THE INTEGRATION OF CANON LAW AND ROMAN LAW WITH TERRITORIAL LAW IN THE PROTESTANT PRINCIPALITIES OF GERMANY IN THE SIXTEENTH CENTURY

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This report consists of two principal propositions. The first is that in the multiple German territories that became Protestant in the sixteenth century the secular rulers, having outlawed the Roman Catholic Church, nevertheless eventually inherited and transformed —"received" is the word legal historians have traditionally used— 0151 major parts of the canon law that had been previously applied in the Roman Catholic ecclesiastical courts within the territory, as well as major parts of the Roman law that had been "received" in previous centuries in the legal scholarship of the German and other European universities and also, though to a much lesser extent, in the practice of some of the German and other European courts.

The second proposition is that with the succession of the Protestant princes, each with his councillors, his *Obrigkeit*, or high magistracy, to supreme authority over the Church in their respective principalities, and with the accompanying increase in princely power over secular lawmaking authorities as well (territorial, feudal, urban, mercantile, village), it was necessary to develop a new method of systematizing the entire law of the territory, a new legal science, and that new method, introduced originally by Luther's partner Philip Melanchthon, was called the topical method.

I shall discuss the first proposition only briefly, by way of background, and shall devote almost all of my report to a discussion of the new topical method, which made possible the harmonizing of diverse bodies of law within a single jurisdiction.

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I

Despite their initial antagonism to the Roman Catholic canon law, the Lutheran reformers ultimately found recourse to many parts of it to be useful and appropriate. This has been amply demonstrated in the distinguished scholarship of Richard Helmholz and, more recently, John Witte, Jr.[1] What was "received", however, in the Protestant German principalities, as they have shown, was not the entire canon law of the Roman Catholic episcopal courts and the papal curia but were those parts of it that were considered to be compatible with the new Protestant theology and politics. Lutheran princes, now each the supreme head of the Church in his territory, assumed responsibility for regulating the activities of the clergy within their principalities as well as church liturgy, marriage and family relationships, punishment of moral offenses, poor relief, education, and many other matters that had previously been within the exclusive competence of the Roman Catholic ecclesiastical hierarchy, as well as other matters that had previously been shared between ecclesiastical and secular authorities, such as control of the widespread landholdings of the Church. Also various secular territorial, feudal, urban, mercantile, and local jurisdictions, which had previously exercised a considerable autonomy, now came under the more unified jurisdiction of the strengthened princely authority. Moreover, the universities, where roman law was studied and taught as a learned discipline, also came under the authority of the Protestant prince and his high magistracy.

The vast increase in the scope of the lawmaking power of the secular territorial rulers in Lutheran principalities was reflected in the promulgation of a steady stream of comprehensive territorial statutes, called Ordnungen, "Ordinances". These were church ordinances (*Kirchenordnungen*), mnarriage ordinances (*Eheordnungen*), moral ordinances (*Zuchtordnungen*), school ordinances (*Schulordnungen*), and poor relief ordinances (*Armenordnungen*), as well as comprehensive ordinances go verning a combination of such concerns, called territorial ordinances (*Landesordnungen*) and policy ordinances (*Polizeiordnungen*). In one German principality over 450 such comprehensive ordinances were enacted between 1500 and 1600.[2]

[1] Helmholz, R. H. (ed.), *Canon Law in Protestant Lands*, 1992; and Witte, John, Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation*, 2002.

[2] See Weber, Matthias, *Die Schlesischen Polizei-und Landesordnungen der frühen Neuzeit*, 1996, p. 222.

Moreover, municipal authorities in individual cities also issued ordinances regulating specific aspects of trade and other economic activities. In the German city of Constance, for example, some 200 laws governing the economy were enacted between 1510 and 1548.[3]

Although the learned jurists of Germany and elsewhere in Europe did not write treatises about these types of statutory law, but confined themselves generally to analysis the *jus canonicum* and the *ius civile*, nevertheless there was a sizable body of sixteenth-century German legal literature, written primarily for practitioners, listing hundreds of differences between the two "learned laws" and the territorial laws of particular principalities. Indeed, both the *ius canonicum* and the *ius civile* were drawn on by courts in German principalities to fill gaps and resolve ambiguities in the statutory laws as well as in local and in regional customary law.

II

New in sixteenth-century Protestant German law was the bringing together of all the jurisdictions under the greatly increased authority of the prince and his body of councillors. Previously such jurisdictions within each polity had had far greater autonomy. Especially the dualism of ecclesiastical and secular jurisdictions had permitted a competition of different bodies of law within the same polity. A contract, for example, was one thing in a German or English or French royal court, another in an ecclesiastical court, another in a feudal court, another in a mercantile court, another in a village court. Not only procedural and substantive rules but also the concepts of law and of legal method differed substantially in the different jurisdictions. Indeed, the predominant science that had prevailed in law, as in other disciplines, since the early twelfth century, namely, the so-called scholastic method, was premised on the co-existence of contradictions; these were ultimately, it was said, to be resolved, but often only by the finest of distinctions.

The German Lutheran Revolution of the sixteenth-century, with its transfer to the territorial prince of supreme lawmaking authority in all fields, required the transformation of the method, as it was usually called,

[3] Feger, Otto and Ruster, Peter, *Das Konstanzer Wirtschafts-und Gewerberecht zur Zeit der Reformation*, 1961, pp. 55-56. fn. 7, p. 432. fn. 8, p. 432.

or science, as it was also called, by which all branches of law were to be analyzed and systematized, including the method by which legal decisions and rules were related to legal principles, legal concepts, and legal theories. The new legal science was ultimately derived from Lutheran theology.

It came in the first instance out of the spiritual and intellectual ferment at the University of Wittenberg following the arrival there in 1518 of the precocious twenty-one-year-old Philip Melanchthon. Melanchthon's earliest major work, entitled *Loci communes rerum theologicarum* ("Common Topics of Theological Matters"), first published in 1521,[4] laid the foundations of Lutheran theology but added to it a new "topical" method of analysis applicable also to other branches of knowledge, including both legal philosophy and legal science.

To construct any science, Melanchthon taught, the topics common to all sciences ("loci communes") should be applied to the subject-matter being investigated, in the form of a series of questions: 1) what is the definition of the thing under investigation? 2) what is its division into genus and species? 3) what are its various causes? 4) what are its various effects? 5) what things are adjacent to it? 6) what things are cognate to it? 7) what things are repugnant to it? Moreover, every particular subject-matter, every "art", he wrote, requires its own "method" (*methodus*) which presents concisely and in an ordered way its own "special topics" (*praecipui loci*). Just as the special topics of theology provide the basic for a concise and systematic statement of the fundamental doctrines of theology, so the special topics of law, in Melanchthon's view, provide the basis for a systematic legal science.[5]

[4] Revisions were published in 1525, 1535, 1544-45, and 1555, with minor changes in the title.

[5] In 1534, in an early edition of the *Erotemata Dialectices*, entitled *Dialectices Philippi Melanchthonis Libri II*, under the heading *De Demonstrationibus*, p. 112, Melanchthon wrote: "The term Method, of which we have spoken above, should be fitted especially to this way of teaching, [namely,] when we use demonstration, when we give definitions, when we seek causes, when we draw effects and proper functions from the causes, when we show the origins and sources of the arts. For [certain] principles, certain common judgments , are born with us. For God has impressed on our minds certain elements of knowledge (*notitiae*) which are like rules in judging concerning nature and concerning civil customs, of whatever kind they are". This passage from the 1534 *Dialectices* clearly identifies Method as a way of demonstrating and judging and not only a way of classifying, investigating, and explicating.

Similar common topics, which were originally derived from Aristotle, had been given new meaning by the scholastics; their meaning had been revised again by the humanists of the fifteenth century, especially Rudolph Agricola (1443-1485), whose *De inventione dialectica* of 1479 strongly influenced Melanchthon. Before Melanchthon, however, the common topics had been viewed merely as a classificatory index (frequently arranged alphabetically) of the materials under examination. Moreover, neither the common topics nor special topics had been applied systematically to the "arts" of theology and law.

The scholastics had considered loci as a branch of rhetoric, and hence primarily as a guide to debate. The humanists of the late fifteenth and early sixteenth centuries, removed the loci from rhetoric to dialectic, which they defined as the science or art of exposition and proof. Nevertheless, in practice the humanists —before Melanchthon— confined the use of loci to the "exposition" side of dialectic, which they called *inventio*, or finding, as contrasted with the "proof" side, which they called *iudicium*, or judgment. That is, the loci, the topics, were a way of organizing the materials, a way of exploring, or "finding", the structure of the subject under investigation; and it was that "finding" of the structure of the subject that constituted, for the earlier humanists, the "methodus", the scientific method. In 1520 Melanchthon wrote: "The dialecticians have adopted this word *methodus* for the most correct order of explication". He himself went beyond that.

Some historians of philosophy have said that it was Peter Ramus (1515-1572), the famous french grammarian and logician, who transformed the loci method of explication (*inventio*) into a method also of proving truth (*iudicium*). In fact, although Ramus did assert that his loci method was a method of proof as well as of explication, it remained in his hands almost entirely the latter. It was, in fact, Melanchthon, not Ramus, who first showed how "the most correct order of explication" could be at the same time a method of determining the validity or invalidity of propositions and arguments. He did this by drawing upon the general part of the method, the loci communes, to take specific items of knowledge out of their particular branches and to define their essential nature. For Melanchthon, the loci communes (genus and species, causes, and the like) were basic axioms applicable not only to language and philosophy but also to theology and law. By combining them with the

praecipui loci of specific branches of knowledge, and thus to ask, in theology, such questions as, What is the genus sin? what are its species? what are their causes? what is grace?, etc. was not only to facilitate explication but also to arrive at truth, in this case the true distinction between Law and Gospel. The specific loci of theology were drawn from the Bible; more particularly, Melanchthon derived the specific loci of sin, grace, and law expressly from St. Paul. In law, as was shown in the previous chapter, Melanchthon derived from the second table of the Decalogue the basic topics of constitutional law, family law, criminal law, moral offenses, property law, fraud, and others.

Melanchthon's disciples adopted his method of classification of law based on the Decalogue and, going beyond that, read into the Roman law texts pairs of loci such as rule and equity, substance and procedure, ownership and obligation, contract and delict. By applying the loci communes —the general or "common" loci— to these specifically legal categories, they not only explicated the legal materials concisely and systematically but they also, in so doing, derived new insights from those materials and gave them new meaning and new applications. They believed, with Melanchthon, that if knowledge is "located" —we might say today "packaged"— by the right "method", then its underlying principles will be validated.[6]

Apel. Among the first jurists to respond to Melanchthon's call for "method" was his Wittenberg colleague, Johann Apel. Although Apel, like many leading jurists of his time, combined an academic career with an active practice as judge and as councilor to territorial and city authorities, he nevertheless also produced two important scholarly works which grew directly out of his teaching. These two books may be said to have founded modern German legal science. The first, whose Latin title, which starts with the word *Methodica*, may be rendered in translation *The Method of Dialectical Reason Applied to Legal Knowledge*, was an attempt to organize and systematize the entire body of law. The second, entitled in translation *Isagoge: A Dialogue on the Study of Law Properly Instituted*, was a treatise on legal education in which the pedagogical need for such a systematization of the entire body of law was set forth.

The Methodica, which was first published in 1535, was based on Apel's course of lectures at the University of Wittenberg during several

6 The corresponding bibliohemerography to this information is settled at the appendix.

years immediately prior to his departure in 1530. It starts by directing attention to Justinian's Institutes. It does not, however, recapitulate, paraphrase, or elucidate the text of the Institutes but instead draws upon it for a multitude of examples of legal rules, which it classifies and analyzes in terms of the Melanchthonian loci —both loci communes and praecipui loci—. Thus Apel systematized legal rules by using them to answer the questions, What is law? What are its genera and species? What is its efficient cause? What are its effects? What concepts and things are related to it? What are contrary to it? What circumstances alter the answers to the above question? Each of these questions ("topics") forms the heading of a chapter, in which charts and examples are used to elucidate the analysis. The answers to the questions resulted in a new synthesis, in which concepts and principles are stated which are not to be found as such in the original text but which nevertheless are reflected in its various passages. It is perhaps for that reason that the great nineteenth-century German legal historian Roderich Stintzing states, "Of the jurists of that time whose efforts were directed to the systematic method, Apel is the most original".[7]

Apel was perhaps the first jurist to apply Protestant hermeneutics to law and thereby to present it as an integrated set of principles and concepts from which the various legal rules are logically derived. Apel set out to do in law what his colleagues had done in theology: to synthesize the principles and concepts in a form quite different from that in which they appeared in the original texts and also quite different from that established by previous authoritative writings.

One of Apel's main contributions was to criticize and reinterpret the division of law, as declared in Justinian's Institutes, into "persons", "actions", and "things". The author of the Institutes did not define these three terms in a satisfactory way and did not in fact organize his exposition around them. Apel contended, first, that the category "persons" is incidental to "things". He then went on to divide "things" (*res*) into "right in a thing" (*jus in re*), to which he applied the term "ownership"

[7] Stintzing, *Geschichte der deutschen Rechtswissenschaft*, p. 289. A similar judgment is offered by Ferslev, *Claudius Cantiuncula: Die didaktischen Schriften*, p. 36, who writes that Apel "was the first to carry through logically the rational treatment of the legal material". See also Muther, Theodor, "Apel's dialectical method as a whole is the Melanchthonian method; the juridical examples are his own", *Doctor Johann Apel*, 1861, pp. 34-35; and Wieacker, Franz, *Humanismus und Rezeption*, 1940, pp. 64-67.

(*dominium*), and "right to a thing" (*jus ad rem*), to which he applied the term "obligation" (*obliqatio*) , under which he also subsumed "actions". The concept *jus ad rem*, not to be found in the Institutes, had been invented by the scholastic jurists of the twelfth century and had become an integral and fundamental concept of European law. Apel's division of civil law into ownership (direct and beneficial) and obligations (contractual and quasi-contractual, delictual and quasi-delictual) established basic terms of modern Western legal science as it has existed into the twenty-first century. To the two fundamental genera of ownership and obligation everything else in the civil law was said by Apel to be related as a) species, b) effective cause, c) effect, d) affine, e) contrary, or f) circumstance. Thus "persons" were to be treated as "circumstances" of ownership and obligation, and "actions" as the "effects" of ownership and obligation.

Apel was among the first Western jurists to use the term "civil law" to refer primarily to the law of property, contract, delict, and other branches of law chiefly governing relations among private persons. The Roman *jus civile* was originally understood to be the whole law governing Roman citizens, including not only what came in the sixteenth century to be called "private law" but also constitutional law, administrative law, criminal law, church law, and other branches of "public law". After the Papal Revolution, some branches of law such as marriage law and criminal law had come to be seen as separate sub-systems within the two main systems of canon law and roman law; however, a sharp division between public law and private law, and the treatment of "jus civile" chiefly (though not exclusively) as private law, became characteristic of Western legal thought only in the sixteenth and succeeding centuries. In many German territories and cities in the sixteenth century separate codes of criminal law and separate legislation governing public administration (Polizeiordnunqen) were enacted. Starting with Apel's, the great sixteenth century German treatises summarizing "civil law" often dealt only briefly with public law, typically under "the law of persons" (especially the person of the king), and also often neglected criminal law, concentrating primarily (though, once again, not exclusively) on ownership and civil obligations, together with inheritance, family law, and other related fields of private law. At the same time substantive civil law was analytically separated from civil procedure.

The emphasis on definition, and the elaborate classification of legal principles into genus and species, led to sharp conceptual distinctions within the body of civil law itself. One such division was the separation of contract from acquisition of ownership. Contract, according to Apel, gives rise to a "cause" of obligation, which in turn is a right "to", not a right "in", property. Ownership, which is a right "in" property, may be acquired in a variety of ways, including not only occupation and inheritance but also contract; nevertheless, a contract which results in acquisition of ownership, such as a contract of sale, may not be said to be a "proximate cause" of ownership, but only a "remote cause". The contract of sale is a "proximate cause" of a personal action, that is, an obligation; thus it may give rise to a right to delivery of the thing sold. It is the actual (even though symbolic) delivery, however, and not the right to delivery, that is the proximate cause —the mode of acquisition— of ownership.

This analysis remained orthodox until the nineteenth century — not only in Germany but throughout the West. It has not been totally abandoned, even in the United States, in the twentieth century. A distinction is still made between the buyer's right of property in goods which have been delivered by the seller (for example, to a carrier) and his contractual right to the delivery of goods which have remained in the possession of the seller; in the former case they are the buyer's goods and he may recover them from a third person, whereas in the latter case he normally may only recover damages for non-delivery. With regard to land, as contrasted with goods, differences between contractual rights and property rights remain even sharper. A contract to transfer ownership of land is different from a conveyance of the land.

A key to Apel's legal science was his concept of the logical unity of the civil law. As Franz Wieacker has put it, Apel and his circle recognized that "the deconstruction of the authorities would not in itself lead to a new basis for finding the law". Having discarded "the scrupulous subdivision of the mos Italicus", they saw the possibility of "deriving [specific rules and] decisions from the larger integration (Zusammenhang)".[8]

Apel's Methodica seems to have been the first of a long series of works, similarly titled, in which sixteenth century jurists —most of whom were German and almost of all whom were Protestant— set out not merely to propose, but actually to present, a synthesis of the entire law. In

[8] Wieacker, *op. cit.*, note 7, p. 69.

the course of the century these syntheses became increasingly comprehensive and increasingly detailed.

Lagus. Apel's work was considerably less comprehensive and detailed than the Methodica —published eight years later— of his younger colleague, Konrad Lagus (c. 1499-1546), who taught at Wittenberg from 1522 to 1540. Like Apel, Lagus came to law while teaching in the faculty of arts. Like Apel, Lagus ardently shared the beliefs of Luther and Melanchthon, and strove to structure legal science, as Melanchthon had structured theology, according to its basic themes or concepts, its *praecipui loci*. Lagus wrote that "the natural order requires that we arrive through the understanding of genera to the elements of knowledge of species". Also as in the case of Melanchthon, of Apel, and of the humanist jurists generally, the search for general legal principles and concepts led Lagus to the Institutes, which, he said, provides "the structure of the legal order". Nevertheless, Lagus, like Apel, did not attempt to follow the "structure" of the Institutes but only used the legal rules and concepts of the Institutes as building blocks for his own Methodica, which was written between 1536 and 1540 and first published in 1543. It was a book of 830 pages —some six times the length of Apel's Methodica— devoted to a presentation of basic principles of law drawn from both Roman law and canon law. In it he attempted to set forth in a systematic way the "principal parts of which the science and art of law consist". The publisher stated in the advertisement of the book that no one in the previous four centuries had ever written a "compendium" (a word often used in those times interchangeably with methodica) of the entire learned law. Lagus himself made a similar claim, referring favorably to the thirteenth-century canon-law and roman-law *summae* of Hostiensis and Azo, respectively, but pointing out that they dealt with the materials according to the order in which they appeared in the authoritative texts rather than according to the basic principles which pervaded the texts.

His own aim, Lagus stated, was to present to students a picture of the whole law, so that from its *genera* their thoughts could be reflected onto its *species* and they could thus rightly perceive the particular legal rules and decisions that are deduced from them.

Although Lagus's legal science was similar in many respects to Apel's, it nevertheless marked a major advance. It was not only much longer and much more comprehensive but also philosophically much richer. In his

Methodica Apel had set forth the principles of dialectical reasoning (the method of loci) and had used them as a basis for systematizing legal principles, starting with the general and proceeding to their particular species. But Apel did not, in his Methodica, systematically address philosophical questions concerning the purposes of law. He was concerned to systematize legal principles and rules independently of the equity which motivates their application to concrete cases. Lagus, on the other hand, separated his treatise into two parts, one of which he called philosophical and the other of which he called historical. The philosophical part, which occupies only fifty-eight pages of the 1544 edition, deals with the general nature of law and sets forth the method of the book. The historical part, which occupies the bulk of the book —766 of its 830 pages— is a detailed analysis of the entire legal structure.

Of special interest is Lagus's systematization of the law, in the philosophical part, in accordance with the Aristotelian analysis of four kinds of "causes" "efficient causes", "material causes", "formal causes", and "final causes". This analysis had been familiar to scholastic theologians, jurists, and philosophers, but it had not been used as a basis for systematizing the branches of knowledge that they explicated. Apel also, following Melanchthon, used the Aristotelian causes as one set of devices, though not the principal basis, for systematizing law. Lagus carried Apel's "causal" analysis of law much farther. He classified law, first, according to its efficient causes, that is, according to the particular source or maker of each particular type of legal order. Thus he divided natural law, whose source is "the sense of nature or the judgment of reason", from civil law, whose source is "the consent of the people" as reflected in statute or custom; he further subdivided statutory and customary law into laws made by the empire, laws made by the church, laws made by individual municipalities, laws issued by specific legislators (such as praetorian laws, Caesarian laws, etcetera), and others.

Lagus's second classification of law was according to its material causes, that is, the subject matter of which particular types of law are composed. These he divided first into divine law, which concerns sacred things (such as temples and tombs), the priesthood, and the like, and human law, which concerns civil affairs (*negotia civilia*). By virtue of its material cause, human law consists of military law, feudal law, and religious rites and traditions (which Lagus distinguished from divine law),

as well as civil law, which in turn is divided into public and private law, each with its own branches.

Lagus's third classification of law was according to its formal causes, that is, the forms which it takes, and these he divided into strict law and equity, sub-dividing equity, in turn, into written and unwritten (or natural) equity.

Lagus's fourth classification was according to final causes, that is, the ends which law serves, and under this heading he divided laws into those laws which chiefly concern public matters (*res publicae*) and those which chiefly concern private matters such as contracts and injuries. Thus the division between public and private law was made basic to the purpose of law, although Lagus added that the protection of public interests serves the utility of individuals (*utilitatem singulorum*) and the protection of individuals ultimately serves the public welfare. "The highest end of all laws", Lagus wrote, "is the public welfare [*salus publica*]".

Lagus concludes his introduction to the "causal" analysis of law by saying: "And these" —that is, public welfare and private utility— "are the final causes of each of the individual laws, by which they are brought into being, so that if these causes should cease then the binding force [*obligatio*] of these laws is also taken away".

Lagus's application to law of Aristotelian and Melanchthonian categories of causation had important philosophical implications. One can see in it elements both of legal positivism (especially in the idea that the efficient cause is the lawmaker) and of natural-law theory (especially in the idea that a law loses its binding force if it ceases to serve the common good). At least equally important, however, are its technical implications for the systematization of the law. The entire historical part of his treatise is organized around classifications derived from the four Aristotelian causes. This is apparent from the chart which Lagus included in the historical part. This chart dealt only with the subject matter of which law is composed (the "material causes"). Lagus's successors expanded his method of charting to include "the whole law" (*universum*), including its sources, its forms, and its purposes as well as its subject matter.

The historical part of Lagus's treatise is divided into a) the law of persons, b) modes of acquiring, alienating, and losing property, c) agreements and obligations, d) actions and pleadings, e) judgments, and f) privileges and legal grants (benefices). The theory of law and the "causes" of

law set forth in the philosophical part are embedded in the historical part in an analysis of the entire body of legal principles and concepts and of their breakdown into specific rules. Of his six-fold division Lagus wrote, "I deem these headings to be capable of embracing every form of law".

In each of the six chapters of the second part, the general topic is broken down into its species, and each species, each form of law, is treated in one or more titles. The first chapter, "On the law of persons", deals with certain aspects of family law (rights and duties of family members) and of constitutional law (powers and responsibilities of emperor, princes, and public officials). The second chapter, "On modes of acquiring, transferring, and losing property (*res*)", deals with property law, the law of succession, and marital property. The third chapter, "On agreements and obligations", deals with contractual, delictual, and other forms of civil liability as well as criminal law. Marriage and divorce are also included in this chapter. The fourth chapter, "On actions and pleadings", covers civil and criminal procedure. The fifth chapter, "On judgments", deals with the composition of courts. The sixth chapter, "On privileges and grants", deals partly with constitutional law and partly with the law of obligations. The breaking down of genera into species is carried out systematically down to the smallest details. As Gerhard Theuerkauf states, "Lagus's course of thinking is determined by a firm plan, down to the individual details, and this plan is held to".

Lagus's "plan" brought to fruition Apel's conception of a systematic organization of the entire body of rules contained in the law. This involved two new methodological principles. First, Lagus organized the subject—matter of law, on Melanchthonian principles, around general topics common to all sciences (loci communes), including the Aristotelian four causes; previously, legal scholars using a topical method had organized the subject—matter of law around the topics and in the order set forth in the authoritative legal texts themselves, called the *loci ordinaria*, "the usual topics", with the result that the same general topic was discussed in a variety of places and sometimes inconsistently.

Second, Lagus combined roman law sources and canon law sources; previously these had been analyzed separately, the roman law texts being read in courses in roman law and written about by Romanists and the canon law texts being read in courses in canon law (which, to be sure, drew on roman law concepts and rules) and written about by canonists. Lagus was one of the first jurists who undertook to present a compen-

dium of concepts and rules of law drawn from both systems (Apel had restricted his treatise largely to a synthesis of roman law). Under each general topic discussed in his Methodica, Lagus would list the chief roman law sources and the chief canon law sources on which the discussion was based.

Once the "topical" method of systematization of law was introduced, it was inevitable that not only roman law and canon law but also various other types of law, such as territorial law (*Landrecht*), urban law (*Stadtrecht*) and imperial law (*Reichsrecht*), would be brought into a common focus. Here Lagus, once again, was a pioneer. In addition to his compendium of civil law, which is devoted primarily but by no means exclusively to roman law and canon law, he wrote a compendium of Saxon law, in which he analyzed systematically the law of Saxony, principally as it was set forth in two great texts, namely, the *Sachsenspiegel* and the Magdeburg Law.

In both his compendium of civil law and his compendium of Saxon law Lagus based his classification, in the first instance, on the threefold source of all human law in God-given reason, the will of the public authority, and custom. However, these concepts were made much more specific when used with reference to the unitary law of a distinct historical community, the people of Saxony, than when used with reference to the Corpus juris civilis of Justinian and the decretals of the popes. In the first place, Lagus treated both Roman law and canon law as subsidiary law in Saxony, applicable only to fill gaps in the territorial law. The territorial law was supreme, and was not to yield, in cases of conflict, to the imperial law; even imperial statutes (Reichspolizeiordnungen) were not necessarily binding in Saxony. In the second place, Lagus viewed territorial law as the law promulgated by the Obrigkeit, the high magistracy, of the territory. Even the customary law summarized in the Sachsenspiegel was considered by him to owe its validity to the tacit consent of the Obrigkeit, and it was to yield to the written law in case of conflict. Likewise, the Magdeburg Law, though it was in form the law of the city of Magdeburg and its numerous daughter cities, was treated by Lagus as applicable thoughout Saxony but it, too, was to yield to territorial law in case of conflict. In short, Saxon territorial law, the law of the principality as such, the Landrecht, was now superior in Saxony to all other kinds of human law. It would yield only to divine law (the Decalogue) and natural law, which were treated as one and were identified

with inborn reason planted by God in every person. Thus in rationalizing Saxon law Lagus also nationalized it.

The subsequent development of legal systematization. The "method" of legal systematization initiated at Wittenberg by Apel and Lagus in the late l520s and l530s, and the new legal science which it reflected, were developed further in various directions chiefly in Germany but also in other European countries throughout the sixteenth and into the seventeenth century. Among the most prominent German legal "methodists" of the latter part of the sixteenth century were Nicolas Vigelius, and Johann Althusius. Vigelius was a pupil of Oldendorp at Marburg and taught there from 1560 to 1594. In his *Methodus universi iuris civilis* ("Method of the Entire Civil Law"), published in 1561, he classified the "kinds" (*genera*) of law into public law and private law a distinction which, as noted earlier, only became basic to legal analysis in the sixteenth century. Public law is treated in the first three of the twenty five "books" that comprise Vigelius's work, private law and modes of acquiring private rights occupy the next 21 books, and the final book deals with a miscellaneous group of topics which do not fit into the other categories.

In terms of legal science generally, Vigelius, like Lagus, freed himself entirely from the agenda imposed by the Roman law texts. "The entire civil law" was not roman law as such but the law as such, that is, the entire law that prevailed in the empire and the principalities and municipalities of Germany. Vigelius used concepts and principles which the scholastic jurists had developed out of the roman texts, but like the jurists of the first stage of legal humanism he examined the texts much more critically than the scholastic jurists had done. In addition, like the jurists of the second stage of legal humanism, Vigelius emphasized the importance of basic principles (such as those set forth in the Institutes) in the systematization of individual branches of law. What is most striking and most significant in Vigelius's work, however, as in Apel's and Lagus's, was his effort to organize the whole of the law, proceeding from general to specific — dividing it first into public and private law, subdividing public law into legislative, executive, and judicial activities, and subdividing private law into the law of persons (including family law, master and servant, and guardianship), the law of property, the law of inheritance and trusts and gifts, and the law of obligations arising from contracts, torts, and unj ust enrichment, with systematization of the specific rules of each branch. These remain to this day the basic "topics" of Western legal science.

The systematic analysis of "the entire law" and its graphic representation through charts reached a climax in the writings of Johann Althusius (1557-1638), a German Calvinist who became famous both as a legal scholar and as a political theorist. Althusius received his doctorate in laws at Basel in 1586 and in the same year published his first major work, *Jurisprudentia Romana*, a massive synthesis of law. This book was later substantially revised and published in 1603 under the title *Dicaelogica* ("The Logic of Law"). These works, which were republished many times in the seventeenth and eighteenth centuries, were in the tradition of Lagus and Vigelius; like them, Althusius divided all law into public law and private law, subdivided private law into ownership and obligation, subdivided obligation into contract, tort, and unjust enrichment, and sought to deduce from general concepts and general principles the detailed rules applicable to individual transactions.

The new legal science pioneered in the works of Apel, Lagus, Vigelius, and other sixteenth-century German Protestant jurists was cultivated and developed in the next two centuries by jurists throughout Europe, both Catholic and Protestant. It differed from the earlier legal sciences, both scholastic and humanist, in its use of the topical method to analyze and synthesize law as a whole as well as to analyze and synthesize common features of the various systems of law that prevailed throughout Europe especially Roman law and canon law, but also common features of the various systems of royal, urban, feudal, and mercantile law. It was this legal science, above all, that constituted the basis of the new European *jus commune* of the sixteenth to eighteenth centuries. The legal scholars who developed it formed a pan-European estate of jurists, a Juristenstand, who wrote not only for their respective countrymen but also, and sometimes primarily, for each other.

The new *jus commune* differed from the first European *jus commune*, the canon law of the Roman Catholic Church, in that it was not the official law of a corporate pan-European polity. It differed also, however, from the second European *jus commune*, the Roman law of Justinian as parsed and summarized and elaborated by the Romanist glossators and commentators, in that it was not confined to scholarly analysis and synthesis of the Roman texts. Nor was it a fusion of these two kinds of law. Although even some of the most outstanding twentieth-century legal historians consistently write of "the reception of Roman-canon law", in fact there was never a body of law called "Roman-canon". The new structure

of legal concepts, principles, and rules that was built on the basis of the new legal science did, to be sure, take much both from the older canon law and from the roman law, each of which had previously been called a jus commune and which together were called *utrumque jus*, "each law". It also took something from royal law, feudal law, mercantile law, and urban law. But it always distinguished these legal systems from each other. One of the genres of early European legal literature consists of books on the differences among the various legal systems by which a given polity was governed. Yet the roman law and the canon law occupied a special position as transcendent sources of legal principles a new *jus naturale*.

Political and philosophical implications of the new German legal science. The need for a new kind of systematization of law arose, in the first instance, from a loss of confidence in the sanctity of the ancient Roman legal texts and the authority of the traditional glosses and commentaries upon them. This in itself, however, could only produce the first two stages of legal humanism the skeptical stage of Valla and Budaeus and the principled stage of Zasius and Alciatus. The principled stage rescued the older scholastic legal science by adding to it some of the philological and historical insights of the skeptical stage; there was a return not to the sanctity of the ancient texts, to be sure, but to their authority, and not to the authority of the traditional glosses and commentaries but to their respectability. This second stage was not enough, however, to restore to legal science the degree and kind of objectivity that was needed to meet either the political or the philosophical needs of a Germany transformed by Protestantism and territorialism.

The new legal science developed by sixteenth century Lutheran jurists served the cause of the Protestant princes by giving both legitimacy and efficiency to the legal order within their principalities. The earlier scholastic legal science had given legitimacy and efficiency to the legal order of a Christendom ruled jointly by a single unified ecclesiastical hierarchy and a multiplicity of secular polities. By the same token, the earlier legal science could not adequately have served the cause of Protestantism viewed as a political movement. Even as modified by the new humanism, pre-Reformation legal science presupposed the diversity of ecclesiastical and secular jurisdictions, each with its own authoritative legal texts. The purpose of the scholastic method was to construct principles out of the specific rules and decisions found in the texts. Thus, for

example, canon law recognized the binding force of an informal agreement (*nudum pactum*), while Roman law did not; feudal law recognized serfdom, while urban law did not; mercantile law enforced bills of exchange independently of the underlying contract that called for their use, while royal law did not. These contradictions, and many others like them, could be tolerated in a "federal" Christendom, in which competing jurisdictions relied on diverse legal texts. It could not, however, be so easily tolerated in a unified princely or royal legal order governing both Church and State within each territory, such as was introduced by the Reformation.

One of the most striking differences between the new legal science and the old was the bringing together of Roman and canon law and more than that, of urban and feudal and mercantile law with them. What historians have mis-called the Reception of Roman Law in sixteenth century Germany was in fact a movement to unify all the various kinds of law, including Roman law, within each polity.

From a purely political point of view, the unification of all jurisdictions, secular and ecclesiastical, under the prince and his councilors, the Obrigkeit, was much better served by a legal science which started by attempting to identify and systematize the principles that underlie the entire legal order than by a legal science which started by attempting to identify and systematize the rules and decisions contained in the authoritative legal texts of diverse jurisdictions. Thus the new legal science served the princely political cause.

Likewise the Lutheran jurists' analysis of law —all law— in terms of the distinction between the efficient cause (who makes the law?) and the final cause (what purposes does the law serve?) had important political implications. It emphasized the legislative character of law, its source in the will of the lawmaker. It went together with the distinction between rules and application of rules: the rules made by the political authority were given an abstract existence separate from, although intended to serve and be corrected by, reason and equity revealed to conscience.

Together with these rather obvious links between the new legal science and the new political order in Protestant principalities, there existed a more subtle link: the exaltation of the political role of the legal scholar. In pre-Reformation Europe as well, legal scholars had played an important role as advisers to popes, emperors, and kings. Also they had sometimes been asked by judges to decide cases. Never before, however, had

legal scholars been recruited as councilors and judges so systematically and on such a large scale as in the sixteenth-century German Protestant principalities. This was due in part, of course, to purely political factors; but it was also due in part to the character of the new legal science, which was so intellectually complex and intricate as to require professorial expertise to articulate and elucidate it.

The political implications of the new German legal science are closely linked with its philosophical implications. The prince, to be sure, was now the supreme lawmaker. Nevertheless, the law that he made had its own built-in requirements. It served a cause higher than the prince. That higher cause was embodied in the legal science itself, which divided all law into divine law (the Ten Commandments) and human law, human law into natural law (reason and conscience implanted in the human heart by God) and positive law, and positive law into public law and private law. The prince, to be sure, was an "efficient cause" of public law, but divine law, natural law, and —in practice— large areas of private law were beyond his competence. Moreover, all law was to be *applied* equitably, that is, according to God-given conscience. The legal science of the Lutheran jurists could hardly be termed Machiavellian, nor would it support the kind of absolute monarchy advocated by Jean Bodin.

Of special importance are the implications of the new German legal science for that branch of philosophy called dialectics, and especially for that branch of dialectics which is concerned with scientific methods of proof. Here the key figure is Melanchthon, who taught the jurists that every branch of knowledge should be arranged according to its own topics (praecipui loci, "special places"), and that by the use of certain general topics common to all the different branches of knowledge (loci communes, "common places") it is possible to take items of knowledge out of their specific branches and to define their essential nature. This was a giant step forward in the development in the natural sciences of a method based not only on "Aristotelian" empiricism but also on "Platonic", and eventually mathematical, conceptualism.

Conclusion. Apel and Lagus and Vigelius were among the first of a large number of German Protestant legal scholars who helped to create a new legal science in the universities of Germany in the sixteenth century. A parallel movement, though not nearly as pronounced, took place later in other countries of Europe, in which Roman Catholic as well as Protestant jurists

participated. This was a european phenomenon, then, although it was pioneered in Germany and nowhere else in Europe did the law professors play such an important practical role in developing the law.

To understand what was at stake in the transition of sixteenth-century european legal thought from a skeptical to a principled to a systematic legal science, it may be useful to compare it with developments in american legal thought in the twentieth and early twenty-first century. "Legal realism", which came to the fore in American law schools in the late l920s, l930s, and l940s, like late fifteenth- and early sixteenth-century humanism, attacked the validity of the prevailing body of legal rules partly from a philological and partly from a historical standpoint. The texts of legal rules were dissected to show the distortions that they underwent in the decisions of those who applied them. In the l950s, l960s, and l970s, a new school of jurisprudence in the United States, emphasizing "the legal process", built on some of the insights of the legal realist school but sought to rescue the formal aspects of law by placing them within the context of general principles relating to specific types of problems requiring legal solution. As in the case of the second "principled" stage of legal humanism, represented by Zasius and Alciatus, american advocates of the concept of "law as a process" succeeded for a time in restoring a qualified respect for rules and in synthesizing individual branches of law. They could not, however, by their method, give the same sense of the integrity of the legal system as a whole, and of its rootedness in an objective reality, which had existed before the nihilistic attack of the realists. As of the first years of the twenty-first century, there seemed to be no objective basis for systematizing american law as a whole; that is, there seemed to be no generally shared belief in inborn elements of knowledge constituting fundamental principles from which all legal institutions can be rationally derived. Likewise, there seemed to be, at least among legal scholars, no generally shared belief in, or at least no analysis of, the capacity of the individual conscience to reach just results in actual cases on the basis of reasoned compassion.

An awareness of this experience can enhance our appreciation of the magnitude of the achievement of German Protestantism in overcoming the insufficiencies of preexisting legal humanism and in inspiring the creation of a new systematic legal science.

APPENDIX

Melanchthon's method developed in the *Loci communes of 1521* and in subsequent works must be contrasted with the loci method developed in certain legal tracts in the years shortly before, most notably, Gammarus, Peter, *Legalis dialectica*, 1514; Everardus, Nicolaus, *Topicorum seu de locis legalium liber*, 1516; republ. 1552, and Cantiuncula, Claudius, *Topica dialectices*, 1520, reprinted in Primum volumen *tractatuum ex variis iuris interpretibus collectorum*, 2a. ed., 1549, pp. 253-271. In these tracts the loci are treated, in Stintzing's words, as "mnemonic devices... in which arguments and materials are organized for quick reference". Stintzing, Roderich von, *Geschichte der deutschen Rechtswissenschaft*, 1880, pp. 114 y 115. Each locus is a subject, such as usury, intestacy, or liberation of slaves, drawn from the Digest, the glosses, the Commentaries, or elsewhere (in the first edition of Everardus' work, there are 131 such loci). Under each subject heading, there is a cryptic summary of the discussion of this subject in the roman law texts and their glosses and commentaries, as well as in the writings of the Greek and Roman philosophers, the Church Fathers, the Christian councils, and the scholastic theologians and canonists. These summaries of traditional teachings, though comprehensive, were largely eclectic and uncritical. There was little attempt made to resolve the tensions or contradictions between certain texts or to purge them of obsolete or impractical teachings. Stintzing concludes that the loci method of these jurists provided convenient summaries of traditional teachings, but did little to advance legal science. "A scientific advance is evident", writes Stintzing, *Geschichte der Rechtswissenschaft*, pp. 119, 121, "only in so far as [these writers] became aware of the need to reform dialectical loci. But [they] did not achieve this reform but continued down well-worn scholastic paths... All this work bore little fruit for the development of topical science. These topical writings can be regarded not as the start of a new movement but only as a vestige of the moribund scholastic tradition. . ."

See, e.g., Gilbert, Neal W., *Renaissance Concepts of Method*, New York, Columbia University Press, 1960, pp. 127-8, who dismisses Melanchthon's dialectical writings as "superficial doctrine" and his analytical questions as a "mélange". "Melanchthon", Gilbert writes, "still dealt with method in the finding part of dialectic, while Ramus's signal, and most controversial, innovation was the placing of method into judgment". *Ibid*. Ramus Ong, Walter J., *Method and the Decay of Dialogue:*

From the Art of Discourse to the Art of Reason, Cambridge, MA, Harvard University Press, 1958, 1983, takes a similar view, arguing that Ramus was the first to make method the key to scientific truth and, further, that Melanchthon did not discuss method at all prior to his *Erotemata* of 1547. In fact, however, Melanchthon in his *Dialectices Libri lIlI* (1534) had already identified "methodus" with right, reason, science, and true knowledge. Neither Gilbert nor Ong refer to the passages from the earlier work (Gilbert remarks that "the inaccessibility of earlier editions prevents us from determining whether doctrines of method appear in earlier versions of [*the Erotemata*]". Gilbert, n. 13, p. 126); Ong, in a short essay on Ramism, published in 1973, seems to have modified his position when he writes: "Between the years 1543 and 1547 all three [Ramus, Sturm, and Melanchthon] introduced sections on method into their textbooks on dialectic or logic (Melanchthon had done a bit with method slightly earlier)". Ong, "Ramism", in Wiener, Philip (ed.), *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas*, New York, Scribner, vol. 4 1973, p. 43 (In a letter to the author written in 1994 Professor Ong acknowledged that he had overestimated the originality of Ramus and that Melanchthon's much earlier elaboration of the topical method was far more significant). More recently, an important book by Ian Maclean on legal interpretation and legal language in the sixteenth century also attributes advances in the topical method chiefly to Ramus, mentioning Melanchthon only in passing. See Maclean, Ian, *Interpretation and Meaning in the Renaissance: The Case of Law*, Cambridge, UK, Cambridge University Press, 1992. Although, following Ong, Maclean associates Ramus's method with Calvinism and Melanchthon's method with Lutheranism, he nevertheless attributes Ramus's method to Freigius (Johan Thomas Frey), without noting that Freigius was Lutheran (pp. 42-43). He neglects to point out that the graphs he reproduces from Freigius's book (*Partitiones Juris Utriusque*, Basle, 1571) were almost identical in style to those being produced by the Lutheran jurists more than a generation earlier.

The position taken in the text, name1y, that Melanchthon from an early time placed method in the judgment part of dialectic, is supported both by Joachimsen, *Loci Communes*, p. 85; and by Wolf, Ernst, *Phillipp Melanchthon: Evangelischer Humanismus* (Göttingen: Vandenhoeck und Ruprecht, 1961). See also Quirinius "The Terms «Loci communes» and «Loci» in Melanchthon"; and Sperl, Adolf, *Melanchthon zwischen Huma-*

nismus und Reformation: eine Untersuchung uber den Wandel des Traditionverständnisses bei Melanchthon und die damit zusammenhängenden Grundfragen seiner Theologie, Munich, C. Kaiser, 1959, p. 34.

Melanchthon seems to have dropped almost entirely out of late twentieth-century German legal historiography. Thus Helmut Coing, in a highly condensed summary of the topical method, whose origin and development he sees as a line from Rudolf Agricola (1444-1485) to Peter Ramus (1515-1572), limits his discussion of Melanchthon's contribution to a single sentence, stating that "the theoretical writings of Melanchthon had the same significance in Lutheran territory as those of Ramus had in Calvinist territory". See Coing, *Handbuch*, at 24-25. Similarly, Hans Hattenhauer, in a comprehensive study of European legal history, notes in a single sentence that Melanchthon and Luther were the source of "binding interpretations of Bible and law for the Lutheran world". See Hattenhauer, *Europäische Rechtsgeschichte*, Heidelberg: C.F. Müller, 1992, p. 367. In his book on sixteenth century legal method, Vincenzo Piano Mortari does refer often to Melanchthon's work, but almost always as indistinguishable from that of Agricola and always as a humanist, never as a Lutheran. See Piano Mortari, Vincenzo, *Diritto Logica Metodo Nel Secolo XVI*, Naples, 1978. Also Paul Koschaker, in his pathbreaking study of the influence of roman law on european history, not only fails to mention Melanchthon but states that legal science itself (*Rechtswissenschaft*) is a nineteenth century invention of the German historical school, "Made in Germany". See Koschaker, Paul, *Europa und das römische Recht 210*, Munich: Biederstein, 1947. One can only explain this historiographical blindspot as a repudiation of the religious sources of the Western legal tradition.

Ramus claimed that his method of classification, which was essentially mathematical in nature, yielded truth, but a careful reading of Ong confirms that in fact Ramus did not prove anything new or important. See Ong, *Ramus*, pp. 171-195.