Great Christian Jurists in German History

Edited by
MATHIAS SCHMOECKEL
and JOHN WITTE JR.

Mohr Siebeck

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Preface and Acknowledgements

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

Until the 1980s, there were still plenty of formally required and voluntary indications of a person's religious identity and affiliation, but today it is generally much harder to recognize these distinctions. Previously, religious diversity sometimes produced various tensions, not only between competing forms of faith but also within religious groups – from being called a heretic to being excluded from some groups altogether. Today, however, the question of religion is often deliberately ignored, in part to avoid such tensions within and between faiths. In the last few decades, even biographies of earlier figures in German history have intentionally neglected discussion of their subjects' confession in order to overcome the remaining religious tensions and ignore the conflicts.[1] Recently, some politicians have even denied the existence of a specific Christian tradition in Germany to include a longstanding Muslim or Turkish influence, symbolized for them by the presence of coffee and croissants.

While such political attempts to deprecate religion might help to reduce social conflict, they are and cause serious and conscious misrepresentations of history. Yet these fashions are now common in today's academic study of history, too. Most German scholarly texts in legal history, political history, and related fields outside the formal fields of theology – and apart from some more or less restricted chapters on canon law and on Luther – tend to ignore the influences of

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

the church or Christian tradition.[2] Moreover, even recent histories of theology and religion are narrowly focused on the history of one Christian tradition or topic, rather than offering comparative and interdisciplinary studies of the lasting influence of the different Christian confessions on various aspects of German thought, culture, politics, or law.

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

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

Today, by contrast, most German scholars and students lack a deep understanding or appreciation of this history of law and Christianity. Not since Erik Wolf's classic text, *Grosse Rechtsdenker der deutschen Geistegeschichte* (4th ed. 1963) has there been a thorough investigation into the influence of Christian theology on German legal thinkers through the centuries. While some scholars of late, animated in part by the five-hundredth anniversary of Luther's Reformation in 2017, have studied Protestant influences on law and politics, the

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

[3] See Mathias Schmoeckel, *Das Recht der Reformation: Die epistemologische Revolution der Wissenschaft unde die Spaltung der Rechtsordnung in der Frühen Neuzeit* (Tübingen: Mohr Siebeck, 2014).

scholarly study of the millennium-long canon law tradition in German history, or the influence of Christianity on discrete areas of public, private, penal, and procedural law, has become almost irrelevant for all but specialists. Ironically, Germany, once the world's leader in the scholarly study of law and Christianity, has now largely lost its capacity to research even its own Christian traditions and their legal influence. And the few bold attempts to do so of late have garnered little public interest, sympathy, or funding, and sometimes have met with considerable opposition.

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

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

We are delighted to have the leading press in Germany, Mohr Siebeck, publish this volume on *Great Christian Jurists in German History*, featuring a score of leading scholars, mostly from German universities. It proved hard to press this vast topic into a single volume, and the editors and contributors had to work out the parameters of this study:

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

With those criteria in mind, the editors and contributors made their selections of biographical case studies for this volume. Of course we had to choose some medieval authors who can be regarded as jurists or at least legal minds. No German legal history could omit Eike von Repgow, who gained his expertise in his position as a judge. Fortunately, we have a chapter on Johannes Teutonicus, too, as an early example of the learned tradition, particularly on canon law. We were fortunate to be able to include a chapter on Albertus Magnus who, while not trained as a jurist, established main ideas of natural law theory and others that led to the establishment of legal professionalization in Germany. Johann von Buch, by contrast, is an early example of a medieval German lawyer trained at the Uni-

versity of Bologna. While it was easy to take Johann Oldendorp as one early example of a leading Lutheran lawyer, it was more complicated to find a suitable Catholic counterpart, and we settled on Andreas Gaill. Authors from the seventeenth and eighteenth centuries, particularly of the Saxon tradition take up a substantial place in the middle of the this volume: Dominicus Arumaeus, Samuel von Pufendorf, Benedict Carpzov, Gottfried Wilhelm Leibniz, and Christian Thomasius [Boehmer] just could not be omitted, even though they constitute a dominating Lutheran block. With the crypto-Calvinist Johannes Wesenbeck, from Wittenberg, and the more outspoken Calvinist Johannes Althusius, we have at least a Reformed counterpart. Although we find distinguished Roman Catholic lawyers in all ages, it is hardly a coincidence that no example of this tradition from the seventeenth and eighteenth centuries appears in this collection. The new, predominant Prussian tradition is represented by Carl Gottlieb Svarez, Friedrich Karl von Savigny, Karl Friedrich Eichhorn, Moritz August von Bethmann-Hollweg, and Friedrich Julius Stahl, while Sylvester Jordan and Max von Seydel represent Roman Catholic counterparts. The reaction to Nazism is reflected in the biographies of a Protestant martyr like Eugen Bolz, Roman-Catholic lawyers like the politician Konrad Adenauer, the jurist Hans Nawiaski, and the great canonist and émigré scholar Stephan Kuttner.

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

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

[4] Mathias Schmoeckel, "Schleiermacher und Savigny: Von der 'intellektuellen Anschauung' zum historischen System (1795–1817)," in Uwe Niedersen (ed.), *Reformation in Kirche und Staat. Von den Anfängen bis zur Gegenwart* (Dresden: Torgau, 2017; 2nd ed. Berlin: Duncker & Humblot, 2019), 197–224.

original views on the topics of the day. This publication may help, therefore, to point toward some historic figures who deserve a more general recognition.

We are grateful for those colleagues who took part in this project – however out of step with current German academic fashions – and delivered such inspiring chapters. In September 2018, most of the contributors convened on the beautiful premises of the medieval Maria Laach Abbey in the Eifel region of Germany, with the organizational help of the team in the Institut für Deutsche und Rheinische Rechtsgeschichte at the University of Bonn, especially Julius Schwafferts and Malte Becker. Many of the collaborators in Bonn agreed to present a chapter for this project, while others helped to organize, translate, or correct the chapters. Gary S. Hauk, senior editorial consultant for the Center for the Study of Law and Religion at Emory University, improved the quality of the texts tremendously with his exacting editorial work. The cooperation of his colleagues Anita Mann, Amy Wheeler, and other members of the Center enabled us to carry out our plans from the first initiative to its realization. And this volume would not have been possible without the generous underwriting of the McDonald Agape Foundation, and its principal officers, Ambassador Alonzo L. McDonald and his wife, Suzie McDonald, and their son and now new foundation president, Peter McDonald. We give thanks to all these friends and colleagues for their support, and to our friends at Mohr Siebeck for applying their usual high standards of excellence to the timely publication of this volume.

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John Witte Jr., Emory University

Chapter 1

Johannes Teutonicus (ca. 1170/75–1245)

Ken Pennington

I. Early Life and Legends

Johannes Teutonicus was the first and earliest German jurist to achieve European-wide fame and was the first German to teach at the law school at Bologna.[1] Johannes was born in the last quarter of the twelfth century probably in the diocese of Halberstadt where he spent the last years of his life (1241–1245) as provost of the cathedral chapter. Previously, he also held the position of provost (1223) of the collegiate church St. Maria in Halberstadt. Two manuscript versions of his epitaph give him the family name of Semeke (Zemeke). In the legal literature of the *Ius commune* he was always referred to as Teutonicus because of his Germanic origins. All the epitaphs describe him a "lux decretorum (the light of Gratian's *Decretum*)" a title that connects Semeke to the jurist in Bologna with some certainty.[2] He died in 1245.

As is the case for so many of the twelfth- and thirteenth-century canonists there is little biographical information about Johannes. His fame, however, was so great that writers from the sixteenth and eighteenth centuries concocted stories about him. He was called a magician, illegitimate, and a champion who fought against papal taxes levied on Germany.[3] The facts are more mundane. He was probably born ca. 1170–1175 and entered law school ca. 1200. The only teacher that he mentioned in his works was the great Roman lawyer, Azo.[4] In 1212 he

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[1] *Peter Landau*, Johannes Teutonicus und Johannes Zemeke: Zu den Quellen über das Leben des Bologneser Kanonisten und Halberstädter Dompropstes, in: Ullmann (ed.), Studien zu Dom und Liebfrauenkirche: Königtum und Kirche (Berlin: Akademie Verlag, 1997), 18–29.

[2] *Stephan Kuttner*, Johannes Teutonicus, in: Neue Deutsche Biographie 10 (Berlin: Duncker & Humblot, 1974), 571–573. The inscription is confirmed by several manuscripts, see *Ken Pennington*, The Epitaph of Johannes Teutonicus, Bulletin of Medieval Canon Law 13 (1983), 61–62; *Horst Fuhrmann*, Das Grabmal für Johannes Zemeke im Dom zu Halberstadt und die Inschriften in seinem Umkreis, Signa iuris 6 (2010), 35–73.

[3] See *Johann Friedrich von Schulte*, Johannes Teutonicus (Semeca, Zemeke), Zeitschrift für Kirchenrecht 16 (1881) 107–132, whose essay is still the most complete evaluation of the evidence for Johannes' time in Halberstadt. Even modern authors insert errors or baseless assertions into his biography, e. g. *Heiner Lück*, Johannes Teutonicus († 1245), in: Cordes/Lück/Werkmüller/Bertelsmeier-Kierst (eds.), Handwörterbuch zur deutschen Rechtsgeschichte 2 (Berlin: Erich Schmidt Verlag, 2012), 1379–1381, thinks that the Ordinary Gloss was based on the *Gloss Palatina*, that Pope Innocent III commissioned Johannes to gloss *Compilatio tertia* and that Johannes may have known Eike von Repgow, the author of the Sachsenspiegel.

[4] Gloss to Gratian's *Decretum* at D. 86 c. 4 s. v. *frangatur auctoritas*.

had been appointed a canon in the cathedral at Halberstadt and already held the title of master (magister), which indicated that he was teaching. There is a letter in the register of the archbishops of Magdeburg dated 1218 in which Johannes was a witness. Consequently, Johannes probably taught at Bologna from ca. 1210 to 1218 and spent the rest of his life in Halberstadt and the surrounding region.

II. Teaching and Writings

If Johannes did teach for only eight years, he was prodigiously productive and successful in a very short time. He must have been viewed as remarkably gifted. In that time he wrote and compiled four major works. His most important work for his future reputation was an extensive gloss to Gratian's *Decretum* that very quickly became the *Ordinary Gloss* used in the classrooms and produced in the writing workshops (scriptoria) all over Europe. His *Ordinary Gloss* alone would have established him as the leading canonist of his age. Johannes incorporated the glosses of other major canonists in his work, especially those of Huguccio and Laurentius Hispanus, which accounts for its immediate acceptance and success. Jurists, polemicists, and theologians used it as a guide to the *Decretum* for centuries. Johannes' student, Bartolomaeus Brixiensis made additions to Johannes' Gloss in the mid-thirteenth century.[5] He updated Johannes' legal citations to conform to Pope Gregory IX's *Decretals* and appended critical comments to Johannes' glosses. The manuscripts and the early printed editions do not always distinguish between Bartolomaeus' and Johannes' texts. A reader must consult manuscripts to be certain whether a particular text is Johannes' or Bartolomaeus'.[6]

Papal decretals were gradually taking precedence over Gratian's *Decretum* in the schools. Early in his teaching career Johannes began to gloss a collection of Pope Innocent III's decretals, called *Compilatio tertia*.[7] The manuscripts reveal that he finished his commentary and then began to revise it but never finished his revisions. Books 3–5 witness his first text and books 1 and 2 his revised version. In the first two books Johannes did not copy glosses of other canonists verbatim but incorporated them into a coherent commentary. In books 3–5 he copied the glosses of Vincentius Hispanus and Laurentius Hispanus frequently and did not refashion them as his own glosses.[8]

When Pope Innocent III promulgated the canons of the Fourth Lateran Council Johannes first glossed them separately and then almost immediately placed them into his new collection of decretals that the schools called *Compilatio quarta*.

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[5] Bartolomaeus' glosses comprise ca. 10 % of the standard *Ordinary Gloss*.

[6] For example Admont, Stiftbibliothek 35.

[7] *Pennington*, Decretal Collections 1190–1234, in: Hartmann/Pennington (eds.), The History of Medieval Canon Law in the Classical Period, 1140–1234: From Gratian to the Decretals of Pope Gregory IX (Washington, D. C.: Catholic Univ. of America Press, 2008), 293–317, at 309–311.

[8] *Pennington*, Johannis Teutonici Apparatus glossarum in Compilationem tertiam, in: Monumenta iuris canonici, Series A, 3; (Città del Vaticano: Biblioteca Vaticana, 1981), xi–xxvi.

He not only compiled the collection but glossed it as well ca. 1216–1217. Innocent refused to approve the new collection for reasons that are opaque. The pope may have wanted the conciliar canons to circulate separately. Johannes worked on several different versions of his collection, but none seem to have satisfied Innocent. Whatever the pope's reasons, this failure may have convinced Johannes that he no longer wished to stay in Bologna. *Compilatio quarta*, however, was accepted by the schools. His glosses became the *Ordinary Gloss* to the collection.[9]

These four works were Johannes' major contributions to canonical jurisprudence. He also wrote three minor works: Glosses to the *Arbor consanguinitatis et affinitatis*, a set of "Quaestiones" on legal problems, and a legal brief (consilium) that he wrote while in Halberstadt.[10] Recently other works have been attributed to him with no solid evidence as well as an alleged, undocumented interest in theological matters that cannot be found in his other works.[11]

III. Jurisprudence

Johannes can be described as a canonist who was concerned about the power and authority of the papacy in the Christian church. His doubts about papal monarchical power and about the pope's usurping the jurisdictional authority of local bishops can be seen in his positions on a number of issues that reveal his ideas about how the Church should be governed. His glosses also touched many subjects concerning people and society. When he wrote about the art of teaching, he noted that some students rush to a prestigious places to learn, not understanding that a teacher brings prestige to a school; the school bestows no prestige on a teacher (Cum magister faciat cathedram, non cathedra magistrum).[12] Lawyers, he thought, should not be paid for their advice if they did not have to burrow into their books.[13] Only labor should be rewarded. He cited a proverb from Cato the Elder, the Roman poet:

> When work is in disrepute
> Poverty then is sure to root.
> (Cum labor in damno est,
> Crescit mortalis egestas)

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[9] *Pennington*, The Fourth Lateran Council: Its Legislation and the Development of Legal Procedure, in: Melville/Helmrath (eds.), The Fourth Lateran Council: Institutional Reform and Spiritual Renewal: Proceedings of the Conference Marking the Eighth Hundredth Anniversary of the Council Organized by the Pontificio Comitato de Scienze Storiche (Rome 15–17 October 2015) (Affalterbach: Didymos-Verlag, 2017), 41–54 at 43–47; *Pennington* (note 7), 314–315.

[10] *Antonio García y García*, Glosas de Juan Teutónico, Vicente Hispano y Dámaso Húngaro a los Arbores Consanguinitatis et Affinitatis, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kan. Abt., 68 (1982), 153–185.

[11] E. g. several essays in Carmassi/Drossbach (eds.), Rechtshandschriften des deutschen Mittelalters: Produktionsorte und Importwege, Wolfenbütteler Mittelalter-Studien, Vol. 29 (Wiesbaden: Harrassowitz, 2015); see my review in Speculum 93 (2018), 1174–1175.

[12] Gloss to Gratian, *Decretum* C. 8 q. 1 c. 21 s. v. *maiorem*.

[13] Ibid. C. 11 q. 3 c. 71 s. v. *iustum*.

Johannes quoted ancient Roman writers fairly often: Virgil, Horace, Ovid (frequently), Persius, Seneca, and Lucan. Although he might have taken some of them from the glosses of earlier jurists he must have had some training in rhetoric.

Johannes frequently included comments about the human condition in his glosses to the *Decretum* that account, in part, for its success. A few examples are comments that he made on marriage, drinking, and sex. Johannes confronted the dangers of marriage from the male perspective. Marriage, he noted, was "Just as a sailor subjects himself to various dangers and is controlled by wind and not his will, so is it when a man has a wife."[14] Long before the age of nationalism, jurists were conscious of differences between peoples. Johannes noted that a soul cannot live in arid conditions. That is why, he continued tongue in cheek, that Normans, English, and Polish drink so much. They do not want their souls to die.[15] In a more philosophical vein, Johannes noted that fishing was superior to hunting. The fisherman can find solitude, but not the hunter. Hunters are so engaged in the hunt they cannot contemplate the divine.[16]

Pleasure, especially sexual pleasure, was a problem for the jurists. When was it sinful? A number of his predecessors, especially Huguccio, had argued that men and women could not have sex without sin. Johannes disagreed. If a spouse requested sexual intercourse, the couple did not sin.[17] Johannes' glosses on sexual issues in the *Decretum* discussed issues that later readers found fascinating for centuries. An example is his gloss on fornication:[18]

> Huguccio said that it is a greater sin to fornicate with a beautiful than with an ugly woman. A man has greater pleasure with a beautiful woman, but a man leaves an ugly woman more quickly. Bazianus wrote that it is a greater sin to fornicate with an ugly woman because many more things tempt a man with a beautiful woman than with an ugly woman: namely her beauty and one's lust.

Because of glosses like these and many others almost everyone who wrote about the Church in the later Middle Ages knew and quoted Johannes' glosses to Gratian. It is almost impossible to pick up a medieval tract dealing with ecclesiastical and theological issues that does not cite him. Thomas Aquinas, Bonaventura, William of Ockham, John Hus, and Martin Luther found a cornucopia of material in his glosses. At the end of the Middle Ages, Johannes Baptista de San Blasio († 1492) wrote that Johannes' glosses were "brief, but full of juice. More fertile and useful than the legal glosses in other volumes of law (breves, sed succo plene et utiliores ac fertiliores quam sunt glossas aliorum voluminum iuris).[19]

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[14] Ibid. C. 17 q. 2 c. 2 s. v. *navigasti*.
[15] Ibid. C. 32 q. 2 c. 9 s. v. *in sicco*.
[16] Ibid. D. 86 c. 9 s. v. *piscatores*.
[17] Ibid. C. 32 q. 2 c. 3 s. v. *ab adulterio*.
[18] Ibid. C. 14 q. 6 c. 4 s. v. *fornicatione*.
[19] *Thomas Diplovatatius*, Liber de claris iuris consultis, in: Schulz/Kantorwicz/Rabotti (eds.), Studia Gratiana 10 (Bononiae: Inst. Gratianum, 1968), 95–97 at 95, who cites other jurists who praised Johannes.

IV. Johannes' Theories of Church Government (Ecclesiology)

Pope Innocent III rejected Johannes's request to approve his decretal collection, *Compilatio quarta*. In the earliest versions of his Commentary on *Compilatio tertia*, Johannes wrote scathing introductory words about Innocent in his letter of promulgation:[20]

> Although here you call yourself the servant of the servants of God, nevertheless at another place you thunder from on high and distain to be called the vicar of Peter.

The Bolognese canonists objected to the sharpness of Johannes's gloss and deleted it from the manuscript copies that circulated in Bologna and elsewhere after he left for Halberstadt. Johannes' animus was not directed towards papal power and authority but towards Innocent. In another gloss he extolled papal power with extravagant language that was immediately embraced and repeated by many later jurists for centuries:[21]

> The pope exercises the office of God, because he can make something out of nothing … Likewise he has fullness of power in ecclesiastical matters … he dispenses from the law.

Johannes granted the pope great authority and used the language that the Roman law jurists used to describe the authority of the emperor to define papal power. The origins of their power was different. The pope received his authority from councils; the emperor from the people. He noted, however, that God also granted the pope authority directly. As Brian Tierney has pointed out these glosses and others in Johannes' *Ordinary Gloss* to the *Decretum* was a rich source for the fifteenth-century conciliarists when they attempted to limit papal power with church councils.[22] Johannes' theories about the origins of papal authority gave them arguments for using general councils to circumscribe papal power. If councils had given the popes authority, they could, logically, take it away.

Johannes was an "episcopalist" in some sense. He argued that the jurisdiction of bishops was also derived from church councils and other sources but not directly from the pope. He defended episcopal jurisdictional rights to grant dispensations to clerics who held multiple benefices which was contrary to canon law. This became an important issue at the Fourth Lateran Council (1215).[23] Innocent III promulgated a canon that forbade any cleric from possessing more than one benefice with the care of souls. The pope could, however, issue a dispensation. Johannes took a strikingly "episcopalist" stance on the issue. For him the conciliar canon raised the question from where bishops derived their juris-

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[20] 3 Comp. ed. Pennington, p. 1 to *Devotioni vestrae* s. v. *servus servorum*.

[21] 3 Comp. ed. Pennington, p. 43 to 3 Comp. 1.5.3 (X 1.7.3) s. v. *sed ueri dei*; see *Pennington*, Pope and Bishops: The Papal Monarchy in the Twelfth and Thirteenth Centuries (Philadelphia: Univ. of Pennsylvania Press, 1984), 26.

[22] Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism, Studies in the History of Christian Thought (Leiden/New York/Köln: Brill, 1998), 229–232 et passim.

[23] *Pennington* (note 21), 137–143.

dictional authority to dispense. In a long and rambling discussion of the problem he would not concede that the conciliar canon took away a bishop's right to dispense. The pope would not have wanted to infringe on a bishop's jurisdictional authority. He made two points in his defense of bishops: the pope must always conform his will to the law and the constitution of the Church. He argued that bishops received their right to dispense from a conciliar canon and are not dependent upon the pope for the exercise of that prerogative. Second, the pope could not have wished to diminish or infringe upon the rights of bishops. Johannes compared the relationship of the pope to his bishops with that of a bishop to his chapter, subject churches, and clerics. Bishops have the same authority over diocesan churches as the pope has over bishoprics. The pope could infringe upon the jurisdictional rights of bishops, but he must have a good reason for acting. He mentioned a conversation that he had with Innocent III in the papal curia about the subject. He suggested to Innocent that perhaps a bishop could grant a cleric a second benefice if the bishop included the phrase in his bestowal "if it would have pleased the pope." Innocent replied:[24]

> I will elect him if it will please the pope is no different from saying, I can sleep with a man's wife if it would please the husband.

Johannes' anecdote is another example of Innocent's acerbic sense of humor noted so often by contemporaries. It also illustrates Johannes' close ties to the Roman curia and to Innocent III at one point in his career.

Johannes limited the authority of papal legates who carried papal jurisdiction and power into the four corners of Christendom.[25] Papal legates were not a major issue in the Church until the twelfth century. Gratian barely discussed them. That changed dramatically when Pope Alexander III issued a decretal in which he asserted that a papal legate can exercise jurisdiction over any case that comes to his attention in a local diocese. Canonists immediately grappled with the ramifications of Alexander's decretal. The first canonists who commented on the decretal accepted its rules. Johannes, however, limited a legate's authority to interfere in diocesan legal affairs. He argued that a legate without a special mandate from the pope may only hear cases that had already been litigated in episcopal courts. The legate could not judge clerics in a diocese without the permission of the bishop. Johannes could not convince his fellow canonists. No thirteenth-century canonist accepted his arguments limiting legatine judicial prerogatives. It was not until the Council of Trent were the provisions of Alexander III's decretal annulled. The place of legates in Johannes' ecclesiology is clear. He distrusted any attempt to give legates power that could undermine the jurisdictional rights of local bishops. He did think that the pope could give legates special mandates, but these special grants of authority were not part of general legatine powers. His opinions were not in the mainstream of canonical thinking,

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[24] Ibid. 141.

[25] For what follows see *Pennington*, Johannes Teutonicus and Papal Legates, Archivum Historiae Pontificiae 21 (1983), 183–194.

but they do give us insight into the few canonists who guarded the fortress of episcopal rights.

Johannes was particularly concerned to keep bishoprics in the hands of the local chapters. His electoral theory favored the rights of members of the cathedral chapter from having an outsider elected to the episcopal chair. At the Fourth Lateran Council Innocent III had promulgated an electoral canon that if the canons in a cathedral chapter had not elected a new bishop within three months, the chapter lost its right to elect. In Johannes' gloss to the canon he asked whether an outsider (extraneus) could be elected. He argued that if a worthy candidate could be found in the chapter the local cleric should be elected. If the chapter elected an outsider, the election was valid but the canons sinned. Johannes also raised the issue of what constituted a valid election. Johannes normally thought that a numerical majority of the canons were necessary to elect a new bishop. However, in the case when a worthy member of the cathedral chapter was opposed by an outsider who was favored by a majority of canons, then even two votes for the local candidate would prevail over the majority. From the point of view of the future Johannes was on the wrong side of the issue. A few years later other canonists had collectively decided that a numerical majority of the canons could elect an outsider. Bartolomeus Brixiensis, his student and reviser of his *Ordinary Gloss* to the *Decretum*, rejected Johannes' opinion and endorsed victory of the majority in any election.[26]

In other cases the key to medieval electoral theory in canon law was the principle "maior et sanior pars" (the greater and wiser part). Johannes never wrote a tract on elections, but he did discuss electoral theory extensively in his glosses. Johannes seems to have been one of the last canonists to insist that a candidate for election should have a clear numerical majority (in all other cases, except in the election of a stranger [extraneus]). Pope Gregory IX (1227–1234) issued a decretal in which he rejected the idea that elections should always be won by the candidate with the most votes.[27] Johannes was a democrat before the word.

Johannes conception of proper governance within the Church was based on what he thought the structure of the local bishopric should be. After the reforms of the eleventh and twelfth centuries the bishop and his chapter of canons became the fundamental administrative unit of the Church at the local level. Gradually the canons of the cathedral usurped the rights of the other clergy in dioceses. To describe this emerging structure the canonists created corporate theories to define the legal relationship between the bishop and his canons. Johannes' views on episcopal authority are important because they mark an important stage in the development of ecclesiastical corporate theory.

The legal relationship between the bishop and his canons falls into three broad categories. What the bishop could do alone without the consent of his chapter; what the chapter may do without the consent of his canons; and what they both

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[26] *Pennington*, The Golden Age of Episcopal Elections 1100–1300, Bulletin of Medieval Canon Law 35 (2018), 243–253 at 251–252.

[27] Decretals of Gregory IX 1.6.57.

should do together. Johannes conceived episcopal authority in much the same way as he did papal authority. All ecclesiastical rights and power were not possessed by the pope, and not all diocesan power was in the hands of the bishop.

Within the diocese Johannes maintained that the canons of the cathedral chapter had little jurisdiction and power when the bishop was not present. The authority of the bishop was also circumscribed when the cathedral chapter was not present. Perhaps the most significant plank in Johannes' ecclesiology was his denial that the rights of the chapter could devolve to the bishop alone under certain circumstances.

The bishop and his chapter formed a corporation, or "universitas." Johannes called the bishop a "procurator," by which he meant an administrator of the diocese. The bishop did not, however, have a "free and general administration" (libera et generalis administratio). The bishop could only alienate small amounts of ecclesiastical property without the consent of the cathedral chapter.[28] In another gloss Johannes noted that:[29]

If the property is small, the necessity is great, the chapter's consent is not necessary.

Nevertheless, the bishop could not pardon a person who had damaged the church. In that case he needed the consent of the chapter.[30]

Johannes opposed concentrating too much power in one person within the corporation. The Fourth Lateran Council had dictated in canon seven that if the cathedral chapter did not correct its members in a time determined by the bishop, then the bishop could judge the canons. Johannes disagreed. He thought the right of judging canons could not devolve from the chapter to the bishop. The bishop must always be considered part of the corporation and not separate from it. If the entire chapter were negligent, then the right of judgment did not devolve to the bishop but to the metropolitan. In no case, did the bishop alone have that right.[31] He would have been judging in a matter in which he had been a participant. It was a cornerstone of his ecclesiology that the rights of the corporation (universitas) could not reside in one person.

The only legal action that the cathedral chapter could take without the bishop was to make a contract. In the case of necessity the chapter could alienate property without the bishop, but the alienation must be approved by the metropolitan. Johannes broached the problem again when he discussed a case in which a cathedral chapter was subject directly to the pope:[32]

Can the canons reduce the prebends and dignities of the church without the authority of the pope? It seems not, because they cannot augment them … I say that they can reduce

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[28] Gloss to Gratian, *Decretum* C. 12 q. 1 c. 28 s. v. *procurationem*.
[29] Ibid. C. 12 q. 2 d.a.c. 1 s. v. *nunc queritur*.
[30] 3 Comp. 5.21.10 s. v. *iniuriosa*. http://legalhistorysources.com/edit517.htm
[31] 4 Comp. 1.13.1 s. v. *per capitulum*, *Antiquae collections decretalium*, ed. Antonio Augustín (Ilerdae: 1576) unfoliated.
[32] 3 Comp. 1.1.4 s. v. *confirmata*, ed. Pennington, p. 5.

the number if there is cause or reason to do so … and if the bishop gives his authority to do so … The canons may alienate completely with the bishop's consent if there is a reason. The bishop can permit them to reduce, divide, or abolish completely one prebend.

The maxim, necessity knows no law (necessitas legem non habet) and cause/reason (causa) were two of the most powerful principles in canonical jurisprudence. Johannes used this principle multiple times in his commentaries. Its force derogated but did not abrogate positive law.

Johannes thought that the bishop and the cathedral chapter legally represented the entire diocese. The bishop managed the diocese with the chapter. Together they ordained priests, dispensed prebends, conferred electoral dignities, and judged court cases.[33] If the bishop wanted to take away a canon's prebend, he needed the consent of other bishops.[34]

The corporate unity of the bishop and the cathedral chapter was the bedrock of Johannes' ecclesiology. He conceived to the Church as being a local institution that served local interests and that was ruled by local people. Johannes' defense of the local chapter and the local bishop reveals a singular and unsuccessful attempt to combat the centralizing tentacles of Rome in the early thirteen century. Johannes preferred a decentralized Church rather than a Church with all power and authority centered in Rome. In addition, Johannes and other canonists were in large part responsible for working out the fundamental principles of modern corporate theory. Johannes' ecclesiology did not prevail, but the question of how the Church should be structured would arise again and again canonical jurisprudence until papal monarchy triumphed in the second half of the fifteenth century.

V. Pope and Emperor

Johannes was a German from northern Germany. Quite naturally his view of the emperor and the pope and their relationship was colored by his origins. Pope Innocent III was a key figure in the development of papal monarchical thought and issued seven decretals that remained important benchmarks for papal claims of authority in the secular world for centuries.[35] Johannes glossed all seven. Although Johannes opposed some of Innocent's ecclesiology he accepted Innocent's program for church and state with only minor qualifications. He managed to harmonize his loyalty to the Roman church with his loyalty to the German imperial house. The question of the relationship of imperial to papal power was framed by the metaphor of the "Two Swords" whose existence was inspired by several biblical texts. One sword, the temporal, was called the material sword,

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[33] Gloss to Gratian D. 67 c. 1, s. v. *sacerdotes*, D. 84 c. 1 s. v. *consilia*, D. 21 c. 1 s. v. *disponit*, D. 24 c. 6 s. v. *clericorum*.

[34] Gloss to Gratian D. 67 c. 2 s. v. solus.

[35] The best discussion of all these decretals remains *John A. Watt*, The Theory of Papal Monarchy in the Thirteenth Century: The Contribution of the Canonists (London: Burns & Oates, 1965).

and the other was called the spiritual sword. By the beginning of the thirteenth century, a lively debate was under way in the law schools about who should or did possess these swords. Did the pope possess both swords and delegate the material sword to the emperor or did the emperor hold his sword independently? Johannes wrote a long gloss in his *Ordinary Gloss* to the Decretum in which he grappled with the question:[36]

> Since, therefore these powers are distinct, here it is argued that imperial power is not held from the pope and that the pope does not have both swords, for the army chooses the emperor … and imperial power is bestowed only by God … Otherwise if it were bestowed by the pope, it would be licit to appeal to him in temporal matters … but the contra argument is that the rights of celestial and earthly power (imperium) are granted to the pope … I believe that the powers are distinct, although the pope may now and then assume both powers, as when he legitimates someone in the secular world as in Innocent III's decretal *Per venerabilem*.

Johannes rejected the idea that the pope granted secular power to lay rulers but accepted Innocent III's claim that under certain limited circumstances the pope could exercise secular power.

Papal claims to exercise secular power in central Italy presented complex problems to the jurists. A grant by the first Christian emperor Constantine purported to give the pope sovereignty over central Italy and established the legitimacy of the papal states. Although the Donation of Constantine was included in Gratian's *Decretum* Johannes did not gloss it. Rather he glossed a grant to the pope by the French King Louis the Pious, who also gave popes sovereignty in central Italy. The issue for the jurists was whether the grant was revocable. Johannes argued it was not and put forward a novel legal argument to defend the pope's temporal jurisdictions:[37]

> The emperor cannot revoke the donation for the law states that immensitas (immeasurableness) is the measure of things which can be given to the Church.

He had culled this maxim out of Justinian's legislation called the *Novellae*. Justinian had attempted to control the donations given to the church. He promulgated a law in which private persons were limited in the amount that they could donate to a church, but only the emperor could give any amount that he wished.[38] Accursius, the Roman lawyer who wrote the *Ordinary Gloss* to Justinian's legislation remarked that if you would take Johannes' argument to its logical conclusion, the emperor could give everything to the church and imperial power would die.[39] Johannes, somewhat surprising, defended the pope's right to rule the papal states, while other jurists rejected the idea.

One historian has described Johannes as "an extreme exponent of the idea of empire" and attributed his enthusiasm to his Germanic background. This is

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[36] Gloss to Gratian D. 10 c. 8 s. v. *discrevit*.
[37] Gloss to Gratian, D. 63 c. 30 s. v. *viculis*.
[38] Justinian, *Novella* 7.2.1.
[39] Accursius, Gloss to Authen. 1.6 s. v. *conferens generi*.

an exaggeration but contains some truth. Like almost every other jurist of the twelfth century, Johannes did believe that the emperor was the highest representative of lay secular power within the Christian world. All kings were subject to him as well as people who were not Christians such as the Jews. In a gloss he wrote to another decretal of Innocent III, he extolled the emperor's great majesty in the secular world:[40]

> The rule of the world has been transferred to the Germans, and they also rule the Roman church … it is clear that imperial power does not reside with the Greeks, even though the Greek ruler is generally called emperor … just as the king of a chess set is called king. Outside the church there is no imperial power … the emperor is over all kings … and all nations are subject to him … for he is the lord of the world … even Jews are under him … and all regions are under him.

Johannes' gloss was read for centuries because Bernardus Parmensis, the ordinary glossator of the *Decretals of Gregory IX*, copied Johannes' gloss into his commentary on the same decretal word for word. Bernardus omitted only Johannes' last sentence: "They admit, moreover, that the Germans have merited imperial power because of their strength and virtue."[41]

Johannes promoted the universality of the emperor's jurisdiction over all the kings of Christendom. Unlike other canonists who were writing at this time, he rejected the dictum that "each king is emperor in his kingdom."[42] He knew that the kings of France, Spain and England were not under the emperor's rule *de facto*, but *de iure* "the king of France is subject to the Roman emperor."[43] In the printed editions of Johannes' *Ordinary Gloss* to the *Decretum* there is a statement about the kings of Spain that seems to contradict Johannes' opinion that kings are subject to the emperor. He appears to concede that Spanish kings are not subject to the emperor because they had wrenched their kingdom from the jaws of their enemies.[44] A look at the manuscripts, however, reveals that an unknown jurist, perhaps Bartolomeus, had added that sentence to his gloss.

Johannes' glosses on two major decretals of Innocent III were not his last words on the omnicompetence of the emperor. In other glosses in the *Decretum* he taught that those who say they are not under Roman imperial power cannot own anything.[45] The emperor should crown all kings.[46] If people do not recognize the Roman emperor as the prince of the whole, they cannot have heredity rights or other rights that private persons have under Roman law.[47]

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[40] 3 Comp. 1.6.19 s. v. *in Germanos*, ed. Pennington, 84–85.
[41] Bernardus Parmensis to X 1.6.34 s. v. *in Germanos*.
[42] On that maxim see *Pennington*, The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition (Berkeley-Los Angeles-London: Univ. of California Press, 1993), 31–37, 95–101.
[43] Gloss to 3 Comp. 4.12.2 s. v. *recognoscat*.
[44] Gloss to D. 63 c. 22 s. v. *per singulas*.
[45] Ibid.
[46] Gloss to C. 7 q. 1 c. 41 s. v. *imperator*.
[47] Gloss to D. 1 c. 12 s. v. *quod nulli*.

In spite of the emperor's power in the secular world, Johannes maintained the separation of the church from state. The city of Rome and its ducal lands fell under the jurisdiction of the pope; the emperor was only the advocate for the city.[48] The emperor receives his sword and power directly from an election of the princes and not from the pope.[49]

Johannes did not believe that the pope possessed both swords, but he did think that the pope had wide ranging rights to exercise jurisdiction in secular affairs. Innocent III's court decisions forced the canonists to recognize and explain why the pope had a legal right to judge in some, if limited, secular matters. Innocent III had put forward the argument that the pope exercised secular jurisdiction by reason of sin (ratio peccati), and Johannes accepted the papal argument.[50]

Johannes was a supporter of the hegemony of the medieval German empire. He also supported Innocent III's claims of papal authority in central Italy and the pope's right to judge in secular matters under certain circumstances. His position on church and state was nuanced and complex. His most significant contributions to legal thought were his theories about the constitutional structure of the church. Although he described the church as a monarchy under the leadership of the pope, he limited papal power within the church. He protected the rights of bishops from the pope and defended the cathedral chapter from an overweening bishop.[51] He emphasized that ecclesiastical offices should be filled by local clerics. The pope may reign over the Church, but local institutions should maintain deep roots in local soil.

Western society has spent seven centuries and much blood trying to achieve a balance between local power and central order. Johannes' position might be described as "tempered absolutism" that may have been appropriate for the early thirteenth century. Central ecclesiastical authority and local rights have always been in conflict in the Roman church. Johannes' ecclesiology may be a model how that chasm can be bridged.

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[48] Gloss to C. 23 q. 8 c. 7 s. v. *nostrum*.
[49] Gloss to D. 93 c. 24 s. v. *imperatorem*.
[50] Glosses to 3 Comp. 2.1.3 s. v. *de feudo*, ed. Pennington p. 171.
[51] *Pennington* (note 21), 137–141.

Chapter 2

Eike von Repgow (ca. 1180–1235) and the Christian Character of his *Sachsenspiegel*

Tilman Repgen

I. Introduction

The famous *Sachsenspiegel*, written around 1225, is the only work by Eike von Repgow (c. 1180–1235). Yet this "law book" is an eloquent expression of Christian legal thought in the Middle Ages, and thus Eike, about whose life we know little else, finds his place as one of the great Christian jurists in German history.[1] This chapter begins by discussing the background of high medieval legal thinking and its Christian character, then deals with the author and his work before analyzing characteristic passages from the *Sachsenspiegel*.

1. Theology and Law in the Middle Ages

"Since you have been raised up to be with Christ, you must look for the things that are above, where Christ is, sitting at God's right hand."[2] This passage from Colossians gives a summary of what Christian life is truly about: to lead such a life in order to enter the heavenly kingdom. Without the Resurrection, life would be meaningless, which is why Mary Magdalene wept at Christ's grave, as reported in John 20:11.

All of this is not some great discovery of the Middle Ages; rather, it has been a core principle of the Christian faith from the very beginning. What came to be far more clearly appreciated at that time, however, was that the attainment of this goal had a lot to do, in essence, with the law. This concept was not necessarily new either, but it was now understood in a new fashion, even though, for instance, the Book of Proverbs (2:1–9) admonished that it is God who teaches understanding of the paths of equity that lead to happiness.

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[1] E. g., *Erik Wolf*, Eike von Repgow, in: *id.*, Große Rechtsdenker der deutschen Geistesgeschichte, 4th ed. (Tübingen: Mohr Siebeck, 1963), 1–29; concerning the date of writing, see *Hiram Kümper*, Sachsenrecht. Studien zur Geschichte des sächischen Landrechts in Mittelalter und früher Neuzeit (Berlin: Duncker & Humblot), 2009, 80–84; concerning the term "law book," see *Kümper* (note 1), 16–52.

[2] Col. 3:1. This quotation as well as the following biblical quotations are taken from the New Jerusalem Bible, 1985.

This important "understanding" reminds us of Solomon, the prototype of the king who is also a judge. As described in the first book of Kings (3:5–12), Solomon prayed for an "understanding heart" so as to gain a knowledge of the law that would enable him to govern his people. In the book of Deuteronomy (4:1–2, 6, 8) the promise of salvation to Israel was made dependent upon the observance of God's commandments. These are just a few biblical references that show that observance of the law plays a role in salvation. Christ did not remove the salvific relevance of the law. The Sermon on the Mount (Matthew 5:17–20) points to this:

> Do not imagine that I have come to abolish the law or the prophets. I have come not to abolish but to complete them. In truth I tell you, till heaven and earth disappear, not one dot, not one little stroke, is to disappear from the law until all its purpose is achieved. Therefore, anyone who infringes even one of the least of these commandments and teaches others to do the same will be considered the least in the kingdom of heaven; but the person who keeps them and teaches them will be considered great in the kingdom of heaven. For I tell you, if your uprightness does not surpass that of the scribes and Pharisees, you will never get into the kingdom of heaven.

It is of course not so simple to explain these words in the context of the Sermon on the Mount as a whole, but it should be clear that Christ makes the observance of the law as much a condition for salvation – entering the kingdom of heaven – in the New Testament as it was in the Old Testament.

European legal thinking in the High Middle Ages, as represented by Eike von Repgow and his *Sachenspiegel*, made an attempt to have a legal system that would serve as an integral part of salvation. The contemporary theologian saw it as his task to convey that God was the beginning and objective of all creatures.[3] The justification of humankind through the following of a path to eternal salvation is a biblical teaching. It would seem that in the High Middle Ages the idea that responsible behavior was directly linked to salvation was much more pronounced than in the first millennium. This fact offers a plausible explanation for why there seemed to be such a great interest in legal issues, as evidenced by the astonishing upsurge in legal thinking from the eleventh century onwards. It would not be contentious to say that there were also other factors that exerted great influence, above all political considerations, as described by Harold Berman.[4]

2. Anselm of Canterbury's Doctrine of Salvation[5]

Augustine taught that humankind could be saved only by means of the overflowing mercy of God, for it was God who gave humanity the *bona voluntas*,

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[3] *Thomas Aquinas*, Summa theologiae (STh) I q. 2, pr., http://www.corpusthomisticum.org/iopera.html (Accessed on 2019/5/2).

[4] *Harold J. Berman*, Law and Revolution: The Formation of the Western Legal Tradition (Cambridge, MA: Harvard University Press, 1983). Worth considering is criticism of Berman by *Nils Jansen*, Rechtswissenschaft und Rechtssystem. Sieben Thesen zur Positivierung des Rechts und zur Differenzierung von Recht und Rechtswissenschaft (Baden-Baden: Nomos, 2018), 9–20.

[5] The following is based on *Tilman Repgen*, De restitutione – eine kommentierende Einführung, in: Vitoria (ed.), De iustitia – Über die Gerechtigkeit, Part 2, edited and translated by

while humankind alone was responsible for original sin.[6] Anselm of Canterbury, in his book *Cur Deus homo?* (1098), developed this teaching further. He insisted that, in addition to God's mercy, every person's participation and cooperation was a requirement for the attainment of salvation. Anselm's opening question was, why did God have to become human, and why did God not redeem us in another way than through God's own death?[7]

Anselm saw it as a demand of justice that humanity had to give God satisfaction for original sin. Adam had violated his duty of obedience to God. Since God alone could not give this satisfaction, the only possibility remained for someone to atone who was both human and divine: Jesus Christ. He redeemed us, but the redemption of each of us demands the liberation from our sins.[8] Sin, according to Anselm, leads to a state of injustice which comes about when God is not given what God is owed. What is owed is honor.[9] Sin is then, in essence, a rejection of God, a failure to recognize either God as creator or God's created order, for by sinning, one violates the eternal law of God.[10] Therefore, no one will come to bliss without restoring to God what is owed.[11]

What is decidedly new in this context is that Anselm's explanation of salvation adopts a personalist approach.[12] Redemption is no longer seen as a liberation of humanity as a whole from bondage to the devil, as the Church Fathers had seen it.[13] The individual now was in a loyalty-based relationship to God, like that of a vassal to his feudal lord. Herein lies the basis for an ethical system that takes the individual up on these vassal-like promises. God wishes for everyone to be saved, so everyone should lead a righteous life and show the necessary respect to God. The redemption through Christ makes this possible.[14] The goal of human-

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Joachim Stüben (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 2017), xvii–lvii, here xxiii–xxx.

[6] Overview: *Alfred Schindler*, Augustin/Augustinismus I, in: Müller (ed.), Theologische Realenzyklopädie, vol. 4 (Berlin: De Gruyter 1979), 646–698, here particularly 672 f.; *Karl-Heinz Menke*, Das Kriterium des Christseins. Grundriss der Gnadenlehre (Regensburg: Pustet, 2003), 39 and passim.

[7] *Anselm von Canterbury*, Cur Deus homo. Warum Gott Mensch geworden, Lateinisch und deutsch, ed. and tr. by Schmitt O.S.B., 5th ed. (Darmstadt: Wiss. Buchges. 1993), I, 1, p. 10 f.; on the changed effect of the soteriology of Anselm of Canterbury: *Philippe Nemo*, Was ist der Westen. Die Genese der abendländischen Zivilisation (Tübingen: Mohr Siebeck, 2005), 52–54 as well as *id.*, A History of Political Ideas from Antiquity to the Middle Ages (Pittsburgh, PA: Duquesne University Press), 2013, 529–531, referenced. For further details concerning the theory of satisfaction by Anselm, see *Repgen*, (note 5), xxiv, fn. 28.

[8] *Anselm* (note 7), I 3, p. 16 f. and I 24, p. 82 f.

[9] *Anselm* (note 7), I 11, p. 40 f.

[10] *Gerhard Gäde*, Eine andere Barmherzigkeit. Zum Verständnis der Erlösungslehre Anselms von Canterbury (Würzburg: Echter Verlag, 1989), 91; Cf. *Augustinus*, Contra Faustum Manichaeum libri, cap. 27, in: Migne (ed.) Patrologia Latina, vol. 42 (Paris: Migne, 1845), col. 418.

[11] *Anselm* (note 7), I, 24, p. 82 f. "Qui ergo non solvit deo quod debet, non poterit esse beatus."

[12] *Otto Hermann Pesch*, Anselm von Canterbury und die Lehre von der stellvertretenden Genugtuung Christi. Eine kleine kritische Ehrenrettung, in: Acklin/Annen (eds.) Versöhnt durch den Opfertod Christi? Die christliche Sühnopfertheologie auf der Anklagebank (Zürich: Theol. Verlag, 2009), 57–73, here 68.

[13] *Anselm* (note 7), I, 7, pp. 20–25.

[14] *Pesch* (note 12), 70.

ity is companionship with God, which is attainable only through atonement and a life without sin, that is, a life in accordance with the will of God.[15] This is at the same time just.[16]

When one takes these claims together with the goal of human life described in Anselm's work, one sees that the integrity of will is not a formal question, but one directed to the will of God. In this individualized ethical system, the actions of the individual acquire a new meaning: one no longer has his back to the wall, with no possibility of achieving what is required, but rather every action counts, whether good or bad.[17]

Thomas Aquinas took this notion further. Philippe Nemo describes it thus: "God's mercy does not act in such a way that it replaces man's sinful nature, but that it heals it and enables him to choose and do good freely."[18] An ethical system so understood, placing the responsible behavior of the individual at its center, was at the core of the work of the author of the *Sachsenspiegel*, who spent a lifetime developing it in conformity with Christian theology. Although the parallels between Anselm's work and that of Eike will become apparent, I am not suggesting that Eike specifically chose to follow Anselm's teachings. However, this perspective is important, for Anselm's ethics are consistent with Eike's strict rejection of slavery.

3. The Author of the Sachsenspiegel

From a historiographical point of view, the *Sachsenspiegel* is the most significant law book in the German language of the Middle Ages. The work was written around 1225 by Eike von Repgow, probably in the vicinity of the Cistercian abbey in Altzelle, close to Nossen in the Meißen district.[19] There is no existing

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[15] *Anselm* (note 7), I, 16–19, pp. 50–71.

[16] Cf. *Anselm von Canterbury*, De veritate, in: *id.*, Über die Wahrheit, Lateinisch-deutsch, tr., with an introduction and notes by Enders (Hamburg: Meiner, 2001), ch. 12, p. 60.

[17] *Nemo* (note 7), 53. Cf. *Augustinus*, Sermones de Scripturis de Novo Testamento, serm. 132, ch. 11, in: Migne (ed.) Patrologia Latina, vol. 38 (Paris: 1845), col. 923. Concerning the context, see *Repgen* (note 5), xxix, fn. 60.

[18] *Nemo* (note 7), 54.

[19] *Peter Landau*, Der Entstehungsort des Sachsenspiegels, in: Aris/Bünz/Hartmann/Märtl (eds.), Deutsches Archiv für Erforschung des Mittelalters 102 (Wien: Böhlau, 2005), 73–101; Earlier, *Peter Johanek*, Eike von Repgow, Hoyer von Falkenstein und die Entstehung des Sachsenspiegels, in: Jäger et al. (eds.), Civitatum Communitas. Studien zum europäischen Städtewesen. Festschrift für Heinz Stoob zum 65. Geburtstag (Köln: Böhlau, 1984), 716–755, here 725–727; *Karl Zeumer*, Die Sächsische Weltchronik. Ein Werk Eikes von Repgow, in: Pappenheim et al., Festschrift Heinrich Brunner zum siebzigsten Geburtstag (Weimar: Hermann Böhlaus Nachfolger, 1910), 135–174, here 139; concerning contemporary research on the subject, see *Kümper*, Sachsenrecht (note 1), 68–80; *id.*, Eike von Repgow, in: Biographisch-bibliographisches Kirchenlexikon 24 (Nordhausen: Bautz, 2005), col. 1208–1213; *Rolf Lieberwirth*, Eike von Repgow, in: Handwörterbuch zur deutschen Rechtsgeschichte, 2. Ed., I (Berlin: Erich Schmidt, 2007), col. 1288–1292; important linguistic-historical reflections on Eike's authorship by *Jörn Weinert*, Studien zur Sprache Eikes von Repgow. Ursprünge – Gestalt – Wirkungen (Frankfurt am Main: Peter Lang, 2017).

model that can be compared to Eike's unique written work.[20] Even though Eike wrote the *Sachenspiegel* at the insistence of his close acquaintances Count Hoyer von Falkenstein, the work itself remained a purely private one, a fact that sheds some light on the personality of the author himself, much more than any legal text emanating from the state ever could.[21]

Given the rather exhaustive literature concerning the *Sachenspiegel*, what could prompt the publication of yet another chapter on the subject? One reason that can be inferred from the perspective discussed thus far is the religious dimension of Eike's book. While none of what follows is entirely new, the focus is new and thus offers a distinctive contribution.[22]

Apart from the self-description the author provides in the preface to the work, only six documents from the period 1209 to 1233 provide more information about him, albeit of a sketchier sort.[23] In the preface, Eike explains that he had translated the work into German from an earlier Latin version of the text, which is not available today.[24] He was born around 1180.[25] Rolf Lieberwirth thinks it is improbable that Eike was an ordinary jurist. According to him, it was far more likely that he was a member of a princely court where he provided legal advice. He was most likely the vassal of Count Hoyer von Falkenstein.[26] From my perspective, it would be interesting to find out more about Eike's education and the sources he used. Peter Landau has reopened the old debate about Eike's connection to the Cistercians and has identified the old cloister's (Altzelle's) library as the spiritual treasure vault of the author of the *Sachenspiegel*.[27] Heiner Lück has shown that Eike received a relatively comprehensive theological education.[28] Lieberwirth saw him as a *literatus*, someone who had learned Latin at a cloister.[29]

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[20] *Lars Rentmeister*, Das Verhältnis zwischen Kirche und Staat im späten Mittelalter am Beispiel der Diskussion um den Sachsenspiegel (Hamburg: Tredition, 2016), 30, 43.

[21] *Heiner Lück*, Über den Sachsenspiegel. Entstehung, Inhalt und Wirkung des Rechtsbuches, 2nd ed. (Dössel: Stekovics, 2005), 27; *Rentmeister* (note 20), 53; *Kümper* (note 1), 17.

[22] Kümper's Sachsenrecht (as in note 1) gives a detailed overview of the work's reception in a systematic way. However, it only briefly touches on the religious side of the subject. *Rentmeister*, Das Verhältnis zwischen Staat und Kirche (note 20), deals with the political side. The subject has already been discussed by *Heiner Lück*, Eike von Repgow und Gott, in: Mitteilungen des Vereins für Anhaltische Landeskunde 12 (2003): 13–24. Important: *Alexander Ignor*, Über das allgemeine Rechtsdenken Eikes von Repgow (Paderborn: Schöningh 1984); *Bernd Kannowski*, Die Umgestaltung des Sachsenspiegelrechts durch die Buch'sche Glosse (Hannover: Hahnsche Buchhandlung, 2007); *Guido Kisch*, Sachsenspiegel and Bible. Researches in the Source History of the Sachsenspiegel and the Influence of the Bible on Mediaeval German Law (Notre Dame, IN: University of Notre Dame Press, 1941).

[23] Reprint of these documents in *Ignor* (note 22), 325–330.

[24] Ssp. Reimvorrede, line 266.

[25] *Lieberwirth* (note 19), col. 1288.

[26] *Rolf Lieberwirth*, Entstehung des Sachsenspiegels und Landesgeschichte, in: Schmidt-Wiegand (ed.), Die Wolfenbütteler Bilderhandschrift des Sachsenspiegels. Aufsätze und Untersuchungen (Berlin: Akademie, 1993), 43–61, here 47; *Lieberwirth* (note 19), col. 1290.

[27] *Landau* (note 19), 73–102; critically, *Kümper* (note 1), 84 f.

[28] *Heiner Lück*, Magdeburg, Eike von Repgow und der Sachsenspiegel, in: Puhle/Petsch (eds.), Magdeburg. Die Geschichte der Stadt 805–2005 (Dössel: Stekovics, 2005), 154–72, here 159; agreeing with *Kümper* (note 1), 93.

[29] *Lieberwirth* (note 19), col. 1291.

Regarding the question of the specific Christian influence on the *Sachsenspiegel* – that is, the Christian legal thinking of Eike – it is important to take into account specific points of the preface. It elaborates on, above all, the "legal idea" of the *Sachsenspiegel*. It is thus necessary to discuss the rhymed preface, the prologue, and the text of the latter. Furthermore, special attention must be given to the "Treatise on Bondage" in Ssp. Ldr. III 42, for in that chapter Eike uses a fundamentally religious argument. It is not necessary to discuss here questions about manuscript transmission, as these have been dealt with frequently elsewhere.[30] The original copy of the *Sachenspiegel* has not survived. For my purposes, I have used texts from the fourteenth century. The Wolfenbüttel copy is the most suitable when complemented, as necessary, by other sources.

II. Christian Legal Thinking in the *Sachsenspiegel*

1. The Rhymed Preface[31]

The eschatological perspective that the goal of humanity is salvation in eternity becomes apparent in the rhymed preface, which Eike wrote.[32] It should not be overlooked that this eschatological perspective was not unfamiliar in the legal context of his time. The Upper German poem "On Laws" can be seen as evidence of this, written as it was in the first half of the twelfth century and thus before the *Sachsenspiegel*.[33] The poem admonishes the reader in very clear terms to observe the law, bearing in mind the Last Judgment.[34] The law applies equally to rich and poor, to high-born and low-born.[35]

Ruth Schmidt-Wiegand has differentiated among four main functions of introductions such as that of the *Sachsenspiegel*: (1) to provide information about the author and his work, (2) to give a *Captatio benevolentiae* to impart a sense of humility, (3) to provide a classification of the legal text under discussion within its tradition, and (4) to invoke the most important thoughts about the law and its divine origin, and thus to advocate its use at court in accordance with justice and morality.[36]

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[30] Cf. *Lieberwirth* (note 26), 63–86.

[31] The *Sachsenspiegel* text follows here and later: *Eike von Repgow*, Sachsenspiegel. Die Wolfenbütteler Bilderhandschrift, Cod. Guelf. 3.1. Aug. 2°, Schmidt-Wiegand (ed.) (Berlin: Akademie, 1988). Since the Wolfenbüttel copy does not contain the rhymed preface, here we follow the text of Schott (ed.), Der Sachsenspiegel, 2nd ed. (Zürich: Manesse 1991), 14–26.

[32] On the question whether the biblical references made are taken directly from the Bible, see *Guido Kisch*, Biblische Einflüsse auf die Reimvorrede des Sachsenspiegels, in: Kisch (ed.), Forschungen zur Rechts- und Sozialgeschichte des Mittelalters (Sigmaringen: Thorbecke, 1980), 36–52. Also on the subject, *Ruth Schmidt-Wiegand*, Reimvorreden deutscher Rechtsbücher, in: Behr (ed.), Mittelalterliche Literatur im niederdeutschen Raum (Frankfurt am Main: Oswald von Wolkenstein Gesellschaft, 1998), 311–326, here 314, 317.

[33] *Unknown Author*, Vom Rechte, in: Waag (ed.), Kleinere Deutsche Gedichte des XI. und XII. Jahrhunderts (Halle: Niemeyer, 1890), 66–81.

[34] Vom Rechte (note 33) lines 183 f. and 113–123 and passim.

[35] Vom Rechte (note 33), lines 96 f.

[36] *Schmidt-Wiegand* (note 32), 313.

The fourth function is the one that should interest us the most, since it relates to the point about the individual's responsibility for his or her own salvation. This responsibility includes the duty to share one's knowledge and wisdom – including Solomon's insight about good and evil – with others. At the very beginning of the preface, Eike compliments the Saxons, writing that God had always given them wise people who used their intellect to do good. According to Eike, being wise was not enough in itself, but rather one had to use one's wisdom responsibly.[37]

Here the Christian commandment to love one's neighbor is related to acting responsibly with this knowledge, and it amounts to following ethical duty: to use any legal text in such a way that one does not use the knowledge from the book to one's personal advantage, but to the glory of God, and in such a way as to bring salvation to all concerned parties.[38] Eike was also very much concerned about wickedness and the many deadly sins which were, unfortunately, widespread at the time, as he thought. This is yet another confirmation of the work's eschatological perspective. It led Eike to the admonition that the law should be made the highest standard, according to which all should live, lest they sin against God.[39] Therefore, breaking the law is a sin. Modern talk of the separation of morality from the law is usually from the one-sided perspective of the state. When one considers this issue from the point of view of the individual, however, the law does have a clear moral dimension which is, in fact, an integral part of the normative order. This perspective is important not only for the purposes of moral theology but also, in the context of the *Sachsenspiegel*, for those using the law, whether judges or law-abiding persons.[40]

God's covenant with humankind, the aim of which is human salvation, has a contractual form. Eike calls it "e." In Hebrew, the Old Testament uses the term *b^{e}rît*, which, in addition to covenant, can mean commandment or law, which in itself suggests a normative meaning.[41] The human relationship with God in the form of religion is shaped as a legal one. Something that Eike saw as especially objectionable was judicial partisanship. Eike insisted that a person must be judged without special treatment based on the person's standing.[42] The origins of this view can also be traced back to the Bible.[43] It is about a professionalism of judicial activity demanded by God.

Once more, Eike's preferred yardstick is one's responsibility to God, for he explained that he could not prevent any alterations to his book in the future, but God would always know what his original intentions were, for no one can

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[37] Ssp. Reimvorrede, lines 97–102 and 159–167.

[38] *Schmidt-Wiegand* (note 32), 321; also Jesus Sirach 20, 30–31. For parallels to Wernher von Elmendorf, see *Schmidt-Wiegand* (note 32), 317.

[39] Ssp. Reimvorrede, lines 103–112 and 136–137: "went he brikt der e bot // Swe so recht verkeret." – who is violating the law, is breaking the commandment.

[40] Cf. Ssp. Reimvorrede, line 129.

[41] *Ernst Kutsch*, Bund I, in: Theologische Realenzyklopädie 7 (1981): 397–403, here 399.

[42] Ssp. Reimvorrede, lines 125–29. In the same way the judge is obliged to do today, cf. e. g. § 38 *Deutsches Richtergesetz*.

[43] Lev. 19:15 und Deut. 16:18–19; to that, *Eckart Otto*, Herders Kommentar zum Alten Testament, Deuteronomium, part 2 (Freiburg im Breisgau: Herder, 2016) 1428, 1463 f.

deceive the Lord. At the end of the day, there will be the Last Judgment, when God turns the mirror upon us and we are rewarded according to our deeds.[44] Here the author's eschatological perspective is directly relevant: no one will be able to escape the Last Judgment, and the deeds of every person will be revealed. What is interesting is that Eike sees the Last Judgment as a process of self-awareness. The day is always followed by a night, warns Eike, and the same applies to human life on earth, which is finite.[45]

2. The Prologue and its Text

The prologue itself as well as the so-called "text of the prologue" (a second preliminary note) at the beginning of the *Sachsenspiegel* fulfils the introductory functions already mentioned. The prologue of the text, which we have in the oldest handwriting, portrays God as the master of the world as well as the law. By invoking the Holy Spirit, Eike seeks to place himself in a direct relationship with God, and nobody should be dissuaded from the right, neither by love nor suffering, anger nor gift. The thought culminates in the saying that God Himself is the law, and that he is also fond of it.[46]

I shall return to this identification of the law with God later. Eike is saying, quite openly, that the yardstick by which people will be judged at the Final Judgment will be the law, and that it should therefore be observed in this world.[47] This is yet another example of Eike's eschatological perspective. It is interesting that one gains insight into the law only with the help of one's mind. The law is handed down, not made or set, and it therefore possesses a metaphysical quality. As in a short summary of the Christian creed, Eike places his work in the text of the prologue in a salvific historical context, similar to canonical law insofar as he associates the conversion of humanity to God with the observance of the legal commandments.[48] Yet again, it is clear that the law is seen as a central element not only to personal salvation but also to the entire history of human redemption. Eike sees himself as a part of this plan, and he sees the law as divinely imparted.

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[44] Sp. Reimvorrede, lines 227–230 and 183–190; similarly, Vom Rechte (note 33), line 505.

[45] Ssp. Reimvorrede, lines 191–194.

[46] Ssp. Prolog, W fol. 9v: "Des heiligen geistis minne, der sterke mine sinne: Das ich recht unde unrecht der Sachsen bescheide, noch gotis hulden unde noch der werlde vrumen. […] Von rechte ensal nimant wisen liebe noch leide, zcorn noch gift. Got is selber recht, dar umme is im recht lip. Dar umme sen si sich alle vor di, den gerichte von gotis halbin bevolin si, das si also richten, alse gotis zcorn unde sin gerichte genediclich ubir si irgen musen."

[47] See note 46.

[48] Ssp. Prolog, W fol. 9v; "Got, der da is begin unde ende aller guten dinge, der machte alrest himel unde erde unde machte den menschin in ertriche unde saczte en in das paradis. Der brach den gehorsam, uns allin czu schaden. Dar umme ginge wir irre alse di hertelosin schaf, wen an di czit, das he uns irloste mit siner marter. Nu abir wir bekart sin unde uns got wider geladin hat, nu halde wir sine e unde sin gebot, das uns sine wissagin gelart habin unde gute geistliche lute unde ouch cristine kunige habin gesaczt, Constantin unde Karle, in Sachsinlande noch sines rechtis nucz." concerning the canon law, cf. DG post Dist. VI c. 3; cf. *Sten Gagnér*, Studien zur Ideengeschichte der Gesetzgebung (Stockholm: Almqvist & Wiksell, 1960), 216 f. Further: Vom Rechte, especially lines 525–50.

III. The Treatise on Slavery and the Theory of Customary Law

1. The theological basis of the equality between individuals and the injustice of serfdom

It is impossible to discuss the Christian influence on the *Sachenspiegel* in a meaningful way without reference to the well-known "Treatise on Slavery" in Ssp. Ldr. III 42.[49] The fact that Eike does not describe the relationship between landlords and bondsmen, even though many people were affected by it, seems to go against his intention to give a summary of the entirety of the law at the time of the *Sachenspiegel*. This omission should be treated with caution: in fact, Eike saw serfdom as an obvious injustice. This is the description he gives in his law book. Eike's eye-opening justification for his claim, using a scriptural basis in Ssp. Ldr. III 42, is also a remarkable plea for the recognition that all human beings should enjoy the same freedom.

He begins with the following consideration: "God created humanity according to God's likeness and redeemed humanity through his suffering, the one as well as the other; to God, both the poor and the rich were the same in this regard."[50]

Indirectly, Eike states that all human beings are equal before the law, for all were created in the image and likeness of God, as is said, for instance, in Genesis 1:26, and all were redeemed by Christ. Here we have a teaching that is notably controversial, for there also are counterarguments to be found in the Bible which Eike has altogether dismissed.[51] What follows are two positive Biblical arguments that support his position. The first is the Old Testament Jubilee Year, described in Leviticus 25:8–10. It was after the forty-ninth year at the latest that every inhabitant of the land was to be freed, so as not to have permanent serfdom. Eike's second argument is derived from the famous passage about the denarius in Matthew 22:15–22, by means of which Eike expands on his initial thoughts concerning the creation of humanity in the image and likeness of God: if Caesar is entitled to the coin because it bears his image, then human beings, created in the image of God, belong to God alone, and not to any other person.[52] As Eike explains: "Truly, the state of unfreedom has its origins in coercion, captivity, and unjustified violence which has become, with the passage of time, a nasty habit, and which

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[49] W fol. 46v. For *bibliographical references* to this famous section, see *Tilman Repgen*, Unfreiheit ist wider die Menschenwürde – eine rechtshistorische Miniatur, in: Thomas/Hattler (eds.), Der Appell des Humanen. Zum Streit um Naturrecht (Heusenstamm: Ontos, 2010), 125–152, here 132–134, note 28.

[50] Ssp. Ldr. III 42 § 1, W fol. 46v. "Got hat den man noch im gebildit unde mit siner martir irlost, den einen als den andern; im was der arme also liep alse der riche" Cf. also the epistle of James 2:1–5.

On the correlation of poor and rich with a view to the idea of equality, cf. *Barbara Frenz*, Gleichheitsdenken in deutschen Städten des 12. bis 15. Jahrhunderts. Geistesgeschichte, Quellensprache, Gesellschaftsfunktion (Köln: Böhlau, 2000), 15–71.

[51] *Repgen* (note 49), 135–140.

[52] Ssp. Ldr. III 42 §§ 4 and 5, W fol. 47; *Repgen* (note 49), 140 ff.

people have come to see as the law."[53] With this statement, Eike touches on an idea which he expressed with something of a sigh in the beginning of his *quaestio*, which goes like this: "Given my understanding, I find it impossible to see as truthful the opinion that one person can be the property of another."[54] This is the culmination of Eike's theological, natural, and, one is tempted to say, reason-based legal arguments advanced against serfdom. He unmasked it as iniquitous.

2. Serfdom as an unjust habit and the theory of customary law

The talk of "iniquitous custom" and the notion of serfdom as a "falsehood" have a charged relationship with Eike's utterances in the "Rhymed Preface," in which he asserts that the content of his work at that point had been handed down from time immemorial, and that it reflected only the truth:[55] in other words, it is a work of customary law. How does this relate to the revolutionary claim that serfdom was not a good customary law, but rather an example of an iniquitous one?

Eike's understanding of law was that it was not some random human invention, not some mere fiction. This notion confirms Eike's place as a representative of the tradition of the Middle Ages. The entire system of law is to be understood as a customary one. A classical expression of this opinion can be found in the tenet *lex est consuetudo in scriptis redacta* (the law is a customary practice put into writing), which goes back to a comment made by Gratian:

> It makes no difference whether the practice is written down or the product of reason. It is obvious that some customs exist in a written form, while others are based around the mores of those using them. Those that are written down are referred to as "laws," while the unwritten ones fall under the general term of "customs."[56]

It would be too simplistic to understand this as a claim that every well-established custom amounts to a legal norm. One must note an important restriction also present in the extract – namely, that the only customs that amount to principles of law are those which correspond to the standards of divine truth and reason.[57] In the decree one finds the following:

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[53] Ssp. Ldr. III 42 § 6, W fol. 47. "Noch rechtir warheit so hat eigenschaft begin von getwange unde von gevengnisse und von unrechter gewalt, die man von aldir an unrechter gewonheit gezogen hat unde nu vor recht haben wil."

[54] Ssp. Ldr. III 42 § 3, W fol. 46v: "An minen sinnen enkan ich is nicht usgenemen nach warheit, das iemant des andern sulle sin."

[55] Ssp. Reimvorrede, lines 36, 178–180.

[56] DG post Dist. I, c. 5. To the tenet mentioned above, cf. *Thomas Simon*, Gab es im Hochmittelalter eine 'gesetzespositivistische Umwälzung'?, in: Olechowksi et al. (eds.), Grundlagen der österreichischen Rechtskultur. Festschrift für Werner Ogris (Köln/Wien: Böhlau, 2010), 477–498, here 481; *Winfried Trusen*, Römisches und partikuläres Recht in der Rezeptionszeit, in: Kuchinke (ed.), Rechtsbewahrung und Rechtsentwicklung. Festschrift für Heinrich Lange (München: C. H. Beck, 1970), 97–120, here 100; *Gagnér* (note 48), 216–218, 296.

[57] *Karl Kroeschell*, Von der Gewohnheit zum Recht, in: Boockmann/Grenzmann/Moeller/Staehlin (eds.), Recht und Verfassung im Übergang vom Mittelalter zur Neuzeit, part I (Göttingen: Vandenhoeck & Ruprecht, 1998), 68–92, here 76, with review by *Tilman Repgen*,

When you find yourself objecting to a custom, always remember that the Lord said "I am the truth." He did not say "I am the custom," but rather, the truth. And certainly (here we use the teaching of Cyprian): a custom, even if from time immemorial, even if generally widespread, but which contradicts the truth, or a practice which does the same, should be discontinued.[58]

Gratian clearly bases his teaching about customary law on a theological concept. From *John* 14:6 he borrows the idea that legal practice should be guided by the truth – not just any truth, but that of God's revelation.[59] Therefore, the legal system is dependent (retrospectively) on God's will.[60] There is no contradiction between this and the role of understanding, for, as Eike's notion of law plainly suggests, something could be true only if it was also rational; canon law, shortly after Gratian's time, derived the idea that rationality was a precondition for the acceptance of a customary practice.[61]

Eike does not discuss this in a theoretical fashion and does not expand on the sources of his ideas, even though the parallelism between his legal teachings and canon law is undoubted.[62] However, we can confidently state that at the beginning of the thirteenth century, a certain theory of customary law was developed based on canon law and related to theological studies, in which the exact structure of arguments in the freedom treatise is clearly present.[63] Eike uses this theory in a radical fashion in the context of serfdom, whose legality he disputes.

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in: Der Staat 41 (Berlin: Duncker & Humblot, 2002), 653; cf. also *Udo Wolter*, Die 'consuetudo' im kanonischen Recht bis zum Ende des 13. Jahrhunderts, in: Dilcher (ed.), Gewohnheitsrecht und Rechtsgewohnheiten im Mittelalter (Berlin: Duncker & Humblot, 1992), 87–116, here 103.

[58] Dist. VIII, c. 5. "Si consuetudinem fortassis opponas, advertendum est, quod Dominus dicit: 'Ego sum veritas.' Non dixit: ego sum consuetudo, sed 'veritas'." §. 1. "Et certe (ut B. Cipriani utamur sententia) quaelibet consuetudo, quantumvis vetusta, quantumvis vulgata, veritati est omnino postponenda, et usus, qui veritati est contrarius, abolendus est." *Gerhard Dilcher*, Die Zwangsgewalt und der Rechtsbegriff vorstaatlicher Ordnungen im Mittelalter, in: Dilcher et al. (eds.), Normen zwischen Oralität und Schriftlichkeit (Köln/Wien: Böhlau, 2008), 123–70, here 157, argues that Gratian's connection of custom and *ratio* and *veritas* is a new thought. This is not convincing when it comes to canon law, as shown by the call to Cyprian in the quotation in the text above (Dist. VIII, c. 5).

[59] Cf. *Siegfried Brie*, Die Lehre vom Gewohnheitsrecht, Vol. 1 (Breslau: Marcus, 1899), 68; *Wolter* (note 57), 106; *Peter Leisching*, Prolegomena zum Begriff der ratio in der Kanonistik, in: ZRG Kan. Abt. 72 (1986): 329–337. See also *Gerhard Dilcher*, Mittelalterliche Rechtsgewohnheit als methodisch-theoretisches Problem, in: *Dilcher* (note 58), 33–84, here 73 f.

[60] A radical divergence from this idea is later taken by *Thomas Hobbes*, Leviathan, Sive de Materia, Forma & Potestate Civitatis Ecclesiasticae et Civilis (Amsterdam: Joan Blaeu, 1668), 133: "authoritas, non veritas facit legem."

[61] *Wolter* (note 57), 106 with reference to *Bernardus Papiensis*, Summa decretalium, Laspeyres (ed.) (Regensburg, 1860), 5. However, it should not be overlooked that in Roman law, rationality was also the condition for validity, cf. Celsus D. 1.3.39 and C. 8.52.2, but canon law first brings together *ratio* and *veritas* in its own way, cf. *Trusen* (note 56), 116, with reference to Dist. VIII, c. 4–9. In *Trusen*, l. c., 117 f. also an important reference to *Tengler*, Laienspiegel (Straßburg, 1511), fol. 27b, who has taken up this doctrine of customary law exactly.

[62] So *Karl Kroeschell*, Rechtsaufzeichnung und Rechtswirklichkeit. Das Beispiel des Sachsenspiegels, in: Classen (ed.), Recht und Schrift im Mittelalter (Sigmaringen: Thorbecke, 1977), 349–380, here 366; *id.* (note 57), 77.

[63] *Peter Landau*, Die juristischen Handschriften der Bibliothek des Zisterzienserklosters Altzelle, in: Ascheri/Colli (eds.), Manoscritti, editoria e biblioteche dal medioevo all'età con-

IV. The Result – God Himself as the Law

This chapter so far, focused as it is on theology, should suffice to outline Eike's core tenets, even though many aspects of the question about the Christian character of his legal thinking have scarcely been touched upon – for example, Eike's formal borrowing from contemporary theology. Almost no one who has studied the *Sachsenspiegel* has been able to ignore the concisely worded legal idea in the preface. Schmidt-Wiegand has called Eike's formulation his "key sentence."[64] The following sentence represents, in its essence, the medieval idea as a whole: "God Himself is the law, which is why the law is so dear to Him."[65]

Eike's statement suggests a unity between God and the legal order. The relationship between religion and the law could not be stated more unequivocally. Eike compresses it in its identity. At first glance, this seems rather presumptuous. It is only natural that one would want to say that God is much more than the "law," even if one reads "the law" to mean "justice." On the other hand, one must concede that Eike's claim was not that God was *only* justice. Nevertheless, Eike's assertion is to be seen in a theological light.

According to Eike, the truthfulness of the faith is the ever-binding benchmark for the law. Thus was the historically salvific dimension of the law made manifest. Eike defers to a mode of thinking influenced by the theology that had appeared since Anselm of Canterbury, which did not confine itself to the academic pursuit of the law. Truth, *ratio* (reason), and the law constitute a unity, which can only be understood metaphysically as the order of salvation.

God Himself is the law – a final thought on this summary of Eike's legal theory. This summary is not something that stands on its own, rather it is to be seen in the context of scholastic theology. Evidence of this is found in the citation of a text by Thomas Aquinas, who discusses God's justice and compassion and asks whether there is justice in God. He states that all things according to God's will are right and just. God Himself, says Thomas, is the law.[66]

To this extent, the jurist who holds the law in high esteem can be said to be carrying out the will of God. Establishing the dominion of the law is then an element of the realization of the order of salvation. The *Sachsenspiegel* was being formulated as Aquinas was dictating his *Summa Theologiae*. It is therefore

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temporanea. Studi offerti a Domenico Maffei per il suo ottantesimo compleanno (Rome: Rinascimento, 2006), Vol. 1, 447–459.

[64] *Schmidt-Wiegand* (note 32), 321. On the interpretation of this section, see also *Ignor* (note 22), 183, according to which Eike saw the origins of law in God, because the human takes part only in the implementation of law, with legal norms acting only as the expression of God's eternal ideas.

[65] Ssp. Prolog, W fol. 9v; in the original the sentence quoated above is: "Got is selve recht, dar umme is em recht lef."

[66] *Thomas Aquinas*, STh I, q. 21, art. 1, ad secundum: "Deus autem sibi ipsi est lex." On this question, see also *Kannowski* (note 22), 594. Cf. also Psalm 10:8: "quoniam iustus Dominus et iustitiam dilexit"; this is referred to by *Ignor* (note 22), 135, and draws attention to the possibilities of translation, since "recht" in the first half sentence by Eike can be read as a noun (meaning "law") or an adjective (meaning "just"). On the prologue, see also *Ignor* (note 22), 165.

unlikely that he would have been aware of the German work. It is clear, however, that a parallel, theologically based understanding of the law was coming into being. Prima facie, one may object that Eike spoke of "the law," while Aquinas mentions a "legal norm." However, Aquinas frequently uses both terms as synonyms, so sometimes he speaks of *lex naturalis* and other times of *ius naturale*.[67] Aquinas shows how the claim that God is the law is to be understood and, in turn, provides a context. The will of God is necessarily fixed on the good and is, therefore, just. We can add that all acts of God are necessarily just, reasonable, and truthful – truthful in the sense that just behavior coincides with the law, just as the perception of a thing coincides with the thing itself.[68]

Seen from this perspective, it is clear why Eike could not have had a different view on bondage. If it is God's will that human beings are free – and are so in order to be able to achieve their supranatural goal – then it cannot be "truthful" that most men and women should live in a state of unfreedom (understood as slavery). This cannot be lawful or right.

All in all, the *Sachsenspiegel* is a "mirror" not merely into the law of its age but also into the central aspects of the theology of the High Middle Ages.

[67] Cf. *Kenneth Pennington*, Lex and ius in the Twelfth and Thirteenth Centuries, in: Fidora/Bachmann/Wagner (eds.), Lex und ius. Beiträge zur Begründung des Rechts in der Philosophie des Mittelalters und der Frühen Neuzeit (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 2010), 1–25, here 10.

[68] STh I, q. 21, art. 2, in resp.

Chapter 3

Albertus Magnus (ca. 1200–1280) Natural Law as Law of Reason and its Significance for the Political Order

Sven Lichtmann and Hannes Möhle

I. Introduction

Albert the Great (Albertus Magnus, Albert der Große) was born around 1200 in Lauingen in southern Germany.[1] After joining the Dominican Order in 1223, he received his education first in Cologne and then, from 1241, at the University of Paris, the most important university of the Middle Ages, where he was appointed magister in 1245 and taught himself. In Cologne, where he had been head of the Studium Generale of the Dominicans since 1248, he was the first and only scholar of the Middle Ages to begin commenting on the work of Aristotle, which had been almost entirely translated into Latin. In addition to commentaries on Aristotle, his scientific work contains further commentaries on the sentences of Peter Lombard, the work of Pseudo-Dionysius the Areopagite, and writings of the Old and New Testament, as well as a number of independent philosophical and theological works. Characteristic of Albert's scientific approach is the adaptation of different methods appropriate to the objects he treats. For this reason, Albert represents a pluralism of scientific disciplines and rejects an all-encompassing, unified science.

In close connection to his scientific work was his extensive activity as a mediator between conflicting parties, a vocation that he exercised in addition to his work on behalf of his order or in church political offices. From 1260 to 1262 he was bishop of Regensburg. Albert died in 1280 in the city of Cologne, which had become his second home, where he spent most of his life.

Albert the Great develops his concept of law[2] by recourse to the natural law doctrine dating back to antiquity. An essential point of reference here is the Stoa,

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[1] For a comprehensive biography and history of Albert's work, see *Simon Tugwell*, Albert & Thomas. Selected Writings (New York/Mahwah: Paulist Press, 1988), 3–39.

[2] The most comprehensive treatment of (natural) law in Albert the Great is found in *Jörn Müller*, Natürliche Moral und philosophische Ethik bei Albertus Magnus (Münster: Aschendorff, 2001). Cf. also *Marko J. Fuchs*, Gerechtigkeit als allgemeine Tugend: Die Rezeption der aristotelischen Gerchtigkeitstheorie im Mittelalter und das Problem des ethischen Universalismus (Berlin/Boston: DeGruyter, 2017); *Aloysius Obiwulu*, Tractatus de legibus in 13th Century

which[3] influenced the understanding of law in the Middle Ages above all through Roman law and its Christian adaptation. While the law (*nomos*) in Aristotle, for example, is essentially related to the individual polis, the Greek Stoa detaches the *nomos* from this spatio-temporal conditionality. Starting from the idea of a divine world reason dominating the entire cosmos, the general *nomos* becomes the unchangeable principle of order, which is synonymous with true reason (*orthos logos*). The human being, as a being of reason, has a part in the *logos* and thus in the eternal world law (*lex aeterna*) via reason. The human *logos* thus refers to the law of nature, that part of the *lex aeterna* corresponding to the human being. Thus the *orthos logos* in the form of natural law becomes the normative basis of every human law (*lex humana*) from which it must derive, insofar as it is supposed to be law at all.

Two central moments in Albert's teaching of natural law deserve special emphasis. On one hand, this is Cicero's philosophy of law. Although Cicero takes over the determination of the law as supreme reason, the *recta ratio* is now no longer only the sign of a divine world reason, but also the determination of perfect human nature. This equation of humanity with the divine in relation to reason has the consequence that the law of nature for Cicero is nothing other than the power (*vis innata*) inherent to the human being due to human nature. To be right by nature therefore does not refer primarily to the constitution of the cosmos as a whole. Rather, it is that which is appropriate to humanity by nature, and precisely this is reason itself, which first of all makes us human.

On the other hand, it is Augustine who takes up the Stoic doctrine of natural law and connects it with Christian ideas. While the Stoa identified the *lex aeterna* with the order of the cosmos in the form of the world reason reigning the cosmos, Augustine's eternal law becomes reason or the will of God, who commands to preserve the natural order (*ordo naturalis*). Thus the *lex aeterna* and the law regulating created nature no longer fall together. The law of nature (*lex naturalis*) given up to humanity is no longer essentially identical with the divine law, but now refers to the inherent law of human nature intended by God in the *lex aeterna. Lex aeterna* and *lex naturalis* are therefore formally separated from each other, but their content cannot contradict each other: the will of the personal Christian God is written into the heart of human beings in the form of the *lex naturalis in* Romans 2:14 f. and is thus the guide for everyone, including non-Christians.

Scholasticism: A Critical Study and Interpretation of Law in Summa Fratris Alexandri, Albertus Magnus and Thomas Aquinas (Münster: Lit., 2003); *Stanley B. Cunningham*, Albertus Magnus on Natural Law, Journal of the History of Ideas 28 (1967), 479–502; *Alfons Hufnagel*, Albertus Magnus und das Naturrecht, Studia Anselmiana 63, 123–48 as well as *Wilhelm Arendt*, Die Staats- und Gesellschaftslehre Albert des Großen. Nach den Quellen dargestellt (Jena: Gustav Fischer, 1929), 28–37.

[3] For the following overview, see *Ernst-Wolfgang Böckenförde*, Geschichte der Rechts- und Staatsphilosophie. Antike und Mittelalter, 2nd ed. (Tübingen: Mohr Siebeck, 2006), esp. 138–41, 160–63 and 203–06.

II. *Ius* and *Lex* in Albert the Great

In accordance with Cicero, Albert says, a law (*lex*) is a written right (*ius scriptum*)[4] enacted with the aim of strengthening the moral attitude (*honestas*) of the citizens (*cives*) living under the law and, for this purpose, prohibiting that which is contrary to moral perfection.[5] This difference leads Albert to differentiate between natural law (*lex naturalis*) and natural right (*ius naturale*). The law of nature thus focuses more on the aspect of the obligation emanating from nature (*obligatio*) through nature's commandment, while the natural right works *per modum iudicantis*, that is, by emphasizing the judgment related to the action. Natural right thus refers to the practical knowledge conveyed by nature (*cogitationes operabilium per naturam*) and emphasizes the central idea for Albert that natural law is right of reason.[6] Albert expressly maintains that the character of natural right as an obligation depends on the rational structure of the person to be obligated, namely, the human being. For without it being possible to know what is owed (*debitum*), there is no point in talking about an obligation through natural law. For this reason, only human beings, or generally the rational creature, can be the addressee of an obligation under natural right.[7]

Of course, Albert knows not only a written law of nature but also other forms of law, which serve the human community with different tasks. On one hand, laws and the associated threat of punishment serve the development of a virtuous attitude, especially among young people who lack the moral disposition that has to be acquired. The pre-existence of a moral habit – promoted by laws – is the prerequisite for the fact that the human being strengthened by this will actually act according to virtue.[8] Laws not only represent customary law but also contribute to the creation of necessary habits. This task cannot be fulfilled by the admonitions in the family alone. Albert emphasizes that ethics, which are based on conviction (*sermo persuasivus*), are not sufficient to make people good. Rather, Albert actually needs the laws as a compelling speech (*sermo coactivus*[9]). The mandatory speech comes about only when the laws are enacted by

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[4] Natural law (lex naturalis, ius naturale) is a fixed term in English, and both ius and lex are usually represented by 'law'. Albert emphasizes the difference between ius and lex or ius naturale and lex naturalis as shown below. Where the reproduction and interpretation of Albert's wording therefore makes it necessary, lex was reproduced with 'law' and ius with 'right'. This applies in particular to the provisions on natural right (ius naturale) as right of reason (ius rationis) that are central to the present context. Otherwise, '(natural) law' stands for both ius (naturale) and lex (naturalis).

[5] See *Albertus Magnus*, De bono tr. 5 q. 2 a. 1 (Ed. Colon. 28, 282.1–23). Ed. Colon. = *Alberti Magni Opera Omnia*, Editio Coloniensis, Albertus Magnus Institut (ed.), volumes published so far (Münster: Albertus Magnus Institut, 1950).

[6] See *Albertus Magnus*, *De bono* tr. 5 q. 2 a. 2 (Ed. Colon. 28, 285.27–34).

[7] See *Albertus Magnus*, *De bono* tr. 5 q. 1 a. 1 ad 2 (Ed. Colon. 28, 264.12–23).

[8] See *Albertus Magnus*, *Ethica* l. 10 tr. 3 c. 1 (Ed. Par. 7, 636a–b). Ed. Par. = *Alberti Magni Opera Omnia*, Editio Parisiensis, Aug. u. Aem. Borgnet (ed.), 38 vol. (Paris, 1890–99).

[9] See *Albertus Magnus*, *Super Ethica* l. 4 lect. 16 q. 1 ad 5 (Ed. Colon. 14, 299.56–61). See also *Albertus Magnus*, *Super Matthaeum* c. 6 v. 10 (Ed. Colon. 21, 192.79–90).