen Recht," 235-240.

164. *Consiliorum et responsorum doctorum et professorum facultatis juridicae in academia Marpurgensi, vol. I, congestum studio atque opera Hermanni Vulteji* (Marburg, 1606), vol. 1, p. 11, consilium V, n. 23.

165. See Hans Liermann, "Das kanonische Recht als Gegenstand des gelehrten Unterrichts."

166. See discussion in Witte, *From Sacrament to Contract*, chap. 2; Udo Wolter, "Die Fortgeltung des kanonischen Rechts," 19n.

167. Stintzing, *Geschichte der deutschen Rechtswissenschaft*, 281.

168. Ibid.; Liermann, "Das kanonischen Recht als Gegenstand," 548.

169. See Liermann, *Der Jurist und die Recht*, 116; Burmeister, *Das Studium der Rechte*, 56.

170. See, e.g., the following ratios of canon law to civil law chairs at selected German universities (as prescribed by statute): Frankfurt an der Oder (1541): 1/3; Heidelberg (1558): 1/3; Jena (1558): 1/2; Leipzig (1555): 1/2; Rostock (1549): 1/3; Tübingen (1535): 1/5. See Stintzing, *Geschichte der*

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deutschen Rechtswissenschaft,280ff., Burmeister, *Das Studium der Rechte*, 73ff., Liermann, *Der Jurist und die Recht*, 116ff.

171. WA TR 2, No. 2496b (1532) and WA TR 4, No. 4382b (1543). See also WA, TR, 6, No. 7011, 7022, 7023, 7024, and discussion in Gerald Strauss, Gerald Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany* (Princeton, NJ, 1986), 217-218.

172. See sources cited in notes 9, 49, 62, 70, 76, 102, 103, and 127.

173. Pelikan, *Spirit versus Structure*, 5.

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