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Kenneth Pennington

*The Catholic University of America, Columbus School of Law*

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## Protestant Ecclesiastical Law and the *Ius commune*

Kenneth Pennington

Protestants almost never called their ecclesiastical norms ‘canons.’<sup>1</sup> When Protestant jurists or theologians wrote ‘canon law’ (*Ius canonicum*) in their works, it was clear to their readers that they meant Roman canon law. Surprisingly, Protestant jurists often cited Roman canon law and its jurisprudence long after Martin Luther burned books of Roman canon law at the Elster gate in Wittenberg. These jurists also continued to teach courses at the universities that treated the *Ius canonicum*. Consequently, an essay on Protestant canon law must confront the question: how much Roman canon law and the jurisprudence of the medieval *Ius commune* remained embedded in the Reformers’ legislation and jurisprudence and how much was rejected? Until relatively recently scholars answered that question largely according to their confessional affiliations.

Each Protestant movement had its own history of its origins. A part of that history invariably related how the early reformers rejected papal authority and especially the legal system that provided the juridical and constitutional foundations of papal power.<sup>2</sup> The great English historian, William Holdsworth, declared in his massive *History of English Law* that ‘change in the position of the <papal> canon law <in England> was more sudden and more dramatic than in any other country.’<sup>3</sup> In recent scholarship Holdsworth’s generalization has been tempered, not only for England but for other Protestant lands as well.<sup>4</sup> This essay will examine the ecclesiastical

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<sup>1</sup> An exception is England; see *The Anglican Canons 1529-1947*, ed. Gerald Bray (Church of England Record Society 6, Woodbridge 1998).

<sup>2</sup> For an excellent discussion of these issues see John Witte, Jr. *Law and Protestantism: The Legal Teachings of the Lutheran Reformation*. (Cambridge 2002) 53-64.

<sup>3</sup> Quoted by Richard H. Helmholz, ‘Canon Law in Post-Reformation England,’ *Canon Law in Protestant Lands*, ed. Richard H. Helmholz (Berlin 1992) 203.

<sup>4</sup> Witte, *Law and Protestantism* 23-29, 53-64 and Harold Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, Mass. 2003) 71-72. Witte and Berman both note Ernst Troeltsch (1865-1923) first put forward the argument that Protestant jurists were not adverse to using Roman canon law.

positive law, institutions, and ordinances produced by the reformers and will illustrate how the reformers used Roman canon law and the *Ius commune* in their works. Both developments are characteristic of Protestant religious law and jurisprudence in the sixteenth century and beyond. This essay will not, however, attempt to determine how ‘revolutionary’ or ‘schismatic’ Protestant jurisprudence was as it developed in the sixteenth century.<sup>5</sup> That would require a much longer and more detailed study. It will focus on areas of Protestant jurisprudence where one can see more continuity than discontinuity. This essay will also concentrate more on the jurisprudence of the Reformers in the heartland of the Reformation than on the peripheries.

All the Reformers, to a lesser or greater extent, incorporated the medieval *Ius commune*, shaped by canonical, Roman, and feudal jurisprudence, into their legislation and legal thought.<sup>6</sup> This is especially true of marriage and family law but is also true in other areas of law such as court procedure, contracts, principles of law, social welfare and education. The reformers rejected unanimously medieval canonical jurisprudence that supported the Roman church’s hierarchical authority, especially, of course, the jurisdictional and dogmatic power of the bishop of Rome. Some of the reformers completely rejected the jurisprudence of the *Ius commune* completely — at least rhetorically.<sup>7</sup> Nevertheless, Protestant jurists were aware of the debt owed to Roman canon law. Conrad Lagus († 1546) had warned his Protestant colleagues that the canonists’ jurisprudence

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<sup>5</sup> E.g. Mathias Schmoeckel, *Das Recht der Reformation: Die epistemologische Revolution der Wissenschaft und die Spaltung des Rechtsordnung in der Frühen Neuzeit* (Tübingen 2014).

<sup>6</sup> On the *Ius commune* and its constituent parts, medieval Roman, canon, and feudal law, see Michael H. Hoeflich and Jasonne M. Grabher, ‘The Establishment of Normative Legal Texts: The Beginnings of the *Ius commune*,’ *The History of Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX* (History of Medieval Canon Law; Washington, D.C. 2008) 1-21. For an extended discussion of the relationship of parts of the *Ius commune* in medieval and early modern Europe and the interests of the feudal aristocracy, see Manlio Bellomo, *Elogio delle regole: Crisi sociali e scienza del diritto alle origini dell’Europa moderna* (Leonforte 2012) especially 57-100.

<sup>7</sup> Witte, *Law and Protestantism* 64.

on procedure, what was called the ‘ordo iudiciarius,’ was essential for the functioning of the law courts.<sup>8</sup>

At the same time I warn you not to reject the *Ius canonicum* and its judicial norms. They preserve the customs of common usage. Since these rights are now observed everywhere in the courts, they expedite cases when conducting trials.

As we shall see the Protestant jurists who taught the *Ius canonicum* at the reformed universities limited their teaching and publishing to certain books and subjects, especially marriage and procedure.

Martin Luther had studied canon law at the University of Erfurt, but he quickly learned that canonical jurisprudence supported the authority of the bishop of Rome and other institutions in the Church. He also learned the flawed jurisprudence that governed and regulated marriage.<sup>9</sup> Luther dramatically demonstrated his aversion of Roman canon law on December 10, 1520 when he burned the papal bull *Exsurge Domine* and other books of papal law in Wittenberg. As John Witte has written Luther announced ‘a loud call for freedom . . . from the tyranny of the pope . . . from the hegemony of the clergy . . . from the strictures of canon law.’<sup>10</sup> What Luther and his reformers did not anticipate was the chaos that quickly ensued. Medieval canon law regulated many aspects of society. It determined and defined social bonds of which the most important was marriage. It disciplined secular and religious lives. The turmoil resulted from the divisions in the reform

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<sup>8</sup> Conrad Lagus, *Iuris utriusque tradition methodica* (Frankfurt: Christ Egnolphus, 1543) 193: ‘Atque simul quoque moneo non esse contemnenda iura canonica in observationibus iudicialibus quia usus sic tulit, ut nunc fere ista iura praecipue observentur in processu iudiciorum, propterea quod magis expeditus eius ordo in exercendis iudiciis esse videatur.’ On Lagus, see Schmoeckel, *Das Recht der Reformation* 88-89, 98. Cf. Berman, *Law and Revolution* 118-124. Also the examples cited by Udo Wolter, ‘Die Fortgeltung des kanonischen Rechts und die Haltung der protestantischen Juristen zum Kanonischen Recht in Deutschland bis in die Mitte des 18. Jahrhunderts,’ *Canon Law in Protestant Lands*, ed. Richard H. Helmholz (Berlin 1992) 13-47 at 19.

<sup>9</sup> Johannes Heckel, ‘Recht und Gesetz, Kirche und Obrigkeit in Luthers Lehre vor dem Thesenanschlag von 1517: Eine juristische Untersuchung,’ *ZRG, Kan. Abt.* 26 (1938) 285-375.

<sup>10</sup> Witte, *Law and Protestantism* 1; Schmoeckel, *Das Recht der Reformation* 1-4.

movement into different sects with different ideas about how a church without the guidance of centralized authority could be governed. In practice the reformers followed the advice of Conrad Lagus and allowed Roman Catholic canon law to provide a solid foundation for their norms and jurisprudence from the beginning of their revolt against Rome.<sup>11</sup>

The jurisprudence of canon law had been intricately entwined with secular law and norms for centuries. While the reformers could easily disentangle Catholic theological thought and traditions from their return to a more pristine set of beliefs, they could not just as easily reject Catholic jurisprudence and norms embedded in the teachings of canon law and return to a purified set of legal norms. Luther had studied law. He and other law students had absorbed the doctrines, norms, and institutions of the *Ius commune* from the past four centuries. Every law school in Europe had a curriculum in which students studied canon law, Roman law in its medieval guise, and feudal law. The *libri legales* were not balkanized into different disciplines but were integrated into a set of common texts.<sup>12</sup> By the fourteenth century, professors in Europe's law schools taught and wrote commentaries on all three components of the *Ius commune*. The great jurist of the fourteenth century, Baldus de Ubaldis († 1400), is not unusual — although his genius is. He taught Roman, canon, and feudal law and wrote significant works on all three.<sup>13</sup> The main point is that while Luther could burn books of canon law, he could never stamp out canonical jurisprudence that had been created from the papal texts in those books. It had become too deeply in European jurisprudence. The irony is that some of the most fundamental concepts and norms that were embedded into the intellectual baggage of every European jurist were based on papal court

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<sup>11</sup> Rudolf Schäfer, 'Die Geltung des Kanonischen Rechts in der evangelischen Kirche Deutschlands von Luther bis zur Gegenwart,' ZRG, Kan. Abt. 36 (1915) 165-413. remains a fundamental introductory text.

<sup>12</sup> Michael H. Hoeflich and Jasonne M. Grabher, 'The Establishment of Normative Legal Texts: The Beginnings of the *Ius commune*,' *The History of Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX* (History of Medieval Canon Law; Washington, D.C. 2008) 1-21.

<sup>13</sup> Pennington, 'Baldus de Ubaldis,' RIDC 8 (1997) 35-61.

decisions and conciliar canons that had been clothed and fashioned by jurists who did not distinguish between Roman and canonical jurisprudence. The *Ius commune* was the product of both. It is particularly important to emphasize that the *Ius commune* was not a set of statutes. Rather it was a set of principles, norms, doctrines, rules, and concepts that could be applied to many different legal problems and areas of law. It was, in other words, jurisprudence, not positive law.<sup>14</sup>

The Reformers' early assaults on medieval papal canon law can obscure the importance that it had in subsequent centuries. Luther attacked papal canon law in his letter to the German nobility in 1520. In 1518 he warned that without destroying medieval canon law reform was not possible.<sup>15</sup> He had three main issues with the Roman ecclesial polity that he called the three walls (Drei Mauern): 1. Secular power had no authority over ecclesiastical power, 2. Only the pope may interpret scripture and dogma, and 3. Only the pope may call a papal council.<sup>16</sup> Luther cited Pope Boniface VIII's decretal *Unam sanctam* and Innocent IV's deposition of the Emperor Frederick II as key texts that supported the first wall.<sup>17</sup> Texts in Gratian's *Decretum* and the *Decretales* supported papal claims for the second and third walls. Texts attributed to Popes Nicholas I and

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<sup>14</sup> Schmoeckel, *Das Recht der Reformation* has a particularly sophisticated understanding of the *Ius commune*. For different and flawed interpretations of the role of the *Ius commune* in medieval and early modern law, see Heikki Pihlagamäki and Risto Saarinen, 'Lutheran Reformation and the Law in Recent Scholarship,' *Lutheran Reformation and the Law*, ed. Virpi Mäkinen (Studies in Medieval and Reformation Traditions 112; Leiden-Boston 2006) 1-17 at 12: 'The study of Roman law was separate from that of canon law . . . until the reception of Roman law, the learned *ius commune*, began in Germany' and Berman, *Law and Revolution II* 126. This essay will be an extended critic of these assertions, which have also been made by many other scholars. See Pennington, 'Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept,' *RIDC* 5 (1994) 197-209 on the concept of 'learned law.' For the development, importance, and the constituent parts of the *Ius commune* from the twelfth century on, see Pennington, 'Sovereignty and Rights in Medieval and Early Modern Jurisprudence: Law and Norms without a State,' *Rethinking the State in the Age of Globalisation: Catholic Thought and Contemporary Political Theory*, ed. Heinz-Gerhard Justenhoven and James Turner (Politik: Forschung und Wissenschaft, 10; Münster 2003) 117-141.

<sup>15</sup> See Walther E. Köhler, *Die Quellen zu Luthers Schrift 'An den christlichen Adel deutscher Nation': Ein Beitrag zum Verständnis dieser Schrift Luthers* (Inaugural-Dissertation Heidelberg, Halle 1895) 220.

<sup>16</sup> Luther's three principles have been widely discussed; e.g. see Karl-Heinz zur Mühlen, *Reformation und Gegenreformation* (Zugänge zur Kirchengeschichte, 6.2; Göttingen 1999) 70.

<sup>17</sup> *Extravagantes communes* 1.8.1 and VI 2.14.2.

Agatho supported the second wall.<sup>18</sup> Papal authority to summon general councils could be found in Gratian.<sup>19</sup> Luther particularly detested a decretal of Pope Pascal II, *Significasti*, which the pope declared that no archbishop could receive his pallium without swearing an oath of obedience to the pope. Every council, the pope went on, established its authority on papal prerogatives.<sup>20</sup>

How much canon law did Luther learn in his short time studying law? The texts cited in the previous paragraph might lead one to conclude he knew the texts of the *Corpus iuris canonici* rather well. But this conclusion would presume that he cited these canons from his own knowledge. Scholars have noted more than once that Luther might have taken canonical references from the texts of other Reformers.<sup>21</sup> If one examines the Luther's early polemical writings he cited very few texts. Understandably, most of those he did cite dealt with papal authority.<sup>22</sup> There is only one text with which we might test Luther's knowledge of canon law and more broadly his range in the *Ius commune*. A *consilium* that dealt with the issue of sanctuary for those who sought refuge in ecclesiastical institutions has been attributed to him.<sup>23</sup> There had been a disputed case of sanctuary in Wittenberg in 1512 that was not resolved until 1515. An anonymous *consilium* dealing with sanctuary was printed in 1516 at Oppenheim (by Jacob Köbel?) on the Rhine and again in 1517 by Johannes Weissenburger in Landshut. In 1520 the tract was printed for a third time. The Oppenheim printing was without attribution of authorship, but Weissenburger inserted

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<sup>18</sup> D.19 c.1.

<sup>19</sup> D.17 c.1 and 5; C.3 q.6 c.9.

<sup>20</sup> X 1.6.4; see Köhler, *Quellen zu Luthers Schrift* 223-224.

<sup>21</sup> Köhler, *Quellen zu Luthers Schrift* 232-233.

<sup>22</sup> Wilhelm Maurer, 'Reste des Kanonischen Rechtes im Frühprotestantismus,' ZRG, Kan. Abt. 51 (1965) 190-253 at 192-195.

<sup>23</sup> Witte, *Law and Protestantism* 54-55, n.8.

Martin Luther's name into the titular rubric. Subsequently, although there have been dissenters, the work has been assigned to Luther by most recent scholars and librarians.<sup>24</sup>

Since the thirteenth century *consilia* had been a major literary genre of the *Ius commune*. The first part of the *consilium* resonates with Luther's approach to problems. The author cited examples taken from the Old Testament, Roman law, and canon law to establish which categories of persons had a right to sanctuary.<sup>25</sup> Hostiensis († 1271), Zabarella († 1417), Panormitanus († 1445, Nicholas de Tudeschis), Gratian's *Decretum*, *Decretales* of Gregory IX, play a prominent role in the discussion. If Luther wrote the *consilium* it would provide evidence at the beginning of the Reformation of his legal learning. It would also be incontrovertible proof that he accepted and used the jurisprudence of the *Ius commune*, especially of canon law with dealing with matters outside dogma. However, this *consilium* must be treated cautiously. Although the text might have been approved by Luther for the 1520 printing, his approval would not eliminate the possibility that the text was cobbled together from at least one other work.<sup>26</sup>

From the beginning of the Reformation the reformers realized that medieval canon law was not a monolithic fortress defending papal authority. The books that were used in the schools and the courts became uniformly papal only in 1582 when Pope Gregory XIII promulgated a *Corpus iuris canonici*. Until then, two texts included in that *Corpus*, Gratian's *Decretum* and the *Extravagantes communes* had not even been given a papal imprimatur. Nonetheless, if they all had been officially promulgated by the papacy earlier than 1582, that approbation would not have

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<sup>24</sup> Martin Luther, *Traktat über das kirchliche Asylrecht: Latein/Deutsch*, edd. Barbara and Dietrich Emme (Regensburg 1985).

<sup>25</sup> Richard H. Helmholz, 'The Law of Sanctuary,' *The ius commune in England: Four Studies* (Oxford 2001) 16-81; William Chester Jordan, 'A Fresh Look at Medieval Sanctuary' *Law and the Illicit in Medieval Europe*, edd. Ruth Mazo Karras, J. Kaye, E.A. Matter (Philadelphia 2008) 17-32.

<sup>26</sup> I have not, however, found a *consilium* from which latter part of the text might have been taken. I suspect the first page that deals with Old Testament law might very well have been from Luther's pen.



damaged their prestige as witnesses to the Christian tradition. That is especially true of Gratian's *Decretum*. Every educated person knew and used his *Decretum*. It is almost impossible to find a fifteenth-century theologian or jurist or polemicist who did not cite Gratian.

Gratian was very attractive from the Reformers' perspective. He could be seen as non-partisan because his texts supporting papal authority were submerged in other topics.<sup>27</sup> In the century before Gratian (1000-1140) almost every canonical collection began with texts that supported papal authority and jurisdiction. Gratian rejected that model; he began with twenty distinctions treating the jurisprudence of law. Further, because his approach to every subject that he treated was embedded in the *sic et non* methodology fashioned by Peter Abelard and the theologians and philosophers of Northern France. Gratian must have appeared irenic and open-minded to the Reformers.<sup>28</sup> Even more importantly, Gratian was a quarry from which hundreds of texts dating to the early Christian traditions could be taken. The *Decretum* was a rich source for anyone, especially the Reformers, interested in returning to the practices of the early Church.<sup>29</sup>

One could use many of the Reformers' works to justify those generalizations. When Melancthon published a tract in which he examined the writings of various theologians

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<sup>27</sup> As Stanley Chodorow, *Christian Political Theory and Church Politics in the Mid-Twelfth Century: The Ecclesiology of Gratian's Decretum* (Berkeley-Los Angeles-London 1972) has argued, Gratian did support papal power and authority; On Gratian, see Anders Winroth, *The Making of Gratian's Decretum* (Cambridge Studies in Medieval Life and Thought, 4<sup>th</sup> Series, 49; Cambridge 2000) and Pennington, 'The Biography of Gratian: The Father of Canon Law,' *University of Villanova Law Review* 59 (2014) 679-706.

<sup>28</sup> It is certain that Luther burned Gratian's *Decretum*; he mentioned the *Decretum* explicitly in a letter to Spalatin, December 10, 1520: 'omnes libri papae, Decretum, Decretales, Sext. Clement. Extravagant.' See Sieghard Müllmann, 'Luther und das Corpus iuris canonici bis zum Jahre 1530: Ein forschungsgeschichtlicher Überblick,' *ZRG, Kan. Abt.* 58 (1972) 235-305 at 286. By Luther's time, no other book would have been referred to as simply 'Decretum.'

<sup>29</sup> Alberto Pincherle, 'Graziano e Lutero,' *Studia Gratiana* 3 (Bologna: Institutum Gratianum, 1955) 451-481, who lists Luther's citations of Gratian and the *Decretals of Gregory IX* and the *Liber sextus in Quare papae ac discipulorum eius libri a Doctore Martino Lutero combussi sint* (Wittenberg: 1520) at p. 467. See also Johannes Heckel, 'Das Decretum Gratiani und das deutsche evangelischem Kirchenrecht,' *Studia Gratiana* 3 (Bologna 1955), 482-537, who cites canonical references in Luther's works at pp. 512-513, 518, and passim. Most recently, Eltjo Schrage, 'Luther und das Kirchenrecht,' *Honos alit artes: Studi per il settantesimo compleanno di Mario Ascheri: La formazione del diritto comune: Giuristi e diritto in Europa (secoli XII-XVIII)*, edd. Paola Maffei and Gian Maria Varanini (Reti Medievali E-Book 19.1; Firenze 2014) 407-416 at 410 lists the number of times Luther cited canon law; also cf. pp. 414-415.

interpretation of the Last Supper in 1530 he turned to a text of Augustine from the third part of Gratian's *Decretum, De consecratione*.<sup>30</sup> He took the text from Gratian because, as he wrote, from the way that Gratian had 'stitched together' Augustine's words from different works many people had been misled. What Melanchthon did not know was Gratian merely copied the text from earlier canonical collections. Nonetheless, it was Gratian's version of Augustine that had become authoritative, and it was the one with which Melanchthon had to wrestle.<sup>31</sup>

The jurisprudence of marriage was even more dependent on Roman canon law. A central feature of Protestant canon law was to move the institution of marriage from its sacramental status to a civil status. 'Marriage and all its institutions was a political matter. Nothing concerning marriage pertained to the Church, except problems of conscience.'<sup>32</sup> In the period between the 1530's and 1560's Lutheran jurists worked on the foundations of a new ecclesiastical legal system and marriage occupied a privileged position. One of the most prominent Protestant jurists was Joachim von Beust. Born just after the Reformation began, he belonged to a Saxon military family. In 1539 he began to study law in Leipzig, and there encountered Luther's teachings. He studied with Modestinus Pistoris and followed in his teacher's footsteps to the law schools of Italy, first Bologna and then Siena. He returned to Germany and was chosen by Duke Elector of Saxony Maurice to teach Roman law at the University of Wittenberg in 1552. Beust died in 1597.

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<sup>30</sup> Phillip Melanchthon, 'Sententiae veterum aliquot scriptorium de Coena Domini,' *Opera quae supersunt omnia*, edd. Karl G. Bretschneider and Heinrich E. Bindseil (Corpus reformatorum, 23; Braunschweig 1855) 733-752 at 744-747. De con. D.2 c.44. Gratian is no longer thought to be the compiler of *De consecratione*, but his authorship has not been definitively disproven.

<sup>31</sup> Witte, *Law and Protestantism* 3-5

<sup>32</sup> Anton Lauterbach, *Tagebuch auf das Jahr 1538, die Hauptquelle der Tischreden Luther's*, ed. Johann Karl Seudemann (Dresden 1872) 152 'coniugium est res politica, cum omnibus suis circumstantiis nihil pertinent ad ecclesiam, nisi quantum est conscientiae casus.' See also Witte, *Law and Protestantism* 17-18.

Beust has been called the founder of Saxon Protestant marriage law.<sup>33</sup> His most important work, *Tractatus de iure connubiorum et dotium*, was printed several times in the sixteenth century.<sup>34</sup> At the beginning of the *Tractatus* the printer listed the jurists and persons whom Beust cited in his work. The canonists ranged from Gratian to Didacus Covarruvias with many canonists in between. He also cited Martin Luther and Phillip Melancthon and other Reformers. Listing the ‘sources cited’ was a common practice among early modern printers. A name in the list indicated neither approval or disapproval. Beust’s purpose was to bring marriage jurisprudence of the past into congruence with the reformers’ theology. At the beginning of his tract he cited Luther on clandestine marriages who had defined such a marriage as being ‘outside the knowledge and consent of those who have power over the couple.’ Even a thousand witnesses to the marriage could not bring it out of those shadows. Luther maintained that this bond could not be considered a marriage, and Beust agreed. He cited a number of canonists to support Luther’s and his opinion, including Pope Innocent IV (†1250), Hostiensis († 1271), and Panormitanus († 1445).<sup>35</sup> Public marriages were always preferred to private and clandestine ceremonies.<sup>36</sup> However, if sexual intercourse happens first after a clandestine marriage, then the clandestine marriage is given precedent, ‘contrary to canon law . . . which is not observed today in these lands.’<sup>37</sup>

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<sup>33</sup> For a good summary of Luther’s views on marriage, see Witte, *Law and Protestantism* 214-241. For a summary of what the Reformers accepted and rejected from Catholic canonical jurisprudence, *ibid.* 243-255. See also Witte, ‘The Reformation of Marriage Law in Martin Luther’s Germany,’ *Journal of Law and Religion* 4 (1986) 293–351; *idem*, *From Sacrament to Contract* (Louisville 1997), 42–73; and S. Hendrix, ‘Luther on Marriage,’ *Lutheran Quarterly* 14 (2000) 335–350. Johan Buitendag, ‘Marriage in the Theology of Martin Luther — Worldly yet Sacred: An Option between Secularism and Clericalism,’ *HTS Teologiese Studies/Theological Studies* 63 (2007) 445–461.

<sup>34</sup> 1591, 1592, 1597.

<sup>35</sup> Joachim von Beust, *Tractatus de iure connubiorum et dotium* (Frankfurt am Main: Ioannes Spies, 1591) fol. 10v-11r.

<sup>36</sup> *Ibid.* fol. 11r-11v.

<sup>37</sup> *Ibid.* fol. 11v: ‘contra dispositionem iuris canonici, quod publica sponsalia praefert clandestinis, etiamsi in clandestinis copula intervenisset . . . hodie in his terris non observatur.’ See Witte, *Law and Protestantism* 236-237, for a summary of the rather complicated development of Protestant jurisprudential thought on clandestine marriages.

Konrad Mauser (†1548), a Protestant jurist who studied law in Wittenberg, distinguished between two types of clandestine marriages. The first was completely secret and without witnesses, and the second was secret, with witnesses, but without the consent of the parents.<sup>38</sup> In the event of a dispute over the validity of a clandestine marriage, Protestant courts (consistorii) should judge cases in accordance with the *Ius commune*, Mauser asserted, because neither Roman law nor canon law is contrary to our true faith.<sup>39</sup> A judge should not render decisions with false equity nor with his own ideas because not only would that be dangerous but such decisions would be full of temerity and frivolity.<sup>40</sup> Quoting Paulus de Castro († 1441), Mauser pleaded that equity should not trump the law. If the courts' decisions were distorted by equity to would mean that all law could be abolished.<sup>41</sup> Although Mauser found justification for his position in the jurisprudence of the *Ius commune*, Paulus de Castro's opinion on equity was more nuanced than Mauser admitted.<sup>42</sup>

In contrast to Beust and Mauser, Johann Oldendorp († 1567) relied much less on the jurisprudence of the *Ius commune* in his wide-ranging works.<sup>43</sup> When he cited medieval

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<sup>38</sup> Mauser, *Explicatio erudite et utilis x. tituli instit. De nuptiis, dictate olim publice a clarissimo et doctissimo iurisconsulto L. Cunrado Mausero Noribergensi* (Wittenberg: Johannes Crato, 1569) 12.

<sup>39</sup> Mauser, *De nuptiis* 11: 'Nos recitabimus iura usitata, tam civilia quam canonica, quae neutiquam pugnant cum nostra vera religione, unde secundum ea in consistoriis debet pronunciari.' On the Protestant consistories, see Ralf Frassek, 'Konsistorium,' *Handwörterbuch zur deutschen Rechtsgeschichte* 3 (2<sup>nd</sup> ed. Berlin 2013) 121-126 and Schmoeckel, *Das Recht der Reformation* 161-163. On Johann Oldendorp's theory of equity see Witte, *Law and Protestantism* 164-168.

<sup>40</sup> Mauser, *De nuptiis* 11: 'Nam ex ficta aequitate et capite suo velle pronunciari, non solum esset periculosum, sed etiam temerarium et levitatis plenissimum.'

<sup>41</sup> Ibid.11-12: 'Nec debemus capite nostro, propter aequitatem, quam esse putamus, a iure scripto recedere. Quia sic omnes leges possunt aboleri, propter praesumptuosos et temerarios, asserentes contrarium, et non tenentes iura scripta, propter aequitatem capitis sui, dicentes non curamus de vestris legibus et subtilitatibus.' See Paulus de Castro, *Lecture super Codice* (Venice 1487) to Cod. 3.1.8, fol. 123vb.

<sup>42</sup> E.g. Paulus de Castro, *Commentaria ad Digestum vetus in secundum partem* (Venice: Iuntas, 1596) fol. 59ra: 'Aequitas non est consideranda mere secundum ius gentium, sed mixtim, habito respectu ad praecepta civilia et praetoria.' On equity in canon law, see Peter Landau, 'Aequitas in the *Corpus iuris canonici*,' *Syracuse Journal of International Law and Commerce* 20 (1994) 95-104 at 103-104. Witte, *Law and Protestantism* 165 n.213, cites further literature.

<sup>43</sup> Jochen Otto and Ira Allen, 'Oldendorp, Johann (c.1488-1567),' *The Oxford International Encyclopedia of Legal History* (Oxford 2009) 4.260-261; Klaus Luig, 'Oldendorp, Johann,' *Neue Deutsche Biographie* 19 (Berlin 1999) 514-515. Berman, *Law and Revolution* 87-99.

jurisprudence he referred mainly to civilian jurists, especially Accursius († 1262) and also Bartolus of Sassoferrato († 1357).<sup>44</sup> His narrow range of sources affected his analysis of key concepts. A striking example is his influential tract on law and equity. Oldendorp attempted to create a jurisprudential model for the application of equity to legal problems.<sup>45</sup> In his treatise on equity he probed the relationship between equity (aequitas), positive law, and rights (ius).<sup>46</sup> At the center of his treatise he placed a text from Justinian's *Digest* by a jurist we know almost nothing about, Claudius Tryphoninus. The text dealt with the Roman contract law of deposit.<sup>47</sup> Two persons agreed to a contract of deposit when the depositor gave the depositee property for safe keeping. Tryphoninus posed the hypothetical: A man deposits 100 Roman coins with me; he is convicted of a capital crime and sent into exile. If the court has ordered that the deposited money be returned, should the public treasury receive the money or the convicted, exiled man? Tryphoninus pointed out that the answer to his question depended on which set of norms one used to render a decision: natural law (ius naturale) and the law of nations (ius gentium) demanded that the money should be given to the deported man. On the other hand, Roman civil law dictated that the money should be handed over to the state.

The contract of deposit had attracted the attention of jurists for centuries. The key question was the duty created by the presumed good faith of each party. Since the contract did not require consideration (quid pro quo) the honesty and good intentions (bona fides) of each party was crucial. The depositor must trust the depositee to take care of his property, and the depositee must have

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<sup>44</sup> In the *Opera Ioannis Oldendorpii* (2 vols. Basle: 1559) canonists are rarely mentioned in contrast to civilians. E.g. Johannes Andreae is cited 5 times in the two volumes; Gratian and Panormitanus only once. An examination of the works of many more Protestant jurists might reveal if some were more inclined than others to reject Catholic jurisprudence. See also Witte, *Law and Protestantism* 79-80 on Protestant jurists' citing Roman canonists and Oldendorp in particular.

<sup>45</sup> Witte, *Law and Protestantism* 167-168.

<sup>46</sup> On Johann Oldendorp's theory of equity see Witte, *Law and Protestantism* 164-168.

<sup>47</sup> Dig. 16.3.31. He had only 22 excerpts of his works in the *Digest*.

confidence that the depositor will exercise due diligence in preserving the property. Because of its unique status in Roman contract law, Tryphoninus connected deposit to the *Ius gentium*. By the seventh century Isidore of Seville wrote that the contract of deposit had been established by natural law. In the middle of the twelfth century Gratian argued that deposit illustrated a fundamental principle of natural law, the Golden Rule: do unto others as you would have others do unto you. If deposit was a principle of natural law, then the solution to Tryphoninus' case was clear: the deposit should be returned to the man in exile.<sup>48</sup>

Oldendorp ignored the jurisprudence of the *Ius commune* on the question almost completely — except for the Ordinary Gloss of Accursius. Protestant jurists had no hesitation about using the rich jurisprudential past when they could incorporate it into their work. Most exhibited no special animus toward Catholic jurisprudence. Oldendorp, however, had a particular distain for the jurists of the *Ius commune* — he cited very few of them and their works — and used Accursius as a vehicle for expressing his contempt. Accursius quite rightly observed that Tryphoninus had not come to a conclusion about which set of norms should be observed in resolving the case he proposed. He noted that The Tryphoninus had simply presented two possible solutions. Oldendorp called Accursius' comment 'absurd (insulsissime) not unlike a pig pushing his snout into roses' because the glossator did not understand how the rest of Tryphoninus' text explained the role of equity in deciding law.<sup>49</sup> When Accursius decided that the Roman state should be given the deposit, Oldendorp concluded that the glossator demonstrated his stupid,

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<sup>48</sup> See my discussion in 'Lex naturalis and Ius naturale,' *The Jurist* 68 (2008) 569-591; slightly revised version in *Crossing Boundaries at Medieval Universities*, ed. Spencer E. Young (Education and Society in the Middle Ages and Renaissance, 36. Leiden-Boston 2011) 227-253, which corrects an editor's error at the end of the essay.

<sup>49</sup> Johann Oldendorp, *De iure et aequitate forensis disputatio* (Cologne: Ioannes Gymnicus, 1541) 49: 'Accursius insulsissime nec aliter quam sus in rosas irruens.' Cf. Guido Kisch, *Erasmus und die Jurisprudenz seiner Zeit* (Basler Studien zur Rechtswissenschaft 56; Basel 1960) 235.

barbarous ignorance of the difference between the good and equitable (*crassissima sua boni et aequi ignorantia*).<sup>50</sup>

In the end, however, Accursius was right. Tryphoninus did not render a solution to his hypothetical. He had proposed two more hypotheticals in which thieves who had unjust possession of objects deposited them. Tryphoninus had argued the legitimate owners' rights trumped the depositor's obligation to return it to depositor, the thieves. These two further considerations, however, did not shed any light on the original hypothetical. Thomas Aquinas had already noted that circumstances could render a depositor's obligation to return property to a depositor void.<sup>51</sup> The most distinguished of the late medieval commentators on Roman law, Paulus de Castro, began his analysis of Tryphoninus' hypothetical by observing that 'Good faith requires that a deposit be returned to the depositor, unless circumstances or a special reason dictates otherwise.'<sup>52</sup> Perhaps if Oldendorp had explored prior jurisprudence of the *Ius commune* on the role that reason, circumstances, and equity should play in deciding cases he might have been more tolerant of Accursius' conclusions. Instead he set up a straw man (Accursius) to make a polemical point that was not new and had been an accepted principle in the jurisprudence of the *Ius commune*. In any case Oldendorp did not break new ground in the jurisprudence of equity.

Oldendorp's combative attitude towards earlier jurists was not typical of Protestant jurisprudence. One could cite many examples to make that point. It was an important goal of Protestant marital jurisprudence to restore the authority of the parents to approve the marriages of

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<sup>50</sup> Ibid. 55-56.

<sup>51</sup> Pennington, '*Lex naturalis*' 582-585 and 241-246 (*Crossing Boundaries*).

<sup>52</sup> Paulus de Castro, *Commentaria ad Digestum vetus in secundum partem* (Venice: Iuntas, 1596) fol. 59ra: 'Bona fides est in genere ut res deposita restituatur ei qui deposuit, nisi extrinseca vel specialis ratio contrarium suadeat.'

their children.<sup>53</sup> Beust raised the question whether this authority extended to guardians (tutor) and trustees (curator). He cited Bartolomeo da Saliceto († 1411) who distinguished between a tutor and a curator. A tutor could prohibit their charges from marrying, but a person subject to a curator could freely marry without the curator's consent. A tutor has authority over persons but a curator only over property.<sup>54</sup> Beust delved into the issue even more deeply. What if the young woman married without the tutor's consent, but when she was on the brink of puberty? Citing Accursius and Baldus de Ubaldis († 1400) Beust argued that if the 'paterfamilias' could not prevent his daughter from marrying under those circumstances, neither could the tutor. Consequently, continued Beust, if a city promulgated a statute that an adolescent boy or girl could not marry without the consent of a tutor, the statute was without doubt invalid because it violated the freedom of marriage. Beust confirmed his opinion by citing Panormitanus and Felinus Maria Sandeus († 1503), two of the most prominent fifteenth-century canonists. Beust finished his discussion by noting that those jurists who cited Luther to defend the idea that a tutor's consent was required, misunderstood Luther. He had written of parents not of tutors in his treatise on marriage.<sup>55</sup>

Beust posed a final question: could a tutor marry his charge. He observed that the Roman law jurists forbade the union but that the canonists permitted it. Sandeus and Bartolomeo da Saliceto accepted the canonistic tradition. Konrad Mauser, followed the canonists. He declared that since neither Roman law or Catholic canon law differed from Protestant law, Protestant courts (consistorii) should follow the *Ius commune*.<sup>56</sup> Beust also silently followed the joined Catholic

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<sup>53</sup> Protestant jurists generally did not distinguish between betrothal and marriage as clearly as did the Catholic canonical tradition; see Witte, *Law and Protestantism* 237.

<sup>54</sup> Beust, *Tractatus de iure connubiorum et dotium* fol. 14v.

<sup>55</sup> *Ibid.* fol. 15r.

<sup>56</sup> Mauser, *Explicatio erudite et utilis x. tituli instit. De nuptiis, dictate olim publice a clarissimo et doctissimo iurisconsulto L. Cunrado Mausero Noribergensi* (Wittenberg: Johannes Crato, 1569) 11: 'Nos recitabimus iura usitata, tam civilia quam canonica, quae neququam pugnant cum nostra vera religion, unde secundum ea in Consistoriis debet pronunciari.'



and Protestant tradition.<sup>57</sup> Mauser pointed out that Saxon law recognized the husband as the tutor of his wife.<sup>58</sup> The *Ius commune* did not grant the husband tutorial authority, but Protestant legislation trumped it.

The legal status of a spouse who abandoned the marriage bed also attracted Beust's attention. The plaintiff had two options: to pursue a separation or petition for cohabitation in court.<sup>59</sup> If the parties lived together in the same community and one party petitioned for reconciliation and cohabitation, the recalcitrant party could be imprisoned, forced and compelled by a 'new' Saxon ecclesiastical ordinance of 1580.<sup>60</sup> Beust also argued that the spouse who deserted and remained in the community showed greater contempt for the magistrate than the spouse who sought refuge in distant lands.

Willful and malicious desertion (*malitiosa desertio*) provided grounds for divorce. Adultery was also grounds for divorce. Other reasons were debatable, and Beust listed them in his commentary. If a husband severely beat his wife and could not be restrained, some jurists thought the husband's behavior could be grounds for divorce. In the end Beust noted that the judgment should be left to the 'political magistrate' because rarely or never are desertions with fornication.<sup>61</sup> In his analysis of desertion, he noted that Panormitanus and Luther agreed that an absent deserter and a deserter who remained in the community had the same legal status.<sup>62</sup>

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<sup>57</sup> Ibid.

<sup>58</sup> Melchior Klingen von Steinheim an der Strassen, *Das gantze Sechsisch Landrecht mitt ex und Gloss* (Leipzig: Hans Steinmann, 1577) fol. 94r-94v.

<sup>59</sup> Ibid. fol. 39r-39v. See Paul Hinschius, 'Beiträge zur Geschichte des Desertionsprocesses nach evangelischem Kirchenrecht,' *Deutsche Zeitschrift für Kirchenrecht* 2 (1862) 1-38.

<sup>60</sup> For the statute see *Die evangelischen Kirchenordnungen des sechszehnten Jahrhunderts: Urkunden und Regesten*, ed. Emil Ludwig Richter (2 volumes; Weimar 1846) 2.480.

<sup>61</sup> Beust, *De nuptiis* fol. 68v.

<sup>62</sup> Ibid. fol. 39v.

Adultery of the wife also united Catholic and Protestant jurisprudence. Beust argued that the husband could bring a civil suit against his adulterous wife, but a wife could not bring a criminal suit against her husband because the adultery of the wife is a greater danger to the husband. She could bear him children who were not his own. To support his conclusions he cited Panormitanus, Johannes Andreae († 1348), Cinus of Pistoia († 1336), Henricus Bohicus († ca. 1350), and Marianus Socinus Senior († 1467). Beust mentioned that a statute of the Emperor Charles V now permitted a wife to accuse her husband criminally.<sup>63</sup>

For the question of whether an adulterous party could accuse the other spouse of adultery either criminally or civilly. Beust relied entirely on Catholic jurisprudence.<sup>64</sup> If the husband prostituted his wife, he could not accuse her of a crime, as had been established by a decretal of Pope Innocent III.<sup>65</sup> If the wife, having learned from good evidence, believed her husband to be dead and had the permission of the Church to remarry, she could not be pursued in court. Beust cited Gratian's *Decretum* and a decretal of Pope Lucius III.<sup>66</sup> He envisioned a Boccaccian scenario in which a woman goes to bed with a man in the dark whom she believes to be her husband. The hypothetical was not farfetched, Beust wrote, because this happened recently to a woman named Friberga. He cited an early medieval conciliar text from Gratian in which a man who slept with his wife's sister and who was judged guiltless.<sup>67</sup> More generally, Beust noted that the canonists thought that according to common law (*ius vulgare*) if a wife committed adultery and the husband knew about it, but he continued to live with her, the canonists considered the continuation of the relationship to be valid and legitimate. A knottier question was whether a husband could leave his

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<sup>63</sup> Ibid. fol. 61r.

<sup>64</sup> Ibid. 61r-61v.

<sup>65</sup> X 4.13.6.

<sup>66</sup> C.34 q.1-2 c.1 and X 4.21.2.

<sup>67</sup> Beust, *De nuptiis* fol. 61v; C.34 q.1-2 c.6, Council of Tribur, 895, c. 43.

wife who had been caught in flagrant and public adultery without a trial and on his own authority. Beust referred his readers to a French jurist, François Marc, who was a participant and a scrupulous recorder of many cases heard in the parlement of Dauphiné in Grenoble between ca. 1486 and 1515.<sup>68</sup> In a long discussion Marc decided that a man must have a court rendered decision. Beust thought his argument posed and resolved ‘many beautiful questions.’ Beust concluded his discussion with the comment ‘Otherwise, whether and when a husband may kill his adulterous wife with impunity or her partner caught adultery, see the comments of Didacus de Covarrubias y Leyva (1512-1577) in his *Epitome* on the marriage book of the papal decretals.’ Didacus was one of the most internationally well-known jurists of the sixteenth century.<sup>69</sup> Covarrubias offered a stiff defense of a husband’s right to kill an adulterous wife and her lover if he caught them in ‘flagrante delicto.’<sup>70</sup> Beust thought Covarrubias got it right.

As this brief survey has shown, medieval papal canon law and jurisprudence not only lived on in Protestant canon law, it flourished.<sup>71</sup> Protestant jurists like Beust found much that they could use and admire in Catholic law books. There were many legal issues and problems that were universal and that did not impinge on theological differences. Consequently, it is not a mystery why they found Catholic jurisprudence congenial in spite of confessional differences. The reformers ideas and conceptions about law, jurisprudence, and legal systems were not balkanized as they are in the mindsets of modern jurists whose vision of law are constricted by legal positivism. The reformed jurists thought that good law could be found in many places and in many

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<sup>68</sup> François Marc, *Decisionum aurearum in sacro delphinatus senatu iampridem discussarum ac promulgatarum Pars prima* (Lyon: Iacobus Iuntae, 1562) fol. 185r-189v. The case concerned Claudia Pachodi who left Phillipus Albi after he had slept with a servant, beaten Claudia, and wasted her dowry (fol. 189vb).

<sup>69</sup> Estrella Ruiz-Gálvez Priego, *Statut socio-juridique de la femme en Espagne au XVIème siècle: Une étude sur le mariage chrétien faite d’après l’Epitome de Matrimonio de Diego de Covarrubias y Leyva, la législation royale et les moralists* (Paris 1990).

<sup>70</sup> Didacus de Covarrubias y Leyva, *Quartum decretalium librum Epitome* (Lyon: Iacobus Iuntae, 1558) Pars secunda, cap. 7, § 7-17, fol. 141a-145vb.

<sup>71</sup> As Johannes Heckel observed in an essay over 50 years ago, see ‘Decretum Gratiani’ passim.

legal systems. Every jurist believed that reason was the foundation of law, and when the reformers found reason in the canon law of the past (Gratian) or the present (Covarrubias) they embraced it.<sup>72</sup> This, however, did not mean that Catholic jurists reciprocated. Covarrubias was a conservative who, for example, was not kind to Martin Luther when he discussed his theory of excommunication.<sup>73</sup>

The confessional divide did affect the teaching of law in the universities. After Luther's dramatic confrontation with the books of Roman canon law in Wittenberg, there was a significant decline in the canon law taught at Wittenberg University. Even later it seems, Luther harbored anger and resentment against jurists. The Elector of Saxony, Johann Friedrich I, promulgated a rescript in 1544 addressed to Melanchthon, Johannes Bugenhagen († 1558) and Gregor Brück († 1557) in which he commanded the three men to dissuade Luther from composing a polemical tract against jurists.<sup>74</sup> We do not have much information about the reasons for Luther's animus. It is puzzling since parts of Roman canon law had been taught at German universities since the Reformation began, even if its role was not as central to the curriculum as it had been before.

Some jurists seem to have had doubts or fears about teaching Catholic canon law. Justus Jonas from Erfurt was appointed to succeed Henning Göde who had died in 1521. He refused to hold his obligatory lectures on canon law and quickly moved to the theological faculty in Wittenberg. He hired others to teach his canon law courses from 1524 to 1528. Göde was replaced

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<sup>72</sup> I would differ from Heckel's conclusion that the Reformers adherence to Roman canonical jurisprudence was due only to the 'unveränderte Zugehörigkeit der evangelischen Gemeinden zur ecclesia universalis,' 'Decretum Gratiani' 536-537. I would rather see their use of Catholic jurisprudence as an adherence to the principles of 'ius bonum et iustum et rationale.'

<sup>73</sup> Ibid. fol. 406v and fol. 432r.

<sup>74</sup> Ibid. 547; see Joel F. Harrington, *Reordering Marriage and Society in Reformation Germany* (Cambridge 1995) 149-151, including a misunderstanding of the *Ius commune* that is common among Reformation scholars.

only in 1528.<sup>75</sup> Jonas was a close supporter of Luther. It is understandable that he might not have wanted to be associated any longer with papal jurisprudence. Another canonist, Christoph Scheurl, had earlier moved from his chair to canon law to Roman law in 1511 for reasons that are not clear.<sup>76</sup>

Although lectures in canon law were established with the restoration of the University of Wittenberg by a statute in 1536, Melchior Kling (1504-1571) had already been teaching the subject.<sup>77</sup> In 1534, he had taught procedural titles of Boniface VIII's *Liber sextus* at Wittenberg, and by 1536 he was elevated to ordinary professor. He received a stipend of 50 guilders for his efforts.<sup>78</sup> He also wrote on the procedural titles of the *Decretales* of Gregory IX.<sup>79</sup> It is clear that by focusing on procedure, which had little theological content, Kling could avoid the problems that might arise from teaching papal law. The rules and norms of procedure as they had evolved in the *Ius commune* had become pervasive in European ecclesiastical and secular courts and were accepted without question by Catholic and Protestant jurists.<sup>80</sup> Kling taught a wide range of subjects at Wittenberg. Like most late medieval and early modern jurists who taught the *Ius commune*, he had to have more than one arrow in his quiver. He taught and wrote tracts on Roman and feudal law.<sup>81</sup> He extended his interests to Germanic law. After moving to Halle, he used Christoph Zobel's (1499-1560) work on the *Sachsenspiegel* to produce a volume on Saxon law.<sup>82</sup>

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<sup>75</sup> Göde's consilia were edited, arranged and published later by Melchior Kling; *Consilia . . . Henningi Goden . . . optimo ordine per D. Melchiorum Kling* (Wittenberg: Johannes Lufft, 1544).

<sup>76</sup> Hans Liermann, 'Das kanonische Recht als Gegenstand des gelehrten Unterrichts an den protestantischen Universitäten Deutschlands in den ersten Jahrhunderten nach der Reformation,' *Studia Gratiana* 3 (Bologna 1953) 539-566 at 543-544.

<sup>77</sup> Schmoeckel, *Das Recht der Reformation* 71-72, 87-88.

<sup>78</sup> Melchioris Kling, *Super secundum Sexti decretalium . . . lectura* (Frankfurt: Christianus Egenolphus, 1562).

<sup>79</sup> Melchioris Kling, *In praecipuos secundi libri decretalium titulos* (Lyon: Iacobus Iuntae 1551).

<sup>80</sup> Liermann, 'Das kanonische Recht' 550.

<sup>81</sup> Kling, *In feudorum usus seu consuetudines brevis et erudite commentatio* (Frankfurt: Christianus Egenolphus, 1563); Kling, *Institutionum iuris principis Iustiniani libros enarrationes* (Lyon: Paulus Mirallietus, 1546).

<sup>82</sup> *Das gantze Sechsisch Landrecht mit Text und Gloss in eine richtige Ordnung gebracht durch Doctor Melchior Klingen* (Frankfurt: Voegelinianus, 1600).

Teaching Roman canon law did not hinder his academic career. In 1539 he was elected rector of the university. Finally, in 1541 he was chosen as the councilor (Kurfürstlicher Rat).<sup>83</sup> He ended his career in Halle and died in 1571.

In his tract on marriage, Kling focused on the same Reform issues that Beust would later: consent of parents, adultery, and desertion. He noted that Roman law demanded the consent of the parents, but canon law did not. In canon law, parental consent was not a matter of necessity but of honesty. In his own times, Kling lamented, a great argument erupted between the theologians and the canonists. The theologians favored Roman law; the canonists ‘*ius canonicum*.’ The two camps did agree that children behave badly if they marry without parental consent. They differed on their legal status if the marriage had been consummated.<sup>84</sup> Kling devoted many pages of his treatise distinguishing between the Roman law and the Roman canon law of adultery.<sup>85</sup> He also ultimately, after much dialectical argumentation, conceded that a second marriage was valid, even though a former spouse still lived.<sup>86</sup> Malicious desertion was a problem that created many problems in marital jurisprudence, but even the canonists accepted it as grounds for a second marriage.<sup>87</sup> In spite of the irenic tenor of Kling’s treatise, it landed in the papal indices of forbidden books, together with his commentary on the procedural titles of the second book of the *Decretales* of Gregory IX and his lectures on Justinian’s *Institutes*.<sup>88</sup>

Other German universities followed in the curricular footsteps of Wittenberg, even though some did not provide for the teaching of canon law. When Marburg was established in 1529 and

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<sup>83</sup> Liermann, ‘Das kanonische Recht’ 547-548.

<sup>84</sup> Melchior Kling, *Matrimonialium causarum tractatus* (Frankfurt: Christianus Egenolphus, 1553) fol. 33v-34v.

<sup>85</sup> *Ibid.* fol. 39r-39v and passim.

<sup>86</sup> *Ibid.* fol. 43v-44r.

<sup>87</sup> *Ibid.* fol. 43r. For an overview of the Protestant reform of marriage law, Witte, *Law and Protestantism* 232-255.

<sup>88</sup> Bernard de Sandoval, *Index librorum prohibitorum et expurgatorum* (Geneva: Iacobus Crispinus, 1619) 68.

Königsberg in 1544, the founders did not establish a chair in canon law. In other universities, the professor of canon law occupied a respected position. At the University of Leipzig, the professor of canon law was given a prebend in the evangelical churches of Nauburg and Merseburg. One of the most famous canonists at Leipzig was the renowned Benedict Carpzov the Younger (1595-1666), whose works on procedure circulated throughout Protestant and Catholic lands.<sup>89</sup> As we have seen, the jurisprudence of procedure was a special focus of all the jurists teaching in Protestant universities. Tübingen and Heidelberg established chairs that were centered on the teaching of procedure. The same conditions prevailed at the universities in Greifswald and Rostock. In Rostock, however, the statutes of 1564 stipulated that there would be five professors of Roman law, one for feudal law, and one to teach the ‘Regulae iuris.’ No provisions were made for a professor of canon law.<sup>90</sup> In the next two centuries, the teaching of canon law almost, with a few exceptions, disappeared from the Protestant universities.<sup>91</sup>

If there is clear evidence in Protestant lands with universities that reformed canon law and legislation evolved in an academic culture that knew Roman canon law and used it when it suited their purposes, the story in the areas without universities is not as clear cut. In the Calvinist Netherlands the place of Roman canon law at the universities of Leiden, Franeker, Groningen, and Utrecht was different from Germany because none of the universities permitted a teaching position for Roman canon law. We know that Henricus Schotanus (1548-1604) taught the second book of the *Decretales* of Gregory IX at Franeker. He lectured only on procedure as Beust and Kling had, but he never published them. There was no question that the contributions of the jurists of the *Ius*

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<sup>89</sup> Liermann, ‘Das kanonische Recht’ 548-550; *Benedict Carpzov: Neue Perspektiven zu einigem umstrittenen sächsischen Juristen* (Tübingen 2000).

<sup>90</sup> *Ibid.* 550-553.

<sup>91</sup> *Ibid.* 556-566. For the seventeenth and eighteenth centuries see the important essay of Udo Wolter, ‘Die Fortgeltung des kanonischen Rechts’ 13-47.

*commune* to procedure immunized this area of law from confessional discord. Schotanus' published works treated only Roman law.<sup>92</sup> After the sixteenth century, however, the teaching of papal canon law almost disappeared from Dutch universities. Although occasional professors explored the history of the discipline and its principles, there did not seem to be an effort to examine and contrast the similarities and differences of the two confessional legal systems.<sup>93</sup>

In European lands that did not yet have universities or where Protestant enclaves were embedded in Catholic kingdoms, the relationship between the old jurisprudence and the new is difficult to untangle. Cities, synods, and individuals established norms or ordinances to guide reformed communities mainly through ordinances and the decisions of the courts (consistories).<sup>94</sup> Without jurists to unite legislation and court decisions with a jurisprudence that replicated the literature of the *Ius commune*, disparate legislative decrees and court decisions remained without a uniform jurisprudence.<sup>95</sup>

In 1541 Geneva promulgated ordinances for the reformed congregations. 'Intolerable' crimes were listed in them: heresy, schism, rebellion against ecclesiastical order, simony, forgery, perjury, usury and dancing. The ordinance added a number of lesser crimes such as interpreting the Scriptures bizarrely, negligence to perform the duties of office, and using language that injured

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<sup>92</sup> Robert Feenstra, 'Canon Law at Dutch Universities from 1575 to 1811,' *Canon Law in Protestant Lands*, ed. Richard H. Helmholz (Berlin 1992) 123-134 at 124-125 and his 'Ten Franeker Law Professors and their Bibliography: Some Results of Recent Research,' *Fundamina: A Journal of Legal History* 8 (2002) 102-115.

<sup>93</sup> *Ibid.* 126-133.

<sup>94</sup> The best source for these texts remains, Richter's *Die evangelischen Kirchenordnungen* and more recently Schmoeckel, *Das Recht der Reformation* 163-165, 217-218, 232-237. For an interesting statistical analysis of the legal problems the consistories handled, see Philip Benedict, *Christ's Churches purely Reformed: A Social History of Calvinism* (New Haven-London 2002) 460-489.

<sup>95</sup> John Witte, Jr. and Robert M. Kingdon, *Sex, Marriage, and Family in John Calvin's Geneva*, 1: *Courtship, Engagement and Marriage* (Religion, Marriage, and Family; Grand Rapids, MI-Cambridge, UK 2005) 419-431 and *passim*. It is important to remember that the collections of decretals were primarily reports of appellate decisions rendered at the Roman curia.



others.<sup>96</sup> Except for dancing these crimes were had been also staples of the medieval *Ius commune*. However, with statutes it is difficult to trace the inspiration of any text. Nonetheless, some ecclesiastical structures and institutions can be easily identified as borrowings from the medieval church. For example, the Geneva ordinances provided an outline for how a visitation to a congregation should be conducted that imitated medieval visitations.<sup>97</sup> In 1546 John Calvin (1509-1564) finally pushed through an ordinance that outlined the norms for marriage for Geneva.<sup>98</sup> The consistories in Geneva applied the norms of the ordinance relatively uniformly.<sup>99</sup> At times Calvin's opinions and the decisions of the consistories led to perplexing and contradictory decisions that differed from the established norms of the *Ius commune*. An interesting case in point is the marriage of elderly men and young women. Roman canon law had no difficulty sanctioning May-December marriages, but Calvin harbored unexplained antipathy toward them. The courts had difficulty rendering uniform decisions in those cases.<sup>100</sup>

It will not be a surprise that the norms for court procedure in the consistories closely follow the *Ius commune*. If a plaintiff brought a case to the consistory, the ordinance dictated the wording of an oath that must be sworn. It is modelled on the oath of calumny that was necessary to begin proceedings in ecclesiastical and secular courts.<sup>101</sup> The Geneva ordinances also dealt with discipline of clergy, sacraments, burials, liturgy, and especially the regulations for marriage.<sup>102</sup>

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<sup>96</sup> 'Les Ordonnances ecclesiastiques de l'Eglise de Geneve,' Ibid. 1.344. On Calvin, his legal education, and his works, see Benedict, *Christ's Churches* 77-114 and William J. Bouwsma, *John Calvin: A Sixteenth-Century Portrait* (Oxford 1987) 10-24.

<sup>97</sup> Ibid. 1.344-345.

<sup>98</sup> Witte-Klingdon, *Sex, Marriage, and Family* 40-48; translation of ordinance 51-61.

<sup>99</sup> Ibid. 131-139, 174-182, 228-238, 272-282.

<sup>100</sup> Ibid. 278-280, 284.

<sup>101</sup> Ibid. 345. On the oaths taken during the legal process, see Antonia Fiori, *Il giuramento di innocenza nel processo canonico medievale: Storia e disciplina della 'purgatio canonica'* (Studien zur europäische Rechtsgeschichte 277; Frankfurt am Main 2013) and Tiziana Ferreri, *Ricerche sul crimen calumniae nella dottrina dei glossatori: Da Irnerio ad Azzone e da Graziano a Ugucione da Pisa* (Archivio per la storia del diritto medioevale e moderno, 15; Noceto 2010).

<sup>102</sup> On marriage Ibid. 347-350.

The same marital issues that occupied the Reformed jurists appeared in the ordinance: permission of the parents, authority of tutors and curators, implications of adultery, and desertion by a spouse.<sup>103</sup>

In 1568, a synod held in Wesel, Belgium dealt primarily with ecclesiastical offices, ministers, deacons, doctors of theology, church elders, as well as the sacraments, including marriage.<sup>104</sup> As had the Geneva ordinances the Wesel synod listed major and minor crimes that were very similar.<sup>105</sup> There was a striking connection in the ordinances to a fundamental norm of the *Ius commune*. In the section of elders it was stated:<sup>106</sup>

Elders should know that it is their duty when they promulgate laws or exercise power and jurisdiction over ministers and colleagues, churches, consistories, the ecclesiastical senate to enforce their will, if ministers are ignorant of the events or absent, the elders actions are completely alien to their office.

The norm of consent and the right of people to consent to matters that touches their rights was encapsulated in the maxim, ‘Quod omnes tangit ab omnibus approbari debet’ (what touches all must be approved by all) and was an important principle in canonical jurisprudence that had its beginnings in Roman law, was brought to maturity by the canonists, and quickly entered the *Ius commune*.<sup>107</sup> Was the statute influenced by the jurisprudence of the *Ius commune*? It is difficult to know. Because of the nature of legislation, connections to particular sources are hard to make. Protestant jurists often cited their sources. Legislators rarely did. We can evaluate the attitudes of

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<sup>103</sup> E.g. Witte, *Law and Protestantism* 238, 248, 250-251.

<sup>104</sup> Richter, *Die evangelischen Kirchenordnungen* 2.310-318: ‘Acta synodi Wesaliensis.’

<sup>105</sup> *Ibid.* 317.

<sup>106</sup> *Ibid.* 314: ‘Leges autem condere vel imperium exercere, sive erga ministros collegasque, sive erga ecclesiam, et vel consistorium seu senatum ecclesiasticum pro suo arbitratu cogere, ministris ignorantibus vel absentibus, sciant a suo munere esse quam alienissimum.’

<sup>107</sup> Cod. 5.59.5.2; on the maxim and its origins see Pennington, ‘Representation in Medieval Canon Law,’ *The Jurist* 64 (2004) 361-383 and in *Repräsentatio: Mapping a Key Word for Churches and Governance: Proceedings of the San Miniato International Workshop, October 13-16, 2004*, ed. Alberto Melloni and Massimo Faggioli (Münster-Hamberg-Berlin-Wien-London 2006).

a particular jurist with a careful reading of his work. That task is much more difficult when analyzing Protestant legislation.

The history of Reformation canon law in England was for a long time framed by the so-called Stubbs v. Maitland controversy.<sup>108</sup> At the end of the nineteenth century William Stubbs ignited it when he argued the medieval ecclesiastical courts strove to be independent from Roman authority and already demonstrated Protestant tendencies toward rejecting Roman jurisdiction. The most prominent legal historian of the day Frederic W. Maitland entered the fray against Stubbs. Maitland's barbed rejoinder to Stubbs's thesis, that the Church of England was 'Protestant before the Reformation and Catholic afterwards' proved that wit could be a lethal instrument of attack in scholarship.<sup>109</sup> Although modern scholarship has found some fault with both positions, few scholars would disagree that the reformed Church of England with the British monarch as its head was more hierarchical in its structure than any other reformed church.<sup>110</sup>

The Roman constitution of the English Church can be seen from a number of different angles. The geographical map of the Church remained virtually the same, even though five new dioceses were established, Bristol, Oxford, Chester, Peterborough, and Gloucester. Their juridical structure, however, was very much the same as the pre-Reformation dioceses.<sup>111</sup> The most significant change in the structure of the Church was in the way in which appeals were handled. King Henry VIII had forbidden appeals to Rome. During his reign a new appellate court was

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<sup>108</sup> Benedict, *Christ's Churches* 121-281, provides a good guide to Protestant churches in France, Scotland, and Eastern Europe as well as England, but with little emphasis on law.

<sup>109</sup> Charles Donahue, 'Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined after 75 Years in the Light of some Records from the Church Courts,' *Michigan Law Review* 72 (1974) 647-716;

<sup>110</sup> Richard H. Helmholz, *Reformation Canon Law in Reformation England* (Cambridge Studies in English Legal History; Cambridge 1990) 4-5; Helmholz, 'Canon Law in Post-Reformation England,' *Canon Law in Protestant Lands*, ed. Richard H. Helmholz (Berlin 1992) 203-221, Helmholz, *The Oxford History of the Laws of England*, 1: *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford 2004) 237-309.

<sup>111</sup> Helmholz, 'Canon Law' 204-206. I am dependent on Helmholz' works for much of what follows.

created, the Court of Delegates to hear all appeals from ecclesiastical courts. A new and different set of jurists were delegated to hear each case that was appealed from diocesan tribunals. These judges were chosen from common law lawyers and civil law jurists, that is those jurists who had been educated at the university law schools in Roman law. A statute of Queen Elizabeth I in 1559 created a second court, the Court of High Commission. This court was governed by the rules and norms of the *Ius commune*'s 'ordo iudiciarius.' Its primary function was to deal with the crime of dissent within the Church.

In the early years of the English Reformation a commission was formed to draft a code of ecclesiastical norms.<sup>112</sup> A similar attempt had been made in Germany under the leadership of Johannes Bugenhagen in 1522.<sup>113</sup> Both attempts at codification failed and were never accepted as official. The English project was published under the title *Reformatio legum ecclesiasticarum* later in the sixteenth century.<sup>114</sup> Although it was a failed attempt at codification, its organization can reveal the mindset of the English Reformers. The commissioners created a text that has many similarities to a modern code. They eschewed quoting texts from the *Ius commune*, except for the last title, *De regulis iuris*. These rules of law were taken primarily from Roman law with a scattering of canonistic texts. Rules number one and four were two of the most famous of the maxims created by the medieval canonists: 'Quod non est licitum in lege, necessitas facit licitum' (Necessitas legem non habet) and 'Quod omnes tangit debet ab omnibus approbari.'<sup>115</sup> Although the beginning and end of the *Reformatio* imitated Roman and canon law collections,<sup>116</sup> the topics

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<sup>112</sup> Ibid. 206-207.

<sup>113</sup> Schmoeckel, *Das Recht der Reformation* 6; see Annaliese Sprengler-Ruppenthal, *Gesammelte Aufsätze: Zu den Kirchenordnungen des 16. Jahrhunderts* (Jus ecclesiasticum 74; Tübingen 2004) for several essays on the subject.

<sup>114</sup> *Reformatio legum ecclesiasticarum ex auctoritate primum regis Henrici 8. inchoata, deinde per regem Edwardum 6 provecta* (London: Johannes Daji, 1571 and London: Laurentius Sadler, 1640). I will cite the 1640 edition.

<sup>115</sup> X 5.41.4 and VI 5.[13].29.

<sup>116</sup> The *Reformatio* began with the title 'De summa trinitate' that is also the first title of Justinian's *Codex* and Pope Gregory IX's *Decretales* and Pope Boniface VIII's *Liber sextus*. The *Reformatio*'s last title, 'De regulis iuris' was also the last title of Justinian's *Digest* and the *Decretales* as well as the *Liber sextus*.

in between departed completely from the organization of the *libri legales* of the *Ius commune*.<sup>117</sup> The last third of the *Reformatio* dealt with procedure. It is here that we find unambiguous evidence of the commissioners' debt to the *Ius commune*. Trials were divided into ordinary and extraordinary proceedings. Decisions were rendered in ordinary trials by 'proofs that were more clear than day.'<sup>118</sup> In proceedings using extraordinary procedure, that is summary procedure, the court could render a judgment 'de plano, et sine strepitu et sine forma, et figura iudiciis.' The wording was taken directly out of Pope Clement V's decretal *Saepe contingit*, that was included in the papal decretal collection, the *Clementines*, when it was promulgated in 1317.<sup>119</sup> The commissioners also accepted the argument of the jurists of the *Ius commune* that court proceedings were established by natural law. Therefore, the key elements of court procedure could not be omitted.<sup>120</sup> In the remaining chapters that laid down the norms of procedure, the principles and language was taken directly out of the procedural texts of the *Ius commune*.

The fate of canon law in the English universities was quite different from what occurred on the continent. From the beginning, the teaching of Roman canon law was completely suppressed. This led to an expansion of Roman law's importance in the curriculum. By the end of the seventeenth century a significant cadre of jurists' teaching Roman law had been entrenched at Oxford and Cambridge.<sup>121</sup> Richard Helmholz has raised the question, since Roman canonical

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<sup>117</sup> Hoeflich and Grabher, 'Establishment of Normative Legal Texts' 9-20.

<sup>118</sup> *Reformatio* 180: 'probationes fuerint ipsa luce clariores,' which borrowed from the standard language of the jurists and remained embedded in tracts on procedure until the nineteenth century, see e.g. Giuseppe Mascardi, *Conclusiones probationum* (4 vol. Frankfurt am Main: Johannes Sybertihey, 1661) 1.26: 'nisi per probationes meridiana luce clariores probarent.'

<sup>119</sup> Clem. 5.11.2.

<sup>120</sup> *Reformatio* 181: 'Processus absque forma et figura iudiciis tunc sit quando ea tantum quae sunt iuris naturalis in processor conservantur, et citatio legitimarum personarum, qua mandatum exhibeant . . . petitio, defensio, et alia huiusmodi.' See Pennington, 'Innocent Until Proven Guilty: The Origins of a Legal Maxim,' 63 *The Jurist* (2003) 106-124.

<sup>121</sup> Helmholz, 'Canon Law' 207-208; Brian P. Levack, *The Civil Lawyers in England 1603-1641: A Political Study* (Oxford 1973).

jurisprudence was used and cited in England for the next two centuries, how did jurists learn what they needed to know? He thought that he could not provide a definitive answer to his question. However, he made the point that the jurisprudence of the *Ius commune* was so entangled that ‘Knowledge of Roman law in the sixteenth century led, almost inevitably, to knowledge of canon law . . . The two laws were so interdependent by 1600 that they could scarcely be pulled apart.’ Helmholz’ last sentence was a translation taken from the canonist Petrus Rebuffus (Pierre Rebuffi, 1487-1557) who had the same insight.<sup>122</sup> There is no question that Helmholz’ tentative answer is the major factor for the extensive use of Roman canon law in English and continental Reformation sources. As Helmholz has illustrated in detail, the procedure of ecclesiastical courts in England remained virtually unchanged by the Reformation. English jurists like Francis Clerke adopted the rules of the *Ordo iudicarius* of the *Ius commune* in an influential treatise on procedure that he wrote ca. 1590.<sup>123</sup>

When one turns from learning and jurisprudence to English court cases one finds that the *Ius commune* thrived outside ecclesiastical courtrooms. The jurists of the *Ius commune* were cited again and again when procedural questions, marriage cases, problems of ecclesiastical benefices and the rights of patronage arose in royal courts.<sup>124</sup> To use one example from case reported by Sir John Davies (1569-1626) about a case in which a commenda contract for an ecclesiastical benefice

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<sup>122</sup> Helmholz, *Roman Canon Law* 149-154 at 151 n.103.

<sup>123</sup> Ibid. 121-144 and Helmholz, ‘Canon Law’ 211-212. Helmholz has noted that a manuscript copy of Clerke’s treatise at Washington, The Catholic University of America, MS 180, was annotated with many citations to the *Ius commune* in the margins in ‘The Privilege and the *Ius commune*: The Middle Ages to the Seventeenth Century,’ *The Privilege against Self-Incrimination: Its Origins and Development* (Chicago 1997) 17-46 at 39 n. 118. Cf. Helmholz, *Canon Law* 255-256.

<sup>124</sup> Helmholz, ‘Canon Law’ 211-216, Helmholz, *Canon Law* 311-353, on procedure in the ecclesiastical courts.

was in dispute ca. 1609.<sup>125</sup> The report of the case was made before a final decision was made by the court. However, Davies noted that:<sup>126</sup>

All the ecclesiastical laws of England were not derived and borrowed from the court of Rome . . . the ancient kings of England . . . with the advice of their clergy . . . made divers ordinances for the government of the church of England . . . <with> divers provincial synods. . . all of which are part of our ecclesiastical laws at this day.’

It was a forceful argument, using historical arguments, for justifying the use of Roman canon law in English seventeenth-century courts. Davies also argued that even before the Reformation, some papal decretals were not received in many lands. Rather local custom was followed.<sup>127</sup> His point was that a jurist could pick and choose which parts of Roman canon law was valid in England. In any case, in his report Davies cited Gratian, canons of the Fourth Lateran Council (1215), Johannes Andreae, Rebuffus repeatedly, and Boniface VIII’s *Liber sextus*. He emphasized, however, that it was the king of England who had the ultimate authority to grant ecclesiastical prebends.

The reader of this essay may conclude at this point that there was much continuity between the pre-Reformation and the post-Reformation churches in Protestant lands. If one focuses solely on law, the courts, and jurisprudence, one can make a good argument for continuity. However, continuity is only one part of the story. As the titles of Berman’s and Schmoeckel’s books remind us, even if only considering law, revolution and schism are another side of a multi-sided story.

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<sup>125</sup> For the use of the commenda in commercial contracts see, John H. Pryor, ‘The Origins of the Commenda Contract,’ *Speculum* 52 (1977) 5-37.

<sup>126</sup> Sir John Davies, *A Report of Cases and Matters in Law resolved and adjudged in the King’s Court in Ireland* (Dublin: Sarah Cotter under Dick’s Coffee House in Skinner Row, 1762) 185-229 at 198.

<sup>127</sup> *Ibid.* 191-192.