

Luther's Attitude Toward the Legal Traditions of His Time

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Questions of law confronted Luther at every turn. As an accused heretic, for example, he became the target of legal proceedings that were instituted either by Rome or the imperial government, and he defended himself with the advice of the Saxon government and its lawyers. More relevant to the theme of Luther's ethics in church and politics, however, is that throughout his entire career as a theologian and pastor he had to deal with problems posed by the codes of law that were in force in the church and state of his day. Unlike the *Causa Lutheri*, which has been much studied,¹ Luther attitude toward the law codes of his time has attracted surprisingly little attention from scholars. It is the topic to be addressed here.² The aim will be to explain Luther's view of the appropriate use of law in church and society without exploring in detail his views on any particular legal issue, such as usury or resistance to authority. In due course, however, it will become necessary to deal with certain aspects of Luther's view of marriage. As we shall see, the consistent element in all of Luther's utterances on the legal traditions of his time was his preoccupation with the relationship between law and conscience.

1 See especially Wilhelm BORTH: *Die Luthersache (Causa Lutheri) 1517-1524: die Anfänge der Reformation als Frage von Politik und Recht*. Lübeck; HH 1970. See also Armin KOHNLE: *Reichstag und Reformation: kaiserliche und ständische Religionspolitik von den Anfängen der Causa Lutheri bis zum Nürnberger Religionsfrieden*. GÜ 2001, chapters 1-3.

2 Much of the material dealt with in this paper has also been discussed by Gerald STRAUSS: *Law, resistance, and the state: the opposition to Roman law in Reformation Germany*. Princeton 1986, 191-224. Despite the rich array of primary and secondary sources cited, Strauss fails to make coherent sense of Luther's utterances on the subject of law. While I cannot here confront Strauss's argument directly, I shall implicitly take issue with his view that Luther was guilty of an »ambiguity« and »inconsistency« that »must have« undermined respect for the very law to which he demanded »unconditional obedience«. For a detailed analysis of the flaws in Strauss's argument, see Gottfried G. KRODEL: *Luther and the opposition to Roman law in Germany*. LuJ 58 (1991), 13-42.

I The Legal Traditions in Question

Of the codes of law that Luther had to deal with, the two most important were Roman law, the »Corpus Iuris Civilis«, and canon law, the »Corpus Iuris Canonici«. The two together constituted the »common law« (*jus commune*) of the Holy Roman Empire and were the basis of the teaching of law in German universities.³ Important here is that canon law was not just the law of the church but rather a long-established, much revered, and highly useful complement to civil law in the adjudication of civil cases.⁴ Then there were the various versions of Germanic law that were struggling to hold their own against the encroachments of the centralizing Roman law that was favoured by ambitious governments and their lawyers.⁵ Finally, there was Mosaic law, which some individuals and groups argued should take precedence over all others in a Christian society. The criteria by which Luther judged these legal codes and the obedience owed them were, first, divine law as recorded in Scripture, and second, natural law (that sense of right and wrong which God has implanted in all human beings and is most succinctly summarized in the Decalogue). Although Luther had important things to say about all the legal traditions of his day, he had by far the most to say about canon law, which means that in the pages that follow it will receive more attention than the others. But before

3 »Common law« in the sense of the common system of law for the Empire, the provisions of which applied directly to all cases not governed by a local statute, custom, or privilege.

4 It was for this reason that, as we shall see in more detail below, evangelical jurists would stubbornly and successfully fight for the retention of much of canon law in the territories that adhered to the Reformation. It could not simply be thrown out without leaving huge gaps in law and legal procedure; see John WITTE, Jr.: *Law and Protestantism: the legal teachings of the Lutheran Reformation*. Cambridge 2002, 65-85; Rolf LIEBERWIRTH: *Martin Luthers Kritik am Recht und an den Juristen*. In: *Martin Luther und seine Universität: Vorträge anlässlich des 450. Todestages des Reformators*/hrsg. von Heiner Lück. Köln; Weimar; W 1998, 53-72, here 65-67; Karl KÖHLER: *Luther und die Juristen: zur Frage nach dem gegenseitigen Verhältniß des Rechtes und der Sittlichkeit*. Gotha 1873, 34-36.

5 On the »reception« of Roman law and its integration into the German legal system alongside traditional Germanic law read in the light Roman law, see Strauss: *Law, resistance, and the state*, chapter 3; Isabelle DEFLERS: *Lex und ordo: eine rechtshistorische Untersuchung der Rechtsauffassung Melanchthons*. B 2005, 108-119.

discussing Luther's approach to any particular legal tradition, it is necessary to say something about his attitude toward law in general. That is at least as important as his attitude toward any particular law code.

II Luther's Attitude Toward Law in General

The earliest and most persistent element in Luther's attitude toward law was his belief that, in both church and state, laws should be enforced in conformity with the concept of »epieikeia« (aequitas, Billigkeit), which he had learned from Aristotle (384-322), the New Testament, and the works of the late-medieval conciliarists. The idea was that, since laws cannot be framed to cover all cases and problems, the severity of the law should be moderated, or indeed that the law should be set aside, if due consideration of the circumstances indicated that reason, justice, and humanity would best be served by so doing. We find Luther making the case for epieikeia as early as the »Dictata super Psalterium« of 1513-1515⁶ and as late as February 1546, in one of the last of the entries in the »Tischreden«.⁷ During the intervening years he was wont to take advantage of any opportunity to advocate this approach to the enforcement of law. There is, for example, a fine discussion of it in Part III of the treatise »Secular authority: to what extent it should be obeyed« (1523), even though in this particular case the word epieikeia (or its equivalents) is not used:

»[...] no matter how good and equitable the laws are, they all make an exception in the case of necessity, in the face of which they cannot insist upon being strictly enforced. Therefore, a prince must have the law as firmly in hand as the sword, and determine in his own mind when and where the law is to be applied strictly or with moderation, so that law may prevail at all times and in all cases, and reason may be the highest law and the master of all administration of law. [...] [It is not] sufficiently praiseworthy merely to follow the written law or the opinions of jurists. There is more to it than that.«⁸

To be able to do this properly, the prince will have to pray for wisdom, heed God's word, be wary of the influence of »the high and mighty and of

⁶ WA 4, 323, 20-35 ≅ 55 II, 916, 734-750.

⁷ WA TR 6, 345 f (7031).

⁸ LW 4, 118 f ≅ WA II, 272, 11-24.

flatterers“, place love and natural law above the content of law books, and thus be able to apply »untrammled reason and unfettered judgment« to the just and equitable treatment of his subjects.⁹

While his intellectual formation as a theologian had thus taught Luther that good laws need to be enforced with wisdom and discretion, his conflict with ecclesiastical and civil authority from 1517 through 1521 taught him that bad laws might have to be resisted in the defence of truth and justice, and in the responsible exercise of a clergyman's pastoral duty. In his famous speech before Emperor Charles and the assembled estates at the Diet of Worms in April 1521, there is a brief passage that has attracted less notice than the much-cited »Here I stand« peroration at the end:

»Another group of my books attacks the papacy and the affairs of the papists as those who [...] have laid waste the Christian world with evil that affects the spirit and the body. For no one can deny [...] *that through the decrees of the pope and the doctrines of men the consciences of the faithful have been most miserably entangled, tortured, and torn to pieces.* [...]. If, therefore, I should have retracted these writings, I should have done nothing other than to have added strength to this tyranny and I should have opened not only windows but doors to such great godlessness.«¹⁰

The immediate target of this outburst was the law of the church, canon law, a subject to be dealt with at length below. For the moment, however, the topic under investigation is still Luther's attitude toward law in general.

In the prolonged conflict with the defenders of the indulgence traffic and of papal absolutism, Luther had to do battle not only with scholastic theology but also with a body of ecclesiastical law which, in his view,

⁹ LW 45, 119-129 ≙ WA 11, 273-280; see also WA 6, 166, 32-37 (Confitendi ratio, 1520); WA 8, 662, 1 - 663, 2 (De votis monasticis M. Lutheri iudicium, 1521); 19, 632, 8-16 (Ob Kriegsleute auch in seligem Stande sein können); WA 25, 58, 28 - 60, 26 (Annotationes Lutheri in epistolam Pauli ad Titum, 1527); WA 51, 352, 20-26 (An die Pfarrherrn, wider den Wucher zu predigen, 1540). As an example of the need for such wise and pious jurisprudence Luther cited the judicial aftermath of the Peasants' War, in which those who had become involved in the rebellion against their will had been executed according to the strict letter of the law along with those who had been guilty of deliberate and intentional rebellion. This, he said, was a case in which the law ought to have yielded to justice; instead, a great injustice was done to many people and innocent blood was shed; WA 19, 630, 28 - 631, 7.

¹⁰ LW 32, 110 ≙ WA 7, 833, 8-13. 17-19 (Verhandlungen mit D. M. Luther auf dem Reichstage zu Worms, 1521); emphasis added.

required Christians to believe and to do things that God himself did not require Christians to believe or to do, or that God had in fact forbidden them to believe or to do. The residue of this experience was an abiding sense of the great propensity of human laws, ecclesiastical no less than secular, to be so at variance with divine law or natural justice as to inflict oppressive burdens and intolerable injuries on human consciences.¹¹

The first product of this experience of the destructive potential of law was Luther's strategy for reform, which was marked by an acute anxiety that he not be guilty of erecting a new tyranny over consciences to replace the old one.¹² Hence his famous insistence, classically formulated in the *Invocavit Sermons* of 1522, that at the outset one should make no more reforms than were absolutely necessary and postpone more basic reforms until the instruction of the people from the word had prepared their con-

¹¹ Few key words occur more often in Luther's writings, including those on law, than does »conscience« (*conscientia*, *das Gewissen*). It is a word that Luther does not trouble himself to define carefully, preferring to describe what conscience does rather than to offer precise definitions of what it is. Common to virtually all conceptions of conscience since classical antiquity, including Luther's, is the idea that it is the faculty of the soul (or mind) with which one observes one's self and renders moral judgements on one's own behaviour. According to St. Paul (R 2, 14f), even the heathen have this faculty by virtue of an innate, though vitiated, knowledge of natural law on the basis of which their consciences either accuse or excuse them. But Luther, less interested in consciences generally than in Christian consciences specifically, treats conscience as the forum in which the Christian hears, simultaneously, God's word in the form of the law, which condemns and terrifies, and the gospel, which liberates and consoles. »Das Gesetz bedrängt das Gewissen durch die Sünden, das Evangelium aber macht es frei und schenkt ihm Frieden durch den Glauben an Christus«; WA 56, 424, 16f. Because the action of conscience is both rational and emotional, Luther often equates »conscience« with »mind«, »spirit«, or »heart«. A conscience »captive to Word of God«, as Luther described his own conscience at Worms (WA 7, 835, 6-8), is one that is aware of the Christian's duty to obey God's law rather than human law. Luther knows nothing of the modern idea of conscience as an autonomous source of religious truth. Moreover, a free conscience is for Luther one freed from dependence on works and, consequently, free to live in a trusting relationship with God through faith. Although he acknowledges that erring consciences have rights that must (within limits) be respected, he knows nothing of »freedom of conscience« in the sense of an inalienable right to worship (or not) as one chooses; see Friedhelm KRÜGER: *Gewissen. III: Mittelalter und Reformationszeit. 2: Reformation*. TRE 13 (1984), 222-225.

¹² This point is particularly well made by Scott HENDRIX: *Luther and the papacy: stages in a Reformation conflict*. Phil 1981, 138f.

sciences to accept changes without fear or compunction.¹³ Hence also his insistent emphasis on Christian freedom in all externals not prescribed by divine law and his anxiety lest anyone think that the ceremonies and usages adopted in Wittenberg were in any way binding on Christians in other communities. External ceremonies, and the rules and regulations governing them, should, he said, be freely chosen and voluntarily submitted to by the communities affected.¹⁴

It was from this perspective that in 1523 Luther defended the right and duty of small communities to enact their own reforms in cases where the established authorities either could not or would not do so.¹⁵ More important in the long run, however, was Luther's advice on how larger communities or territories should arrive at a common church order. The advice he gave is often taken as an example of Luther's shortcomings as an ecclesiastical organizer but is really an example of his preference for freedom over law. To the German-speaking community in Livonia, for example, he recommended in 1525 that their pastors should »get together in a friendly way and come to a common decision« about external ceremonies, thus establishing »one uniform practice«.¹⁶ Once this was done, they would have to »instruct the people lest they [commit the old papist error of regarding] such uniform practices as divinely appointed and absolutely binding laws«, the observance of which would contribute to their salvation, rather than viewing them simply as »useful and necessary [measures] for governing the people externally«. Even more instructive on this point is Luther's reaction to the effort of Landgrave Philip of Hessen (1504, 1518-1567) to impose an evangelical church order in his domains.

Landgrave Philip was the first Lutheran prince to act in response to the view of evangelical jurists that the recess of the Diet of Speyer in 1526 had established the right of the territorial princes to impose in

13 WA 10 III, 1-64 (Acht Sermonen D. M. Luthers von ihm gepredigt zu Wittenberg in der Fasten [Invokavitpredigten vom 9.-16. März 1522]).

14 WA 12, 218, 33 - 219, 7; 19, 72, 1-24.

15 WA 11, 408-416 (Das eine christliche Versammlung ... Macht habe, alle Lehre ..., 1523).

16 LW 53, 45-50 $\cong$ WA 18, 417-421 (Eine christliche Vermahnung vom äußerlichen Gottesdienst und Eintracht an die in Livland); cf. the treatise »De instituendis ministris ecclesiae ad senatum Pragensem Bohemiae« (1523), where Luther gives the same advice to the clergy in Bohemia; WA 12, 193, 22 - 194, 20.

their territory an ecclesiastical order that would be valid at least until a general council.¹⁷ The result was the »Reformatio ecclesiarum Hassiae«, which was adopted by the so-called synod of Homberg in October 1526 and quickly sent by the landgrave to Luther for his opinion.¹⁸ In his reply to the landgrave, dated 7 January 1527,¹⁹ Luther strongly advised that the »Reformatio« not be published »at this time«. In so doing he advanced no objection to the doctrines enumerated, eminently Lutheran all of them, or to the congregational-synodal polity prescribed, which was hardly objectionable even though it was not the wave of the future for German Lutheranism. Nor, indeed, did Luther object because the prince was taking the initiative in church reform. Instead, his complaint was that the »Reformatio« was »ein hauffen gesetze«, a great heap of laws whose enactment the Wittenberg theologians would not have dared to recommend in Saxony (where the Reformation was already much further advanced than it was in Hessen).

As Luther saw it, the »Reformatio« was an attempt prematurely to impose a uniform and highly detailed order on a territory in which there had still not been any communal reformation to speak of. He took the view that such enactments should be the culmination of a piecemeal process of law-making, not its beginning, and he pointed to the example of Moses, whose law code, he said, was for the most part a codification and harmonization of laws already long in force among the people of Israel. Experience has shown, he continued, that there is a great gulf between prescription and performance and that, if laws are made too early, in advance of practice and custom, they remain abstract thoughts about how things ought to be and do not really take root among the people and do not lend themselves readily to needed correction.

17 The recess declared that, with respect to the enforcement of the Edict of Worms (1521), the estates of the Empire would conduct themselves »wie ein jeder solches gegen Gott und kaiserliche Majestät hofft und vertraut zu verantworten«; Walch2 16, 210.

18 Text of the Reformatio in DIE EVANGELISCHEN KIRCHENORDNUNGEN DES SECHSZEHNTEN JAHRHUNDERTS/ hrsg. von Aemilius Ludwig Richter. Nachdruck der Ausgabe Weimar 1846. Nieuwkoop 1967, 56-59; see also Gerhard MÜLLER: Franz Lambert von Avignon und die Reformation in Hessen. Marburg 1958, 33-52.

19 WA Br 4, 157f (1071).

»For truly, making law is a big, risky, complicated business, and without the spirit of God no good will come of it. Therefore one must proceed with fear and humility before God, following these principles: brief and good, few and well made, gradually and always to the point.«²⁰

This, said Luther, has been the experience of all lawgivers, including Moses, Christ, the Romans, and the popes. So the proper starting point in Hessen should be for the landgrave to see to it that local parishes and schools are provided with »good people«, who might be provided with brief and clear instructions about how to proceed. But it would be even better if »one, three, six, [or] nine« pastors were to make a start by agreeing to common practice on »three, five, [or] six matters« and continue in this fashion until all the pastors had agreed to adhere to a common order that could be written down in »a small booklet«. This procedure would lead to a result far more tailored to real needs and would thus be much easier to maintain in practice and to correct as needed. This, as Luther did not say directly, is what had happened in Saxony and should now happen in Hessen.

By the time Luther wrote this endorsement of law-making as the gradual process of introducing and harmonizing practices voluntarily agreed to, events in Saxony were already teaching him how difficult it was to achieve the desired voluntary agreement on a common church order. By the autumn of 1525 the Reformation had established itself in the vast majority of the leading communities in the elector's domains and, in the process, had produced a great deal of confusion and disorder in preaching, public worship, and church finances.

Seeing this, Luther decided that, for the sake of good order and effective ministry, a visitation of the parishes was needed to impose a common order in the territory. Since the evangelical church in Saxony had no bishop of its own to undertake such a visitation, Luther appealed to the elector »as Christian brother« to establish a commission that would

²⁰ WA Br 4, 158, 33-36 (1071). Here, as in all other instances where the LW text is not cited, the translation is my own. The German of this passage is difficult, particularly in the second sentence: »Es ist fur war gesetz machen ein gros, ferlich, weitleufftig ding, vnd on Gotts geist wird nichts gutts draus. Darumb ist mit furcht vnd demut fur gott hie zu faren, Vnd diese mas zu halten: kurtz vnd gut, Wenig vnd wol, Sachte vnd ymer an.« The WA editors interpret »Sachte vnd ymer an« as »nicht zu hastig und stetig fort«.

undertake the episcopal office of visitation of the parishes. A year later, in the wake of the recess of the Diet of Speyer already mentioned, the elector agreed and the visitors began their work in the summer of 1527.

In his justification of this procedure – the introduction to the edition of the Saxon Visitation Articles published in 1528 – Luther, true to form, emphasized that neither he nor the other visitors had the authority to »issue any strict commands, as if [they] were publishing a new form of papal decrees«. At the same time, however, he emphasized that pastors who did not »willingly, without any compulsion« subject themselves to the visitation could expect the elector, as guardian of public peace and order, to »constrain them to preserve unity in teaching and faith«, just as the emperor Constantine had done in his day.²¹ What this reveals is that, by the end of the 1520s, Luther's desire for Christian freedom in externals and his dislike of legalism were coming into conflict with the need for good laws and decent order that the rapid and unregulated spread of the Reformation had created.²² In other words, Luther's emphasis on the defence of Christian freedom against the oppressive burden of papal law was giving way to an emphasis on the need to discipline evangelical freedom with good laws and wholesome order administered by ecclesiastical officials who were entitled to obedience. As a result, he would in the 1530s speak somewhat differently about law and government in church and state than he had up to that point. But before considering that development, it is necessary to go back to the beginning to consider, one by one, Luther's attitude toward the specific legal traditions of his time.

III Luther and Mosaic Law

Of the codes of law to which Luther had to address himself, the law of Moses can be dealt with most quickly and easily. In the early years of the Reformation there were, in Saxony and elsewhere, some who urged

²¹ LW 40, 269-273 ≙ WA 26, 195-201.

²² This tension is reflected in the Large Catechism (1529), where Luther explains at some length that the divine commandment to participate in the Sacrament of the Altar has to be observed without resorting to force or compulsion, »lest we institute a new slaughter of souls«; see *THE BOOK OF CONCORD: the Confessions of the Lutheran Church*/ ed. by Robert Kolb; Timothy J. Wengert. MP 2000, 471f (§§ 40-52); German and Latin texts see BSLK, 716, 1 - 718, 35.

that »heathen law«, particularly Roman law, should give way to Mosaic law, or at least contain nothing contrary to it. Among these were Thomas Müntzer (ca. 1489-1525), the pamphleteer Eberlin von Günzburg (ca. 1470-1533), and possibly Andreas Bodenstein aus Karlstadt (1486-1541).²³ In 1524, when Duke John the Steadfast, soon to be Elector John (1468, 1525-1532), seriously proposed introducing such a radical measure into Saxony, Luther had to contribute private letters and memoranda to the (successful) effort to dissuade him from doing so.²⁴

In August of the following year, Luther addressed the subject publicly in a sermon that was published under the title »How Christians should regard Moses«.²⁵ Luther's view was that, just as the fallen world could not be governed by the gospel, so the Germany of his day could not be governed by the »dead and gone« law of ancient Israel. The law of Moses, said Luther, was given to the Jews alone and not to the Gentiles, who were deliberately excluded. It is therefore not binding on Christians except in so far as it happens to agree with the New Testament or with natural law (as in the Decalogue), which has been given to the Gentiles as well as to the Jews. Mosaic law was, to be sure, God's word, but it was God's word for the Jews alone in ancient Israel and not for anyone else. Christians should obey the laws established by their own governments in the exercise of the authority over secular life that God has given them. One can, to be sure, find in Moses examples of good law-making and voluntarily imitate them. From time to time Luther himself sought guidance from Mosaic law, as,

23 Lieberwirth: *Martin Luthers Kritik ...*, 62f. The charge that Karlstadt argued for the replacement of civil law (the Justinian code) by Mosaic law was made by Melanchthon in texts that date from after 1530. But no such argument can be found in Karlstadt's own writings, and there are good reasons to doubt that he ever argued the position attributed to him by Melanchthon; see Ulrich BUBENHEIMER: *Consonantia Theologiae et Iurisprudentiae: Andreas Bodenstein von Karlstadt als Theologe und Jurist zwischen Scholastik und Reformation*. Tü 1977, 246-250.

24 WA Br 3, 254, 21-27 (720), Luther to Spalatin, 14 March 1524; 306, 4 - 307, 32 (753), Luther to Duke John Frederick, 18 June 1524.

25 Martin LUTHER: *Eine Unterrichtung, wie sich die Christen in Mose sollen schicken*; WA 16, 363-393; see also WA Br 3, 484, 1 - 485, 14 (861), Luther to the City Council in Danzig, 5 (7?) May 1525; and cf. WA 18, 67-84 (the section of the treatise »Wider die himmlischen Propheten, ...« entitled »Von den Bildstürmen«).

for example, in its rules governing marriage,²⁶ but he did not in the process attribute to it binding force for Christians. This remained Luther's position for the rest of his life.²⁷

IV Luther and Secular Law in the 1520s

In the 1520s, the most significant expression of Luther's attitude toward secular law was his identification of a long list of clerical abuses as violations of it (because they constituted »robbery and theft«) and his insistence that popes, bishops, or any other clergymen found guilty of such violations were liable to appropriate punishment by the secular authorities. God, he said, has given secular government complete authority over such matters, which means that canon law's claims of clerical privilege are contrary to Scripture and reason and thus entirely bogus.²⁸ Apart from this, Luther's direct comments on secular law in these early years are not plentiful. When he does comment, it is to side, in rather general terms, with those who object to the wholesale reception of Roman law at the expense of local Germanic law. In the address »To the Christian nobility of the German nation concerning the reform of the Christian estates«, for example, he observes that »secular law [...] has become a [veritable] wilderness! Though it is much better, wiser, and more honest than the spiritual [i. e., canon] law [...] *there is far too much of it.*« Wise rulers aided by Holy Scripture ought to be law enough. It would be best, moreover, if »territorial laws and customs« were to take precedence over »general imperial laws«, for »brief laws« suitable to a people's »peculiar character« are better than »rambling and farfetched laws« that »burden the people« and are more of a hindrance than a help to the settlement of cases. That said, Luther defers to the judgement of those who have

26 As, for example, the treatise »Von Ehesachen«, 1530; WA 30 III, 214, 15 - 215, 14; 225, 10 - 227, 7; 232, 24-28; 241, 4-10.

27 The idea that Mosaic law should replace established law did not entirely die out. In 1542 Luther once again found it necessary to state his opposition to it and to insist on the Christian's duty to obey the established imperial and territorial laws. Lieberwirth: *Martin Luthers Kritik ...*, 64, citing WA TR 6, 127f (6693).

28 See James M. ESTES: *Peace, order, and the glory of God: secular authority and the church in the thought of Luther and Melancthon*, 1518-1559. Leiden 2005, 10-14. 22f.

given more attention to this problem than he has been able to do.²⁹ By 1530, however, Luther – having witnessed the Peasants’ Revolt, with its denunciation of »new laws« and its demand for customary law – will have thought more about the matter and will have kinder things to say about Roman law as well as harsher things about Germanic law. Meanwhile, he had been devoting much attention to canon law.

V Luther on Canon Law

Strictly speaking, the category »canon law« includes any enactment of ecclesiastical authority that has acquired the force of law in the church. But when scholars speak or write of »canon law«, they are usually referring specifically to the codification of church law that we know as the »Corpus Iuris Canonici« (CIC). Since, however, that term was first officially used in 1582 and did not come into common use until the end of the seventeenth century, we do not find it in Luther’s works. On the other hand, the five-part collection³⁰ now known as the CIC was already in existence by 1500, was already understood unofficially as a unity, and was already being printed in collected editions.³¹ We know, moreover, that Luther himself understood as a unity the component parts of the CIC and that he did not confuse the contents of the collection with ecclesiastical laws and decrees that had not been included in it or that had come later.³² Luther’s vocabulary in referring

29 LW 44, 203f ≙ WA 6, 459, 30 - 460, 5, emphasis added. On the subject of wise rulers aided by Scripture being »law enough«, WA 6, 554, 24-32: »Hoc scio, nullam rem publicam legibus foeliciter administrari. Si enim prudens fuerit Magistratus, ductu naturae omnia foelicus administrabit quam legibus: si prudens non fuerit, legibus nihil promovebit nisi malum, cum nesciat eis uti nec eas pro tempore moderare. ideo in rebus publicis magis curandum est, ut boni et prudentes viri praesint quam ut leges ferantur: ipsi enim erunt optimae leges, omnem varietatem casuum vivaci aequitate iudicaturi. Quod si assit eruditio divinae legis cum prudentia naturali, plane superfluum et noxium est scriptas leges habere. Super omnia autem, Charitas nullis prorsus legibus indiget.«

30 The Decretum Gratiani (circa 1140), the Liber Decretalium Gregorii IX (1234), the Liber Sextus of Boniface VIII (1298), the Clementina of Clement V (1314), and the Extravagantes of John XXII (1499-1502).

31 Sieghard MÜHLMANN: Luther und das Corpus Iuris Canonici bis zum Jahre 1530. Teil 1: Prolegomena. L 1972 – L, Univ., Theol. Fak, Diss., 1972 –, 103-107.

32 This is clearest in a letter of 10 December 1520 to Georg Spalatin, where he lists Decree-

to the CIC is not always free of ambiguity (*Libri papae*, des Papstes Gesetz, das geistliche Recht, *decretum pontificum*, and so on at great length), but his references to the collection are sufficiently abundant and sufficiently clear to establish that – most of the time, at least – the CIC was what he was talking about and that it was something that Luther dipped into frequently and carefully. He was certainly not »learned in the law« in the professional sense, but he knew enough about canon law to deal with it effectively where it impinged on in his work as a theologian and reformer.³³

When one thinks of Luther and canon law, the image that immediately comes to mind is that of him throwing copies of it into a bonfire outside the Magpie Gate at Wittenberg on 10 December 1520. As is well known, that event, together with other evidence of seemingly indiscriminate hostility toward canon law,³⁴ cost Luther the support of many in the legal profession, including that of the most distinguished jurist of them all, Ulrich Zasius (1461-1536).³⁵ In the present context, however, it is important to emphasize that Luther's rejection of canon law was never as complete as the burning of it seemed to indicate and that he would, as we shall see, find positive uses for portions of it.

tum, *Decretales*, *Sextus*, *Clementina*, and *Extravagantes*; WA Br 2, 234, 4-7 (361). There are similar passages in WA 5, 259, 26; WA Br 1, 353, 28-32 (157); WA 10 III, 358, 29; 31 I, 241, 33-35. See also Mühlmann: *Luther und das Corpus Iuris Canonici* ..., 109f.

33 Mühlmann: *Luther und das Corpus Iuris Canonici* ..., 299. In his confrontation with Cardinal Cajetan (1469-1534) at the Diet of Augsburg in 1518, for example, Luther proved more conversant with canon law than the cardinal expected. Cajetan appears to have assumed that Luther would be ignorant of the bull »Unigenitus« (1343), which was not included in the standard collections of canon law, and believed that when confronted with its definition of the treasury of the church as the merits of Christ, Luther would have to admit that his position on indulgences was in conflict with a valid papal decree. But Luther had in fact seen »Unigenitus« and had come to Augsburg prepared to reject its content as contrary to the plain sense of Scripture; see Hendrix: *Luther and the papacy*, 59.

34 As, for example, in the letter of 8 June 1521 to Justus Jonas that served as the preface to the »*Rationis Latomianae pro incendiariis Lovaniensis scholae sophistis redditae, Lutheriana confutatio*«, Luther advised Jonas, who at that moment was expected to lecture in canon law at the university, that he should devote his efforts to the refutation of its contents: »Ita, mi frater, facito, ut doceas dediscenda esse, quae doces, et sciant fugienda sicut mortifera, quaecunque Papa et Papistae statuunt ac sentiunt«; WA 8, 44, 39 - 45, 1.

35 Köhler: *Luther und die Juristen*, 34f.

Luther's motive for burning canon law was that it was a treasury of everything in the doctrine and practice of the papal church that stood in contradiction to what he saw as the clear teaching of Scripture.³⁶ Above all, it was the embodiment in law of the theory of papal absolutism behind which the Roman hierarchy defended its catastrophic failure to nourish the people with the word of God.

»For if you want to know in a few words what the canon law contains, then listen. It is, to put it briefly, the following: The pope is a god on earth over everything heavenly, earthly, spiritual, and secular, and all is his own. No one is permitted to say to him: »What are you doing?«³⁷

At the same time, however, Luther recognized in canon law a repository of much wholesome legislation that the papalists themselves chose to ignore or evade. From the beginning he was alert to any opportunity to point out that the those antagonists who demanded his obedience to some provision or other of canon law frequently excused themselves from heeding other and better provisions of it.³⁸ So it is no surprise that when, in the address »To the Christian nobility of the German nation ...« he declared that canon law should be blotted out »from the first letter to the last«, he made two important qualifications.³⁹ The first one was to add the words »especially the decretals«, i. e., especially the »Liber Decretalium Gregorii IX« which contained so much of the medieval legislation on which the claims of papal absolutism were based. By implication, this qualification granted a certain grudging recognition to the earlier »Decretum Gratiani«, which incorporated more of the legislation of the ancient church. Concerning it, Luther said – and this was his second qualification – that there was much in it that was good, even though the pope and his flatters assumed the right to ignore anything in it that they did not like.⁴⁰

36 WA 7, (152) 161-182.

37 LW 31, 392f ≅ WA 7, 177, 6-10 / 24-29.

38 For an abundance of examples, see Hendrix: Luther and the papacy, chapters 2-4 *passim*.

39 LW 44, 202f ≅ WA 6, 459, 1-29.

40 This point is made more clearly in »Warum des Papstes und seiner Jünger Bücher von D. M. Luther verbrannt sind« (WA 7, 180, 11-18) than in »To the Christian nobility of the German nation ...«. Cf. Luther's statement 1530 at the end of the treatise »Von Ehesachen«: »[...] das geistliche recht [...] ist so unördig ynn einander geworffen und

Though his visceral antipathy toward canon law as a whole would never go away, and would indeed be reiterated with astonishing vehemence in the last years of his life, Luther would in the interim pay a good deal of attention to the »good things« in it. In this connection it is important that Luther was at the head of a movement, most of whose leaders had made their way to the Reformation via Erasmian humanism and were for that reason predisposed to view canon law, insofar as it incorporated the wholesome legislation of the ancient church, as a weapon in the battle for the reform of a church that they perceived as having departed from the apostolic purity of the ancients. No less a person than Erasmus of Rotterdam (1466/69-1536) had argued that canon law was not a compendium of eternal truths, all of them of equal value and force, but rather the accumulated residue of a historical development that was subject to critical examination and revision. To him it was clear that the legislation of the most ancient councils and synods was in closer harmony with Scripture and Christian virtue than that of later ages and that the authority that had made the laws could revise them in order to restore ancient purity. Luther himself *may* have been influenced by Erasmus in this respect via some of the latter's scriptural annotations.⁴¹ Be that as it may, Luther was entirely in agreement with humanist scholars, including Philip Melancthon, that canon law viewed historically was a useful tool in the hands of the reformers.

This historical-critical approach to canon law made it possible to see in it a repository of reliable information about the constitution of the ancient church that could be used selectively as a model for reforms in the present. So, for example, when in 1528 Luther needed to justify the Saxon visitation, he was able to refer to the example of the holy bishops who, »in the days of the ancient fathers«, diligently conducted visitations, »concerning which

offt widder einander, als das aus sendebriefffen des Bapsts, so auff mancherley zeit und sachen gegeben sind, zusammen gerafft«, that it is a difficult task to deal with it. »Est ist war, Es sind viel guter urteil und rechtsprüche drinnen, Etlich sind auch so hin [i. e., von mäßigem Wert]«; WA 30 III, 248, 1-8.

41 Wilhelm MAURER: Reste des kanonischen Rechtes im Frühprotestantismus. In: Ders.: Die Kirche und ihr Recht: gesammelte Aufsätze zum evangelischen Kirchenrecht/ hrsg. von Gerhard Müller; Gottfried Seebass. Tü 1976, 145-207, here 154-169.

much is still to be found in the papal laws«. ⁴² More often, however, canon law was used polemically to refute the arguments of those who condemned the reformers as heretics. In 1527, for example, in a defence of communion sub utraque against a ban on it that had been published by Albert of Brandenburg, Cardinal-Archbishop-Elector of Mainz (1490, 1518-1545), Luther argued his case by citing from the »Decretum« papal decrees that were in accordance with his understanding of scriptural teaching on the proper distribution of the sacrament. ⁴³ He did so, he said, not because he felt it necessary to confirm the clear teaching of Scripture with the authority of canon law but rather because he wanted to confront his adversaries with the content of their own law »and slay them with their own weapon«. ⁴⁴

It was in this same spirit that Luther expressed his pleasure with »Ein kurzer Auszug aus den päpstlichen Rechten der Dekrete und Dekretalien ...«, which Lazarus Spengler (1479-1534) published at Nürnberg in 1529. ⁴⁵ This little volume of excerpts from the CIC, mostly the »Decretum« but with some from the »Decretales« as well, was intended to demonstrate that the ancient law of the church was essentially in harmony with Scripture as Luther and his followers understood it. Spengler found canonical justification for virtually every distinctly Lutheran doctrine and practice, including the precedence of Scripture over tradition, communion in both kinds, the priesthood of all believers, the marriage of priests, and the subjection of bishops to the authority of Scripture. ⁴⁶ In the preface that

⁴² LW 40, 269f ≡ WA 26, 196, 1-5.

⁴³ WA 23, 416, 10 - 418, 26.

⁴⁴ WA 2, 418, 27 - 419, 7. Luther then goes on to criticize Gratian for paying too little attention to Scripture and too much to »the pope and the Roman church« in the execution of his laudable aim of bringing order and coherence out of the »discordant« accumulation of ecclesiastical laws; WA 2, 419, 8-21. The same point is made 1539 in »Von den Konziliis und Kirchen«; 50, 543, 23-28.

⁴⁵ The »Ein kurzer Auszug ...« is still not available in a modern critical edition. Thanks to the library of the Luther Seminary in Minneapolis, I was able to examine the microfiche of an edition of it printed at Strassburg in 1556 (HAB 420.3 Theol. 4^o). But the summary of the contents of the »Ein kurzer Auszug ...« offered here is based on Maurer: *Reste des kanonischen Rechtes* ..., 188-204, where citations of the relevant portions of the CIC are given.

⁴⁶ He also found in old canons (1) condemnation of the death penalty for heretics but at the same time the requirement that secular government should take action against false teachers and protect the church; (2) support for the emperor's role as the protector of

he wrote for the edition of the »Ein kurzer Auszug ...« that was printed at Wittenberg in 1530, Luther stated that he had often thought of producing such a volume himself in order to demonstrate that »the miserable people« who blindly reject the doctrine of the reformers are guilty not only of not obeying their own law but also of recklessly condemning it as heresy.⁴⁷

In the wake of the publication of Spengler's »Ein kurzer Auszug ...« similar use of the CIC was made, with Luther's knowledge and approval,⁴⁸ in the »Confessio Augustana«, which was presented to the emperor at the Diet of Augsburg in the summer of 1530. Citations from the »Decretum« were used to support the argument that the doctrine and ceremonies of the emerging evangelical churches were closer to the biblical and apostolic purity of the ancient church than were those of the papal church. Cited, for example, were papal decrees that sanctioned the marriage of priests, that stipulated that communion must be distributed in both kinds, and that declared that rites and ceremonies do not need to be the same everywhere. More fundamentally, decrees were cited affirming that customs contrary to God's commands are not to be approved and that bishops have no authority to teach or command anything contrary to Scripture.⁴⁹ Moreover, the »Tischreden« of the early 1530s record several

Christendom who can demand even of a pope an accounting of his faith; and (3) justification for the German hope for a free Christian council.

⁴⁷ WA 30 II, 219, 2-28.

⁴⁸ Luther himself participated, along with Melancthon, Bugenhagen, and Jonas, in the preparation of the so-called Torgau Articles, which contain several citations of the Decretum that Melancthon incorporated, with still others, into the »Confessio Augustana«. The Torgau Articles, with notes identifying the citations of the Decretum are found in SOURCES AND CONTEXTS OF THE BOOK OF CONCORD/ ed. by Robert Kolb; James A. Nestingen. MP 2001, 94-104. For the original German of the passages used in the »Confessio Augustana«, see the critical apparatus of the pages of the BSLK cited in the following note. The complete German text of the Torgau Articles is in CR 26, 171-200.

⁴⁹ See the conclusion to part one (following article 21) and articles 22-23, 25, 27-28 of the »Confessio Augustana« in BSLK 83d, 1-5; 85, 14-24; 86, 6-9; 87, 39 - 88, 5; 89, 29-33; 99, 11 - 100, 5; III, 4f; II4, 13-15; II6, 5-13; 124, 22 - 125, 2; 126, 6-8 ≡ The Book of Concord, 59 (2). 62 (8). 63 (9). 64 (13). 66 (16). 74 (II). 84 (23). 86 (31f). 88 (10). 94 (27). 96 (31). Not surprisingly, canon law is put to similar use in the »Apologia Confessionis Augustanae« (1531), and the »Tractatus de potestate papae« (1537).

versions of Luther's remark that he would dearly like to see his papalist adversaries made to live by their own law: »I'd give my left hand to see the papists forced to observe their own canons; I think they would scream more loudly about that than about Luther.«⁵⁰ By the end of the 1530s, however, we find Luther once again decrying the hated papal law in language far more violent than any he had used in 1520 to justify consigning it to the flames. In the process, moreover, he had some breathtakingly rude things to say about the Wittenberg jurists. To see why this was so, it is necessary to return to 1530 and deal once more with Luther's attitude toward law in general.

VI Luther on Law in the 1530s

By 1530, as we have already seen, the rapid but disorderly development of the Reformation in Saxony had shifted Luther's attention from the task of freeing the territorial church from papal laws to that of providing it with good evangelical laws. Since 1527, the visitation commission that the elector had established at Luther's request had been engaged in the long and difficult task of imposing order and uniformity on the doctrine, ceremonies, and financial affairs of the Saxon church. Pleased with these developments and with the electors – John, and then from 1532, John Frederick (1503, 1532-1554) who presided over them, Luther, in his lectures and sermons of the early 1530s, was wont to take advantage of any biblical text – here particularly The Song of Solomon (1530/31) and Psalm 101 (1534/35) – that enabled him to sing the praises of a commonwealth in which church and state flourished under the rule of a godly prince. In the process, he elaborated a view of the *cura religionis* of Christian princes that was fundamentally identical to the one that Philip Melanchthon worked out and published in those same years.⁵¹ More important in the present

⁵⁰ Albert of Brandenburg, for example, would not be able to hold three bishoprics at once, including the imperial archbishopric of Mainz; WA TR 2, 72, 35-39; 73, 4-6 (1362); see also 489, 32 - 490, 1 (2496 b); 6, 239, 19 f (6862). The treatise »Von den Konziliis und Kirchen« contains a number of references to the damage to the pope's cause that would ensue if he actually kept certain of the decrees of the councils and the fathers that were incorporated into church law by Gratian; see for example WA 50, 531, 19 - 532, 5.

⁵¹ See Estes: Peace, order, and the glory of God, chapter 5.

context, however, is that Luther's concern for the welfare of church and state compelled him once more to address the question of the role of law in both. It will be evident that his observations were an elaboration of his view of the proper relationship between »the two kingdoms«.

In his lectures on the Song of Solomon, Luther offered the most detailed of all his discussions of the three hierarchies established by God for the good of mankind: family, government, church.⁵² In the present context, it is the relationship between the latter two that is important. For Luther, the Song of Solomon was an »encomium of the political order«, a song in which Solomon thanks and praises God for »the divinely established and confirmed kingdom and government« in which Solomon had ruled over »the people of God« in peace and tranquillity. The mark of such a splendid *politia* is that in it both church and state are governed by the word of God. Whether one considers the population from its political or its ecclesiastical side, it is one and the same people of God living under two distinct but closely coordinated administrations. The *politia*, the secular regime, is God's left hand; the priesthood is his right hand. Significantly, Luther also uses the word »*politia*« with reference to the external church.⁵³ Just as the *politia externa* is governed by the *magistratus politicus* or *corporalis*, so the *politia ecclesiastica* is governed by the *magistratus ecclesiasticus* or *spiritualis*. Because the church on earth is a *corpus mixtum* that includes unbelievers and evildoers in its membership, it is no less in need of laws than is the *politia externa*. The crucial difference between the two is that ecclesiastical punishment consists only in the proclamation of God's judgement, something that affects only the conscience, while secular punishment imposes the physical penalties of human law.

Given this need of the church for laws, and given that such laws were by definition freely chosen human laws aimed at facilitating the church's divine mission,⁵⁴ it was both easy and natural to see positive value in

52 The text is in WA 31 II, 586-769. My summary of the relevant content is based entirely on Maurer: *Reste des kanonischen Rechtes ...*, 177-188.

53 Cf. Luther's commentary on Isaiah (1529), where the church is described as »*novum genus vitae et Politiae*«; WA 31 II, 507, 5-12.

54 On this point, see especially the treatise »*Von den Konziliis und Kirchen*« (1539); WA 50, 640, 7 - 650, 14.

many provisions of canon law. These included, for example, a long list of ceremonies and usages that were harmless *adiaphora* and could freely be observed in the interest of good order.⁵⁵ Also included, as we have already seen, were ancient canons on the office of bishop that could be cited to justify the Saxon visitation. For the evangelical jurists, moreover, the CIC was a gold mine of law upholding the rights and privileges of the clergy and the integrity of church property.⁵⁶ On the other hand, as we shall see presently, the jurists were attached to provisions of canon law that, in Luther's view, could not be enforced without great harm.

Meanwhile, Luther's lectures on the Song of Solomon were interrupted by the Diet of Augsburg in the summer of 1530. Unable as an imperial outlaw to attend the diet in person, Luther had to remain behind at the Koburg, the closest he could get to Augsburg on Saxon territory. One of the products of his forced idleness at the Koburg was the »Sermon on keeping children in school«,⁵⁷ portions of which are of direct interest to our topic. Alarmed that so few parents seemed willing to supply their children with education beyond basic instruction in German sufficient to the immediate needs of making a living, Luther admonished them to remember society's urgent need for learned men qualified to take on the vital task of governing church and state.

The church, he said, needs pastors, preachers, and schoolmasters who together make up the spiritual estate, which has been established by God and is therefore highly to be honoured.⁵⁸ Secular authority, too, is »a glorious ordinance and splendid gift of God, and it too needs learned men. Why? Because the government in our German lands is supposed to be guided by the imperial law of Rome«, which is its »wisdom and reason,

55 »Wir kunden auch on schaden alle Gebot halten, des Bapsts und seiner Concilien, so nicht stracks an jnen selbs wider Gottes Wort sind, wenn es nicht mehr betreffe denn eusserliche Ordnung und halten bestimpter zeiten, kleidung, speise etc. [...] solch eusserlich Mittelding, [...]«; WA 21, 499, 33-38.

56 Johannes HECKEL: *Das Decretum Gratiani und das deutsche evangelische Kirchenrecht*. Ders.: *Das blinde, undeutliche Wort »Kirche«: gesammelte Aufsätze/ hrsg. von Siegfried Grundmann*. Köln; Graz 1964, 1-48, here 33 f.

57 LW 46, 213-258 ≙ WA 30 II, (508) 517-588 (Eine Predigt, dass man Kinder zur Schule halten solle).

58 LW 46, 219-237 ≙ WA 30 II, 526-553.

given it by God«. In principle, a truly wise prince guided by Scripture is all that one needs for good rule. But since there are only one or two such »Wunderleute« in any generation, it is best to be guided by a code of written law. This law cannot be maintained by »fists and weapons; heads and books must do it. Men must learn and know the law and wisdom of our worldly government.« Secular government, in short, needs »jurists«, by which Luther means not only the doctors of law but the entire legal profession, including »clerks, judges, lawyers, notaries, and all who have to do with the legal side of government«. Their work is to be highly esteemed,

»for just as in the kingdom of Christ, a pious theologian and sincere preacher is called an angel of God, a saviour, prophet, priest, servant, and teacher [...], so a pious jurist and true scholar can be called, in the worldly kingdom of the emperor, a prophet, priest, angel, and saviour«.

Similarly, a false and faithless jurist is just as big a scoundrel, knave, and devil as is a heretical or false preacher. Indeed, it takes abler people to be jurists in secular administration than are required in the office of preaching. For

»in the preaching office, Christ does the whole thing, by his Spirit, but in the worldly kingdom men must act on the basis of reason [...], for God has subjected secular rule and all of physical life to reason. He has not sent the Holy Spirit from heaven for this purpose. This is why to govern temporally is harder, because conscience cannot rule; one must act, so to speak, in the dark.«⁵⁹

There is a similar encomium of the secular realm and the role of reason in it in Luther's commentary on Psalm 101,⁶⁰ which is his portrait of godly rule in church and state as exemplified by King David. Because secular government is to have no jurisdiction over the welfare of souls but only over physical and temporal goods, God has made it subject to human authority and to reason. He has, moreover, lavished a high degree of

59 LW 46, 237-242 $\cong$ WA 30 II, 554-562, quotations 558, 27 - 559, 17; 562, 27-33. Although it is too complicated a matter to be dealt with here, it seems clear that in this new, positive view of Roman law as the epitome of God-given wisdom in the secular realm Luther had been decisively influenced by Melanchthon. For the development of Melanchthon's thought on the subject, see Guido Kisch: Melanchthons Rechts- und Soziallehre. B 1967, chapters 4 and 5.

60 LW 13, 198-200 $\cong$ WA 51, (197) 200-264, here 242, 1 - 243, 35.

reason, intelligence, wisdom, and learning upon the heathen, so much so that they make Christians look like »mere children, fools, and beggars by comparison«. Take, for example, the imperial law, according to which the Holy Roman Empire will continue to be ruled until the Last Judgement. It is nothing but heathen wisdom, established and written down before the Romans had ever heard of Christians or even about God himself. And yet it surpasses by far anything that all the jurists of today taken together could accomplish. The ancient lawmakers did their work wonderfully, but look »what a childish, silly, and bad thing the canon law is, even though the people who set it down were much holier and better« than the heathen authors of Roman law.⁶¹ As the jurists themselves say, »A pure canonist is a jackass«, for they have got lost in their subject and taken little account of worldly wisdom. So, »whoever wants to learn and become wise in secular government, let him read the heathen books and writings« of Homer (fl. 8th century B.C.), Plato (ca. 429-347), Aristotle, Virgil (70-19), Demosthenes (384-322), Cicero (106-43), Livy (59 B.C.-A.D. 17), and »the fine old jurists«. They have portrayed secular government »quite beautifully and generously« and no one has yet equalled or surpassed them in this. Their works have been preserved so that »virtue, laws, and wisdom with respect to temporal goods, honor, and peace on earth« can be taught alongside Holy Scripture, which teaches about »faith and good works with respect to eternal life in the kingdom of heaven«.

While Luther's attitude toward Roman law had thus become far more positive than it had been in 1520, his attitude toward Germanic law was now far more critical. Specifically, he found the »Sachsenspiegel«, the most influential codification of German law, barbarous in its severity, and he expressed regret that it was far too deeply entrenched to be done away with in favour of uniform application of Roman law (*ius caesareum*), the common law of the Empire. What particularly stuck in his craw was that

⁶¹ Cf. WA TR 6, 239, 17-19 (6862): »Kaiser=Recht ist anders nichts, denn was menschliche Vernunft lehret; aber das geistlich Recht ist, was der Papst setzt, fartzet und träumet.« Cf. also 6, 328, 25-31 (7023): »Wenn man der Heiden Rechte im römischen Reich nicht hätte, so wären unsere Fürsten, Kaiser und Könige alle zu Narren worden. [...]. Der Heiden Rechte sind besser und ehrlicher, denn der vermeinten Christen. Aber des Papsts Rechte sind am Aergesten, und was Gutes drinnen ist, das ist aus den kaiserlichen Rechten genommen.«

the Saxon code was grossly unfair to married women. It stipulated that when a husband died, he was obliged to leave his widow only »a chair and a distaff« (einen Stuhl und Rocken), no matter how many years she had faithfully lived with him and cared for him. According to Luther, the jurists interpreted this »grammatice«, according to the strict letter, thus leaving widows with less than one might give to a servant or to a beggar at the door. Luther thought this provision of the law should be interpreted »allegorice«, with »Stuhl« taken to mean »Haus«, and »Rocken« taken to mean »Nahrung«. In other words, a just and equitable reading of the law would guarantee to a widow bed and board for the rest of her life.⁶² In the present context, the most interesting feature of these comments, which he made 1537 and 1538, is not Luther's opinion of the »Sachsenspiegel« itself but rather his sharply critical attitude of the way in which jurists had interpreted one of its provisions. For the fact is that, in the period from 1530 through 1544, we find Luther nursing a growing animosity toward jurists, particularly the members of the faculty of law in Wittenberg.⁶³ He never retreats from his opinion of the importance and the dignity of the legal profession, but he is increasingly inclined to rail against what he regards as the abuse of it.

VII Luther and the Wittenberg Jurists, 1530-1544

This growing animosity toward jurists is most easily traced in the »Tischreden«, the earliest of which date from circa 1530 and continue from there to the end of Luther's life. They are liberally sprinkled with derogatory comments about jurists' disregard for truth, faith, and ideals, their preoccupation with what will work rather than with what is just, their greed for money and influence, their arrogance, and so on at length.⁶⁴ But it would

62 WA TR 3, 446f (3604 A-B), 1537; 4, 163f (4139), 1538.

63 Professors of law also functioned as members of the Hofgericht and (from 1539) the Wittenberg consistory, the membership of which included two jurists and two theologians; Heiner Lück: *Die Spruchstätigkeit der Wittenberger Juristenfakultät*. Köln; Weimar; W 1998, 67-87, here esp. 83-85. For more on the consistory, see below, 21-28.

64 Two examples from among many will suffice. Luther described the Saxon chancellor, Gregor Brück (1485-1557), as the only true Christian he knew among jurists, and then added that »die Anderen gemeiniglich allzumal gottlos [sind und] suchen nur ihren

take something far more serious than these perceived ethical shortcomings of the legal profession as a whole to provoke Luther to attack the Wittenberg jurists from the pulpit.⁶⁵

At first, all seemed well. At the famous conference of Saxon jurists and theologians at Torgau in the autumn of 1530, Luther and the other theologians yielded courteously, if not exactly gracefully, to the opinion of the jurists that the evangelical princes did indeed have the right in law to offer armed resistance should the emperor make war on them because of their support for the true faith.⁶⁶ Luther did not complain (or even mention) that the jurists had supported their argument with extensive citations from canon law as well as from civil law.⁶⁷ In the aftermath, he was concerned only to make clear that he as a theologian had not counselled resistance but had simply taken the position that it was for jurists rather than theologians to know what the law said and to bear responsibility for their reading of it.⁶⁸ By 1532, however,

Genieß und Nutz, ziehen das Recht, und drehen es nach ihrem Vorthel, machen aus Recht, Unrecht, und aus Unrecht, Recht, mit irer Deuteley und Sophisterey, allein umbs Geldes willen«; WA TR 3, 619, 7-9 (3793). The same point could be made more succinctly: »Juristen sind oft Christi Feinde, wie man sagt: ein rechter Jurist, ein böser Christ«; WA TR I, 143, 10f (349). Such sentiments were scarcely new in the 1530s, nor were they unique to Luther in particular or to theologians in general. They were, rather, widely shared in society at large. See Lieberwirth: Martin Luthers Kritik ..., passim.

65 Unfortunately, much less is known than one would like concerning the things that the Wittenberg jurists said and did to provoke Luther's wrath. This is because »die Geschichte der Wittenberger Juristenfakultät und deren Wirksamkeit in der europäischen und deutschen Rechtswissenschaft keinesfalls aufgearbeitet ist«; Heiner Lück: Die Wittenberg Juristenfakultät im Sterbejahr Martin Luthers. In: Martin Luther und seine Universität, 73-93, here 74.

66 WIDERSTANDSRECHT ALS PROBLEM DER DEUTSCHEN PROTESTANTEN, 1523-1546/ hrsg. von Heinz Scheible. GÜ 1969, 67f.

67 See Widerstandsrecht als Problem ..., 63-66, for footnote references to the relevant sections of the CIC. The jurists' argument was based largely on principles of legal procedure, an area in which, as Luther conceded, canon law offered much that was good and useful for the practice of civil law: »Was er [Papst] aber Guts hat in seinen Rechtsbüchern, das zu Gerichtshändeln und Policy gehört, und weltlichen kaiserlichen Rechtes ist, da ist er gar ein Kaiser«; WA TR 2, 490, 33f (2496 b), 22 January - 28 March 1532.

68 WA TR I, 40f (109), 9.-30. November 1531; 6, 322f (7007) ≙ WA Br 6, 16, 9 - 17, 24 (1772), Luther to Wenzeslaus Linck 15 January 1531.

Luther was already complaining that the jurists were entirely too fond of canon law and consequently tempted to interfere in matters of conscience, which were the proper concern of the theologians.⁶⁹ By 1537 these general grumblings had turned into specific complaints about the jurists's advocacy of certain provisions of canon law on marriage that Luther judged to be contrary to Scripture and reason.⁷⁰ He thought it preposterous, for example, that the jurists wanted to enforce the canonical rule that a widowed clergyman who took another wife was guilty of »digamy« and could no longer hold a spiritual office.⁷¹ If Solomon could have several hundred wives all at once, why could not a poor pastor have two or three wives in succession? What would the enforcement of this canon achieve apart from either preventing or dishonouring a legitimate marriage and depriving the church of good pastors?⁷² Similarly, Luther

69 WA TR 2, 489-491 (2496 a-b), 624f (2738 a), both of 1532.

70 The leader of the jurists in Wittenberg was Hieronymus Schurff, aka Schürpf (1481-1554). An early convert to Luther's cause who had been his legal adviser at the Diet of Worms in 1521, Schurff participated actively in the Saxon visitation that commenced in 1527. On the other hand, he embodied the attachment to »received law«, particularly with respect to marriage, that would produce serious estrangement between Luther and the Wittenberg jurists; see Theodor MÜTHER: D. Hieronymus Schürpf. In: Ders.: *Aus dem Universitäts- und Gelehrtenleben im Zeitalter der Reformation*. Nachdruck der Ausgabe Erlangen 1866. Amsterdam 1966, 178-229; Hermann DÖRRIS: »Der Juristen Schwitzbad«: das beirrte Gewissen als Grenze des Rechts. In: *Festschrift für Erich Rupel: zum 65. Geburtstag am 25. Jan. 1968/ hrsg. von Heinz Brunotte ...* Hannover, B; HH 1968, 63-88, here 73f, with footnote 45; Deflers: *Lex und ordo*, 133-139. For information on other members of the faculty of law involved, including Melchior Kling (1504-1571), the student of Schurff who, following the reorganization of the faculty of law in 1536, was appointed professor of church law, see Otto MEYER: *Anfänge des Wittenberger Consistoriums*. In: Ders.: *Zum Kirchenrechte des Reformationsjahrhunderts: drei Abhandlungen*. Hannover 1891, 3-83; Lück: *Die Spruchfähigkeit der Wittenberger Juristenfakultät*, 80-85; Ralf FRASSEK: *Eherecht und Ehegerichtsbarkeit in der Reformationszeit: der Aufbau neuer Rechtsstrukturen im sächsischen Raum unter besonderer Berücksichtigung des Wittenberger Konsistoriums*. Tü 2005, 102-III.

71 In contrast to bigamy, which consisted of having two wives simultaneously, digamy consisted of having two or more wives in succession. On the history of digamy as a cononical impediment to holy orders, see James A. BRUNDAGE: *Law, sex, and Christian society in medieval Europe*. Chicago 1987, 97f. 142. 196. 207. 252f. 318f. 405-407. 479. 540.

72 WA TR 3, 452f (3609 A-B), 18 June - 28 July 1537 / 16 April 1539.

vehemently disapproved of the desire of the jurists to restore the canonical rule, long since banished from the church in Saxony,⁷³ that a couple who secretly became engaged, without parental knowledge or approval, had thereby entered into a marriage that could not be dissolved by the subsequent decision of either party to marry someone else.⁷⁴ He sided with Roman law in his insistence that public engagements entered into with parental consent were the best way to prevent hot-blooded young people from rushing into ill-considered unions, with unhappy consequences for everyone involved. To dismiss parental approval as irrelevant was, in Luther's view, to deny parents the authority over their children given them by God in the Fourth Commandment.⁷⁵

On two separate occasions, in 1539 and again in 1544, Luther angrily and abusively attacked the Wittenberg jurists from the pulpit. On the first occasion, the charge was that they were poisoning the minds of their students by teaching canon law, and Luther made his point with specific reference to the matter of digamy.⁷⁶ On the second occasion, digamy was not forgotten,

73 Luther reports that Elector John Frederick had, at the request of the theologians, issued an order to this effect but that the jurists continued to insist that it was their duty to point out what established law prescribed; WA TR 6, 330, 18-28 (7024); WA 49, 300, 28 - 301, 10.

74 Canonists actually disliked clandestine marriages and sought to discourage them. But, given their view that marriage had its origin in mutual consent that could be given privately and without witnesses, they were adamant in their insistence that secret marriages were valid and binding; see Brundage: *Law, sex, and Christian society* ..., 239. 276 f. 289. 335 f. 361-364. 440-443.

75 Luther's position on this question, already evident in the 1520s, had been clearly set out in 1530 in his treatise »Von Ehesachen« (WA 30 III, 207-217 ≙ LW 46, 268-281), where he observed [WA 30 III, 208, 1 f ≙ LW 46, 268] that »the ancient canons and [...] the best points of canon law [...] forbid such secret engagements«. Only the LW editors supply the canon law reference, which is to the *Decretales*, lib. iv, tit. III. For the reiteration of Luther's views in the period 1539-1544, see WA TR 4, 242-247 (4345), February 1539, which records his detailed response to an inquiry from Basilius Monner (ca. 1501-1566), a jurist and member of the consistory. See also WA Br 10, 500 f (3958), Luther to Elector John Frederick, 22 January 1544.

76 WA 47, 670, 16 - 671, 4 (sermon of 23 February 1539); 676, 3 - 678, 15 (sermon of 2 March 1539). See also WA TR 4, 280-284 (4382 a-b: three versions of the sermon of 23 February); 462-464 (4743: further accounts of the sermon of 23 February, where 462, 15 - 463, 25 could actually refer to the sermon of 2 March); 465 (4745: brief account of sermon of 2 March). In WA 47, 676, 27, the text speaks of »bigamia« rather than »digamia«.

but Luther's principal complaint was that the Wittenberg consistory⁷⁷ had erred outrageously in decreeing that Kaspar Beyer (documented 1537-1545), a law student whom Luther had befriended, was obliged marry the young woman to whom he had become secretly engaged in 1541 rather than the one to whom he had become publicly engaged in 1542.⁷⁸ Of the two issues, that of clandestine engagements was by far the more important to Luther because it involved a much more direct challenge to the authority of theologians and pastors in the church, and it was only that issue that provoked him into a decisive confrontation with the Wittenberg jurists.⁷⁹ The attempt here will be to summarize Luther's general argument as it was most fully developed in 1544, taking full account of things said in 1539 as well, but without becoming involved in the details of the dispute over digamy or those of the case of Kaspar Beyer.⁸⁰

⁷⁷ Established in 1539, the consistory functioned primarily as a marriage court with two jurists and two theologians as sitting members (see above note 64). On the history of the establishment and early development of the consistory (to 1545), see Mejer: *Anfänge des Wittenberger Consistoriums*, and Frassek: *Eherecht und Ehegerichtsbarkeit* ...

⁷⁸ WA 49, 297, 14 - 307, 12 (sermon of 6 January 1544); 316, 1 - 317, 30 (sermon of 13 January 1544); 318-324 (sermon of 20 January 1544); and 340, 16 - 343, 9 (sermon of 3 February 1544). See also WA TR 6, 329-335 (7024: from the sermon of 6 January). 335-337 (7025: from the sermon of 20 January). 337f (7026: again from the sermon of 6 January). 340-343 (7028: from the sermon of 3 February). See further Luther's letter of 22 January 1544, written to the elector in support of Kaspar Beyer's appeal to the elector against the decision of the consistory - WA Br 10, 500-504 (3958) -, as well as the letter of 21 June 1544 to Gregor Brück, thanking him for his role in the settlement of the case; WA Br 10, 598-600 (4006).

⁷⁹ At the time of the Beyer case, the jurists on the consistory were Benedikt Pauli (1490-1552) and Konrad Mauser († 1548), but the Wittenberg jurists stood together as a group in support of the views of Schurff and Kling (neither of whom ever served on the consistory) against Luther's objections. See Mejer: *Anfänge des Wittenberger Consistoriums*, 73; Frassek: *Eherecht und Ehegerichtsbarkeit* ..., 114f.

⁸⁰ The complicated but not very well documented history of the Beyer case is ably summarized in WA Br 10, 498-500 (3958). 598f (4006); Mejer: *Anfänge des Wittenberger Consistoriums*, 64-80; Dörries: »Der Juristen Schwitzbad«, 65f; and in Frassek: *Eherecht und Ehegerichtsbarkeit* ..., 111-114. As is clear from those accounts, however, many aspects of the confrontation between Luther and the jurists over this issue remain unclear (cf. above note 66). The WA editors assert that Luther's denunciation of the consistory's decision was unfair, but Dörries, 75, note 54, finds Luther's judgement of it to be fair and accurate. Be that as it may, I have, for the purposes of this article, accepted Luther's

As Luther saw it, the basic problem was that the jurists were not content to stick to their proper sphere of responsibility, which was secular matters, but were, rather, determined to intervene in spiritual matters and rule over consciences, which are in Christ's kingdom and are the divinely appointed responsibility of the theologians. For four hundred years, he said (i. e., during the period that he regarded as the life-span of the medieval papacy), jurists ruled the church and despised the theologians. Now that their power has been taken from them and they are not permitted to govern the church, they are upset and want to recover the ground lost to the theologians,⁸¹ whom they deride as »jackasses and dunces« (Esel und Bachanten) who do not understand the law.⁸² To Luther it seemed that the jurists had seized upon the establishment of the Wittenberg consistory as an opportunity to reassert their lost authority.⁸³

Not content simply to intervene in spiritual matters that do not concern them, the jurists, said Luther, want to do the devil's work of bringing back into force in the church that heap of stinking papal filth,⁸⁴

version of events at face value. In the absence of more information to work with, it is difficult to do anything else.

81 WA TR 6, 344, 10-19. 25-27 (7029), undated but with clear references to the consistory's verdict in the case of Kaspar Beyer: »Die [Juristen] haben nun vier hundert Jahre regieret, und je die Theologos verachtet, und sind ihnen gram gewesen. [...]. Nu, weil man ihnen das Regiment nimmt, und ihr Ding umstößt, [...], und man will sie nicht lassen die Kirchen regieren und Pfarr bestellen, das thut ihnen faul. [...]; sie wollen in der Kirchen seyn, und die Conscientias mit regieren; das wollen wir [Theologen] nicht leiden.« Denn wir »haben ja fein distinguiret, wie weit die Juristen mit ihrem Regiment gehen sollen; aber sie wollens nicht thun, sie wollen alleine über Alles herrschen«.

82 WA 47, 670, 23; 676, 8f.

83 See Luther's letter of 18 January 1545 to Elector John Frederick; WA Br 11, 23, 27-32 (4070). What is not clear from this letter or from the other sources is *how* the jurists managed their little *coup* in the Beyer case. Of the two theologians on the consistory at the time, one was Georg Major (1502-1574), a friend and student of both Luther and Melancthon, who had joined the faculty of theology in 1536. In the case of the other, however, not even his name appears in the records. It is quite possible that he, like his immediate predecessor, Magister Ambrosius Berndt († 1541), was not even a member of the theological faculty. See Frassek: *Eherecht und Ehegerichtsbarkeit ...*, 108. 109f. What, if anything, the theologians said or did in defence of Luther's position on clandestine vows is not known. What is known is that Luther's wrath came down exclusively on the heads of the jurists.

84 Luther's language here (i. e., in the texts cited in the following note) is graphically scato-

the canon law that was long ago burned and banished from the church and denounced in the »Confessio Augustana«.⁸⁵ At the most elementary level, as in branding widowed priests who remarried as digamists unfit for clerical office, or as in trying to force a young man into an unsuitable marriage, this constituted the kind of unwarranted severity that violated of the principle of *epieikeia*.⁸⁶ More seriously, it constituted a wanton disturbance of the established order of the church in Wittenberg and Saxony, which the lawyers should treat with respect and not oppose.⁸⁷ Most seri-

logical. Canon law is »des Papsts Unflat«, »des papsts esels dreck vnd furtze«, »pöpstlicher, stinkender Dreck«, and so on, with frequent repetition. The same language is found *passim* in the texts of 1544. As for those »große Eselsköpfe«, the jurists, Luther observed in 1544 that »[es] ist des Papsts Recht, daran sie hangen, wie dem Teufel im Hintern«; WA TR 6, 329, 26 (7024); cf. 338, 41f (7026). It should be remembered that when Luther resorted to scatological language, it was not because he routinely spoke that way or that he had lost control of his temper but rather that he perceived himself to be locked in a vitally important battle with the devil, against whom scatological language was taken to be an appropriate and effective weapon; see Heiko A. OBERMAN: Luther: man between God and the Devil (Luther: Mensch zwischen Gott und Teufel (engl.))/transl. by Eileen Walliser-Schwarzbart. New Haven; LO 1989, 106-109.

85 WA TR 4, 280-283 (4382), 2 March 1539; WA 47, 670, 16-18; 671, 6f (2 March 1539). The reference to the »Confessio Augustana« is doubtless to Art. 28, which stipulates that bishops have no authority to teach or prescribe anything contrary to Scripture. In 1544 Luther accused the jurists of being »gut mainzisch« as well as »gut päpstlich«, i. e., of acting in the interests of Archbishop Albert of Mainz and taking money from him; WA 49, 298, 10-12; 305, 14f; 341, 14-17. 29-34; WA TR 6, 332, 24f; 333, 6f; 334, 39f (7024). I have no idea what was behind this accusation. Muther: D. Hieronymus Schürpf, 211; 226, note 94, asserts, without explaining why, that the accusation was probably aimed at Melchior Kling, the professor of church law.

86 Luther does not cite this principle by name, but he does refer to the need to »weichen von der scherffe des rechten, wo man kan«; WA 49, 316, 34. To highlight the consequences of indiscriminate enforcement of the law, Luther pointed out that if canon and imperial law were to be enforced *in toto* and with full rigour, the elector would not only have dismiss him from the ministry and send him back to the monastery but also, because he had married a nun, order his decapitation and declare his children unfit to be his heirs; WA 49, 341, 23-27; WA Br II, 23, 59 - 24, 65 (4070).

87 WA 47, 670, 18-23. 25 (23 February 1539): »Ideo freundlich bit [to you jurists], ut non agatis contra Ecclesiam nostram. [...]. Non volumus nec possumus leiden, das ir meam Ecclesiam solt zerreißen. Nolumus papae Ecclesiam. [...], nolumus des Bapsts furtzen etc.« WA TR 4, 280, 14-21 (4382 a), 2 March 1539: »Ist derhalben meyn freuntlich bitte vnd beger an euch [Juristen], das yrs mit vns haldet, wie mans offentlich in der kirchen

ously of all, it amounted to doing the devil's work of restoring »popery« in the sense of laws that »perplex consciences« (die Gewissen verwirren) by imposing restrictions or burdens that are not required by God's word or sound reason. Luther repeatedly identified this »inexpressible perplexity of poor consciences« as the chief source of his anger at »the filthy jurists«⁸⁸ and insisted that this was a matter in which human law of every sort must yield to God's law: »Oportet Deo magis quam hominibus obedire.«⁸⁹ So determined was he to place the welfare of stricken consciences above the letter of the law that he was even prepared to set aside the Second Table of the Decalogue if that were necessary to prevent the loss of a soul.⁹⁰

Luther cannot here be accused of having invented a new argument to bolster his case in a jurisdictional dispute with the Wittenberg jurists. Quite the contrary, he was defending a position that he had already stated clearly in 1530 in the treatise »On marriage matters«. In that work, which is replete with examples, drawn from his own experience as pastor and theologian,⁹¹ of how consciences can be entangled and tormented by

helt in d[ies]em furstenthum, landgrauenthum vnd [andere lender vnd stende], wie sie in der confession vnterschrieben sind. [...] wir [Theologen] wollens nicht leiden, das ir sollet vnser kirchen zu reissen; wollet yrs aber thun, so thuts anderswu. Wir wollen des baptsts esels dreck vnd furtze nich haben; frest irs selber!«

88 WA 49, 316, 27-32: »Ich kans nit leiden, das sie [Juristen] die gewissen verwirren, das ist die ursache meins zorns, [...]. Es heist Perplexitas, ist nit new, Ich habs nit erst erdacht, Im Bapstumb haben sie viel gehabt, Non est toleranda perplexitas in via Dei [...]« WA TR 6, 332, 14f (7024): »Drüm will ichs nicht leiden, daß sie [die garstigen Juristen] in meiner Kirche eine Perplexität anrichten, und die Gewissen verwirren wollen mit ihrem beschmissenen Rechte.«

89 WA 49, 317, 4f / 19f (cf. Act 5, 29). Luther recognized that judges themselves could be subjected to »preplexity of conscience« by the teaching of the jurists that a judge who knows absolutely that a defendant is innocent must nonetheless find him guilty (or else resign from office and let someone else do it) if the formal requirement of imperial law is met that guilt is established by the testimony of two or three witnesses. Luther insists that the judge should declare the man innocent even if there were 10,000 witnesses against him. Is that contrary to imperial law? »Ich schiß ins keyzers recht, das dem armen Man unrecht thut. [...]. Jurist hat kein Conscientz, drumb fragen sie auch nicht nachm periculo conscientiae«; WA 49, 303, 19 - 304, 38, esp. 304, 29-38.

90 »Ehe ich ein seel verlieren sol, ehe die 7 praecepta hin werffen«; WA 49, 317, 3f.

91 Besides dealing with marital matters as a pastor, Luther was also heavily burdened with

the enforcement of »crazy, unreasonable, unnatural, and godless laws«, Luther advises pastors and clergy to treat marriage as a worldly matter covered by secular laws and to abstain from involvement in marriage matters as much as they can. Only where matters of conscience are involved, as, for example, when jurists enforce the law in such a way as to »entangle and confuse consciences«, should clergymen intervene. In cases where either

»conscience or the law has to yield and give way, then [says Luther] it is the law which is to yield and give way, so that the conscience may be clear and free. The law is a temporal thing that must ultimately perish, but the conscience is an eternal thing that never dies. [...] The law exists for the sake of the conscience, not the conscience for the sake of the law. If one cannot help both at the same time, then help the conscience and oppose the law.«⁹²

Given that Luther's entire career can be viewed as a campaign to establish the free and orderly exercise of a Christian ministry that liberates Christian consciences from the tormenting burden of man-made laws, and given that he had risked everything by defying pope and emperor in order to launch and sustain that campaign, it is perhaps not surprising that at the end of his life he should have mounted so ferocious a defence of this ministry against the latest attempt of Satan to undermine it.⁹³ Not content simply to assert in general that clergymen exercise God-given authority in the spiritual realm of conscience⁹⁴ and are entitled to

requests from the authorities for his opinion in difficult marital cases. By 1530, he had already written forty such Ratschläge: Lieberwirth: Martin Luthers Kritik, 67.

⁹² LW 46, 317-319 ≙ WA 30 III, 246, 23 - 247, 23. It is worth noting in passing that in 1539 this view of the relationship between law and conscience figured significantly in the decision of the Wittenbergers to grant Philip of Hessen a dispensation to take a second wife; see Martin BRECHT: Martin Luther. Bd. 3: Die Erhaltung der Kirche, 1532-1546. S 1987, 206.

⁹³ Cf. the apt observation of Dörries: »Der Juristen Schwitzbad«, 68, concerning the importance of Luther's experiences as a father-confessor in his career as a reformer: »Wie sein Angriff auf den Ablass durch seine Erfahrung als Beichtvater ausgelöst war, so auch der gegen die heimlichen Verlöbnisse. Dort weckte er die Gewissen, die sich in trügerischer Sicherheit wiegten, hier will er bedrängte Gewissen aus gesetzlicher Verstrickung befreien. Von Anfang an sind es diese Beichterfahrungen, die ihn zum Handeln treiben.«

⁹⁴ See, for example, WA TR 6, 339, 32-34 (7027): »Ihr [Juristen] sollt uns Theologen nicht

obedience,⁹⁵ Luther asserted specifically his own personal prerogatives as preacher in Wittenberg. »They are meddling with *me* in *my* jurisdiction.«⁹⁶ The Wittenberg church, he insisted, was *his* and *he* would have to give answer for it in the Day of Judgement. He exercised authority in that church, »not as Doctor Martinus but rather as a servant of Christ, acting on his orders«, and for that reason he should be obeyed. He would tolerate no clandestine engagements in his church; indeed, he would abandon his pulpit rather than tolerate any such thing.⁹⁷ »I was not put here so that jurists might teach me what it means to govern and to console consciences.«⁹⁸ If the jurists do not mend their ways, »we will drive them out of the church to the devil, and they shall know that the consistory is not to be subject to their law but rather to the authority of the pastor.«⁹⁹

regieren, noch uber uns herrschen. Die Herrschaft und das Regiment (in der Kirchen) gebührt uns, [...].« 344, 29-35: »Unsere Juristen sprechen mir im Consistorio ein Urthel, quod pertinet ad conscientiam regendam; das gehöret hieher in die Kirche für mich Doctor Martinum und andere Theologen. Extra conscientiam sollen sie [die Juristen] sprechen, nicht intra conscientiam; sie sollen haben iura corporum et famae, da fragen wir Theologen nichts nach. Aber daß sie wollen fallen in die Spiritualia, und die conscientias regieren, das können wir nicht leiden.« See also WA TR 4, 280-284 (4382 a-b).

95 According to the Epistle to the Hebrews (H 13, 17, as Luther translates it): »Gehorchet ewren Lernern, vnd folget inen, denn sie wachen vber ewre Seelen, als die da rechnschafft dafür geben sollen, [...].«; WA DB 7, 381-383. See WA TR 6, 341, 34-40 (7028).

96 WA 49, 307, 15-17: »Ich bin zornig und wils auch sein, Denn sie greiffen mir in mein Regiment. Das wil Ich nicht haben, das Bapst und Meintz Wittenberg solt regieren, [...].«

97 WA 49, 318, 4 -319, 3: »[...] verum est Ecclesiam Witenbergensem esse meam. Ja ich mus dafür antworten am jüngsten gericht, [...]. Cum ergo sim is, qui hic in Ecclesia das hochste ampt füret und sols verantworten etc. so wil ich sagen, was ich tragen et non tragen kan. [...] In mea Ecclesia sol man kein heimlich verlubnis einreissen noch gelten lassen, es geschehe, wie es wölle. Ich wils nit halten, wils nicht leiden nec verantworten. [...] Kan ich solchs nicht erhalten so wil ich mich des predigstuels enthalten [...].« WA TR 6, 340, 24-33 (7028): »Ich, als ein Prediger, muß strafen, und sagen, was unrecht ist, bey Verlust meiner Seelen Seligkeit, wie Gott im Propheten Ezechiel [3, 17f] ernstlich gebeut, daß ich für dich soll Rechenschaft geben. [...] Weil ichs [...] thue [nicht als D. Martinus, sondern] als ein Diener Christi, und sage dirs aus Befehl Gottes , [...], der michs geheißsen hat, daß ich dirs sagen und verkündigen, und dich warnen soll, sollt du mir billig gehorchen.« See also WA Br 10, 501, 41 - 502, 56 (3958).

98 WA TR 6, 338, 16f (7026).

99 WA TR 6, 333, 13-16 (7024). In Wittenberg, »the pastor« was Johann Bugenhagen, whom Luther as preacher acknowledged as his ecclesiastical superior.

Not surprisingly, the jurists were indignant at what they took to be an assault on their professional honour, and they were not inclined to bow the knee to the theologians. Indeed, at some point in the proceedings they denounced Luther to the elector.¹⁰⁰ It took the intervention of the elector and the skilful mediation of chancellor Gregor Brück to produce an agreement in which the judgement against Kaspar Beyer was overturned and Luther's rejection of clandestine engagements was made the law of the land.¹⁰¹

VIII Conclusion

What shall we conclude from all this? From Luther's standpoint, the Beyer case was not just a contest over jurisdiction between jurists and theologians. Nor was it simply an attempt to keep tidy the boundary between spiritual authority and secular authority. It was of course, both of those things, but it was more besides. The emotion that Luther invested in this particular case – including the clear threat to abandon his ministry and excommunicate the jurists if he did not get his way – makes sense only if one takes seriously his claim that he was faced with a diabolical attempt to undo the liberation of Christian consciences from the tyranny of human law as enshrined in canon law. This being so, one is entitled to conclude that Luther's career as a reformer ended exactly where it had begun. The Luther who mounted the pulpit 1544 to denounce the jurists and their papal canons because they were causing grave »perplexity of conscience« in parishioners for whose spiritual welfare he was responsible, was the same Luther who in 1521 had stood before the emperor and refused to retract his books attacking the papal decrees by which »the consciences of the faithful [had] been most miserably entangled, tortured, and torn to pieces«. Freeing consciences from the oppression of »crazy, unreasonable,

¹⁰⁰ Mejer: *Anfänge des Wittenberger Consistoriums*, 73f. Their complaint appears to have predated somewhat Luther's attack on them from the pulpit and to have focused on the Luther's alleged intention to write against them.

¹⁰¹ Dörries: »Der Juristen Schwitzbad«, 76-79; Mejer: *Anfänge des Wittenberger Consistoriums*, 76-80. Luther's own account of the final agreement with the jurists is in a letter of 18 January 1545 to Elector John Frederick; WA Br II, 22-25 (4070).

unnatural, and godless laws« was, to a large degree, what Luther's reformation was all about. Through it all he maintained that the writ of human law stops at the boundary of the human conscience and that the ministers of God's church have the solemn duty to defend that boundary. Of all the things he had to say about the legal traditions of his time, that was to him the most important.