



Faith for This World: Protestantism and the Reconstruction of Constitutional Democracy in Germany, 1933-1968

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Faith for This World: Protestantism and the Reconstruction of Constitutional Democracy in
Germany, 1933-1968

A dissertation presented
by
Brandon Jack Bloch
to
The Department of History

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for the degree of
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Faith for This World: Protestantism and the Reconstruction of Constitutional Democracy in
Germany, 1933-1968

Abstract

This dissertation analyzes the transformation of Protestant political thought and practice in Germany between the 1930s and 1960s. It follows a generation of theologians and lay intellectuals who coalesced around oppositional networks under National Socialist rule and then participated in West German politics after 1945 as jurists, parliamentarians, and church leaders. I examine an ideological shift that facilitated the consolidation of postwar democracy on the ruins of Nazi dictatorship. Whereas Germany's Protestant churches served as bastions of anti-republican nationalism during the interwar Weimar Republic, postwar Protestant thinkers emerged as leading defenders of the West German constitution.

Bridging intellectual, political, and legal history, the dissertation argues that the rapprochement of Protestant intellectuals with West German democracy reflected their own role in shaping the postwar political and constitutional order. The catalyst for this transformation was a series of exchanges between theologians and lay Protestant jurists, which commenced under the Nazi regime and continued in a public sphere organized by the postwar Protestant churches. Protestant jurists drew on contemporary theological innovations to challenge both legal positivist doctrines that reduced law to the will of the state, as well as natural law theories that aimed to derive law from a set of permanent moral norms evident to human reason.

The first part of the dissertation examines the origins of a Protestant defense of constitutional democracy during the turbulent years spanning the consolidation of Nazi dictatorship, the Second World War, and the postwar Allied occupation of Germany. Protestant intellectuals affiliated with the Nazi-era Confessing Church called into question a disjuncture

between spiritual and worldly authority, while also eschewing contemporary appeals by the Catholic Church for an international legal order grounded in natural law principles.

The dissertation's second part describes how Protestant jurists and church leaders marshaled theological innovations of the Nazi and early postwar years to intervene in debates about West German constitutional law during the 1950s and 1960s. Confessing Church veterans criticized the deployment of natural law discourse by the ruling Christian Democratic Union in the service of conservative social legislation and Cold War politics. Instead, they suggested that ideals of religious tolerance, freedom of conscience, reconciliation, and the right of resistance, rooted in Protestant traditions, provided a basis for common political life in a constitutional democracy. By constructing a narrative of the Protestant origins of democracy, postwar Protestant politicians and intellectuals obscured the limitations of Protestant opposition against National Socialism, while developing an ideological and legal framework for linking religious pluralism to Christian culture that has continued to inform German politics.

Table of Contents

Abstract	iii
Acknowledgements	vi
Abbreviations	xiii
Introduction.....	1
Chapter One: Natural Law and the Ethics of Protestant Opposition in Nazi Germany.....	37
Chapter Two: Postwar Justice and the Origins of Protestant Rights Theories in Occupied Germany.....	91
Chapter Three: Institutionalizing Protestant Ethics: Families, Schools, and the West German Basic Law.....	168
Chapter Four: To Obey God Rather than Men? Conscientious Objection and the Revaluation of Resistance	230
Chapter Five: The Law of Reconciliation: German Protestants and International Law in a Divided World	289
Chapter Six: <i>Rechtsstaat</i> or Revolution: Protestant Intellectuals and the New Left in 1960s West Germany.....	343
Epilogue: Reinventing Protestant Germany.....	409
Glossary of Names	431
Bibliography	435

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Research for this dissertation involved forming a picture of an intellectual world that has no exact parallel in the United States, and whose factions and hierarchies can appear inscrutable to outsiders. I have been fortunate to have as my guides in this endeavor a number of Protestant academics in Germany, who are in many respects successors (though oftentimes critical ones) to the figures studied in this dissertation. Hans-Michael Heinig invited me to speak about my work before an expert audience at the *Institut für evangelisches Kirchenrecht* at the University of Göttingen and has encouraged my scholarship on the intersections of theological and legal debates. Members of the *Deutsche Forschungsgemeinschaft* research group on "*Der Protestantismus in den ethischen Debatten der Bundesrepublik Deutschland 1949-1989*," including Andreas Busch, Tobias Schieder, and Georg Kalinna, involved me in their ongoing conversations about religion and politics in postwar Germany notwithstanding my divergent academic background. Manfred Gailus, Siegfried Hermle, and Klaus Tanner engaged in extended conversations about my work, while Paul Nolte, one of the academic advisers to the Berlin Program as well as the director of the *Evangelische Akademie* in Berlin, invited me to present at his colloquium on contemporary history at the Freie Universität. Michael Germann selected me to participate at an international conference in Wittenberg in August 2017 commemorating the five-hundredth anniversary of the Reformation, which provided a fascinating view onto the contemporary intellectual landscape of German Protestantism. Siegfried Virgils, a retired Protestant pastor in Bonn, and Dagmar Pruin, the director of the

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Abbreviations

ACDP	Archive for Christian Democratic Politics, Sankt Augustin
AEKR	Archive of the Protestant Church in the Rhineland, Düsseldorf
APO	Extraparliamentary Opposition
ASD	Archive for Social Democracy, Bonn
BArch	German Federal Archive
CCIA	Committee of the Churches on International Affairs (World Council of Churches)
CDU	Christian Democratic Union
CSU	Christian Social Union
DGB	German Trade Union Confederation
DNVP	German National People's Party
EABB	Protestant Academy in Bad Boll
EDC	European Defense Community
EKD	Protestant Church in Germany (national federation of regional churches)
EZA	Protestant Central Archive, Berlin
FEST	Protestant Research Center, Heidelberg
FDP	Free Democratic Party (liberal)
GDR	German Democratic Republic
GDVP	All German People's Party
IMT	International Military Tribunal, Nuremberg
KPD	Communist Party in Germany
LAEKW	Archive of the Protestant Church in Westphalia, Bielefeld
LAELKB	Archive of the Lutheran Church in Bavaria, Nuremberg
NATO	North Atlantic Treaty Organization
NSDAP	National Socialist Party
SDS	Socialist German Student League
SED	Socialist Unity Party (East Germany)
SPD	Social Democratic Party in Germany
SRP	Socialist Reich Party
SUB	State and University Library, Göttingen
UAF	University Archive of Freiburg
UN	United Nations
VDBT	Protocols of the German Parliament
VELKD	United Lutheran Church of Germany
WCC	World Council of Churches

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Introduction

Addressing the annual party convention of her Christian Democratic Union in December 2015, Chancellor Angela Merkel defended her decision of four months earlier to open the German border to refugees of the Syrian Civil War in terms that astonished the German press. Invoking the "C" in her party's name, she declared the CDU to be "a party that finds its foundation...in the God-given dignity of each individual person. That means that today, it isn't a mass of people that is coming to us. It means they are individuals."¹ By the time of Merkel's address, nearly one million refugees had entered Germany, leading to fierce debate over the sustainability of the Chancellor's policy and dissent within her own party. Yet Merkel refused to bow. The newsmagazine *Der Spiegel* marveled that the Chancellor, renowned during her decade in office as a consummate pragmatist, "finally found an issue to fight for. But why now?" An answer was proffered by the Social Democratic politician Klaus von Dohnányi, a close friend of Merkel as well as the son of the Protestant jurist Hans von Dohnányi and nephew of the theologian Dietrich Bonhoeffer—both executed for their involvement in the failed coup d'état against the Nazi regime of July 20, 1944. Merkel, Dohnányi explained, grew up as the daughter of an East German Lutheran pastor who operated a home for the disabled, internalizing the tenet "Love your neighbor as yourself." As Dohnányi pointed out, Merkel's pronouncements on refugees were "virtually identical" to those of the German Protestant Church.²

¹ Quoted in Markus Feldenkirchen and René Pfister, "The Isolated Chancellor: What is Driving Angela Merkel?" *Spiegel Online*, January 25, 2016, <http://www.spiegel.de/international/germany/why-has-angela-merkel-staked-her-legacy-on-the-refugees-a-1073705.html> (accessed April 15, 2018). For further press coverage, see "'Zur Identität unseres Landes gehört es, Großes zu leisten,'" *Zeit Online*, December 14, 2015, <http://www.zeit.de/politik/deutschland/2015-12/angela-merkel-karlsruhe-cdu-parteitag-rede> (accessed April 15, 2018); and Antje Sirleschtov, "Angela Merkel: Wir können Größtes leisten," *Der Tagesspiegel*, December 14, 2015, <https://www.tagesspiegel.de/politik/parteitag-der-cdu-angela-merkel-wir-koennen-groesstes-leisten/12723118.html> (accessed April 15, 2018).

² Feldenkirchen and Pfister, "Isolated Chancellor." On the German Protestant Church's position on refugee policy, see the report on the 2017 synod: Matthias Kamann, "Kirche und Flüchtlinge? 'Moralische Durchhalteparolen helfen

Merkel's more recent statements on the occasion of the quincentennial of the Protestant Reformation lend credence to Dohnányi's suggestion that the Chancellor's Christian rhetoric represents more than a political ploy. Speaking at the All Saints' Church in Wittenberg on October 31, 2017, according to legend the date that Luther nailed ninety-five theses to the church door five-hundred years earlier, Merkel celebrated the contributions of the Reformation to modern democracy. While acknowledging Luther's hostility toward Jews and other non-Protestants, Merkel lauded the Reformer's "liberating message that mankind can find salvation solely before God, by grace and through faith alone":

With this belief, the Reformers considered themselves to be free from the paternalism of church authorities and, by extension, also of secular hierarchies. And so an understanding of humanity emerged that was to have a profound impact on the modern era – the concept of emancipated human beings called unto liberty, assuming responsibility for themselves and for others...Every democratic order is essentially based on this understanding of humanity. Even though, of course, no straight line can be drawn from the Reformation to democracy and to a constitutional state as we know it today, the Reformation and the concept of freedom on which it is based proved to be a driving force in the ongoing process of social and political renewal.³

In an article for Berlin *Tagesspiegel* published on the eve of the Reformation anniversary entitled "My Luther," the Chancellor went further in linking Luther's ethics to her own political biography. The Reformation, Merkel now argued, fused a sober recognition of human fallibility with a call to a "sense of responsibility." Luther's ethic of political responsibility was rooted in his dual understanding of freedom, not only "freedom *from*" authority but "freedom *toward* the

nicht," *Welt*, November 12, 2017, <https://www.welt.de/politik/deutschland/article170550630/Kirche-und-Fluechtlinge-Moralische-Durchhalteparolen-helfen-nicht.html> (accessed April 15, 2018).

³ Angela Merkel, "Speech given by Federal Chancellor Dr Angela Merkel in Lutherstadt Wittenberg on 31 October 2017 on the occasion of the 500th anniversary of the Reformation," *The Federal Chancellor*, https://www.bundestkanzlerin.de/Content/EN/Reden/2017/2017-10-31-bk-merkel-reformation_en.html (accessed April 15, 2018).

service of people."⁴ According to Merkel's reading, Luther called for prudence and restraint on the one hand, but bold action on the convictions of conscience on the other—an understanding of politics to which sympathetic commentators have attributed her own handling of the refugee question.

Merkel was hardly the only German politician who seized on the Reformation anniversary as a chance to trumpet the significance of religious values in politics. In January 2017, the conservative Finance Minister Wolfgang Schäuble, Merkel's archrival in the CDU, released a screed against the "politicization" of the Protestant churches. According to Schäuble's *Protestantismus und Politik*, too many Protestants believed that "the church is primarily about politics," alienating those church members who did not share their (leftwing) views. Whereas Merkel emphasized the world-transcending freedom heralded by Luther, Schäuble stressed the Reformer's "two kingdoms" doctrine, which separated the spheres of church and state. Luther shocked the Diet of Worms with his proclamation of "Here I stand, I can do no other," but at the same time he counseled Christians to obey political authority, famously translating Romans 13:1 as "Everyone is subordinate to authority [*Obrigkeit*], because there is no authority without God." Most political issues, Schäuble cautioned, did not rise to the gravity of Luther's challenge to the Catholic Church. In a democracy, after expressing their views in fair and open debate, Christians should submit to the will of the majority.⁵ Hardly beneath the surface of Schäuble's essay lay a polemic against Merkel's refugee policy and the Protestant leaders who defended it.⁶

⁴ Angela Merkel, "Mein Luther: Die Orientierung für ein politisches Leben," *Der Tagesspiegel*, May 5, 2017, <https://www.pressreader.com/germany/der-tagesspiegel/20170505/282398399322404> (accessed April 15, 2018), emphasis added.

⁵ Wolfgang Schäuble, *Protestantismus und Politik* (München: Claudius, 2017), 22-29.

⁶ The press also recognized this connection: see Jan Grossarth, "Schäuble kritisiert Politisierung der Protestanten," *Frankfurter Allgemeine*, February 20, 2016, <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/wolfgang-schaeuble-kritisiert-politisierung-der-protestanten-14079994.html> (accessed April 15, 2018).

The spectacle of Germany's two most powerful politicians arguing about the meaning of the Lutheran Reformation draws attention to the ways in which confessional rhetoric continues to permeate German politics. Germany's political elites retain strong personal, institutional, and intellectual ties to religious leaders. Merkel and Schäuble understand Protestant pastors, church leaders, and lay church members not only as constituents but as interlocutors, and they speak with fluency in a theological language of political engagement. Moreover, this episode illuminates how Protestant theology continues to serve as a resource for defining German national identity. While Merkel and Schäuble emphasized contrasting tendencies of the Reformation, both recognized Protestant theology as a discourse that addressed political questions of power, authority, and freedom. The problem they identified was endemic to Protestant political debate in twentieth-century Germany: To what extent should Christian convictions be recognized in the public sphere as a legitimate ground for political standpoints?

While neither Merkel nor Schäuble provide an unequivocal answer, they advance a narrative linking Protestantism, democracy, and German history that gives the question its urgency and relevance. For both politicians, the German state's commitment to religious pluralism stands in tension with the country's Christian culture. On the one hand, both recognize that Germany's constitution prohibits the establishment of a state religion and insist that a pluralist democracy requires tolerance of all religion. On the other hand, both privilege Protestantism as the very *source* of constitutional democracy. According to Schäuble, the history of German Protestantism since the Reformation has been a "learning process" marked by the gradual abandonment of prejudice in favor of pluralism and tolerance. Muslim immigrants should be allowed the chance to undergo a similar reconciliation with democracy, "although it is

clear that in this case, it must not last hundreds of years."⁷ At her Reformation quinquennial address, Merkel employed identical language of a "learning process" to describe the Protestant path toward tolerance and remarked that "churches," alongside politicians, "have a vitally important role to play" in "instilling a common awareness of our basic values and norms."⁸

Narratives of the Protestant sources of democracy remain ubiquitous in German politics, anchored in the social connections between religious and political leaders. The heads of Germany's Protestant churches are frequently members of elite political networks that encompass cabinet ministers, parliamentarians, and Constitutional Court judges. Among West and then reunified Germany's presidents, moreover, ten of twelve have been Protestant pastors or prominent lay Protestant church members. On the election of the Protestant *Kirchentag* (Lay Assembly) board member Frank-Walter Steinmeier to the presidency in February 2017, the Munich *Süddeutsche Zeitung* noted sardonically, "A Protestant loves the word and the nice speech."⁹ Yet larger issues were at stake. As the head of state and symbolic representative of the nation, the German president is charged with embodying and espousing the country's deepest values, positioning himself (all of Germany's postwar presidents have been men) above partisan divides. The longstanding connections between this office and Protestant circles demonstrates

⁷ Schäuble, *Protestantismus und Politik*, 48.

⁸ Merkel, "Speech given by Federal Chancellor Dr Angela Merkel."

⁹ Heribert Prantl, "Der Glaube, das Wort und das Amt," *Süddeutsche Zeitung*, February 11, 2017, <http://www.sueddeutsche.de/politik/steinmeier-bundespraesident-der-glaube-das-wort-und-das-amt-1.3373972>, (accessed April 15, 2018). On Steinmeier's role at the *Kirchentag*, see "Verleihung der Ehrendoktorwürde an Bundesminister Dr. Frank Walter Steinmeier," *Deutscher Evangelischer Kirchentag*, December 19, 2016, https://www.kirchentag.de/service/meldungen/berlin/januar_2017/verleihung_der_ehrendoktorwuerde_laudatio_bundesminister_dr_frank_walter_steinmeier.html (accessed April 15, 2018). The previous Federal Presidents with connections to the Protestant churches included: Theodor Heuss (1949-59), Gustav Heinemann (1969-74), Walter Scheel (1974-79), Karl Castens (1979-84), Richard von Weizsäcker (1984-94), Roman Herzog (1994-99), Johannes Rau (1999-2004), Horst Köhler (2004-10), and Joachim Gauck (2012-17).

the ongoing political salience of the Protestant churches, even as church attendance and membership have declined since the 1960s.

This dissertation is a study of the engagement of Protestant lay intellectuals and theologians with constitutional politics in a democratizing West Germany during the two decades following the Second World War. It also speaks to larger questions about the place of Protestantism as a discourse, narrative, idea, practice, and set of institutions in contemporary German politics. My story departs from the narrative of a "learning process" proffered by Merkel and Schäuble, which patently downplays the ruptures of the twentieth century—the First World War, the collapse of the Weimar Republic, National Socialism, and the Holocaust—even if these events are cursorily acknowledged. The embrace by German Protestant politicians and church leaders of concepts of democracy, pluralism, and tolerance was not the result of a linear path extending from the sixteenth century to the twenty-first, but a response to the historical conjunctures of the mid-twentieth century. In particular, I argue that the very narrative of the origins of constitutional democracy in a Protestant concept of freedom emerged as a strategy in political struggles of the postwar period. At the same time, this dissertation rejects the skeptical impulse to reduce all politicians' invocations of religion to cynical bids for power. Instead, it suggests that Protestant thought served as a cultural resource for adapting to new political challenges after 1945. Indeed, the rapprochement of Protestantism and democracy in postwar Germany involved as much a transformation of the Protestant churches as of the meaning of democracy.

Antinomies of Protestant Thought

The debate between Merkel and Schäuble over the "politicization" of the Protestant churches reflects issues that have preoccupied German Protestant religious leaders and politicians since 1945. Understanding the terms of their dispute, however, requires attention to deeper antecedents. As the historian Sarah Shortall has argued, "religious discourses" contain "transformative power" inasmuch as they "emerge in conversation both with the particular historical context of their production, and with the manifold internal resources of a much longer religious tradition."¹⁰ Thus, any history of religious thought, even when tightly focused in place and time, is necessarily also an intellectual history in the "*longue durée*."¹¹ I propose five antinomies that structured Protestant understandings of political life in the generation after 1945, but are rooted in lineages that extend back centuries: law versus gospel; authority versus freedom; duties versus rights; self-abnegation versus self-assertion; and symbolization versus symbolic asceticism. Setting postwar Protestant thought in a longer context does not mean to accept uncritically the genealogies in which postwar actors situated themselves, but it does mean to take seriously the persistence of a set of categories that could be reinvested with political salience across generations. Tracing key moments around which these antinomies consolidated provides the groundwork for approaching Protestant political debate in the mid-twentieth century.

The law-gospel distinction formed the foundation of Reformation theology and the core of Luther's doctrine of salvation. At stake was the relation between the Old and New Testaments, between God's covenant with the Jewish people and the salvation of humanity through Christ's

¹⁰ Sarah Shortall, "Lost in Translation: Religion and the Writing of History," *Modern Intellectual History* 13 (2016): 284.

¹¹ David Armitage, "What's the Big Idea? Intellectual History and the *Longue Durée*," *History of European Ideas* 38 (2012): 493-507.

death and resurrection. For Luther, the medieval Catholic Church, through its practice of indulgences, had erroneously conflated law and gospel. The promise of salvation was the result of God's mercy alone, for which no proliferation of good works in accordance with the law, let alone financial contributions to the church, could compensate.

But what were the political consequences of the law-gospel dualism? Such was the antinomical structure of Luther's thought that he has been received in the centuries since as both a herald of the modern emancipated subject and a defender of authoritarian hegemony. The essence of Luther's doctrine of the two kingdoms involved a distinction between the spiritual kingdom of the right, governed solely by Christ's love proclaimed in the Gospels, and the kingdom of left ruled by the sword of the worldly sovereign. Both kingdoms ultimately stood under the sovereignty of God, but in a postlapsarian world God instituted the state to constrain humanity's sinful and violent proclivities. The consequences of this theological metaphysics for questions of obedience to political authority were ambiguous. Luther famously condemned the Peasants Revolt of 1525, rejecting the use of violence to advance the message of the Gospels, and he went as far as to endorse the rebellion's violent suppression. In 1539, however, as the Habsburg Emperor Charles V prepared for an attack on the Protestant Schmalkaldic League, Luther developed a doctrine of the "apocalyptic tyrant" to justify open Christian resistance.¹²

As the Reformation expanded beyond Wittenberg, Protestant communities faced the problem of establishing social and legal order on terms compatible with novel theological tenets. When Luther called for the abolition of canon law in 1520, he expressed a loathing for jurists. By the 1530s, however, as the Reformation matured beyond its attack on the Catholic Church, Luther embraced the work of a new class of Protestant jurists who sought to restore aspects of

¹² Cynthia Grant Shoenberger, "Luther and the Justifiability of Resistance to Legitimate Authority," *Journal of the History of Ideas* 40 (1979): 19-20.

canon law as part of the "common law of Europe."¹³ Jean Calvin's Reformation in Geneva faced to a yet greater extent the need to establish Christians' rights and duties, insofar as Calvinist theology centered around an ideal of the self-regulating Christian community living in accordance with God's will. Calvin's early followers endorsed a more expansive right of resistance against tyranny than Luther had, and called for the introduction of a wide range of fundamental rights, valid by both divine and natural law. Yet rights were closely tied with corresponding duties, and the emancipatory potential of the Reformation stood in tension with new norms of social order. For Calvinists and their heirs in early modern Europe and North America, church, family, and state were hierarchical structures of authority, in which the scope of one's rights, including the right of disobedience, were tied to one's particular station.¹⁴

The problem of the Christian's role in worldly politics became acute for Protestants in the German-speaking lands during the eighteenth and nineteenth centuries, as the eclipse of absolutist sovereigns, the Enlightenment, and then the French Revolution gave rise to new ideas of self-rule. The question raised by Luther's two kingdoms doctrine reappeared with heightened urgency: Was Christianity a spiritual religion of worldly withdrawal, or a means of remaking the world in light of privileged knowledge of divine salvation? Among the Christian denominations in Central Europe that sought to bridge the antinomies of political self-abnegation and self-assertion, the most influential was the Pietist movement. Born in seventeenth-century Württemberg, Pietism called for a return to the spiritual, inward core of Lutheran teachings. At the same time, Pietists' efforts to promote Christian revival fueled a new missionary zeal, which frequently blurred the lines between religious and political reform. In the aftermath of the 1848

¹³ Gerald Strauss, *Law Resistance, and the State: The Opposition to Roman Law in Reformation Germany* (Princeton: Princeton University Press, 1986), 217-220.

¹⁴ For an overview, see John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), 1-37.

revolutions, the Hamburg Pietist pastor Johann Hinrich Wichern founded the *Innere Mission*, a reform movement that aimed to promote social welfare and swell the ranks of the Protestant laity while advancing the German national project. For Wichern, rationalism, liberalism, democracy, and atheism were "all the same," products of the debased French Revolution, whereas "the whole of German history was part of the sacred history of God's kingdom on earth." Despite the disillusionment of Wichern and his followers with the failure of German unification to bring about a popular religious revival, the ideal of the people's church (*Volkskirche*) pioneered by the Inner Mission animated the hopes of Germany's Protestant clergy in the ensuing decades.¹⁵

Pietists were hardly the only Protestant nationalists in nineteenth-century Germany, but they exemplified the dilemma of symbolization faced by Protestants in the years leading to the formation of the German Empire: Could history, the nation, or the "people" be taken as signs of divine presence in human affairs? While the Reformation ostensibly separated politics from Christian salvation, Protestant theologians increasingly embraced the idea that the emergence of the German nation represented an instance of divine intermediation in human history. Moreover, Protestant theology provided ample resources for nationalist narratives. In the aftermath of the Napoleonic wars, Pietist pastors, long engaged in a revival of Old Testament themes, invoked theological notions of the covenant in order to represent the German nation as "God's chosen people."¹⁶ Under the German Empire formed in 1871, Protestant leaders drew lines from Luther to German unification, presenting the Reformation as a source of national freedom from both the papacy and the atomizing impulses of the French Revolution. The imperial state in turn

¹⁵ Hartmut Lehmann, "Pietism and Nationalism: The Relationship between Protestant Revivalism and National Renewal in Nineteenth-Century Germany," *Church History* 51 (1982): 39-53, quoted 49.

¹⁶ Hartmut Lehmann, "'God Our Old Ally': The Chosen People Theme in Late Nineteenth- and Early Twentieth-Century German Nationalism," in *Many Are Chosen: Divine Election and Western Nationalism*, eds. William Hutchison and Hartmut Lehmann (Harrisburg, PA: Trinity Press International, 1994), 85-107.

privileged the interests of the Protestant churches, which represented the dominant cultural milieu. Not only did German heads of state serve as the titular leaders of the regional Protestant churches, a legacy of the early modern principle aligning the official religion of a territory with that of its ruler (*cuius regio, eius religio*). As public corporations, the churches oversaw religious education in public schools and chaplaincy in the military. The Prussian constitution of 1850, maintained in the German Empire after 1871, announced that "the Christian religion" stood at the "foundation" of "all institutions of the state that are related to religious practice."¹⁷

Protestants were also well represented among more radical nationalists in the German Empire, particularly after the tapering off of Bismarck's *Kulturkampf* of the 1870s, a series of legislative and executive acts aimed at bringing the Catholic Church under greater state control.¹⁸ The pastor Adolf Stoecker's Christian Social Workers Party, formed in 1878, peddled antisemitism to a rural, churchgoing lower middle class.¹⁹ The rabidly anti-Catholic, anti-socialist Protestant Federation, founded in 1886, boasted a membership of 510,000 by 1913.²⁰ The overwhelming majority of the Protestant clergy participated in the war frenzy leading to 1914 and during the war preached sermons assuring that God would ensure German victory over

¹⁷ Stefan Koriath, "Die Entwicklung des Staatskirchenrechts in Deutschland seit der Reformation," in *Staatskirchenrecht oder Religionsverfassungsrecht? Ein begriffspolitischer Grundsatzstreit*, eds. Hans Michael Heinig and Christian Walter (Tübingen: Mohr Siebeck, 2007), 49-52.

¹⁸ For an overview of Protestant nationalism in the German Empire, see Helmut Walser Smith, *German Nationalism and Religious Conflict: Culture, Ideology, Politics, 1870-1914* (Princeton: Princeton University Press, 1995).

¹⁹ Lehmann, "Pietism and Nationalism," 51; Harry Liebersohn, *Religion and Industrial Society: The Protestant Social Congress in Wilhelmine Germany* (Philadelphia: American Philosophy Society, 1986), 8-12.

²⁰ Gangolf Hübinger, *Kulturprotestantismus und Politik: zum Verhältnis von Liberalismus und Protestantismus in wilhelminischen Deutschland* (Tübingen: Mohr Siebeck, 1994), 236.

materialist Western "civilization."²¹ Even the smaller group of theologians associated with more moderate versions of liberal Protestantism supported a version of this narrative.²²

In the Weimar Republic, horror before the grisly toll of the First World War coexisted uneasily alongside a resurgent Protestant nationalism. German defeat discredited the liberal theologians who had all too quickly seen the divine hand in history promising the deliverance of victory. But new theologies emphasizing God's alterity and otherworldliness hardly entailed an abandonment of the nationalist mentalities that fueled the war fervor of 1914. To the contrary, Protestant pastors widely viewed the Versailles Treaty as an abomination and the Republic as the offspring of a lost war. Dreams of a renewed *Volkskirche* came up against the reality of declining church membership and a turn, especially in the cities, away from the cultural norms and values of the church.²³ If one strand of Lutheran theology taught obedience to state authority, the legitimacy of the Republic could as easily be denied, on the grounds that democracy lacked a unitary center of authority to which Christians owed allegiance.

In short, when Adolf Hitler assumed the chancellorship in January 1933, Protestant theologians and lay intellectuals hardly possessed the resources to deliver a coherent response. The antinomies of Protestant theological traditions appeared insurmountable, and past experiences and historical traditions hardly provided guidance for facing a regime that

²¹ Martin Greschat, "Krieg und Kriegsbereitschaft im deutschen Protestantismus," in *Bereit zum Krieg: Kriegsmentalität im wilhelminischen Deutschland, 1890-1914: Beiträge zur historischen Friedensforschung*, eds. Jost Dülffer and Karl Holl (Göttingen: Vandenhoeck & Ruprecht, 1986), 33-55; John A. Moses, "Justifying War as the Will of God: German Theology on the Eve of the First World War," *Colloquium* 31 (1999): 3-20. More broadly, see Doris L. Bergen, "'War Protestantism' in Germany, 1914-1945," in *Nationalprotestantische Mentalitäten: Konturen, Entwicklungslinien und Umbrüche eines Weltbildes*, eds. Manfred Gailus and Hartmut Lehmann (Göttingen: Vandenhoeck & Ruprecht, 2005), 115-131.

²² Hübinger, *Kulturprotestantismus und Politik*, 233-250.

²³ On the idea of the *Volkskirche* in the Weimar Republic, see David J. Diephouse, *Pastors and Pluralism in Württemberg, 1918-1933* (Princeton: Princeton University Press, 1987). The broader literature on the Protestant churches in the Weimar Republic is discussed in chapter 1.

understood the churches as ideological competitors rather than allies. The ensuing story of compromise, adaptation, and complicity is well known. But what followed is not yet fully understood.

Argument of the Dissertation

This dissertation asks how, from a position of political fragmentation in 1933, a generation of Protestant intellectuals whose formative years coincided with National Socialism would come to identify Protestant values as foundational to the constitutional order of the West German Federal Republic by the 1960s. It aims in part to demonstrate that the ideological transformation of Germany's Protestant leadership was a critical factor behind West German democratization after 1945. More deeply, it inquires into why and how this shift came about. I argue that Protestant integration into West German democracy involved not simply opportunistic adaptation, but innovation within longstanding theological discourses. Facing transformed political circumstances, Protestant intellectuals reassessed and recombined well-trodden theological motifs, in turn opening new political possibilities.²⁴ When Protestant theologians and lay intellectuals committed themselves to a defense of the constitutional *Rechtsstaat* (rule of law state) and a nascent form of "constitutional patriotism" by the mid-1960s, they were both defending their own role in shaping the postwar West German state as well as articulating a normative vision for that state's future.

The establishment of National Socialist dictatorship by the middle of 1933 constituted a foundational crisis for Germany's Protestant churches. During their early years in power, Nazi

²⁴ For the approach to cultural change motivating my account, see William H. Sewell, Jr., "A Theory of Structure: Duality, Agency, and Transformation," in Sewell, *Logics of History: Social Theory and Social Transformation* (Chicago: University of Chicago Press, 2005), 124-151. For a similar adaptation of Sewell within postwar German intellectual history, see Sean A. Forner, *German Intellectuals and the Challenges of Democratic Renewal: Culture and Politics after 1945* (Cambridge: Cambridge University Press, 2014), 15, 146.

authorities engaged in unprecedented efforts to subordinate church hierarchies to state oversight, invalidate the baptism of Jewish converts to Christianity, and incarcerate pastors who publicly criticized the regime. Much of the Protestant clergy and laity welcomed the Nazi rise to power in 1933, but by the mid-1930s, a growing number of theologians and lay intellectuals opposed the state's encroachments on the churches. Traditional doctrines of obedience to state authority appeared inadequate to confronting the Nazi regime, while questions of law and legitimacy assumed new urgency. Oppositional circles that emerged during the Nazi years would form the nucleus for Protestant political networks after 1945, bequeathing an ambiguous legacy to their postwar heirs. The dominant theological strand of Protestant opposition to National Socialism involved not the embrace of natural law and human rights—in the manner of contemporary Catholic "anti-totalitarianism"—but calls for a return to the putative biblical foundations of the Protestant faith. The inaugural statement of the Confessing Church, the organization of pastors established in May 1934 to preserve the independence of the Protestant churches from the Nazi state, pressed for a pure religion founded on Jesus Christ's revealed word and actions alone. The Confessing Church advocated for the renunciation of "natural theology," any theology that regarded nature, or the human being's natural reason, as a source of knowledge of God's will. The movement's intellectual lodestar, the Swiss Reformed theologian Karl Barth, construed himself as a second Luther, updating the Reformation's inaugural act of "purification" to purge the Christian community of nationalist blasphemies and thereby clear the ground for true faith.²⁵

²⁵ I adopt the category of "purification" from Webb Keane, *Christian Moderns: Freedom and Fetish in the Mission Encounter* (Berkeley: University of California Press, 2007), 4-7. For Keane, following Bruno Latour, "purification" refers to the drawing of boundaries between the world of (anthropomorphic) agents and that (inanimate) objects; Keane applies the concept to the Reformation's attack on Catholic notions of symbolism and intermediation. It should also be noted that Barth's polemic against "natural theology," a crucial intellectual event in my narrative, remains a subject of debate within contemporary Protestant theology. More recent German theologians have criticized Barth's injunction against natural law theorizing, arguing that Barth hobbled the development of Protestant social ethics: see especially Klaus Tanner, *Der lange Schatten des Naturrechts: eine fundamentalethische Untersuchung* (Stuttgart: Kohlhammer, 1993). Tanner's work forms part of a renewed interest in natural law among

Protestant intellectuals inspired by the theology of the early Confessing Church faced a fundamental paradox. Barth's theology leaned strongly toward the pole of symbolic asceticism. Demanding the extirpation of worldly categories from theology, Barth appeared to affirm the compatibility of the church with a wide array of political forms, excluding only states that overtly repressed Christian life. At the same time, the obvious abuses of the Nazi regime renewed interest in Protestant theories of freedom, rights, and political self-assertion. Confessing Church theologians and lay intellectuals, both under National Socialism and especially in the decades that followed, thus quickly rediscovered the "political." Confessing Church veterans fostered an activist church that would seek not simply to proclaim the truths of Gospel, but to fundamentally shape the political structures of the world surrounding it.

Demographic and political transformations of the early postwar years were crucial factors in motivating Protestant political engagement. Following the Cold War division of Germany, which left the traditional East Elbian heartlands of German Protestantism under Communist rule, Protestants in the Western occupation zones, and then in the West German state formed in May 1949, faced numeric parity with Catholics for the first time in modern German history. Political Catholicism emerged as a dominant force, as politicians from the interwar Catholic Center party regrouped to form the Christian Democratic Union. Some wartime Protestant opposition leaders joined the early CDU, but confessional tensions pervaded the party from the outset, especially over volatile issues of the family, schools, and military service. Moreover, many Confessing Church veterans eschewed the CDU, objecting to both its Catholic social basis as well as its

Protestant theologians in both Europe and North America in the past three decades. Most notably, the theologian Stanley Hauerwas has argued that Barth, for all of his pretensions to the contrary, was in fact one of the twentieth century's great proponents of natural theology: Hauerwas, *With the Grain of the Universe: The Church's Witness and Natural Theology* (Grand Rapids, MI: Baker Academic, 2013), 141-204. The debate about the validity of Barth's views on natural law, however, is beyond the scope of this study. As a work of intellectual history, this dissertation remains strictly agnostic on the defensibility of the theological positions in question. Of interest for my purposes is how Barth's works were interpreted and instrumentalized politically in postwar Germany.

reliance on a conception of natural law derived from Catholic theological traditions. Rather, Protestant intellectuals sought to reformulate a theory of political ethics on specific confessional grounds. Novel political theologies reflected bids for political influence in the new state.

At the same time, intellectual innovations contributed equally toward Protestant political interventions. Dialogue between theologians and Protestant lay intellectuals, in particular legal and political theorists, gave rise to new ways of relating politics and theology. A core circle of theologians and lay jurists around the Nazi-era Confessing Church formed the nucleus of an expansive postwar lay-theological network, which spanned periodicals, church commissions, newly founded Protestant Academies, as well as the Confessing Church's successor organizations. For lay jurists, Protestant theology offered a path beyond a set of antinomies in German legal thought that appeared inadequate to the challenges of postwar reconstruction. On the one hand, Protestant jurists attributed the fall of the Weimar Republic to legal positivist traditions that understood the state as the sole source of legitimate law, bemoaning the Weimar Constitution's lack of an ethical foundation. On the other hand, they criticized West Germany's Catholic hierarchy for its instrumentalization of natural law claims in defense of confessional privileges. In search of an alternative basis for infusing politics with religious morality, postwar Protestant jurists transformed the Confessing Church's critique of "natural theology" into a specifically anti-secular *and* anti-Catholic political theology and legal theory. Protestant constitutional theorists in postwar West Germany argued for a pluralist legal order that respected the multiplicity of West German religious identities and the constitutional prohibition on the establishment of a state religion. At the same time, Protestant interventions in postwar constitutional debates were premised on concepts of ethical citizenship that drew on ongoing theological reappraisals of the relationship between state, community, and individual. According

to a wide spectrum of postwar Protestant intellectuals and politicians, the constitutional order rested on common adherence to values of tolerance, responsibility, reconciliation, and, within strict limits, a willingness to disobey authority. Protestant actors derived such values, though ostensibly universal, from narratives of the historical maturation of Protestant ethics.

The political interventions of the first postwar Protestant generation not only resulted in a series of legal outcomes that proved foundational to West German constitutional law, but shaped the trajectory of West German secularization. By the late 1960s, lay participation in religious life, already decreasing after a short-lived revitalization in the immediate postwar years, entered a period of rapid decline as traditional religious milieus decomposed under the weight of generational change and an expanding consumer culture. The rhetoric of Christian natural law championed by postwar Christian Democrats, particularly Catholics, became increasingly obsolete as a political discourse. However, in the decades since the 1960s, arguments for linking religious pluralism with Christian cultural values, pioneered by Protestant intellectuals in the political struggles of the postwar years, have continued to resonate widely in German politics.

My argument requires an elaboration of the category "Protestant intellectual." I do not restrict this term to individuals with formal theological training, let alone ordained pastors or theologians—though such figures are included within this heuristic. Rather, I define the term broadly to comprise academic scholars beyond theology, as well as politicians, writers, and professionals of various stripes who participated in the public sphere cultivated by the postwar Protestant churches and their affiliated organizations. What bound these figures together was not simply their baptism as Protestants, but their efforts to draw on Protestant theology and history as resources for imagining alternative presents and for justifying and situating their political projects.

The viability of this category reflects peculiarities of the German context. Confessional religious education was a required subject in public schools under the German Empire, such that pupils even from irreligious households would have gained an understanding of the basic principles of their baptismal confession.²⁶ Within the educated bourgeoisie from which the majority of this dissertation's subjects emerged, moreover, "cultural Protestantism" remained a dominant social force and theology a prestigious subject well into the twentieth century.²⁷ Although lay Protestant intellectuals did not hold university degrees in theology, many possessed deep knowledge of theological debates and embraced historical narratives that regarded the German nation as heir to Reformation concepts of freedom and responsibility. Through their upbringings, education in Germany's elite humanistic *Gymnasien*, and familial networks, they maintained close ties to the Protestant churches. At the same time, precisely because they were not bound to defend established theological canons, lay intellectuals could become effective innovators within Protestant discourses about political ethics.

Among lay Protestant intellectuals, this dissertation focuses in particular on jurists, a decision that requires further justification. Indeed, it might be objected, Christian politics in postwar Europe hardly limited its ambitions to merely legal transformation, but trained its sights on social and economic relations, families, schools, workplaces, and the inner core of the human being's spiritual life. Restricting my investigation to the ostensibly formalistic domain of law would seem to evacuate conceptual categories of their meanings assumed through social experience. But beyond the need to contain what would otherwise become an unmanageable

²⁶ On religious education during the German Empire, see Ernst Christian Helmreich, *Religious Education in German Schools: A Historical Approach* (Cambridge, MA: Harvard University Press, 1959), 53-100.

²⁷ On "cultural Protestantism," see Hübinger, *Kulturprotestantismus und Politik*; Claudia Lepp, *Protestantisch-liberaler Aufbruch in der Moderne. Der deutsche Protestantenverein in der Zeit der Reichsgründung und des Kulturkampfes* (Gütersloh: Gütersloher Verlagshaus, 1996).

topic, two points justify my choice. The first again involves the particularities of the German context. Since the nineteenth century, jurisprudence in Germany has served as a privileged site of debate about larger questions of political theory. Operating within a civil law jurisdiction, German courts rely more on the writings of legal theorists than on precedent, especially by comparison to Anglo-American courts. The published opinions of academic jurists therefore frequently assume political importance. Concepts central to modern German political thought, such as the *Rechtsstaat*, civil society, and constitution (*Verfassung*) originally emerged within jurisprudential debates.²⁸ The second involves a more general approach to legal history. I examine the law not as an internally closed discourse but as a mediating site between "social imaginaries"—shared ideas about a society's core values and institutions—and social practices.²⁹ Legal arguments were never merely about the law, but serve as indices for shifting understandings of the relationships between individual, society, and state.

Literature Overview

This dissertation builds on a rich, largely recent literature on the place of Christianity in the trajectory of twentieth-century European politics and political thought, particularly in the period after 1945. Until a decade ago, major surveys of postwar European reconstruction, working largely within paradigms of Marxism or modernization theory, made little mention of religious figures, institutions, and discourses. Within the past decade, however, a new wave of

²⁸ Christopher J. Thornhill, *German Political Philosophy: The Metaphysics of Law* (London: Routledge, 2007). For an overview of nineteenth-century German political thought from this perspective, see Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004), 56-64. On debates about the *Rechtsstaat* in imperial Germany and their political significance, see Kenneth F. Ledford, *From General Estate to Special Interest: German Lawyers, 1878-1933* (Cambridge: Cambridge University Press, 1996).

²⁹ On the utility of the category of the "social imaginary" for intellectual history, see Samuel Moyn, "Imaginary Intellectual History," in *Rethinking Modern European Intellectual History*, eds. Darrin M. McMahon and Samuel Moyn (Oxford: Oxford University Press, 2014), 112-130.

scholarship has underscored the significance of religion for the stabilization of conservative democracies across the Western half of the continent.³⁰ A remarkable array of recent studies have drawn attention to the dynamism of Christianity both as a source of political identity, and as an institutional actor that shaped social relations and political structures.

Much important work on religion in postwar West Germany has taken place within the domain of social and cultural history. Following Maria Mitchell's pioneering 1995 article on the anti-secular ideology of the early CDU, a wave of studies focused on the role of the churches as sources of conservative revival, opponents not only of Communism but of the "Americanization" of popular culture and the liberalization of gender norms.³¹ Other works on the social history of religion, however, demonstrated that the churches were multivalent bodies. Aging church leaders whose political socialization was rooted in the pre-World War I years frequently clashed with a

³⁰ Major surveys of postwar Germany and European history that have provided the foundations for more recent historiography, but which paid little attention to religion, include: Frank Biess and Robert G. Moeller, eds., *Histories of the Aftermath: The Legacies of the Second World War in Europe* (New York: Berghahn, 2010); István Deák, Jan T. Gross, and Tony Judt, eds., *The Politics of Retribution in Europe: World War II and its Aftermath* (Princeton: Princeton University Press, 2000); Ulrich Herbert, ed., *Wandlungsprozesse in Westdeutschland: Belastung, Integration, Liberalisierung 1945-1980* (Göttingen: Wallstein, 2002); Konrad H. Jarausch, *After Hitler: Recivilizing Germans, 1945-1995*, trans. Brandon Hunziker (New York: Oxford University Press, 2006); Konrad H. Jarausch and Michael Geyer, *Shattered Past: Reconstructing German Histories* (Princeton: Princeton University Press, 2003); Tony Judt, *Postwar: A History of Europe since 1945* (New York: Penguin, 2005); Charles S. Maier, "The Two Postwar Eras and the Conditions for Stability in Twentieth-Century Western Europe," *American Historical Review* 86 (1981): 327-352; Robert G. Moeller, ed., *West Germany under Construction: Politics, Society, and Culture in the Adenauer Era* (Ann Arbor: University of Michigan Press, 1997); Hanna Schissler, ed., *The Miracle Years: A Cultural History of West Germany, 1949-1968* (Princeton: Princeton University Press, 2001). For a critique of the use of modernization theory in the historiography of postwar West Germany, see Noah Benezra Strote, *Lions and Lambs: Conflict in Weimar and the Creation of Post-Nazi Germany* (New Haven: Yale University Press, 2017), 5-8.

³¹ Maria Mitchell, "Materialism and Secularism: CDU Politicians and National Socialism, 1945-1949," *Journal of Modern History* 67 (1995): 278-308; Mitchell, *The Origins of Christian Democracy: Politics and Confession in Modern Germany* (Ann Arbor: University of Michigan Press, 2012). On the churches as conservative actors in postwar culture, see especially Heide Fehrenbach, *Cinema in Democratizing Germany: Reconstructing National Identity after Hitler* (Chapel Hill: University of North Carolina Press, 1995), 118-147. Works of postwar German gender history also touched on the conservative role of the churches: see Elizabeth Heineman, *What Difference Does a Husband Make? Women and Marital Status in Nazi and Postwar Germany* (Berkeley: University of California Press, 1999); Dagmar Herzog, *Sex After Fascism: Memory and Morality in Twentieth-Century Germany* (Princeton: Princeton University Press, 2005); and Uta G. Poiger, *Jazz, Rock, and Rebels: Cold War Politics and American Culture in a Divided Germany* (Berkeley: University of California Press, 2000). These works are discussed in greater length in chapter 3.

younger generation of pastors, who sought—with varying degrees of success—to revitalize Christian spiritual and associational life through the introduction of film, popular music, and even psychoanalysis.³² A slightly later stream of scholarship moved beyond the institutional churches and their affiliated associations to explore the persistence of Christian motifs in the media, architecture, and popular culture, along with the emergence by the 1960s and 1970s of a range of spiritual communities outside the established churches.³³

The most recent current of scholarship has turned a critical eye on postwar religious institutions from the perspectives of intellectual history and the history of human rights. Historians including Giuliana Chamedes, James Chappel, Marco Duranti, Udi Greenberg, Samuel Moyn, and Noah Strote have in some ways revived an older images of the Catholic and West European Protestant churches as bastions of Cold War anti-Communism, whose signal political achievement was to help stymie ambitious programs of economic nationalization and social reform championed by Communists and Social Democrats. Yet these scholars have demonstrated that postwar Christian conservatism was hardly a sclerotic force, but a dynamic movement that abandoned a 1930s-era romance with fascism to reinvent Christian politics. Catholic conservatives in particular helped to mold neo-corporatist democracies characterized by

³² Mark Edward Ruff, *The Wayward Flock: Catholic Youth in Postwar Germany, 1945-1965* (Chapel Hill: University of North Carolina Press, 2005); Benjamin Ziemann, *Encounters with Modernity: The Catholic Church in West Germany, 1945-1975*, trans. Andrew Evans (New York: Berghahn, 2014). As yet, there are no works on Protestant youth movements or pastoral care in postwar West Germany comparable to Ruff's and Ziemann's studies.

³³ Frank Bösch and Lucian Hölscher, eds., *Kirchen – Medien – Öffentlichkeit. Transformationen kirchlicher Selbst- und Fremddeutungen seit 1945* (Göttingen: Wallstein, 2009); Wilhelm Damberg, ed., *Soziale Strukturen und Semantiken des Religiösen im Wandel: Transformationen in der Bundesrepublik Deutschland 1949-1989* (Essen: Klartext, 2011); Nicolai Hannig, *Die Religion der Öffentlichkeit. Kirche, Religion und Medien in der Bundesrepublik 1945-1980* (Göttingen: Wallstein, 2010); Benjamin Städter, *Verwandelte Blicke: eine Visual History von Kirche und Religion in der Bundesrepublik 1945-1980* (Frankfurt: Campus, 2011). On religion outside the established churches, see Monica Black, "Miracles in the Shadow of the Economic Miracle: The 'Supernatural '50s' in West Germany," *Journal of Modern History* 84 (2012): 833-860; Thomas Großbölting, *Losing Heaven: Religion in Germany since 1945*, trans. Alex Skinner (New York: Berghahn, 2017), 215-222; and Dagmar Herzog, "The Death of God in West Germany: Between Secularization, Postfascism, and the Rise of Liberation Theology," in *Die Gegenwart Gottes in der modernen Gesellschaft: Transzendenz und religiöse Vergemeinschaftung in Deutschland*, eds. Michael Geyer and Lucian Hölscher (Göttingen: Wallstein, 2006), 431-466.

broad-based but limited welfare states, government support for subsidiary institutions such as churches, families, and schools, and West European economic integration. Christian churches developed a language of human rights to champion these aims on the international stage and fueled the rise of Christian Democratic parties throughout Western Europe.³⁴

As a whole, works of the past two decades have succeeded in drawing postwar religious history out of the confines of *Kirchengeschichte*, demonstrating the centrality of religion for broad themes of politics, culture, and society.³⁵ Moreover, they have disrupted once self-evident narratives of a linear process of "secularization" in postwar West Germany. This recent scholarship does not deny that the "hour of the church" proclaimed by Catholic and Protestant leaders after 1945 proved elusive. The attractions of film, sports, dance halls, and new possibilities for leisure and consumption drew increasing numbers of Germans away from church services already during the 1950s. But these works also demonstrate that churches remained influential actors in postwar national and international politics, and that religious institutions both shaped and adapted to postwar society rather than receding into insignificance.

³⁴ James Chappel, *Catholic Modern: The Challenge of Totalitarianism and the Remaking of the Church* (Cambridge, MA: Harvard University Press, 2018); Giuliana Chamedes, "The Vatican and the Making of the Atlantic Order, 1920-1960" (PhD Dissertation, Columbia University, 2013); Marco Duranti, *The Conservative Human Rights Revolution: European Identity, International Politics, and the Origins of the European Convention* (Oxford: Oxford University Press, 2017), especially 290-320; Darcie S. Fontaine, *Decolonizing Christianity: Religion and the End of Empire in France and Algeria, 1940-1965* (Cambridge: Cambridge University Press, 2016); Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton: Princeton University Press, 2014), 120-168; Piotr H. Kosicki, *Catholics on the Barricades: Poland, France, and "Revolution", 1892-1956* (New Haven: Yale University Press, 2018); Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015); Sarah Shortall, *Soldiers of God in a Secular World: The Politics of Catholic Theology in Twentieth-Century France* (Cambridge, MA: Harvard University Press, forthcoming); Sarah Shortall and Daniel Steinmetz-Jenkins, eds., *Christianity and Human Rights Reconsidered* (Cambridge: Cambridge University Press, forthcoming); Strote, *Lions and Lambs*. On Christian human rights in the postwar United States, see David Hollinger, *After Cloven Tongues of Fire: Protestant Liberalism in Modern American History* (Princeton: Princeton University Press, 2013) and Gene Zubovich, *The Global Gospel: Christian Human Rights and the Fracturing of America* (Philadelphia: University of Pennsylvania Press, forthcoming).

³⁵ For an excellent overview of the historiography of religion in postwar West Germany (through 2009), including both works of secular history and *Kirchengeschichte*, see Mark Edward Ruff, "Integrating Religion into the Historical Mainstream: Recent Literature on Religion in the Federal Republic of Germany," *Central European History* 42 (2009): 307-337.

This dissertation nevertheless departs from extant scholarship in several important respects. Most significantly, whereas recent histories of Christian politics in postwar Europe have focused on the Catholic Church, this work places Protestant political culture at center stage. While there is an extensive historiography on German Protestantism during the Third Reich, and to a lesser extent during the Weimar Republic, no monograph in English takes the politics of the Protestant intellectual milieu in the postwar Federal Republic as its central theme, or puts developments within West German Protestantism into conversation with debates about human rights and secularism in postwar Europe. Much of the scholarship on the Protestant churches in postwar Germany has been written within the framework of church history (*Kirchengeschichte*) based at German departments of theology.³⁶ The major exception is the historian Matthew Hockenos' excellent study of Protestant debates about guilt and responsibility for National Socialism. Hockenos' study, however, extends only to 1950 and remains focused on leading theologians, rather than the lay milieu explored in this work.³⁷ Moreover, the exchanges between theology and jurisprudence at the heart of this dissertation have hardly received attention outside

³⁶ The leading scholar of postwar Protestant *Kirchengeschichte* is the Münster church historian Martin Greschat; for his overview, see Greschat, *Der Protestantismus in der Bundesrepublik Deutschland 1945-2005* (Leipzig: Evangelische Verlagsanstalt, 2010). This vein of scholarship is too vast to summarize here, but references to the works I have found most pertinent can be found throughout the dissertation. Most recently, an interdisciplinary group of scholars and doctoral students based at the Universities of Göttingen and Munich, funded by the Deutsche Forschungsgemeinschaft, has embarked on a multi-year study of "Der Protestantismus in den ethischen Debatten der Bundesrepublik Deutschland 1949-1989." The doctoral dissertations produced by members of this research group treat individual domains of Protestant political intervention, such as gender politics, expellee integration, the welfare state, ideas of subsidiarity, and Christian-Marxist dialogue in far more exhaustive depth than is possible in the present study. For the earliest results of this collaboration, see Christian Albrecht and Reiner Anselm, eds., *Teilnehmende Zeitgenossenschaft: Studien zum Protestantismus in den ethischen Debatten der Bundesrepublik Deutschland 1949-1989* (Tübingen: Mohr Siebeck, 2015). The research group has also produced a highly useful online encyclopedia of West German Protestantism.

³⁷ Matthew D. Hockenos, *A Church Divided: German Protestants Confront the Nazi Past* (Bloomington: Indiana University Press, 2004). See also the study of the Protestant laity in postwar West Germany by Benjamin Pearson, which, however, remains restricted to the institution of the *Kirchentag*: Pearson, "Faith and Democracy: Political Transformations at the German Protestant *Kirchentag*, 1949-1969" (PhD Dissertation, University of North Carolina Chappel Hill, 2008).

of a specialist, largely biographical literature.³⁸ I set these exchanges in a broader political context, showing how they drove Protestant political interventions and intellectual transformations. Issues treated separately in more specialized works on the postwar Protestant churches, such as family law, conscientious objection, and the German-Polish border, were linked through common intellectual discourses and political networks.

Moreover, close attention to Protestant politics reshapes our understanding of the role of religious institutions in the early Federal Republic, complicating a narrative of postwar conservative restoration. Certainly, a small number of historians have recently turned their attention to the ideological diversity of postwar Catholic milieus and shown how marginal groups of "left Catholics" challenged, if often futilely, the positions of the hierarchy on major political questions.³⁹ However, given the lack of a centralized Protestant doctrinal office, as well as the fracturing of the Protestant churches under the Third Reich, political divisions within West German Protestantism went to the core of the church leadership and dissidents gained far greater latitude for airing their views. From the earliest postwar years, a substantial and vociferous wing

³⁸ Jochen Bohn, *Herrschaft ohne Naturrecht: der Protestantismus zwischen Weltflucht und christlicher Despotie* (Berlin: Duncker & Humblot, 2004); Gert Ulrich Brinkmann, *Theologische Institutionenethik: Ernst Wolfs Beitrag zur Institutionendiskussion in der evangelischen Kirche nach 1945* (Neukirchen-Vluyn: Neukirchener Verlag, 1997); Theodor Herr, *Zur Frage nach dem Naturrecht im deutschen Protestantismus der Gegenwart* (Paderborn: Schöningh, 1972); Manfred Müller-Simon, *Von der Rechtstheologie zur Theorie des Kirchenrechts: Die Verbindung von juristischen und theologischen Themen im Werk von Hans Dombois* (Frankfurt: Peter Lang, 1994); Albert Stein, "Evangelische Rechtsethik 1945-1963," in *Katholizismus, Rechtsethik und Demokratiediskussion 1945-1963*, ed. Anton Rauscher (Paderborn: Schöningh, 1981), 123-146; Bradley Shingleton, "Motifs in Modern German Protestant Theologies of Law," *Oxford Journal of Law and Religion* 2 (2013): 278-306; Wilhelm Steinmüller, *Evangelische Rechtslehre: Zweireichelehre, Christokratie, Gnadenrecht* (Köln: Böhlau, 1968); Jonathan Stonebraker and Sarah Irving, "Natural Law and Protestantism: A Historical Reassessment and its Contemporary Significance," *Oxford Journal of Law and Religion* 4 (2015): 1-21. An exception, which brings together Protestant theologies of law and practical politics, is the theologian Reiner Anselm's study of West German criminal law reform: Anselm, *Jüngstes Gericht und irdische Gerechtigkeit: Protestantische Ethik und die deutsche Strafrechtsreform* (Stuttgart: Kohlhammer, 1994). For this reason, criminal law is not a major focus of the present work.

³⁹ See especially Mark Edward Ruff, *The Battle for the Catholic Past in Germany, 1945-1980* (Cambridge: Cambridge University Press, 2017). Former, *German Intellectuals*, deals with the left Catholic intellectuals Walter Dirks and Eugen Kogon. For a comparable case of ideological dissention within postwar French Catholicism, see Rachel M. Johnston-White, "A New Primacy of Conscience? Conscientious Objection, French Catholicism and the State during the Algerian War," *Journal of Contemporary History*, prepublished November 8, 2017, DOI: 10.1177/0022009417714315.

of the German Protestant churches contested the settlement trumpeted by Christian Democratic movements across Western Europe as the apogee of the "Christian West." Protestant theologians and jurists aimed to articulate a place for Christianity in postwar politics in terms that did not echo the rhetoric of Cold War anti-Communism. I therefore counter the assumption, still dominant in much of the historiography, that Catholicism provided the driving force behind the reinvention and revitalization of postwar Christianity, while Protestants, without a social or political theory of their own, merely followed their Catholic counterparts into new Christian Democratic parties.⁴⁰ Precisely such anxieties drove postwar Protestant intellectuals to rethink the place of the church in a society where Protestantism was no longer demographically or politically dominant.

This dissertation further departs from recent literature in its approach to theology as a subject for intellectual history. Rather than understanding theological discourse as simply reflective of the political and social programs supported by its exponents, I suggest that in certain instances, theological concerns motivated the very substance of the political positions taken by Protestant intellectuals.⁴¹ By this, I do not mean to abandon social context for an untethered idealism. To the contrary, theological discourse assumes meaning against the background of particular social worlds. Experiences of both collaboration in and resistance against National Socialism, and then of defeat and postwar division, provided debates about political ethics in postwar West Germany with a distinctive set of reference points and emotional valences. The

⁴⁰ Recent scholarship on the international Protestant ecumenical movement, however, has begun to challenge this assumption. See Udi Greenberg, "Protestants, Decolonization, and European Integration, 1885-1961," *Journal of Modern History* 89 (2017): 314-354; Justin Reynolds, "Against the World: International Protestantism and the Ecumenical Movement between Secularization and Politics, 1900-1952" (PhD Dissertation, Columbia University, 2016); and Terrence Renaud, "Human Rights as Radical Anthropology: Protestant Theology and Ecumenism in the Transwar Era," *Historical Journal* 60 (2017): 493-518.

⁴¹ For contrasting approaches to this question, see James Chappel, "Beyond Tocqueville: A Plea to Stop 'Taking Religion Seriously,'" *Modern Intellectual History* 10 (2013): 697-708 and Shortall, "Lost in Translation."

antinomical structure of Protestant theology allowed for a recasting of concepts of freedom, authority, resistance, and democracy in light of narratives of wartime experience. Theology provided a common set of referents for intellectuals socialized within Protestant cultures, which could be deployed across disciplinary, professional, and political divides.⁴²

Finally, this dissertation intervenes within a specific, politically freighted set of debates about German Protestantism in the twentieth century. Until the 1980s, and in some cases well beyond, histories of the German churches under National Socialism served an apologetic function. Church historians focused on isolated martyrs such as Dietrich Bonhoeffer, while neglecting the wider background of Christian complicity and collaboration.⁴³ The field has undergone a sea change during the past three decades, however, as a generation of scholars has spearheaded a far more critical and sober account. More recent scholarship has shown how the Nazi-era Protestant churches permitted the use of church records by state officials to trace "Aryan" ancestries, remained silence in the face of ongoing evidence of Nazi criminality and atrocity, furnished hundreds of military chaplains, and provided theological justifications for antisemitism at the height of the Holocaust.⁴⁴

⁴² I thereby aim to address the "dearth of works dealing with the powerful denominational networks in West German academia." See A. Dirk Moses et al., "Forum: The Intellectual History of the Federal Republic," *German History* 27 (2009): 256, and also on this absence in the intellectual history of postwar Germany, Frank Biess, "Thinking After Hitler: The New Intellectual History of the Federal Republic of Germany," *History and Theory* 51 (2012): 243-244.

⁴³ For an overview and critique of this historiography, see Robert P. Ericksen and Susannah Heschel, "The German Churches Face Hitler: Assessment of the Historiography," *Tel Aviver Jahrbuch für deutsche Geschichte* 23 (1994): 433-459. An updated account is offered in Ericksen and Heschel, "The German Churches and the Holocaust," in *The Historiography of the Holocaust*, ed. Dan Stone (New York: Palgrave Macmillan, 2004), 296-318.

⁴⁴ For overview of this historiographical (and political) shift, see Robert P. Ericksen, "Wilhelm Niemöller and the Historiography of the Kirchenkampf," in *Nationalprotestantische Mentalitäten*, eds. Gailus and Lehmann, 433-451 and Manfred Gailus, "Keine gute Performance. Die deutschen Protestanten im 'Dritten Reich,'" in *Zerstrittene Volksgemeinschaft: Glaube, Konfession und Religion im Nationalsozialismus*, eds. Manfred Gailus and Armin Noizen (Göttingen: Vandenhoeck & Ruprecht, 2011), 96-121. Major works include Doris L. Bergen, *Twisted Cross: The German Christian Movement in the Third Reich* (Chapel Hill: University of North Carolina Press, 1996); Bergen, "German Military Chaplains in the Second World War and the Dilemmas of Legitimacy," in *The Sword of the Lord: Military Chaplains from the First to the Twenty-First Century*, ed. Doris L. Bergen (Notre Dame, IN: University of Notre Dame Press, 2004), 165-186; Robert P. Ericksen, *Complicity in the Holocaust: Churches and*

This dissertation is deeply indebted to the advances made by the past generation of critical scholarship on the German Protestant churches. At the same time, my focus on the post-1945 period shifts the emphasis not only in content but argumentative focus. Many works on Protestants in Nazi Germany include a concluding chapter documenting the efforts of their major actors to cover up Nazi-era crimes.⁴⁵ However, this study has a different purpose, seeking to explain how Protestant intellectuals came to not only affirm but actively shape West German constitutional democracy. It shows how efforts at reconciliation and evasion, assuming responsibility and downplaying complicity, often went hand and hand, legitimated through a single theological framework. Moreover, although German church historians have recently turned their attention to the West German 1960s and 1970s, the dominant narrative has been one of "rupture" with the conservative nationalism of the early postwar years.⁴⁶ Yet as Manfred Gailus pointedly observes, church historians have often neglected to connect developments since the 1960s to the period of National Socialism and the immediate postwar.⁴⁷ I aim to tell a more

Universities in Nazi Germany (Cambridge: Cambridge University Press, 2012); Ericksen, *Theologians Under Hitler: Gerhard Kittel, Paul Althaus and Emanuel Hirsch* (New Haven: Yale University Press, 1985); Ericksen and Susannah Heschel, eds., *Betrayal: German Churches and the Holocaust* (Minneapolis: Fortress Press, 1999); Manfred Gailus, *Protestantismus und Nationalsozialismus: Studien zur nationalsozialistischen Durchdringung des protestantischen Sozialmilieus in Berlin* (Köln, Böhlau, 2001); Wolfgang Gerlach, *And the Witnesses Were Silent: The Confessing Church and the Persecution of the Jews*, trans. Victoria J. Barnett (Lincoln: University of Nebraska Press, 2000); Susannah Heschel, *The Aryan Jesus: Christian Theologians and the Bible in Nazi Germany* (Princeton: Princeton University Press, 2008); Kyle Jantzen, *Faith and Fatherland: Parish Politics in Hitler's Germany* (Minneapolis: Fortress Press, 2008); and Kevin P. Spicer, ed., *Antisemitism, Christian Ambivalence, and the Holocaust* (Bloomington: Indiana University Press, 2007). For comparable works on German Catholicism under National Socialism, see Beth A. Griech-Polelle, *Bishop von Galen: German Catholicism and National Socialism* (New Haven: Yale University Press, 2002) and Kevin P. Spicer, *Hitler's Priests: Catholic Clergy and National Socialism* (DeKalb: Northern Illinois University Press, 2008).

⁴⁵ See for instance the works by Bergen (1996), Ericksen (2012), and Heschel (2008) cited above.

⁴⁶ Siegfried Hermlé, Claudia Lepp, and Harry Oelke, eds., *Umbrüche: Der deutsche Protestantismus und die sozialen Bewegungen in den 1960er und 70er Jahren* (Göttingen: Vandenhoeck & Ruprecht 2007); Klaus Fitschen et al., eds. *Die Politisierung des Protestantismus: Entwicklungen in der Bundesrepublik Deutschland während der 1960er und 70er Jahre* (Göttingen: Vandenhoeck & Ruprecht, 2011).

⁴⁷ Manfred Gailus, "Ist die *Aufarbeitung* der NS-Zeit beendet? Anmerkungen zur kirchlichen Erinnerungskultur seit der Wende von 1989/90," *Kirchliche Zeitgeschichte* 27 (2014): 60-62.

complex story, whereby impulses toward reform emerged already in the 1940s and 1950s, but were laden with the theological categories that authorized Protestant inaction under National Socialism and attacks on the Allied occupation governments thereafter. Theological discourse structured Protestant understandings of war, guilt, responsibility, and reconciliation in ways that cannot be reduced to reactionary or emancipatory politics.

Protestantism, Secularism, Modernity

While this dissertation is a historical study, its subject matter puts it in dialogue with interdisciplinary debates about the secular character of the modern state and the place of religious discourse in liberal public spheres. These questions, whether explicit or implicit, are present in much of the recent historical scholarship on Christian politics in postwar Western Europe.⁴⁸ Along with a stream of scholarship over the past two decades, this dissertation challenges classical understandings of secularization that associated the rise of mass education, capitalism, and liberal democracy with the privatization and eclipse of religion.⁴⁹ As a study of Protestantism, it also engages with a recent, more controversial strand of social theory that has revived a classic question of Max Weber and Ernst Troeltsch, albeit with the moral valance reversed: Is secularism simply a form of crypto-Protestant hegemony? Scholars such as Talal Asad, Wendy Brown, and Saba Mahmood have contended that liberal conceptions of religious freedom rest on a notion of religion as a matter of private conscience that derives from the

⁴⁸ For instance, see Samuel Moyn's contention that the Christian anti-Communism of the Cold War years has reemerged in contemporary European human rights law in the guise of "religious freedom" jurisprudence directed against Muslims: Moyn, *Christian Human Rights*, 137-168.

⁴⁹ Major works include José Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994) and Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007). For a defense of a classical view of secularization, see Steve Bruce, *God is Dead: Religion and Secularization in the West* (Oxford: Blackwell, 2002).

Protestant Reformation. According to this line of argument, the secularism of Western liberal states involves the regulation of acceptable religious beliefs and practices derived from Protestant norms.⁵⁰

Contemporary theories of secularism can be justifiably criticized for their inadequate historical grounding. Certainly, genealogies tracing the emergence of contemporary secularism to sixteenth- or seventeenth-century Protestantism are likely to arouse suspicion among historians.⁵¹ A broader aim of recent works, however, has been to show how ostensibly secular European states have contributed toward the privileging of churches and the racialization of European Muslims in recent decades. Such concerns are borne out by historical and ethnographic studies of postwar and contemporary Germany, and call for an examination of the discourses underpinning elisions between Christianity, secular citizenship, and European identity.⁵² While calling into question the causal validity of the genealogies proposed by theorists such as Asad and Mahmood, this study aims to lay the groundwork for a more historically robust account of the contradictions of the secular state unearthed in their work.

⁵⁰ Much of the recent critical scholarship on secularism has been produced by cultural anthropologists: see Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford: Stanford University Press, 2003); Asad, Wendy Brown, Judith Butler, and Saba Mahmood, *Is Critique Secular? Blasphemy, Injury, and Free Speech*, 2nd ed. (Berkeley: University of California Press, 2013); Keane, *Christian Moderns*; and Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton: Princeton University Press, 2015). For similar views from the perspective of political theory, see Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006) and Anne Norton, *On the Muslim Question* (Princeton: Princeton University Press, 2013). For a historical account informed by recent critical theories of secularism, see Joan Wallach Scott, *The Politics of the Veil* (Princeton: Princeton University Press, 2007).

⁵¹ Udi Greenberg and Daniel Steinmetz-Jenkins, "Is Religious Freedom a Bad Idea?" *The Nation*, March 16, 2016, <https://www.thenation.com/article/is-religious-freedom-a-bad-idea/> (accessed April 15, 2018); Greenberg and Steinmetz-Jenkins, "The Cross and the Gavel," *Dissent* 65, no. 2 (Spring 2018): 106-113.

⁵² For instance, Rita Chin, *The Crisis of Multiculturalism in Europe* (Princeton: Princeton University Press, 2017); Chin, *The Guest Worker Question in Postwar Germany* (Cambridge: Cambridge University Press, 2007); Ruth Mandel, *Cosmopolitan Anxieties: Turkish Challenges to Citizenship and Belonging in Germany* (Durham: Duke University Press, 2008); Esra Özyürek, *Becoming German, Becoming Muslim: Race, Religion, and Conversion in the New Europe* (Princeton: Princeton University Press, 2014). See also Sultan Doughan, "Teaching Tolerance: Citizenship, Religious Difference, and Race in Germany" (PhD Dissertation in progress, University of California Berkeley).

Rather than seeking the roots of contemporary German secularism in the early modern period, I argue that Protestant intellectuals after the Second World War themselves constructed a narrative of secularization that has gained wide acceptance in German political culture. According to this narrative, which took shape in political debates of the 1950s and consolidated by the mid-1960s, postwar constitutional democracy embodied Protestant Christian values of dignity, tolerance, and responsibility, and reflected the culmination of German political development since the Reformation. Certainly, given that the majority of Germans remain nominal members of the Christian churches, the biases of the secular state evident in recent controversies about circumcision or the headscarf may have as much to do with the Christian majority culture in general as with Protestant influence in particular. Nevertheless, Protestant jurists, politicians, and church leaders have played salient roles in defining the bounds of acceptable religious discourse in the public sphere. Protestant political actors in the postwar decades rejected natural law claims that sought to translate religious prescriptions directly into positive law, while locating the underlying values of the West German constitution in Germany's Christian culture. This framework for relating Christianity and pluralism has retained enduring influence beyond the postwar decades. Postwar Protestant intellectual and political life therefore provides a vantage point for analyzing the formation of ideals of citizenship that remain significant in contemporary Germany.

Chapter Outline

The six core chapters of this dissertation tell the story of the political transformation of the Protestant generation born roughly between 1890 and 1910—beginning with the formative political rupture in 1933, and continuing through this generation's role in reconstructing West

German politics into the 1950s and 1960s. Moving roughly chronologically, each chapter is framed around a particular political conjuncture. Yet while the chapters can be read independently as contributions to German political history, they track the careers of a common set of figures, tracing a continuous narrative.

The first part of the dissertation describes the origins of a Protestant defense of constitutional democracy during the years of Nazism and postwar Allied occupation. Chapter one analyzes Protestant political debates during National Socialism (1933-45). This chapter shows how the Nazi state's disruption of established academic disciplines, alongside its efforts to seize control of the Protestant churches, catalyzed the formation of interdisciplinary intellectual networks around Protestant periodicals and organizations. Debates about natural theology and historical revelation served as proxies for political conflicts over the appropriate Christian stance toward the regime. While Protestant supporters of the Nazi state regarded the history of the German *Volk* as an unfolding process of divine revelation, Protestant thinkers aligned with the oppositional Confessing Church criticized forms of "natural theology" that acknowledged sources of revelation outside scripture. Instead, Confessing Church intellectuals sought to articulate a Christian theory of legal order centered on the protection of individual conscience and divinely-ordained communities, known solely through biblical revelation, from state interference. Members of the Confessing Church placed renewed emphasis on Christian responsibility for bringing ethical precepts to bear on political life but denied that natural law mediated between Christian revelation and the positive law of the state.

Chapter two follows Confessing Church intellectual networks into the early years of the postwar Allied occupation of Germany. This chapter argues that members of wartime Protestant oppositional networks aimed to translate their political theology of Christian responsibility into a

language of human rights, participating in an emergent international human rights movement in which Christian churches played a leading role. German Protestants' defense of human rights, however, diverged from that of their Catholic counterparts. Whereas postwar Catholic human rights theories rested on a claim of the inherent dignity of the human being, Protestants emphasized human fallenness and dependence on divine grace. Confessing Church members gave practical expression to their emergent theory of rights in campaigns to secure clemency for former Nazi officials sentenced to death in Allied war crimes trials. Protestant advocates for the "human rights" of convicted war criminals maintained that merely human laws could not achieve justice following the calamity of war and therefore must give way to the Christian imperatives of mercy and reconciliation. Such arguments reflected the persistence of nationalist and antisemitic attitudes among German Protestants after the Second World War. Yet efforts to reposition the church as a defender of human rights, in the context of criticisms of Allied war crimes trials, also facilitated Protestants' subsequent advocacy for the expansion of individual rights under the West German constitution. Calls for postwar reconciliation and renewal would remain closely intertwined with efforts to obscure questions of guilt and complicity under Nazism.

The second part of the dissertation moves to Protestant politics in the two decades following the formation of the West German state in May 1949. These chapters describe how despite initial demographic and political disadvantages, Protestant opponents of National Socialism drew on theological innovations of the 1940s in efforts to shape the political foundations of the West German state. In debates about the scope of constitutional rights, Confessing Church veterans marshaled their wartime critique of natural theologies to denounce the instrumentalization of natural law discourses by the Christian Democratic Union in the service of conservative social legislation and Cold War politics. Instead, they suggested that

Protestant notions of religious tolerance, freedom of conscience, and the right of resistance provided a framework for common political life in a constitutional democracy.

Chapter three discusses Protestant participation in debates about family law and interconfessional schooling that pervaded West German politics during the 1950s. These debates formed a turning point at which Protestant intellectuals articulated a vision of Christian participation in constitutional democracy, presenting the churches as guardians of the values underlying the West German constitution rather than as architects of social policy. Numerous Protestant church leaders, politicians, and jurists criticized CDU support for patriarchal family codes and single-denominational schools, which CDU politicians justified with recourse to an explicitly Catholic language of natural law. Instead, Protestants proposed alternative standards for social legislation based on values of individual freedom and religious tolerance. Protestant legal opinions contributed to the Federal Constitutional Court's rulings of the late 1950s that struck down the privileging of fathers in the West German Civil Code and determined that state governments were not obliged to provide single-denominational schools. These decisions overturned policies of the CDU-led governing coalition.

Chapter four turns to the role of Confessing Church veterans in 1950s debates about conscientious objection to military service. While the West German constitution guaranteed the right of conscientious objection, petitions to the Federal Constitutional Court by Protestant jurists were instrumental in the Court's 1961 decision to expand this right to include individuals who refused to participate in war based on current political circumstances. Central to Protestants' defense of conscientious objectors, I argue, was an ongoing reappraisal of the legacy of resistance against the Nazi state. In defending the legitimacy of resistance against National Socialism, postwar Protestant intellectuals theorized conscience as a domain of ultimate freedom

before God that authorized resistance against overbearing state authority. Confessing Church veterans aimed to translate this theological conception of conscience into the language of constitutional law. They argued that the state's recognition of an expansive domain of freedom of conscience, including the right of conscientious objection, would eliminate the conditions that gave rise to resistance under Nazism, instead securing the individual's loyalty to the political community. At the same time, Protestant defenders of an expansive right of conscientious objection advanced an inflated narrative of Christian wartime resistance that would position the churches as arbiters of postwar society's foundational values.

Chapter five treats Protestant engagement with international law from the late 1950s to the mid-1960s, in particular the question of the former Eastern German territories ceded to Poland and Czechoslovakia under the 1945 Potsdam Agreement. While both the CDU and the opposition Social Democratic Party continued to claim these territories for Germany, the national German Protestant Church was the first major German organization to support the recognition of the territorial concessions, a policy adopted by the West German state only in 1970. The Working Group of Church Brotherhoods [*Arbeitskreis kirchlicher Bruderschaften*], a successor organization to the Confessing Church, provided the intellectual framework for the Protestant Church's influential 1965 "Eastern Memorandum." German expellees, they contended, lacked an ahistorical natural right to their homeland that superseded the imperative of postwar reconciliation. By calling for diplomatic recognition of the German-Polish border, the Protestant Church championed the idea of reconciliation as a foundational value of West German politics, shifting from interventions in individual domains to constitutional law to an attempt to articulate the moral basis of political life as a whole.

Chapter six examines the emergence a fully-fledged Protestant defense of West Germany's constitutional democracy in the mid-1960s, in the context of a series of controversies over the scope of executive power. The CDU government's attempt to introduce a series of "emergency laws," which would authorize the suspension of constitutional basic rights in cases of a declared emergency, gave rise to a broad-based opposition movement that would coalesce as the West German New Left. Protestant intellectuals and politicians, in particular figures associated with the *Arbeitskreis kirchlicher Bruderschaften*, played a pioneering role in campaigns against emergency laws. In contrast to more radical members of the student movement, who sought to use these campaigns to overturn the West German political order, Confessing Church veterans called for resistance against the proposed constitutional amendments precisely to preserve the constitution's core values. For these Protestants, a willingness to engage in disobedience in defense of the rule of law and human rights appeared as a hallmark of democratic citizenship. Protestant opponents ultimately failed to hinder the promulgation of emergency laws. However, the contested amendments were introduced in May 1968 alongside a constitutional right of resistance against breaches of democracy, reflecting the vision of resistance promoted by Protestant opposition movements. The campaign against emergency laws consolidated Protestant allegiance to an ideal of constitutional democracy buttressed by Christian values, while extending a narrative of Confessing Church resistance forged since 1945.

The conclusion traces the legacies of postwar Protestant politics into the present day. Though Germany's religious composition and socio-economic structure have changed markedly since the late 1960s, in particular following German reunification in 1990, the first postwar generation of Protestant jurists, theologians, and politicians articulated a defense of Protestant constitutionalism that remains influential. In particular, the concept of "constitutional patriotism"

championed by left-liberal German intellectuals since the 1980s, a post-nationalist identity based upon common adherence to values immanent in the constitution, can be traced to a postwar Protestant lineage. The political vision of Confessing Church veterans linked freedom with responsibility, religious confession (not secularism) with the tempering of fanaticism, and religious pluralism with the privileging of churches in the public sphere. In short, the Protestant subject was construed as the ideal democratic citizen, and Protestant history as a path, albeit twisted, toward constitutional democracy. As recent commemorations of the Reformation quinqucentennial have demonstrated, such ideas continue to maintain strong purchase in German political culture. Far from remaining confined to a narrow stratum of elite politicians, Protestant visions of the just society continue to shape policy and ordinary lives, in particular through their instantiation in constitutional law and the decisions of the Federal Constitutional Court. Close attention to Protestant political ideas in postwar West Germany therefore reveals tensions between freedom and authority, pluralism and uniformity, tolerance and consensus at the heart of contemporary German citizenship.

Chapter One: Natural Law and the Ethics of Protestant Opposition in Nazi Germany

Reflecting in August 1945 on the writings of Protestant theologians and jurists who had opposed National Socialism, the Bavarian pastor Karl-Heinz Becker lamented that, "If we once again read today all that could be said publicly in the perilous situation of the Third Reich, one has every cause for thanks—but also for astonishment that this work, for all of the agreement it received, was so completely without effect."¹ Becker pointed toward a forgotten facet of intellectual life under the Third Reich, the intensive exchange between Protestant theologians and jurists seeking to grapple with the historical origins of the National Socialist regime, its claims to legitimacy and obedience, and its consequences for theories of law, the state, and the worldly role of Christianity. Theology and jurisprudence, seemingly the most otherworldly and politically engaged of the academic disciplines respectively, converged on questions of the origins and limits of law and faced common political and intellectual crises with the establishment of Nazi dictatorship. Yet Becker's insistence on the futility of wartime intellectual opposition should be revised in light of a longer historical perspective. New understandings of the sources of legal authority, the legitimacy of resistance, and state-church relations that emerged under the Third Reich contributed fundamentally to the development of a Protestant defense of constitutional democracy and human rights in postwar West Germany.

My insistence on the productivity of Protestant thought in Nazi Germany departs from the standard historiography of the Third Reich. Intellectual historians of this period have focused on émigrés from Germany or on scholars who subordinated their work to the ideological dictates

¹ Karl-Heinz Becker, "Ein Kampf ums Recht: Bericht an das Forschungsinstitut des Ökumenischen Rates der Kirchen," Niedersächsische Staats- und Universitätsbibliothek (SUB) Göttingen, Nachlass Rudolf Smend, Cod. Ms. R. Smend A 43.

of the regime.² The historiography of religion, on the other hand, has largely neglected the intellectual history of the Confessing Church.³ While there is a substantial biographical and exegetical literature on the most eminent German-speaking theologians of the period, a wider angle illuminates the intellectual networks within which Protestants responded to the Nazi state.⁴ Precisely the constrained circumstances of academic life under the Nazi regime brought together figures from disparate disciplines in religiously-based networks, forged through conferences, society meetings, periodicals, and correspondence. These modes of communication sustained intellectual dialogue outside the university and formed the foundation for the more extensive interchange among theologians and lay intellectuals around German Protestant churches after 1945. The turning points of Protestant intellectual life under Nazism occurred not in internecine theological disputes but in newly forged connections between theology and secular disciplines, in particular legal theory.

The elective affinity of law and theology in European thought did not first emerge under the Third Reich. Christian theology and jurisprudence had long treated common questions surrounding the meaning of justice and the sources of legitimate legal authority.⁵ From the early

² Exemplary works on wartime émigrés include Greenberg, *Weimar Century*; Martin Jay, *Permanent Exiles: Essays on the Intellectual Migration from Germany to America* (New York: Columbia University Press, 1985); and Strote, *Lions and Lambs*. On intellectual adaptation to the regime, see Wolfgang Bialas and Anson Rabinbach, eds., *Nazi Germany and the Humanities: How German Academics Embraced Nazism* (London: Oneworld Publications, 2007). Alternatively, in a vein closer to that explored here, Jerry Z. Muller points toward a transformation of German conservative thought during the Third Reich: see Muller, *The Other God that Failed: Hans Freyer and the Deradicalization of German Conservatism* (Princeton: Princeton University Press, 1987), especially 330-339.

³ An exception is Kenneth C. Barnes, "Support, Acquiescence, or Passive Disobedience: Protestant Thought and the Nazi State, 1933-1937," *Zeitschrift für Religions- und Geistesgeschichte* 40 (1988): 151-169. Barnes notes that the vast literature on the political and institutional history of the Nazi-era "Church Struggle" has paid little attention to the intellectual history of the conflict, an observation that remains largely true today.

⁴ Recent works on major theologians include Charles Marsh, *Strange Glory: A Life of Dietrich Bonhoeffer* (New York: Knopf, 2014) and Alister E. McGrath, *Emil Brunner: A Reappraisal* (Chichester, West Sussex: Wiley Blackwell, 2014).

⁵ For an overview, see John Witte, Jr. and Frank S. Alexander, eds., *Christianity and Law: An Introduction* (Cambridge: Cambridge University Press, 2008).

twentieth century, the Catholic and German Protestant churches employed cadres of jurists specializing in internal church law as well as church-state relations in order to both modernize ecclesiastical structures and secure privileges from the state.⁶ With the establishment of the National Socialist regime, however, questions about the relationship between secular law and Christian conceptions of justice emerged with new urgency. In a state that claimed total domination not only over politics but the inner lives of its subjects, what place remained for Christian faith? Did Christian teachings refer to a purely otherworldly realm or demand a critique of Nazi ideology?

This chapter unearths a specifically Protestant discourse responding to these dilemmas that emerged among jurists and theologians under the Third Reich. It attends not only to formal declarations produced by Protestant synods, which have been closely reconstructed by church historians, but to the common language that facilitated dialogue among theologians and lay legal and political theorists.⁷ The crucial category to be explored here is that of *natural law*, most broadly defined as the notion that the positive legal order rests on a normative foundation self-evident to human reason through reflection on the properties of nature. In early twentieth-century European theology, natural law was associated with a Catholic revival of the theology of Thomas Aquinas, who argued that although natural law extended from God's "eternal law," individuals could come to know the natural law solely through their rational faculties.⁸ Neo-Thomism conflicted with Protestant doctrines of *sola fide*, justification by faith alone, whose adherents

⁶ On the modernization of Catholic canon law in the early twentieth century, see Chamedes, "Vatican," 40-43. On Protestant state-church contracts in the 1920s, see Jonathan R. C. Wright, *Above Parties: The Political Attitudes of the German Protestant Church Leadership, 1918-1933* (London: Oxford University Press, 1974), 32-48.

⁷ The classic church history of the National Socialist period is the monumental but never completed three-volume work by Klaus Scholder, *Die Kirchen und das dritte Reich: Vorgeschichte und Zeit der Illusion, 1918-1934* (München: Econ, 2000); *Das Jahr der Ernüchterung, 1934: Barmen und Rom* (München: Econ, 2000); *Spaltungen und Abwehrkämpfe, 1934-1937*, ed. Gerhard Besier (Berlin: Propyläen-Verlag, 2001).

⁸ Brian Tierney, "Natural Law and Natural Rights," in *Christianity and Law*, eds. Witte and Alexander, 92-94.

regarded with suspicion Thomist efforts to combine reason and revelation. From a Protestant standpoint, neo-Thomism could be criticized as a form of "natural theology" that allowed for knowledge of God through nature or reason, without appealing to divine revelation in Scripture.

This chapter argues that both Protestant supporters and detractors of the Nazi regime rooted their political arguments in a theological critique of natural law, and that efforts to establish a Christian grounding for secular law in the absence of natural law motivated the formation of Protestant legal-theological networks under the Third Reich. In rejecting natural law, Protestant theologians shared with Nazi legal theorists a tendency to valorize the "concrete" over the "abstract" and to dismiss rationalist thought, making currents of Protestant theology compatible with National Socialism early on. However, Protestant intellectuals could draw on the same theological resources to challenge Nazi racial theories as reiterations of natural law and to posit a new basis for a post-Nazi legal order proceeding from biblical guidelines. I therefore disagree with a reduction of Nazi-era Protestant theology to a debate between proponents and critics of "natural theology," as well as the view that a revival of natural law was the major intellectual legacy of the Protestant opposition to Nazism.⁹ While natural law found a warmer reception among Catholic thinkers during the war, the primary stance cultivated by Protestants sought to expose the insufficiency of *any* normative framework as a guide to political ethics, while emphasizing the infinite gap between divine justice and secular human law. Protestant thinkers who affirmed and criticized the regime to varying degrees drew on a common structure of argumentation, characterized by suspicion toward natural law and emphasis on the situational determinants of ethical action.

⁹ The former argument was put forth by Karl Barth and his associates and has continued to influence the historiography of the Confessing Church. For the latter view, see Klemens von Klemperer, "Naturrecht und der deutsche Widerstand gegen den Nationalsozialismus. Ein Beitrag zur Frage des deutschen 'Sonderwegs,'" *Vierteljahreshefte für Zeitgeschichte* 40 (1992): 323-337.

The chapter begins with an overview of the "coordination [*Gleichschaltung*]" of the Protestant churches and the legal profession under National Socialism. Shared assumptions about the failure of legal positivism during the Weimar Republic and the bankruptcy of natural law as an alternative led many Protestant theologians and jurists in 1933 to affirm the National Socialist revolution through the category of the "total state." The subsequent section demonstrates how a minority wing of Protestant intellectuals influenced by the Swiss Reformed theologian Karl Barth, the intellectual leader of Protestant opposition to Nazi incursions on the churches, developed a set of arguments against the total state. Protestant critics of Nazism did not repudiate but radicalized the critique of natural law doctrines advanced by their political opponents. Preparations for a 1937 conference of the international ecumenical movement at Oxford motivated the consolidation and confrontation of these two branches of German Protestant political thought. The final section turns to the period of the Second World War. In the early 1940s, Protestant oppositional circles, building upon the critique of the total state advanced by figures around Barth, sought to articulate an alternative theological foundation for law beyond natural law. These groups theorized categories of individual conscience and divinely-ordained institutions, rooted in a theology of biblical revelation, as foundations for legal order in a post-Nazi Germany.

From Weimar to the Third Reich

The theological frameworks that structured Protestant responses to the rise of the Third Reich had their roots in the aftermath of the First World War. As in so many dimensions of German life, defeat in 1918 unleashed a foundational crisis in Protestant politics and thought. Protestant pastors widely espoused a nationalist theology during the war, promising that God

would ensure a German victory; defeat confronted the churches with precipitous challenges to their legitimacy. The abdication of German monarchs—not only the Hohenzollern emperor-king in Prussia but the federal princes throughout the German states—meant the collapse of the territorial sovereigns who had headed the regional Protestant churches in Central Europe since the Peace of Augsburg. Moreover, the Weimar Constitution of January 1919 marked a transformation of the legal basis of state-church relations. In contrast to the Prussian Constitution of 1850, built on the ideal of a Christian state, Article 137, Paragraph 1 of the Weimar Constitution firmly declared that "There is no state church." Christian churches maintained their traditional status as "corporations of public law," but the Weimar Constitution specified that churches were not organs of the state; remaining distinctions between established and merely tolerated religions were abolished. Nevertheless, the Protestant and Catholic churches could continue to collect revenue through the state tax system and maintained their authority over religious education in public schools.¹⁰

Germany's Protestant bishops acted in concert with their Catholic counterparts to stymie the initial anti-clerical ambitions of the socialist government that took power in 1918-19 and sought to exclude the churches from schools and public life. In the course of the 1920s, regional Protestant churches in Bavaria, Prussia, and Baden concluded contracts with their respective state governments guaranteeing church property, government subsidies, and autonomy over the pastoral appointments.¹¹ The Protestant clergy hardly endorsed the Weimar Republic, however; members of the church hierarchy widely regarded the postwar state as the product of the despised Versailles Treaty. Lutheran theologians contrasted the formal system of procedure and

¹⁰ Koriath, "Entwicklung des Staatskirchenrechts," 54-58.

¹¹ Wright, "*Above Parties*", 32-48.

administration set out in the Weimar constitution against the spiritual values embodied by the *Volk*, which could not be represented through mere quantitative, parliamentary mechanisms.¹² Church leaders clashed with the state over not only church-related issues such as schools and taxation but overtly political matters. During the presidential election of 1925 and even more forthrightly in the debate leading to the 1926 plebiscite on the expropriation of dynastic property (supported by the Communist and Social Democratic parties), Protestant pastors rallied their congregations to support the conservative side.¹³ Contemporaries estimated that seventy to eighty percent of Protestant pastors supported the conservative-nationalist *Deutschnationale Volkspartei* (DNVP), which by the early 1930s would facilitate Hitler's rise to power.¹⁴ Just before the fall of Heinrich Brüning's second cabinet in May 1932, the Berlin scholar of constitutional law Rudolf Smend, the son of a prominent Reformed theologian, announced that Protestantism was the sole "spiritual power in Germany" that could achieve the "spiritual-moral overcoming of the cultural and political crisis."¹⁵ Containing the germ of an idea that would gain wide traction after 1945,

¹² Klaus Tanner, *Die fromme Verstaatlichung des Gewissens: zur Auseinandersetzung um die Legitimität der Weimarer Reichsverfassung in Staatsrechtswissenschaft und Theologie der zwanziger Jahre* (Göttingen: Vandenhoeck & Ruprecht, 1989), 59-100.

¹³ Daniel R. Borg, *The Old Prussian Church and the Weimar Republic: A Study in Political Adjustment, 1917-1927* (Hanover, NH: University Press of New England, 1984), 278-287. On the political history of the German Protestant churches in the Weimar Republic, see also Shelly Baranowski, *The Sanctity of Rural Life: Nobility, Protestantism, and Nazism in Weimar Prussia* (New York: Oxford University Press, 1995) and Kurt Nowak, *Evangelische Kirche und Weimarer Republik: zum politischen Weg des deutschen Protestantismus zwischen 1918 und 1932* (Göttingen: Vandenhoeck & Ruprecht, 1981).

¹⁴ Karl Wilhelm Dahm, *Pfarrer und Politik: Soziale Position und politische Mentalität des deutschen evangelischen Pfarrerstandes zwischen 1918 und 1933* (Köln: Westdeutscher Verlag, 1965), 148. Daniel Borg has similarly argued that "nationalism" was the "most striking political feature" of the Prussian Protestant church, excepting a minority of Religious Socialists: Borg, *Old Prussian Church*, 292.

¹⁵ Rudolf Smend, "Protestantismus und Demokratie," in Smend, *Staatsrechtliche Abhandlungen und andere Aufsätze*, 3rd ed. (Berlin: Duncker & Humblot, 1994), 297-308. On the context of this essay, published as part of a "manifesto" that supported Brüning's government, see Stefan Koriath, "Evangelisch-theologische Staatsethik und juristische Staatslehre in der Weimarer Republik und der frühen Bundesrepublik," in *Konfession im Recht: Auf der Suche nach konfessionell geprägten Denkmustern und Argumentationsstrategien in Recht und Rechtswissenschaft des 19. und 20. Jahrhundert*, eds. Pascale Cancik et al. (Frankfurt: Klostermann, 2009), 132.

Smend's essay could appear only farcical against the upheavals of the Republic in 1932, which the Protestant churches hardly ameliorated but helped to incite.

Theology mediated Protestant interpretations of political rupture. The carnage of the First World War discredited the prewar liberal theology espoused by such luminaries as Albrecht Ritschl and Adolf Harnack, who construed Christianity as a source of ethics and culture rather than a repository of divinely revealed truths. After 1918, theologies of revelation and alterity held sway.¹⁶ For all of their differences, the predominant currents in Weimar-era Protestant theology—the "Luther revival" pioneered by the theologian Paul Althaus, and the "dialectical theology" of the circle around the Swiss Reformed theologian and Bonn professor Karl Barth—concurred in their derision of theological liberalism. The president of the prestigious *Luther-Gesellschaft* from 1926 to 1964, Paul Althaus was Germany's most influential Luther scholar for a generation. Already before the First World War, Althaus aligned with the conservative views of the Lutheran theologian Adolf Schlatter and church historian Karl Holl, who emphasized the otherworldly character of Luther's religion, the perversion of the world through sin, and the undeservedness of divine grace. Althaus' experiences as a military chaplain during the First World War strengthened his nationalist convictions and only further convinced him of the need for a strong state to contain human passions. As a professor of systematic theology at Erlangen from 1925, Althaus gained renown for his theology of "orders of creation." Drawing on Luther's eponymous concept, Althaus contended that while God revealed himself primarily in Jesus Christ, a secondary form of "general revelation" occurred in worldly institutions such as marriage, family, and the state. Althaus' emphasis on Christian obedience to a hierarchy of orders reinforced Protestant skepticism toward parliamentary democracy. At the 1927 Königsberg

¹⁶ Peter E. Gordon, "Weimar Theology: From Historicism to Crisis," in *Weimar Thought: A Contested Legacy*, eds. Peter E. Gordon and John McCormick (Princeton: Princeton University Press, 2013), 150-178.

Kirchentag, Althaus implored the Protestant laity to cooperate with the burgeoning "national movement," arguing that the *Volk* itself constituted a divine "order of creation."¹⁷

The most revolutionary German-speaking theologian of the years after the First World War was indisputably Karl Barth. Born in Basel in 1888 and trained in both Switzerland and Germany, Barth, like Althaus, absorbed anti-liberal currents of Protestant theology well before 1914. As a student, Barth was drawn to the teachings of the Marburg theologian Wilhelm Hermann, among the most vociferous critics of the preeminent representative of prewar liberal Protestantism, Ernst Troeltsch. According to Troeltsch and other Protestant liberals, Christianity served as a source of civilization and social ethics; Christian theology had preserved the ancient natural law tradition of the Stoics and formed the foundation for the modern natural law of the Enlightenment, with its notions of freedom of conscience, religious toleration, and individual rights.¹⁸ For Troeltsch as much as his contemporary Max Weber, the Reformation, especially in its Calvinist guise, represented a fount of rationality and (albeit ambivalent) progress, an inflection point in the history of Western civilization.¹⁹ Hermann, by contrast, rooted Christian revelation in the "*self-authenticating* experience" of the individual believer, rather than natural law. Appealing to Luther's concept of justification by faith, Hermann insisted that God could hardly be recognized as a principle of objective knowledge. The young Karl Barth, although he would later eschew the subjective, experiential dimensions of Hermann's doctrine of revelation,

¹⁷ Erickson, *Theologians Under Hitler*, 79-119, especially 99-102. On the origins and politics of Althaus' theology, see also Tanja Hetzer, "*Deutsche Stunde*": *Volksgemeinschaft und Antisemitismus in der politischen Theologie bei Paul Althaus* (München: Allitera Verlag, 2009), at 37-41 on Althaus' relationship to Schlatter and Holl.

¹⁸ Ernst Troeltsch, "Christian Natural Law," in Troeltsch, *Religion in History*, trans. James Luther Adams and Walter F. Bense (Minneapolis: Fortress Press, 1991), 159-167 and Troeltsch, "Stoic-Christian Natural Law and Modern Secular Natural Law," in *Religion in History*, 321-342. For a detailed analysis of Troeltsch's views on natural law, see Tanner, *Lange Schatten des Naturrechts*.

¹⁹ Ernst Troeltsch, *Protestantism and Progress: A Historical Study of the Relation of Protestantism to the Modern World*, trans. William Montgomery (New Brunswick: Transaction Publishers, 2013); Max Weber, *The Protestant Ethic and the "Spirit" of Capitalism*, trans. Peter Baehr and Gordon C. Wells (New York: Penguin, 2002).

was deeply impressed by Hermann's attack on liberal theology.²⁰ The experience of war would only make such a breach more attractive.

Barth published his landmark commentary on Paul's Epistle to the Romans in December 1918, after spending the war as a pastor in the Swiss town of Safenwil, and issued a thoroughly revised second edition in early 1922. The text marked a rupture with the liberal theology of the prewar years, inaugurating a revolution in "dialectical theology" that would shape a generation of German theology students. Like Althaus, Barth eschewed historicist biblical criticism for its unconcern with the truth of divine revelation. Barth, however, emphasized the radical gulf between divinity and humanity, rather than the mediating institutions of Althaus' "orders of creation." Revelation, for Barth, occurred only in the moment of Christ's resurrection; revelation stood outside history to constitute a "breakthrough" in time that established humanity's objective knowledge of God. Embracing an Augustinian conception of universal sin, Barth regarded human knowledge of God as entirely dependent on God's self-revelation in Christ, not on natural human capacity. Barth thus engaged in a polemic against "natural law" well before the rise of the Nazi regime.²¹ The political implications of his theology were ambiguous. Barth gained sympathy for socialist politics during his pastoral appointment in the working-class Safenwil, and as a professor at Bonn he joined Germany's Social Democratic Party in early 1931. At the same time, Barth rejected the "Religious Socialist" theology of his Swiss colleague Leonhard Ragaz. Religious socialism, Barth charged, conflated theological and political commitments, falsely purporting to bring about the Kingdom of God through human action.²² For all of Barth's

²⁰ Bruce L. McCormack, *Karl Barth's Critically Realistic Dialectical Theology: Its Origins and Development, 1909-1936* (Oxford: Clarendon Press, 1995), 49-68, quoted 59, emphasis in the original.

²¹ For a detailed exposition of Barth's theology of revelation in the first edition of his *Romans* commentary, see McCormack, *Critically Realistic Dialectical Theology*, 141-62.

²² *Ibid.*, 173-80, 414.

personal political commitments, his theology, centered on God's radical otherness, provided few resources for describing a just society.²³

If Germany's Protestant church leaders and intellectuals widely adopted antipathetic attitudes toward the Weimar Republic, buttressed by contemporary theology, the National Socialist regime that succeeded it hardly proved more amenable to their interests. Upon assuming the chancellorship on January 30, 1933, Adolf Hitler regarded the subordination of the Protestant and Catholic Churches to the new regime as a crucial task. Nearly the entire German population belonged to one of the two major Christian confessions, making churches the largest civil society organizations in Germany and potentially powerful sources of independent moral authority. A Concordat (treaty) with the Catholic Church promising state support for Catholic confessional schools and freedom of religious worship, in exchange for a ban on clerical political activity, was concluded on July 2.²⁴ No such agreement with the Protestant churches was forthcoming, however. German Protestantism was both geographically and theologically fractured, divided into twenty-eight regional churches split among Lutheran, Reformed, and United denominations. The ultra-nationalist German Christian movement, founded in Thuringia in 1932, placed the German *Volk* as the subject of a Christian history of salvation and provided enthusiastic support for the National Socialist revolution.²⁵ Not only German Christians celebrated the Nazi rise to power, however. National Socialism appealed to many Protestants,

²³ For an alternative interpretation, arguing that Barth's rejection of overtly confessional politics paved the way toward a pragmatic acceptance of the Weimar Republic, see Rudy Koshar, "Demythologizing the Secular: Karl Barth and the Politics of the Weimar Republic," in *The Weimar Moment: Liberalism, Political Theology, and Law*, eds. Leonard V. Kaplan and Rudy Koshar (Lanham, MD: Lexington Books, 2012), 313-334. However, the larger argument stands that Barth and his allies did not speak out forthrightly against the destruction of the Weimar Republic, and raised their voices in opposition only when the Nazi regime began dismantling the traditional structures of the Protestant churches.

²⁴ Chamedes, "Vatican," 149-150.

²⁵ See Bergen, *Twisted Cross*, especially 21-43 on German Christian views of *Volk* and race.

from the clerical hierarchy to ordinary churchgoers, who believed that Hitler's movement would bring about a national spiritual renewal and reverse the economic blight and diplomatic humiliation associated with the Weimar Republic.²⁶ The Lutheran theologian Otto Dibelius, superintendent of the Brandenburg church province of Kurmark, greeted the new regime in a circular letter to his subordinates, three days after elections of March 5 confirmed the National Socialist-led coalition: "What a contrast between the new Parliament and...the National Assembly of Weimar! There will be only very few of us who do not celebrate this turn with all our hearts."²⁷

The hopes of Protestant elites such as Dibelius that the National Socialist regime would nourish local religious life soon vanished. In mid-1933, German Christians were elected to majorities in regional synods throughout Germany following intense propaganda campaigns and voter mobilization by Nazi *Gauleiters*; the German Christian pastor Ludwig Müller was elected Reich bishop on September 27.²⁸ The Berlin pastors Martin Niemöller and Gerhard Jacobi formed the Pastors Emergency League in October 1933 in opposition to German Christians' "encroachments...on the Reformation confessions." Above all, the Pastors Emergency League

²⁶ The greater propensity of Protestants than Catholics to vote for the NSDAP was noted by early social historians of the Nazi electorate. These historians attributed this result primarily to Protestants' lack of a confessional party on par with the Catholic Center, while also noting the significance of Nazi appeals to rural, religious Protestants. See Thomas Childers, *The Nazi Voter: The Social Foundations of Fascism in Germany* (Chapel Hill: University of North Carolina Press, 1983), 258-261 and Richard F. Hamilton, *Who Voted for Hitler?* (Princeton: Princeton University Press, 1982), 361-385. For approaches that stress the ideological affinity between National Socialism and the nationalist Protestantism that had gained ground since the nineteenth century and especially in the Weimar Republic, see Hartmut Lehmann, "Hitlers evangelische Wähler," in Lehmann, *Protestantische Weltsichten: Transformationen seit dem 17. Jahrhundert* (Göttingen: Vandenhoeck & Ruprecht, 1998), 130-152 and Richard Steigmann-Gall, "Apostasy or Religiosity? The Cultural Meaning of the Protestant Vote for Hitler," *Social History* 25 (2000): 267-284. For regional case studies of Protestant enthusiasm for National Socialism in 1933, see Manfred Gailus, "1933 als protestantisches Erlebnis: emphatische Selbsttransformation und Spaltung," *Geschichte und Gesellschaft* 29 (2003): 481-511 (on Berlin) and Samuel Koehne, "Nazi Germany as a Christian State: The 'Protestant Experience' of 1933 in Württemberg," *Central European History* 46 (2013): 97-123.

²⁷ Cited in Hartmut Fritz, *Otto Dibelius: ein Kirchenmann in der Zeit zwischen Monarchie und Diktatur* (Göttingen: Vandenhoeck & Ruprecht, 1998), 386.

²⁸ John Conway, *The Nazi Persecution of the Churches, 1933-1945* (New York: Basic Books, 1968), 41-48.

criticized German Christian attempts to remove baptized pastors and church officials of Jewish descent by implementing the "Aryan Paragraph" of Nazi civil service laws within the churches. In the ensuing conflict for control over the churches, termed the "Church Struggle [*Kirchenkampf*]" in the parlance of contemporaries and subsequent commentators, Protestants divided into three factions: German Christians loyal to Bishop Müller; the Confessing Church that emerged from the Pastors Emergency League and opposed the German Christian takeover of the synods; and a broad unaffiliated middle, concentrated around the "intact" Lutheran churches of Bavaria, Hannover, and Württemberg that retained their independence and resisted cooptation into the churches coordinated under Müller.²⁹ The inaugural Confessing Church synod at Barmen in May 1934 issued a rebuke to German Christian theology that became the Confessing Church's foundational statement of faith. Drafted principally by Karl Barth, the Barmen Declaration proclaimed the Gospel of Jesus Christ, rather than the "spirit of worldly authority," to be the sole foundation of Christianity. Yet the Barmen statement criticized the "totalitarian" state only for infringing upon the proper sphere of the church, without drawing attention to Nazi violations of the rights of individuals, let alone of Jews.³⁰

The subordination of the legal profession followed a different pattern. Hitler and his ministers viewed jurists less as potential sources of subversion than as professionals whose cooptation was necessary to secure the legitimacy of the regime in the eyes of conservatives. Despite the rupture of the Enabling Act of March 23, 1933, which allocated permanent emergency powers to Hitler's chancellery and abrogated constitutional government, the regime implemented most legal changes gradually, in order to preserve the facade of a "national

²⁹ Hockenos, *A Church Divided*, 15-23, quoted 22.

³⁰ "Theological Declaration of Barmen (Confessing Church, May 1934)," in Hockenos, *A Church Divided*, 179-80. The Barmen statement has been subjected to innumerable interpretations; for a concise overview, see Hockenos, *A Church Divided*, 23-28.

Rechtsstaat" to which jurists disillusioned with Weimar democracy could assent.³¹ Constitutional lawyers divided into groups who emigrated (primarily Jews and Social Democrats), who actively supported the Nazi state, and who retired or retreated to non-political scholarship.³² Jurists who refused to supply the regime with legal justifications found their professional positions under attack while still experiencing pressure to join National Socialist organizations. The Protestant constitutional scholar Rudolf Smend joined the Association of National Socialist German Jurists in March 1934, even as he was forced to move from his elite Berlin chair to the provincial Göttingen to make way for the Nazi stalwart Reinhard Höhn.³³

Orders of Creation Theology, Natural Law, and the Total State

Jurisprudence and Protestant theology were largely isolated disciplines during the Weimar Republic, whose members interacted far less than after 1945. Statutory positivism, which regarded law as a self-contained system of norms that admitted of no external influences, remained a dominant legal methodology, despite being increasingly challenged by a younger generation of jurists.³⁴ Religion was a marginal issue for most jurists; religious themes rarely appeared in the flagship journals of the legal profession, and then only with regard to technical issues of church-state relations.³⁵ However, by the late 1920s, nationalist jurists and theologians

³¹ Michael Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany*, trans. Thomas Dunlap (Chicago: University of Chicago Press, 1998), 142-143.

³² *Ibid.*, 96-98. A comprehensive portrait covering individual university faculties is offered in Stolleis, *A History of Public Law in Germany, 1914-1945*, trans. Thomas Dunlap (Oxford: Oxford University Press, 2004), 249-331.

³³ Bund Nationalsozialistischer Deutscher Juristen to Rudolf Smend, March 1, 1934, SUB Göttingen, Nachlass Smend, Cod. Ms. R. Smend C 13; Stolleis, *History of Public Law*, 262-263.

³⁴ Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham: Duke University Press, 1997), 63-84.

³⁵ The churches were the subject of only three articles in the *Archiv des öffentlichen Rechts*, the flagship journal in the field of public law, during the period of the Weimar Republic: Friedrich Giese, "Das Kirchenpolitische System

critical of the Weimar constitution had begun to form professional networks and engage each other's works. Detractors of Weimar legal positivism, who criticized the Weimar Constitution as a mere collection of rules devoid of a unifying principle, could adopt the ideal of a "national cultural state [*nationale Kulturstaat*]" espoused by prominent Lutheran theologians.³⁶

The consolidation of the Nazi state in the first months of 1933 opened new paths of exchange between conservative Protestant jurists and theologians. The regime won strong and early acclaim from representatives of both disciplines, who during its early years found their professional fortunes enhanced. Intellectual enthusiasts of Nazi rule praised the new regime's ability to project unitary sovereignty and to express the coherence and purpose of the national community. For the administrative law professor and president of the Protestant Gustav Adolf Association Hans Gerber, the National Socialist state reflected the "historical self-representation of the *Volk*."³⁷ The nationalist theologian Friedrich Gogarten similarly celebrated the German Christian victories of 1933 as a rejoinder to the collapse of the *Volk* into "conflicts of interest" during the Republic.³⁸ The shared rhetoric of jurists and theologians in support of the Nazi state was rooted not only in their conservative-nationalist politics but in a common conceptual logic: Both groups rejected rationalism and natural law.

der Weimarer Verfassung," *Archiv des öffentlichen Rechts* 7 (1924): 1-70; Hans Liermann, "Das evangelische Konkordat," *Archiv des öffentlichen Rechts* 13 (1927): 381-431; Günter Holstein, "Über die Rechtsgrundlagen der Staatsleistungen an die evangelischen Landeskirchen Deutschlands," *Archiv des öffentlichen Rechts* 18 (1930): 161-187. The major work on Protestant ecclesiastical law of the period, the Greifswald jurist Günther Holstein's *Die Grundlagen des evangelischen Kirchenrechts* (Tübingen: J. C. B. Mohr, 1928), received little attention apart from specialists in the subject.

³⁶ For an overview of these exchanges, see Tanner, *Fromme Verstaatlichung*, 194-195. More broadly on the Lutheran ideal of a *nationale Kulturstaat*, see Tanner, *Fromme Verstaatlichung*, 186-262.

³⁷ Hans Gerber, *Das ewige Reich* (Tübingen: J. C. B. Mohr, 1935), 8. For Gerber's earlier engagement with nationalist Lutheran theology, see Gerber, *Die Idee des Staates in der neueren evangelisch-theologischen Ethik* (Berlin: Junker und Dünnhaupt, 1930). See also Stolleis, *History of Public Law*, 296-297.

³⁸ Friedrich Gogarten, *Einheit von Evangelium und Volkstum?* (Hamburg: Hanseatische Verlagsanstalt, 1933), 18.

For many nationalist jurists, the formation of the Nazi state promised the resolution of the political and theoretical problems of the Weimar years. In particular, jurists who proposed legal doctrines for National Socialism aimed to overcome the impasse between natural law and legal positivism that framed German constitutional debates of the 1920s. In the Weimar Republic, the leading exponents of legal positivism—concisely defined as "the notion that law is what a lawgiver has set forth (or posited), regardless of its morality or justice"—were liberal jurists such as Gerhard Anschütz, Hugo Preuss, and Richard Thoma. For these jurists, staunch defenders of the Weimar Constitution, statutory law emanated from the will of the German people, represented through the parliamentary state.³⁹ The most prominent interwar expositor of legal positivism, the Austrian constitutional theorist Hans Kelsen, sought to overcome the tension between the ideal of a democratic general will and the reality of social disunity by deriving all law from a "basic norm" that presupposed the validity of the legal system as such.⁴⁰ Many jurists remained unsatisfied with this solution. Critics of legal positivism argued that the Weimar parliament had devolved into competing interest groups that failed to represent the popular will. Only the sovereign decision, whether of the executive or of the people represented through direct, plebiscitary means, could serve as the true source of legitimacy.⁴¹ At the same time, detractors of legal positivism widely regarded the idea of natural law to represent an untenable restriction on state sovereignty. Calls to ground positive law in natural law remained an unusual stance even among conservative Weimar jurists; most criticized legal positivism for its failure to

³⁹ Caldwell, *Popular Sovereignty*, 63-65. For the cited definition of legal positivism, see Douglas G. Morris, "Write and Resist: Ernst Fraenkel and Franz Neumann on the Role of Natural Law in Fighting Nazi Tyranny," *New German Critique* 42, no. 3 (2015): 199.

⁴⁰ Caldwell, *Popular Sovereignty*, 88-96.

⁴¹ For classic works in this vein, see Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge, MA: MIT Press, 1988) and Schmitt, *Legality and Legitimacy*, trans. Jeffrey Seitzer (Durham: Duke University Press, 2004). On Weimar-era debates about legal positivism, see also David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford: Clarendon Press, 1997).

grasp the sociological complexities of contemporary life and its lack of a clear theory of sovereignty.⁴²

The constitutional theorist Carl Schmitt was the most prominent Weimar jurist to turn to an authoritarian solution to the problem of the state's legitimacy with the concept of the "total state," which he introduced already in 1932. A state that centralized the means of rule "separate from society" while resisting colonization by narrow-minded interest groups, Schmitt's total state represented a repudiation of Weimar liberalism and the positivist legal doctrines that undergirded it. Schmitt also eschewed the idea of a natural law superior to the will of the sovereign, regarding the executive as the ultimate guardian of law.⁴³ Following Hitler's assumption of power, Schmitt's concept of the total state became a favored rhetorical weapon among nationalist jurists. In a widely-circulated text published in May 1933, Schmitt's student Ernst Forsthoff developed the category in an explicitly racist direction. According to Forsthoff, the "total state" inaugurated by the National Socialist revolution was anchored in both an "order of authority" that divided rulers from the ruled as well as an "order of the people" that established a racially homogenous community, "distinguish[ing] friend from enemy."⁴⁴

The son of a Protestant pastor and himself a student of Protestant theology at Tübingen during the mid-1920s, Forsthoff imagined the "total state" as the fulfillment of a vision of Protestant national unity. Through his father, Forsthoff had established contact with nationalist Lutheran theologians including Friedrich Gogarten and Wilhelm Stapel already during the early 1930s; he joined the leadership of the German Christians following the rise of the Nazi regime,

⁴² Morris, "Write and Resist," 199-200.

⁴³ Peter C. Caldwell, "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State, 1933-1937," *Cardozo Law Review* 16 (1994): 415-416. More broadly on the link between Weimar anti-positivism and Nazi legal theory, see Stolleis, *Law Under the Swastika*, 87-101.

⁴⁴ Ernst Forsthoff, *Der totale Staat* (Hamburg: Hanseatische Verlags-Anstalt, 1933), 30, 38 (quoted).

remaining involved with the movement until 1936.⁴⁵ Moreover, Forsthoff's notion of the total state found wide resonance among Protestant theologians during the early years of the Third Reich, in particular among proponents of a theology of "orders of creation" around Paul Althaus. Aligned with the "intact" Lutheran churches, Althaus' cohort included signatories of the June 1934 Ansbach Memorandum, a Lutheran rejoinder to the Confessing Church's Barmen Declaration that emphasized the obedience owed to Hitler as a "pious and faithful sovereign."⁴⁶ Following Schmitt and Forsthoff, orders of creation theologians affirmed theories of the total state that expressly *rejected* natural law. Not only did these nationalist Lutherans agree with the politics and anti-positivism of Nazi jurists, but they drew on long-standing Protestant critiques of natural law to provide an independent justification for Nazi dictatorship.

The writings of the young Lutheran theologian Walter Künneth exemplify how Protestant apologists for Nazism marshaled orders of creation theology to criticize natural law doctrines and defend the Nazi state. A student of Althaus' colleague Friedrich Brunstäd during the early 1920s, Künneth served as a leader in the Young Reformation movement, a predecessor to the Confessing Church that opposed the exclusion of Christians of Jewish descent from the Protestant clergy but continued to espouse a deeply antisemitic theology.⁴⁷ Künneth edited a volume with contributions by leading young theologians and lay Protestant intellectuals that sought to demonstrate the relevance of the Christian message in the Nazi state, producing five editions between 1933 and 1937. Künneth's theology rested on an understanding of creation as an ongoing process of God's active preservation of the world, rather than an idealist or deist view

⁴⁵ Florian Meinel, *Der Jurist in der industriellen Gesellschaft: Ernst Forsthoff und seine Zeit* (Berlin: Akademie Verlag, 2011), 16-24.

⁴⁶ Ericksen, *Theologians Under Hitler*, 87.

⁴⁷ Hockenos, *A Church Divided*, 19-21.

on the one hand (a "watchmaker" God gave order to the world but then departed from it) or a postlapsarian fatalism on the other (the Fall so corrupted the world that no human institution bore the trace of divine intervention). For Künneht, God maintained the world through divinely-mandated "orders of preservation," institutions such as marriage, family, state, and profession. In the context of 1933, an uncritical adoption of the National Socialist category of the *Volk* proved easily compatible with this theology, leading Künneht to regard the *Volk* as an order of God. The "fateful integration and differentiation of humanity into *Völker* and races," Künneht wrote, were "manifestations of the will of God."⁴⁸ The "principled Yes of the church to the 'national revolution'" followed from "the question of the order of God."⁴⁹

Künneht's valorization of the categories of *Volk* and race might be ascribed to a "natural theology," but such a reading neglects how Künneht grounded his affirmation of the National Socialist state in an insistence on the primacy of God's revealed word. Künneht acknowledged that the orders of creation were dimly intelligible via individuals' natural existence but argued that their divine purpose was illuminated only through biblical revelation.⁵⁰ Moreover, Künneht rejected the "scholastic-Thomist teaching of 'natural law'" as a structure that could be known apart from divine revelation:

Natural law leads to a conception of nature stemming not from revelation but from Aristotelian-Stoic philosophy and is burdened by the principal misunderstanding, contradicting Christian revelation, that one could rescue the realm of the natural, rational, moral from the Fall and sin, and raise the orders of the kingdom of nature over the supernatural kingdom of grace.⁵¹

⁴⁸ Walter Künneht, "Die biblische Offenbarung und die Ordnung Gottes," in *Die Nation vor Gott: zur Botschaft der Kirche im dritten Reich*, ed. Walter Künneht, 3rd ed. (Berlin: Wichern Verlag, 1934), 25-28, 40 (quoted).

⁴⁹ *Ibid.*, 36.

⁵⁰ *Ibid.*, 37.

⁵¹ *Ibid.*, 29.

Künneth's appeal to revelation over "Aristotelian-Stoic philosophy" reflected not only a widespread Protestant critique of natural theology for its optimism about human nature. His rejection of natural law also resonated with the language of concreteness and decisionism characteristic of Nazi rhetoric in general and the theory of the total state in particular. Because the divinely-mandated orders were grounded in the "concrete commands of the Bible" rather than general norms, Künneth argued, the individual was "called in unconditional responsibility before changing concrete situations." Biblical revelation provided an "orientation" for political behavior but did not absolve the individual of the "free concrete decision." For Künneth, this orientation must always be *toward* obedience to God's orders, including the state, as explained in Paul's injunction to subordination to political authority in the Epistle to the Romans.⁵²

Orders of creation theology was therefore not, as Karl Barth and his followers asserted, merely a recapitulation of a Catholic or German Christian natural theology. Alongside Künneth, adherents of orders of creation theology contrasted a static "nature," which bore connotations of rationalism and deism, with a concept of creation that indicated God's active presence in the world. As Paul Althaus' student Heinz-Dietrich Wendland wrote in an essay published in Künneth's volume, "Creation is not a rigid natural-being but uninterrupted presence of divine creative action and therefore at the same time becoming and happening; creation is an event." A Christian understanding of the *Volk* was bound to "revelation in the gospel"; the fate of the *Volk* was "no natural law" but an ongoing dialectic of divine creation and forgiveness in Christ.⁵³ The state, along with the *Volk*, marriage, and the economy was "a creation of God's mercy," a fact that could not be known to natural reason alone.⁵⁴

⁵² Ibid., 39-40.

⁵³ Heinz-Dietrich Wendland, "Volk und Volkstum," in *Die Nation vor Gott*, ed. Künneth, 142-147, quoted 144-145.

⁵⁴ Heinz-Dietrich Wendland, "Staat und Reich" in *Die Nation vor Gott*, ed. Künneth, 181.

This concept of the state, as both a divinely-instituted order and a reflection of the history and character of the *Volk*, not only disabled a critique of National Socialism but allowed proponents of orders of creation theology to explicitly appropriate the concept of the total state developed by Nazi legal scholars. Paul Althaus could thus argue, "According to the Lutheran view, there is no '*natural law*' that contains general norms for the correct formation of the state order, such as democracy." The "total state" remained a superior political form because it overcame the tendency of the liberal state toward social fragmentation, so long as it "serve[d] the life of the *Volk* according to God's will."⁵⁵ Heinz-Dietrich Wendland suggested that the individual had no "natural right" to freedom but could be free only in obedience to the orders created by God.⁵⁶ The Swiss theologian Emil Brunner, a delegate alongside Althaus at an April 1934 Paris ecumenical conference on "The Church and the Problem of the State in the Present," emphasized that "There is no best state form, either authoritarian or democratic."⁵⁷

The framework of orders of creation theology not only enabled Protestant theologians to offer a Christian defense of the total state, but allowed National Socialist jurists with close ties to the Protestant churches to seek a Christian basis for their theories. This link is evident in the career of the jurist closest to the circle around Künneht and Wendland during the early part of the National Socialist regime, Erik Wolf, whose rejection of natural law in favor of the authoritarian Nazi state drew deeply from contemporary Protestant thought. A student of the eminent legal philosopher Gustav Radbruch in the mid-1920s, Wolf came under the influence of the

⁵⁵ Paul Althaus, "Zum gegenwärtigen lutherischen Staatsverständnis," in *Die Kirche und das Staatsproblem der Gegenwart*, ed. Paul Althaus, 2nd ed. (Berlin: Furche-Verlag, 1935), 7-8, emphasis in original.

⁵⁶ Heinz-Dietrich Wendland, "'Christliche' Freiheit, kreatürliche Freiheit und totaler Staat," in *Totaler Staat und Christliche Freiheit* (Genf: Forschungsabteilung des Oekumenischen Rates für Praktisches Christentum, 1937), 163-164.

⁵⁷ Emil Brunner, "Kirche und Staat," in *Kirche und das Staatsproblem*, ed. Althaus, 15.

notoriously pro-Nazi rector Martin Heidegger as a young professor of criminal law at the University of Freiburg, where he was appointed dean of the law faculty in late 1933 at the age of thirty-one.⁵⁸ Wolf's inaugural lecture put forth a legal theory of National Socialism as an alternative to both legal positivism and natural law. Wolf's argument depended on an opposition between abstract reason and concrete situations that resonated strongly with Protestant theologies of divinely-mandated orders. Both positivist and natural law theories, Wolf claimed, treated law as the realization of an abstract principle, whereas "just law in the National Socialist state" was rooted in the "existence" of the "German *Volksgemeinschaft* in which we live."⁵⁹ A "fundamentally necessary connection between National Socialism and Christianity" resided in their common mission to preserve the divinely-mandated orders of "race and peoplehood."⁶⁰

Wolf linked his affirmation of the National Socialist state to a Protestant rejection of natural law even more clearly in a revised version of his inaugural lecture published in the 1934 edition of Walter Künneth's collection.⁶¹ In this essay, Wolf developed his critique of natural law in a distinctly anti-liberal direction, claiming that the natural law teachings of the Catholic Church depended on "the Aristotelian presupposition of the constitution of human beings as abstractly free and naturally equal rational subjects." Protestant theology, on the other hand, rejected the rationalism of the Catholic Church and its attendant idea of the natural equality of human beings in favor of a jurisprudence for which "there are no final...legal norms" standing

⁵⁸ Alexander Hollerbach, *Jurisprudenz in Freiburg: Beiträge zur Geschichte der Rechtswissenschaftlichen Fakultät der Albert-Ludwigs-Universität* (Tübingen: Mohr Siebeck, 2007), 332, 336.

⁵⁹ Erik Wolf, *Richtiges Recht im nationalsozialistischen Staat* (Freiburg: Fr. Wagnersche Universitätsbuchhandlung, 1934), 9.

⁶⁰ *Ibid.*, 26.

⁶¹ On the link between the two essays, see Reinhard Mehring, "Rechtsidealismus zwischen Gemeinschaftspathos und kirchlicher Ordnung: Zur Entwicklung von Erik Wolfs Rechtsgedanken," *Zeitschrift für Religions- und Geistesgeschichte* 44 (1992): 147.

above history.⁶² Wolf's anti-rationalism and emphasis on the absence of legal norms in a fallen world not only deprived him of a basis on which to critique the Nazi state, but as in the writings of Künneht and Wendland, enabled an explicit defense of the total state. In particular, Wolf perceived an affinity between the concept of divine orders of creation and Ernst Forsthoff's notion of the "total state" as an "organic unity" of hierarchically arranged orders organized around a personal sovereign.⁶³ The mandate of the Protestant churches was therefore never to impose "supra-state law" but to preserve the divinely-mandated institutions of "marriage, family, and community as fundamental elements of the order of the *Volk*."⁶⁴

Wolf's writings during the early years of National Socialism, as well as those of other Protestant jurists sympathetic to the regime such as Hans Gerber, were emblematic of the appropriation of orders of creation theology by jurists seeking to elaborate a legal doctrine of the Nazi state.⁶⁵ An interdisciplinary meeting hosted by the *Luther-Gesellschaft* in Wittenberg in March 1935 on the question of "whether and how law is grounded in a reality that is accessible to faith alone" exemplified the intellectual problems entailed in this newfound encounter between law and theology.⁶⁶ Organized by the society's director Paul Althaus, the conference was attended by the orders of creation theologians Friedrich Brunstäd, Friedrich Gogarten, and Heinz-Dietrich Wendland; representatives of an older generation of Protestant jurists including Rudolf Smend and the scholar of ecclesiastical law Hans Liermann; and the Confessing Church

⁶² Erik Wolf, "Richtiges Recht und evangelischer Glaube," in *Die Nation vor Gott*, ed. Künneht, 258.

⁶³ *Ibid.*, 249.

⁶⁴ *Ibid.*, 257.

⁶⁵ In addition to the work by Hans Gerber already cited, see Gerber, "Recht – Staat – Bekenntnis. Eine Untersuchung zum Verhältnis von Recht und Religion, Staat und Kirche," *Zeitschrift für Theologie und Kirche* 16 (1935): 97-120.

⁶⁶ Paul Althaus to Rudolf Smend, February 8, 1935, SUB Göttingen, Nachlass Smend, Cod. Ms. R. Smend O 81.

legal experts Hermann Ehlers and Wilhelm Flor.⁶⁷ The Greifswald administrative jurist Arnold Köttgen delivered a keynote address reiterating what had become a common case for the compatibility of Protestant theology with Nazi jurisprudence: Both aimed to overcome the dichotomy of legal positivism and natural law. According to Köttgen, positivism reduced law to mere form and could not explain the ultimate source of legal authority. In attempting to redress this error, natural law lost sight of the historical life of the *Volk*, positing eternal legal norms. Protestant theology, by contrast, provided jurisprudence with a concept of "obedience" absent from legal positivism, while acknowledging the cleft between human and divine justice overlooked by natural law doctrines.⁶⁸ Aside from Smend's handwritten notes, no record of the reception of Köttgen's lecture exists. However, the eclectic attendance suggests that Köttgen's position was not that of a fringe Nazi but one shared by German Protestant intellectuals across a wide political spectrum, including by members of the Confessing Church.

For Protestant theologians and jurists writing in the early years of the National Socialist regime, the political consequence of a theology of orders that prioritized the obedience demanded by biblical revelation over the fixed norms of natural law was an uncritical attitude toward the Nazi state. The affirmations of the total state proffered by theologians such as Althaus, Künneth, and Wendland, as well as jurists such as Wolf, Gerber, and Köttgen, stood in contrast to an emergent Catholic anti-totalitarianism. A 1935 "Syllabus of Errors" prepared by the Vatican Holy Office condemned Nazi "totalitarianism" in the name of Aristotelian-Thomist natural law, and in his 1942 Christmas message Pope Pius XII championed the God-given

⁶⁷ Participant list for "Tagung der Luther Gesellschaft e.V., 8.-12. März 1935 in Wittenberg," SUB Göttingen, Nachlass Smend, Cod. Ms. R. Smend O 81.

⁶⁸ Arnold Köttgen, "Glaube und Recht," *Luther Jahrbuch* 17 (1935): 36-55, especially 38-40 and 46-48.

"dignity of the human person" as a universal right.⁶⁹ Catholic political thought of the 1930s did not inherently correspond to a more democratic politics than its Protestant counterpart, but their repudiation of natural law deprived German Protestants after 1933 of one potentially powerful language for issuing a critique of a regime that recognized no limits to its sovereignty. The widespread rejection of natural law among German Protestants, moreover, ensured that both Protestant affirmations and critiques of Nazism would be framed around a situational ethics according to which biblical revelation must always be interpreted in light of concrete circumstances.

Beyond Orders of Creation: Law and the Confessing Church

While orders of creation theology remained the dominant framework for relating theology and law among Lutheran theologians associated with the intact churches, the wing of the Confessing Church around Karl Barth that spearheaded the Barmen Declaration offered a systematic critique of this theological model. Contextualizing the theology of the Confessing Church within contemporary legal debates sheds light on the vexed question of its relationship to the Nazi state. After the war, Confessing Church members advanced hagiographic accounts; one prominent pastor claimed that his cohort had defended not only the "rights of the church" but the "rights of all of the disenfranchised."⁷⁰ On the other hand, more recent scholarship has emphasized the limits of the Confessing Church. Hardly a resistance organization, historians

⁶⁹ Chamedes, "Vatican," 194; Moyn, *Christian Human Rights*, 52, 83. On the reorientation of Catholic neo-Thomism during the 1930s around ideas of anti-totalitarianism, see also James Chappel, "The Catholic Origins of Totalitarianism Theory in Interwar Europe," *Modern Intellectual History* 8 (2011): 561-590.

⁷⁰ Heinrich Albertz to Martin Albertz, "Die Vorläufige Kirchenleitung der Deutschen Evangelischen Kirche," August 3, 1951, Universitätsarchiv der Freien Universität Berlin, Bestand APO, Nachlass Helmut Gollwitzer, Box 1. Although Heinrich Albertz did not sign this letter to his half-brother, the identity of the author is evident from the text.

have argued, the Confessing Church was at most a reformist theological movement concerned to preserve the integrity of the Gospel, while acquiescing to the Nazi state's abrogation of constitutional government and abetting its antisemitism.⁷¹ Significant evidence supports the latter view. Early resolutions of Confessing synods, including the Barmen Declaration, focused on the German Christian takeover of Protestant church administrations, without discussing the rights of those persecuted by the regime.⁷² The preservation of church and Gospel against external attacks was also the core aim of jurists in the service of the Confessing Church. As the Confessing Church legal adviser Wilhelm Flor stated in a 1934 pamphlet, "The fight for the Protestant Church is very closely connected to the fight for law *within the church*."⁷³

Despite these limitations, however, Confessing Church members inaugurated an alternative legal-theological exchange under National Socialism by recognizing early on the conceptual linkages between orders of creation theology and theories of the total state. In response to their counterparts who wholeheartedly endorsed the regime, Confessing Church jurists and theologians adumbrated a language of inner freedom from the dictates of state authority, which would later be adopted by wartime oppositional circles whose members sought to theorize a Christian basis for law in a post-Nazi Germany.

The preeminent theologian behind the Confessing Church's rejection of orders of creation theology was indisputably Karl Barth. The division between Barthian and orders of creation

⁷¹ A historiographical turning point on the antisemitism of the Confessing Church was Gerlach, *And the Witnesses Were Silent*, completed as a dissertation in 1970 but not published until 1987 due to opposition from Confessing Church veterans and leading Protestant church historians. On the opposition initially encountered by the work, see Gerlach's preface to the English edition. For critical scholarship on the Confessing Church, see the works cited in the introduction (note 45).

⁷² See the documents collected in Erik Wolf, ed., *Im Reiche dieses Königs hat man das Recht lieb: Der Kampf der Bekennenden Kirche um das Recht* (Tübingen: Furche-Verlag, 1946), 11-16.

⁷³ Reichsgerichtsrat Flor, "Kirche und Recht," in *Kampf der Bekennenden Kirche*, 43, emphasis added. Flor's pamphlet was privately circulated among Confessing Church members.

theology coalesced in Barth's famous exchange with his erstwhile theological ally Emil Brunner in 1933-34. During the 1920s, Brunner, along with Barth, had been an exponent of the "dialectical theology" movement that sought to displace the dominant liberal Protestantism through a radical Christocentrism. After the rise of the Third Reich, however, long-simmering theological and political differences between the two erupted into a rhetorical battle that commanded the attention of activists on all sides of the conflict within the Protestant churches. At stake in the debate between Barth and Brunner was the viability of "natural theology" as an avenue for a Protestant doctrine of revelation. According to Barth, Protestants should entirely dispense with the category of natural theology, on the grounds that divine revelation occurred in Christ alone as recorded in the Gospels. For Brunner, God's revelation also took place in the created world, though a sinful humanity required biblical revelation in order to recognize its natural counterpart.⁷⁴

At another moment, the controversy between Barth and Brunner might have remained academic, resting on technicalities of little interest to most lay Protestants or even theologians. In the heady atmosphere of the early years of the Third Reich, however, the conflict quickly assumed political significance and led to a breakdown of relations between the former colleagues and their respective allies. More significant than the nuances of the disagreement, Paul Althaus and Friedrich Gogarten, both prominent theologians sympathetic to the German Christian movement, published favorable reviews of Brunner's mid-1934 tract *Nature and Grace*. Seizing on the reviews as evidence for his suspicions of Brunner's malign politics, Barth shot back in September, just four months after the Barmen Declaration, with a pamphlet parsimoniously

⁷⁴ This conflict has been discussed extensively in the theological literature. For overviews, see McGrath, *Brunner*, 90-132 and John W. Hart, *Karl Barth vs. Emil Brunner: The Formation and Dissolution of a Theological Alliance, 1916-1936* (New York: Peter Lang, 2001), 141-175.

titled, "No!". Brunner's willingness to allow for a "natural" path toward revelation, Barth argued, aligned with the German Christian pretension to perceive God's revelation in the history of the *Volk*. Already in March 1933 Barth had written that theology must "cling solely to the God who has revealed himself in Jesus Christ," in order to overcome the fatal theological error of the German Christians.⁷⁵ Now Barth associated Brunner with this error, concluding that "Brunner has been unable to adhere to *sola fide-sola gratia*."⁷⁶ As the previous section demonstrated, proponents of orders of creation theology never purported to defend natural theology, but linked their defense of the "total state" precisely to a rejection of natural law. By redefining "natural theology" such as to encompass Althaus and Brunner, however, Barth and his allies sought to undermine a theological defense of the total state. At the same time, they continued to face the challenge of articulating a Protestant understanding of law in the absence of a secure normative foundation.

The theologian Ernst Wolf, a close ally of Barth who would emerge as a major figure in Protestant politics after 1945, found his voice as a theological polemicist during the Barth-Brunner controversy. Following his training at Rostock, Wolf (of no relation to the Freiburg jurist Erik Wolf) had assumed a chair in Church History at Bonn on Barth's personal recommendation in 1931, at the age of twenty-nine. Upon the rise of the Nazi regime and the beginning of the Protestant church conflict, Wolf quickly became among his mentor's most vocal supporters. In April 1934, Wolf founded the monthly journal *Evangelische Theologie*, the leading organ of the Barthian wing of the Confessing Church, and would serve as the lead editor until the journal's

⁷⁵ Cited in Hart, *Karl Barth*, 144.

⁷⁶ Cited in Hart, *Karl Barth*, 160.

closure by Nazi censors in October 1938.⁷⁷ Wolf entered the natural theology debate with a 1934 tract on Luther's view of non-Christian religions, published in Barth's series *Theological Existence Today*. Wolf's text presented a minimalistic conception of natural knowledge of God, claiming that individuals have a "natural consciousness of God" that can be filled with content only through divine revelation.⁷⁸ Brunner, seeking to heal the rift with Barth, claimed that Wolf's position on natural theology aligned fully with his own.⁷⁹ Wolf, however, published a rebuke to Brunner in the August 1934 issue of *Evangelische Theologie*. By suggesting that natural revelation could deepen one's knowledge of God, Wolf argued, Brunner gravely misunderstood Reformation teachings.⁸⁰

In a September 1935 essay in *Evangelische Theologie*, Ernst Wolf directly confronted the pretension of Brunner and other partisans of orders of creation theology to have rejected natural law on account of their hostility toward rationalism and neo-Thomism. Wolf now claimed that *both* Catholic neo-Thomism *and* neo-Lutheran orders of creation theology misunderstood the Reformation teaching of the law-gospel relation, albeit in opposite ways. Catholic natural law adopted the "nomian" error of making the receipt of God's grace dependent on a "natural" morality that could be known apart from the Bible. Neo-Lutheran theology, by contrast, indulged the "anti-nomian" error of making gospel and law entirely independent of one another, such that God's grace could become the fulfillment of the "German hour," as Paul Althaus put it, rather than of God's revealed law. In this way, orders of creation theology led back to a crypto-natural

⁷⁷ Wolfgang Maaser, "Wolf, Ernst," in *Biographisch-bibliographisches Kirchenlexikon*, vol. 13, ed. Friedrich Wilhelm Bautz (Hamm: Bautz, 1998), 1495-1501. On Wolf's early friendship with Barth, see the biography in the finding aid to his Nachlass at the Bundesarchiv Koblenz (N 1367), compiled by Bettina Martin-Weber.

⁷⁸ Ernst Wolf, *Martin Luther, das Evangelium und die Religion* (München: Kaiser, 1934), 9-12.

⁷⁹ Hart, *Karl Barth*, 149.

⁸⁰ Ernst Wolf, untitled note, *Evangelische Theologie* 1 (1934): 215-216. Compare Wolf, *Luther*, 27 and Emil Brunner, *Natur und Gnade: Zum Gespräch mit Karl Barth* (Tübingen: J. C. B. Mohr, 1934), 11, 17-18.

law: "The people's law [*Volksgesetz*] as the concretized natural law becomes the necessary presupposition for an effective proclamation of the Gospel."⁸¹ Barth put forth a similar argument against orders of creation theology in "Gospel and Law," a tract written shortly following his return to Basel in July 1935 having lost his Bonn professorship after refusing to swear allegiance to Hitler.⁸² For both Barth and Wolf, God's promise of grace was bestowed freely on all, without respect to qualities of nature and history, and could be known only through biblical revelation. They believed that a proper understanding of divine grace would expose the inadequacies not only of legal positivism and natural law, but also of efforts to ground law in a total state that expressed the unity of the *Volk*.

Karl-Heinz Becker, the only jurist who wrote consistently for *Evangelische Theologie*, offered a more explicit argument for the incompatibility of the total state with a Protestant understanding of law. Trained in both law and theology, Becker, who worked as a pastor in the Bavarian town of Ezelheim from 1930 until his conscription into military service in 1939, was a unique figure in legal-theological exchange under the Third Reich, serving as an intellectual and personal mediator between the two disciplines.⁸³ In a series of articles for *Evangelische Theologie*, Becker drew on Luther's text "On the Freedom of a Christian," the Lutheran Augsburg Confession, as well as Psalms, to contend that the state could legitimately claim the outward but not the inward allegiance of its subjects. A "total state" that demanded "particular

⁸¹ Ernst Wolf, "'Natürliches Gesetz' und 'Gesetz Christi' bei Luther," *Evangelische Theologie* 2 (1935): 306-309, quoted 309.

⁸² Karl Barth, "Gospel and Law," in *Community, State, and Church: Three Essays*, ed. David Haddorff (Eugene, OR: Wipf & Stock, 2004), 91-92. On the circumstances of Barth's expulsion from Germany, see David Haddorff, "Karl Barth's Theological Politics," in *Community, State, and Church*, 12.

⁸³ Karl-Heinz Fix, "Karl-Heinz Becker," in Forschungsstelle für Kirchliche Zeitgeschichte, *Widerstand!? Evangelische Christinnen und Christen im Nationalsozialismus*, <http://de.evangelischer-widerstand.de/html/view.php?type=kurzbiografie&id=55&l=de> (accessed April 15, 2018). Becker's interventions in debates about theology and law are recounted in his "Kampf ums Recht" (see note 1).

ideological theories and impulses in its subjects" violated the Christian's inner freedom. While instructing its members of their duty to fulfill their obligations to the state, the church also had to preach the "true free obedience of the German person" bestowed by God's grace.⁸⁴

Whereas adherents of orders of creation theology affirmed the total state on the basis of a critique of natural law, writers for *Evangelische Theologie* emphasized God's all-encompassing sovereignty even over worldly politics. For Ernst Wolf, the state's violation of the word of God abrogated its claim to the obedience of the individual.⁸⁵ In 1936, Becker went a step further, arguing that where state law was incompatible with Protestant beliefs, Christians must intercede in an effort to revise the law; if this failed, they would confront the biblical command to "obey God rather than men." In such cases, "the church must expressly declare that its members are not bound to state instructions that are unbearable to them," although "their obligation to obedience to all other commands" was not diminished.⁸⁶

The extent of Christian resistance against Nazism advocated in the pages of *Evangelische Theologie* should not be exaggerated. By rejecting natural law, both Ernst Wolf and Karl-Heinz Becker eschewed the notion of a natural right to human freedom or dignity in favor of a narrower conception of "inner" or "Christian" freedom, which concerned only the individual's personal beliefs and allegiances rather than outward actions. Such a concept of freedom could not form the basis for a general doctrine of resistance against the total state but, as Wolf and Becker both acknowledged, permitted disobedience only in instances when the state violated specific biblical

⁸⁴ Karl-Heinz Becker, "Über das theologische und politische Problem der Versöhnung," *Evangelische Theologie* 2 (1935): 127-140, quoted 129 and 135. See also Becker, "Der Christ als Untertan nach lutherischem Bekenntnis," *Evangelische Theologie* 3 (1936): 276-288.

⁸⁵ Wolf, "Natürliches Gesetz," 327.

⁸⁶ Karl-Heinz Becker, "Kirche und Recht," *Christdeutsche Stimmen*, April 15, 1936. The biblical citation is Acts 5:29.

precepts. Even in such cases, Wolf in particular cited an obligation to suffer the consequences of one's disobedience rather than actively resist the state in the name of God's higher law.⁸⁷ Wolf's emphasis on the gap between divine justice and human law reflected the critique of natural law that the circle around Barth shared with orders of creation theologians. As theorists of Christian intervention in state affairs, Wolf and Becker went little beyond arguments proposed by Confessing Church jurists in defense of freedom to proclaim the Gospel. However, by exposing a rift between Christian belief and the total state, even if only at the level of inward allegiance, authors for *Evangelische Theologie* also foreshadowed Protestant attempts later during the Third Reich to develop a stronger conception of "conscience" as the basis for determining the allegiance owed by the Christian to the state.

Natural Law and the 1937 Oxford Ecumenical Conference

German Protestant intellectual life in the mid-1930s centered around preparations for the ecumenical conference organized by the Geneva-based Christian Council for Life and Work, scheduled for July 1937 in Oxford. While the Gestapo revoked the passports of the planned German delegates several weeks prior to the conference, the preparations exposed both the fault lines and ongoing evolution of German Protestant attitudes toward the Nazi state.⁸⁸ The conference, on the theme of "Church, Community and State," took place amidst rising international Protestant criticism of the authoritarian regimes that had taken root throughout Europe, not excepting Nazi Germany.⁸⁹ German Protestant responses to an emergent ecumenical

⁸⁷ Wolf, "Natürliches Gesetz," 327.

⁸⁸ Kenneth C. Barnes, *Nazism, Liberalism, and Christianity: Protestant Social Thought in Germany and Great Britain, 1925-1937* (Lexington, KY: University Press of Kentucky, 1991), 9.

⁸⁹ For instance, see the statement of the conference's organizer: J. H. Oldham, *Church, Community and State: A World Issue*, 2nd ed. (London: Student Christian Movement Press, 1935), 12-13.

anti-totalitarianism indicated a reluctance to criticize the Nazi state directly but also, crucially, a turn away from "orders of creation" theology toward a new emphasis on the responsibility of the individual Christian for ethical decision-making in the political realm.

German preparations for the Oxford conference reflected persistent fissures within the Protestant churches. The official German Protestant Church (*Deutsche Evangelische Kirche*), an umbrella organization of the regional churches that had been coordinated under Reich Bishop Müller following the Nazi assumption of power, organized a series of working groups to prepare papers on topics pertinent to the upcoming conference. At the same time, the Confessing Church split at its February 1936 synod in the Westphalian town of Bad Oeynhausen over the issue of conciliation with the Nazi state. When conservative Lutherans within the Confessing Church sought to gain recognition from the regime as the legitimate leadership of German Protestantism, more radical Confessing Church pastors who aligned with Barthian theology broke off to form a Provisional Church Government [*Vorläufige Kirchenleitung*], which undertook independent preparations for the Oxford conference.⁹⁰

Announcements of the conference in the Protestant press exemplified the ongoing chasm between these groups in their approaches to state and law.⁹¹ Both agreed on the importance of overcoming natural law in favor of a strong distinction between the fallen world of secular

⁹⁰ On the split of the Confessing Church, see Victoria J. Barnett, *For the Soul of the People: Protestant Protest Against Hitler* (New York: Oxford University Press, 1992), 68-71 and Hockenos, *A Church Divided*, 31. Hockenos translates "vorläufige Kirchenleitung" as "Provisional Directory." The provisional government elected by the more radical wing of the Confessing Church at Bad Oeynhausen was the second such body to emerge; an earlier "Provisional Church Government" had been formed by conservatives following a synod organized at Martin Niemöller's parish at Dahlem in October 1934, where the radical wing called for "the replacement of the administrative and governing bodies of the Reich church [led by Bishop Müller] with Confessing synods and councils of brethren." See Hockenos, *A Church Divided*, 28-29. For the purposes of this chapter, I use "Provisional Church Government" or "Confessing Church Provisional Government" to refer to the body formed in February 1936 at Bad Oeynhausen.

⁹¹ On the representation of both the *Deutsche Evangelische Kirche* and the Confessing Church in preparations for the Oxford conference, see also Barnes, "Protestant Thought," 152.

politics and God's redemptive justice; but whereas for the former group this stance led to an appeasement of the Nazi state, for the latter it motivated a reconsideration of Lutheran doctrines of obedience. For the Lutheran pastor Gerhard May, coordinator of the conference preparations around the Foreign Office of the German Protestant Church, the primary adversaries at the upcoming conference were English liberal Protestants, who viewed individuals as fundamentally good and sought to reshape politics according to a Christian natural law. The Lutheran mission, May argued, was to remind world Protestantism that the church's only task in the political realm was to protest the "deification of any human reality." The Church could reconstitute itself in the "new political reality" so long as it distinguished "Christian conscience" from "political reason."⁹² Karl-Heinz Becker, taking the position of the Confessing Church Provisional Government, similarly eschewed natural law but also warned against the opposite danger of a Lutheran affinity for legal positivism, according absolute legal authority to the state and leaving churches silent in the face of their own destruction. According to Becker, Luther himself supported a division between executive and judicial authority, such that the acquiescence of orders of creation theologians to Carl Schmitt's theory of the total state represented a grave miscalculation.⁹³

Questions of law and the state played a central role in the German preparatory discussions for the ecumenical conference. A particular point of contact for jurists and theologians aligned with the official German Protestant Church was the Working Group on Church and State chaired by Heinz-Dietrich Wendland, one of six established by the Church's

⁹² "Vorschau auf die Oxforder Weltkirchenkonferenz 1937," *Junge Kirche*, September 19, 1936. The anonymous author of this report drew heavily on an article by May in the August 1936 volume of *Volk in Werden*.

⁹³ Karl-Heinz Becker, "Zur Vorbereitung der Oxforder Weltkirchenkonferenz 1937," *Theologische Blätter* 16 (1937): 112 and Becker, "Zum Thema der Weltkirchenkonferenz in Oxford 1937," *Evangelische Theologie* 3 (1936): 454.

Foreign Office to coordinate conference preparations, whose members included Erik Wolf, the Munich professor of ecclesiastical law Johannes Heckel, and the Lutheran theologian Friedrich Karl Schumann.⁹⁴ A joint meeting of the "Church and State" and "Church and *Volk*" working groups in January 1937 brought together Heckel, Schumann, Paul Althaus, Walter Künneth, and Hans-Dietrich Wendland, among others, and scholars around these groups generated a significant number of papers on natural law and church-state relations.⁹⁵ By 1937, even conservative Protestant thinkers who had endorsed orders of creation theology at the outset of the Nazi dictatorship avoided a forthright defense of the total state, suggesting instead that the church could fulfill its worldly mission in many possible political forms. Erik Wolf's commentary on the discussions of the "Church and State" working group concluded that "Christian co-responsibility for the formation of public life" could be realized equally under a democratic or totalitarian state.⁹⁶ Hans-Dietrich Wendland submitted a paper to the working group claiming that Christian critiques of the total state rested on "ideas of freedom, equality, and justice" derived from natural law and political ideology rather than Scripture. According to Wendland, the Oxford conference should not devolve into a defense of "Christian democracy" but recognize that *no* state form deserved an exclusive Christian sanction.⁹⁷ While eschewing an

⁹⁴ "Arbeitstagung des Oekumenischen Arbeitskreises innerhalb der Deutschen Evangelischen Kirche vom 20. bis 22. Oktober 1936," Evangelisches Zentralarchiv, Berlin (EZA) 5/4043. Notes from the meeting indicate that Wendland suggested adding Erik Wolf as an additional jurist; later records of the Oxford preparations indicate Wolf's participation.

⁹⁵ Eugen Gerstenmaier to Friedrich Brunstäd, December 3, 1936, and "Sitzung in Dahlem am 22. und 23. Januar 1937. Sachgruppen I und II," EZA 5/4044. Relevant papers by Althaus, Künneth, Schumann, Wendland, Erik Wolf, and Ernst Wolf, as well as the theologians Alfred de Quervain, Hermann Sasse, and Werner Wiesner were submitted to the Church's Foreign Office between November 1936 and May 1937. Paul Althaus, "Sachgruppe I," EZA 5/4044 and Bann, "Sachgruppe II: 'Kirche und Staat,'" EZA 5/4045.

⁹⁶ Erik Wolf, "Bemerkungen zu dem Entwurf für die Diskussionsgrundlage über 'Kirche und Staat,'" March 1937, EZA 5/4045.

⁹⁷ Heinz-Dietrich Wendland, "Grundfragen des gegenwärtigen ökumenischen Gesprächs," in *Kirche, Volk, und Staat: Stimmen aus der deutschen evangelischen Kirche zur Oxforder Weltkirchenkonferenz*, ed. Eugen Gerstenmaier (Berlin: Furche-Verlag, 1937), 227-232, quoted 227.

overt affirmation of National Socialism, Wolf and Wendland continued to suggest that in the absence of natural law, the Christian was bound to work within the existing state.

Although spearheaded by conservative Lutherans who sharply distinguished the ethics of gospel from questions of political form, the Oxford preparations of the official German Protestant Church also occasioned a more thoroughgoing reevaluation of the relationship between Protestant theology and the total state. In a February 1937 lecture, the young jurist Johannes Poppitz, a student of Hans Gerber at Leipzig, reframed Protestant political ethics to emphasize individual *responsibility* for the political order in the absence of fixed norms derived from natural law or Scripture.⁹⁸ Poppitz delivered his remarks before an ecumenical preparatory workshop on "Religion and Law" whose participants included the leading Protestant jurists Hans Gerber, Friedrich Giese, Arnold Köttgen, Hans Liermann, Walther Schönfeld, and Rudolf Smend.⁹⁹ Poppitz opened his lecture by noting that the recent scholarship of Protestant jurists, including Köttgen, Schönfeld, and Erik Wolf, sought a new foundation for law beyond positivism and natural law by way of Protestant theology. Poppitz did not celebrate the total state as the overcoming of abstract doctrines of law, however. Rather, Poppitz argued that in recognition of the gap between the ideals of law and the fallen reality of the world, Protestants must place greater emphasis on human "responsibility" for the establishment of standards of justice, a "risk" without which legal order could not be preserved. The importance of religion for law lay not in any "deification" of the *Volk* but in making individuals aware of this

⁹⁸ On Poppitz's biography, see Jörg Winter, *Die Wissenschaft vom Staatskirchenrecht im Dritten Reich* (Frankfurt: Peter Lang, 1979), 222. Poppitz, who was killed in battle in 1943, should not be confused with Johannes Popitz, the Prussian finance minister and participant in the July 20, 1944 plot against Hitler.

⁹⁹ Hans Gerber to Friedrich Giese, January 18, 1937 and "Studientagung über das Thema 'Religion und Recht,'" Bundesarchiv (BArch) Koblenz, Nachlass Friedrich Giese, N 1117/8. Erik Wolf appeared on the initial list of participants but was unable to attend. Smend's name does not appear on the initial invitation list, but his participation is noted in the meeting minutes.

responsibility.¹⁰⁰ Nazi legal doctrine, by contrast, was a form of both crypto-positivism and natural law that asserted the "total, causal, racial determination of all happenings," divesting law of human control rather than permitting a space of individual responsibility for legal order.¹⁰¹

Poppitz's effort to articulate a Protestant alternative to Nazi theories of law found acclaim in the discussion following his lecture. Rejecting "Catholic natural law" on the grounds that "such an eternal system of established norms" was not given in revelation, participants emphasized the indeterminacy of divine prescriptions for human law. Following Poppitz, the assembled jurists relied not on the *Volk* but on individual responsibility and "Christian sensibility" as mediating categories between divine justice and the fallen human world. Rudolf Smend suggested that the churches should remind the state of the limits of its authority. Although Protestant churches were not "political counterpart[s]" to the state, Smend argued, "the task of proclamation [of Gospel] contains precisely the mandate to speak immediately on the conditions and configurations of the world, and therefore also on political problems, within the framework of ecclesial Christian ministry."¹⁰² Smend did not specify how the churches should address the Nazi regime, but he declined to treat the state as a divinely-mandated order that required Christians' absolute obedience.

If jurists around the official German Protestant Church took tentative steps away from orders of creation theology, and toward an articulation of the limits of legitimate state power, the April 1937 report submitted by the Confessing Church Provisional Government to the organizers of the Oxford conference pursued a more rigorous critique of Nazi theories of the total state.

¹⁰⁰ Johannes Poppitz, "Religion und Recht: Über ihr Verhältnis nach der Lehre der gegenwärtigen deutschen Rechtswissenschaft," *Archiv des öffentlichen Rechts* 28 (1937): 150, 154.

¹⁰¹ *Ibid.*, 135.

¹⁰² "Bericht über die Studentagung 'Religion und Recht', Leipzig, Franz-Rendtorff Haus, 23. und 24. II 1937," *BArch Koblenz*, N 1117/8.

Written by the pastor Hans Böhm and theologian Dietrich Bonhoeffer, the report was the product of two meetings in the Dahlem district of Berlin in early 1937, whose participants included Otto Dibelius, Martin Niemöller, the Freiburg economist Constantin von Dietze, and Karl-Heinz Becker.¹⁰³ The Provisional Church Government continued to face the problem of locating a basis for worldly law in biblical revelation alone, while acknowledging the incommensurability of divine justice with the fallen world. The authors could not rely on a fixed, higher legal norm as a vantage point from which to challenge the Nazi state. Rather, the Provisional Church Government followed the course outlined in *Evangelische Theologie*, replacing the demand that Christians accept the existing state as a divinely-mandated order with a new reliance on the *conscience* of the individual Christian to determine when obedience was owed.

While Poppitz and Smend also alluded to the importance of individual responsibility for interpreting divine commandments, the Provisional Church Government's report was distinct in its emphasis on the active reign of Jesus Christ over all worldly orders. Following Karl Barth, its authors argued that obedience of the state and service to the *Volk* was "grounded in our salvation in Jesus Christ [and] is determined and delimited through the commandments of God." Divine rule established "the *freedom of Christian conscience over the state*: We should obey the state according to God's will, be co-responsible for its welfare and cooperate loyally with it. But above the law of the state stands the law of God, which he revealed to us in the Ten Commandments." In cases of conflict between the law of the state and God's word, the individual Christian was charged to decide the appropriate course of action, based not on "general judgments" but on "a

¹⁰³ Daniela Rütter, *Der Widerstand des 20. Juli auf dem Weg in die Soziale Marktwirtschaft: Die wirtschaftspolitischen Vorstellungen der bürgerlichen Opposition gegen Hitler* (Paderborn: Schöningh, 2002), 195. Karl-Heinz Becker cites his own participation in "Siebenkittel, oder was die Dinge forderten: Ein Kampf ums Recht," 1946, 14, Landeskirchliches Archiv der Evangelisch-Lutherischen Kirche in Bayern (LAELKB), Nürnberg, Nachlass Karl-Heinz Becker, 101/58 – 4.

careful examination of the particular situation."¹⁰⁴ With these formulations, the document's authors shifted the locus of ethical decision-making in political life from a divinely-mandated state apparatus to individual conscience. The Provisional Church Government treated conscience as the imprint of God's all-encompassing authority on the individual, endowing the individual not with inalienable rights but with responsibility for heeding divine commandments in particular situations. Such an understanding of conscience, the report's authors argued, was inherently incompatible with a total state that sought complete ideological control over its subjects. Thus, by recognizing "the claim of authority of Jesus Christ in their whole lives," Christians could free themselves of "all false claims of the state to bind conscience."¹⁰⁵

Neither group of Protestants involved in preparations for the 1937 ecumenical conference invoked natural law or natural rights as a basis for determining the limits of legitimate state authority. However, both groups took significant steps beyond a theology of orders of creation by appealing to individual responsibility as the missing ground of legal order in a world where fixed norms for worldly law could be derived from neither human reason nor divine commandment. The Confessing Church Provisional Government in particular extended the critique of orders of creation theology laid out by the Barthian circle around *Evangelische Theologie*, establishing the importance of conscience as a source of ethical behavior in conflicts between state law and the divine word. As the historian Kenneth Barnes has noted, the Provisional Church Government report did not articulate a fully-fledged doctrine of Christian resistance against the state but continued to instruct Christians to suffer the consequences of their obedience to God's higher

¹⁰⁴ Hans Böhm, *Kirche, Volk und Staat: Bericht des ökumenischen Ausschusses der Vorläufigen Leitung der Deutschen Evangelischen Kirche* (Stuttgart: Quell, 1948), 11, emphasis added.

¹⁰⁵ *Ibid.*, 13.

commandments.¹⁰⁶ However, members of the Provisional Church Government emerged as central figures in the Protestant resistance during the Second World War, and the intellectual legacy of this group would be carried on in the efforts of postwar Protestant theologians and jurists to establish a comprehensive "Christological" grounding of law.

The Freiburg Circle and the Law in Wartime Protestant Thought

Historians of the Nazi-era "Church Struggle" have pointed toward 1937-38 as a period of intensification of church-state conflict, during which the National Socialist regime turned ever greater attention to ideological coordination. By 1937, the Ministry of Religious Affairs, formed in 1935 under Hitler's longtime associate Hans Kerrl, had failed to achieve a unified national Protestant church strong enough to suppress the Confessing Church. Instead, Nazi officials increasingly resorted to arrests of dissident pastors. Most famously, Martin Niemöller was detained "on Hitler's personal order" in July 1937; after a show trial acquitted Niemöller on charges of treason, he was rearrested and imprisoned, at Sachsenhausen and then at Dachau, for the remaining years of the regime.¹⁰⁷ Private seminaries directed by Confessing Church pastors, including Dietrich Bonhoeffer's seminary at the Pomeranian town of Finkenwalde, were made illegal in 1937 and abolished by 1941.¹⁰⁸ The blatant disregard of Nazi officials for the nominal church independence promised by the regime in its early years led to numerous acts of protest by Confessing Church pastors. Throughout the Reich, pastors faced charges for circulating illicit pamphlets comparing Nazism to Soviet Communism and reading aloud "intercession lists" of

¹⁰⁶ Barnes, "Protestant Thought," 163.

¹⁰⁷ Conway, *Nazi Persecution*, 202-212, quoted 209. Heinrich Albertz remembered this as a period when "The pressure of the state brought the intact churches closer to the destroyed [churches]." Albertz, "Vorläufige Kirchenleitung" (see note 70).

¹⁰⁸ Conway, *Nazi Persecution*, 191.

imprisoned church members at Sunday worship.¹⁰⁹ A small number of pastors went beyond protests on behalf of church independence to challenge the state's legitimacy itself, a move which, as the previous section showed, was not attempted even by the more radical wing of the Confessing Church before 1937. Karl Steinbauer, a pastor in the Bavarian town of Senten, was imprisoned in the Sachsenhausen concentration camp after instructing his congregants in a July 1938 sermon to heed the biblical injunction "Fear not those who destroy the body but cannot destroy the soul."¹¹⁰ The pastor Waldemar Schmidt, sentenced to eighteen months imprisonment for his public defense of Niemöller and Steinbauer, refused to apologize before a Nuremberg regional court, arguing, "There is no 'new ideology' that would require from the Christian churches 'total obedience' in belief."¹¹¹

As the Nazi regime's military aggrandizements gave way to fully-fledged war, not only individual pastors but intellectuals circles around the Confessing Church turned their attention toward the limits of legitimate state authority. With further restrictions imposed on religious periodicals, culminating in the closing of the Confessing Church organs *Evangelische Theologie* in 1938 and *Junge Kirche* in 1941, Protestant intellectual life increasingly took place in private homes and clandestine meetings. Groups of religiously-minded intellectuals, both clerical and lay, coalesced throughout Germany in the late 1930s to discuss the causes of National Socialism and the political and ethical foundations of a post-Nazi Germany. The resistance group that

¹⁰⁹ Staatsanwalt bei dem Landgericht Nürnberg to Generalstaatsanwalt bei dem Oberlandesgericht Nürnberg, October 29, 1937; Oberstaatsanwalt bei dem Landgericht in Darmstadt to Reichsminister der Justiz, September 2, 1938; and Oberstaatsanwalt to Vorsitzende des Sondergerichts für den Oberlandesgerichtsbezirk Breslau, September 15, 1938, BArch Berlin, R 5101/23693; "Fürbittenliste (Stand am 25. Juni 1937)," Archiv für christlich-demokratische Politik (ACDP), Sankt Augustin, Nachlass Hermann Ehlers, 01-369-034/6.

¹¹⁰ Oberstaatsanwalt München I to Reichsminister der Justiz, September 23, 1939, BArch Berlin, R 5101/23690. The biblical citation is Matthew 10:28.

¹¹¹ Reichsminister der Justiz to Reichsminister für die kirchlichen Angelegenheiten, October 21, 1940, BArch Berlin, R 5101/23691.

maintained the closest ties to oppositional political and military leaders was the circle that met at the military intelligence officer Helmuth James Graf von Moltke's estate at the Silesian town of Kreisau beginning in January 1940. Several members of the "Kreisau Circle" were prominent church members, including the Protestant theologian Eugen Gerstenmaier, the future president of the West German parliament, and the ecumenical leader Otto Heinrich von der Gablentz. The Kreisau Circle's discussions and secretly produced memoranda emphasized the centrality of Christian belief and ethical traditions for the reconstruction of a postwar German state.¹¹²

Political-theological discussion circles also sprung up in the Rhineland. The Confessing Church theologians Hans Asmussen and Heinrich Kloppenburg participated in an interconfessional circle in Cologne, and a Düsseldorf oppositional circle around the jurist and former DNVP politician Robert Lehr would form the core of the city's Christian Democratic movement in 1945.¹¹³

The wartime oppositional circle most significant for reorientation of Protestant discussions of law was the group of anti-Nazi professors and church leaders around the University of Freiburg who met between 1938 and 1944. The Freiburg opposition consisted of three distinct groups: the interconfessional Freiburg Council, which met regularly in its members' homes between December 1938 and September 1944; the "Freiburg Bonhoeffer Circle" composed exclusively of Protestant scholars, which met between October 1942 and January 1943; and the Working Group on economic policy around the economist Erwin von Beckerath formed in March 1943. The Protestant membership of all three groups displayed significant

¹¹² Günter Brackelmann, "Der Kreisauer Kreis als christliche Widerstandsgruppe," in *Der 20. Juli 1944 und das Erbe des deutschen Widerstands*, eds. Günter Brackelmann and Manfred Keller (Münster: Lit, 2005), 67-85, at 70-71 for the circle's membership. For a far more critical interpretation, see Hans Mommsen, "Social Views and Constitutional Plans of the Resistance," in *The German Resistance to Hitler*, eds. Walter Schmitthenner and Hans Buchheim, trans. Peter and Betty Ross (London: Batsford, 1970), 55-148.

¹¹³ On the Cologne circle around the medical doctor Joseph Kill, see the documents collected in ACDP, Nachlass Hans Asmussen, 01-398-001/1. On the Düsseldorf circle, see the unsigned letter to Walter Hensel, June 13, 1965, "Erinnerungen an den Kreis um Dr. Lehr," ACDP, Nachlass Hellmut Lauffs, 01-007-001/3 and Mitchell, *Origins of Christian Democracy*, 31.

continuity with the networks of theologians and jurists formed around the Confessing Church Provisional Government during the 1930s. Freiburg was the home university of Constantin von Dietze and Erik Wolf, and their wartime associates included Otto Dibelius, Ernst Wolf, Rudolf Smend, Barth's student Helmut Gollwitzer, and Karl-Heinz Becker, among other leading thinkers in the post-1945 Protestant Church.¹¹⁴ While the role of the Freiburg opposition in theorizing the postwar social market economy has received significant scholarly attention, moreover, its importance for reorienting Protestant legal thought remains understudied.¹¹⁵

Although the Freiburg Council included participants from both Christian confessions, its core members—the economists Constantin von Dietze, Walter Eucken, and Adolf Lampe, as well as the historian Gerhard Ritter—were Protestants who sought to advance on contemporary lay-theological dialogue. None of these individuals was trained as a jurist or theologian. However, by approaching questions of law and legitimacy from a Protestant standpoint, the Freiburg Council's leaders sought to articulate a critical stance toward the National Socialist regime while theorizing the conditions for a postwar political order immune to the reemergence of ultranationalist dictatorship. Moreover, these figures worked closely with Protestant jurists, in particular Erik Wolf, who by 1936 had retreated from his earlier support for the Nazi state, as well as Friedrich Justus Perels, the legal adviser to the Confessing Church in Berlin and a close

¹¹⁴ A useful chart showing the overlapping membership of the three groups is found in Dagmar Rübsam and Hans Schadek, eds., *Der "Freiburger Kreis": Widerstand und Nachkriegsplanung 1933-1945: Katalog einer Ausstellung* (Freiburg: Verlag Stadtarchiv Freiburg, 1990), 17. Smend and Gollwitzer did not attend the meetings of the circle but remained in active correspondence with its members: Gollwitzer to Dietze, April 19, 1944 and Gollwitzer to Dietze, July 16, 1944, ACDP, Nachlass Constantin von Dietze, 01-345-005/2; Gollwitzer to Dietze, January 9, 1939, ACDP 01-345-014/1. On Smend's wartime connections, see Smend to Dulles, August 26, 1947 and Smend to Huppenkothen, January 7, 1948, SUB Göttingen, Nachlass Smend, C 25.

¹¹⁵ On the economic thought of the Freiburg Circle, see Christine Blumenberg-Lampe, *Das wirtschaftspolitische Programm der Freiburger Kreise: Entwurf einer freiheitlich-sozialen Nachkriegswirtschaft: Nationalökonomien gegen Nationalsozialismus* (Berlin: Duncker & Humblot, 1973); Rainer Klump, "Der Beitrag der Freiburger Kreise zum Konzept der Sozialen Marktwirtschaft," in *Wirtschaft, Politik und Freiheit: Freiburger Wirtschaftswissenschaftler und der Widerstand*, ed. Nils Goldschmidt (Tübingen: Mohr Siebeck, 2005), 383-401; and Rüther, *Widerstand des 20. Juli*.

associate of Dietrich Bonhoeffer.¹¹⁶ The Freiburg opposition retained the anti-positivist and anti-natural law structure of Protestant legal thought but also worked toward a productive grounding of law on a Protestant basis. To this end, Freiburg Protestants drew on the critique of orders of creation theology and its complicity with the total state articulated by the Barthian wing of the Confessing Church. At the same time, they aimed to excavate from Scripture precepts of Christian morality and outlines of worldly institutions that determined the boundaries of legitimate law. Not only did they charge individual conscience with discerning when the state had abrogated its claim to obedience, but they insisted that divinely-ordained institutions served as guiding frameworks for law.

Already in December 1938, in the immediate aftermath of the *Kristallnacht* ("night of broken glass") when Nazi paramilitary troops destroyed thousands of Jewish synagogues and shops throughout Germany, the Freiburg Council produced a memorandum entitled "Church and World" that proposed a shift away from the traditional statism of Lutheran political ethics. Composed primarily by the Freiburg historian Gerhard Ritter along with the Freiburg pastors Karl Dürr and Otto Hoff, the "Church and World" memorandum went beyond the claim that the Christian owed ultimate obedience only to God, a familiar theme of *Evangelische Theologie*, to consider the theological foundations for the Christian's withdrawal of obedience from the total state.¹¹⁷ The authors invoked not only individual conscience but Christian community as bulwarks against the Nazi state's claim to total authority: "It is no longer sufficient that the individual's need for salvation is maintained before his eyes, that his *private* conscience is shaken

¹¹⁶ Hollerbach, *Jurisprudenz in Freiburg*, 339; Rübsam and Schadek, "*Freiburger Kreis*", 85. Wolf joined the constitutional committee of the Confessing Church Provisional Government in 1936. Wolf's turn away from the theory of the total state is also evident in the revised version of his inaugural lecture, "Richtiges Recht und evangelischer Glaube" published in the fifth, 1937 edition of Künneth's *Die Nation vor Gott*, which eliminated references to Forsthoff, Gerber, Schmitt, and *Mein Kampf*.

¹¹⁷ On the circumstances that motivated the memorandum, see Rübsam and Schadek, "*Freiburger Kreis*", 76.

and he experiences the solace of the grace given to him through the cross, but rather, the call to repentance must be directed toward the community of the people as a whole."¹¹⁸ Not only could the individual be obliged to deny obedience to state authority in order to obey God, but the "Christian community" was called to serve as a witness to God's commandments by refusing to participate in the "sinful doings of the world."¹¹⁹ While departing from the traditional Lutheran injunction to obedience, the "Church and World" memorandum also advanced a Protestant critique of natural law by suggesting that the decision to disobey the state could follow only from particular situations and not fixed norms.

Ritter's colleague Constantin von Dietze situated the work of the Freiburg Council more directly within the debate about the foundations of law that had occupied Protestant theologians and jurists since 1933. Trained as an agricultural economist, Dietze was dismissed from his professorship in Berlin in 1936 on political grounds but came to find a more amenable environment in Freiburg among the like-minded anti-Nazi economists Walter Eucken and Adolf Lampe.¹²⁰ Dietze's lecture at the 1936 lay Protestant assembly (*Evangelische Woche*) in Berlin indicated a critical stance toward the Nazi state, and he participated in the meetings leading up to the 1937 ecumenical report of the Confessing Church Provisional Government.¹²¹ Dietze's 1939 talk before the Freiburg Council on "The Position and Task of the Protestant Christian and the Protestant Church in their Relationship to Law" put forth a critique of natural law as a product of

¹¹⁸ "Kirche und Welt: Eine notwendige Besinnung auf die Aufgaben des Christen und der Kirche in unserer Zeit," in *Gerhard Ritter: Ein politischer Historiker in seinen Briefen*, eds. Klaus Schwabe and Rolf Reichardt (Boppard: Boldt, 1984), 650, emphasis in original.

¹¹⁹ *Ibid.*, 639, 647.

¹²⁰ Detlef J. Bleggen, "'Widersteht dem Teufel' - Ökonomie, Protestantismus und politischer Widerstand bei Constantin von Dietze (1891-1973)," in *Wirtschaft, Politik und Freiheit*, ed. Goldschmidt, 67-73.

¹²¹ "Mein Glauben in meinem Beruf: Vortrag für die evangelische Woche in Berlin am 20.11.36," ACDP 01-345-012/2.

"Catholic hubris" while eschewing a positivist reduction of law to "a function of power." The Christian's loyalty to the law, Dietze argued, must be rooted in morality rather than mere state power, and when the state overstepped its legitimate bounds by advancing a "total claim to validity," then "the church in obedience to God must remind the state of the limits of its coercion and of its law."¹²²

Dietze's most important wartime contribution to Protestant theorizations of law was a lecture on "National Economy and Theology" presented at a plenary meeting of the Society for Protestant Theology in the Württemberg town of Alpirsbach on June 6, 1941. The Society was founded by the former editor of *Evangelische Theologie* Ernst Wolf in February 1940 for the purpose of promoting "a lively connection between theology and the ecclesial proclamation."¹²³ The Society also facilitated new connections between Protestant theology and political and legal thought, and from the Society's first meeting in February 1940 Ernst Wolf placed the question of natural law high on its agenda.¹²⁴ The key insight of Dietze's Alpirsbach lecture, departing from the dominant currents of Protestant theology during the Third Reich, was that a critique of natural law did not vitiate a language of rights and human dignity, associated during the 1930s and 1940s with Catholic critiques of totalitarianism. Rather, if Protestant theology lacked "a similarly detailed doctrine of natural law and its requirements as Catholics have," Protestants still had to draw on "what is fundamental from natural law" in order to overcome their tendency

¹²² "Stellung und Aufgabe des evangelischen Christen und der evangelischen Kirche in ihrem Verhältnis zum Recht," ACDP 01-345-012/6. This lecture was delivered by Dietze at a meeting of the Freiburg Council on June 16, 1939; Wendula Gräfin von Klinckowstroem, "Walter Eucken: Eine Biographische Skizze," in *Walter Eucken und sein Werk: Rückblick auf den Vordenker der sozialen Marktwirtschaft*, ed. Lüder Gerken (Tübingen: Mohr Siebeck, 2000), 92 n234. Another copy of the lecture is found at BArch Koblenz, Nachlass Gerhard Ritter, N 1166/420, where it is listed as a preliminary study for the January 1943 Freiburg memorandum.

¹²³ "Satzung der Gesellschaft für Evangelische Theologie," BArch Koblenz, Nachlass Ernst Wolf, N 1367/318.

¹²⁴ Gesellschaft für Evangelische Theologie, "Niederschrift über die Gründungsversammlung," February 7-8, 1940 and "Niederschrift über die erste Sitzung des Vorstands," April 15, 1940, BArch Koblenz, N 1367/318.

toward theological otherworldliness. A new basis for inalienable human dignity, moreover, could be founded on a Protestant theology of biblical revelation. Thus, Dietze argued, an understanding of the "essence, value, and dignity of human personality" could be derived directly from the Decalogue, without reference to natural law. Even in the absence of natural law, Protestant churches remained responsible for determining "what resulted from God's word for the fundamental order of human life" and for helping individuals come to "decisions of conscience" about their ethical lives.¹²⁵

Dietze concluded his Alpirsbach lecture with "a cry for help from political economy to theology" that registered a turning point in lay-theological exchange during the Third Reich.¹²⁶ Whereas Protestant jurists and theologians in the first years after 1933 celebrated the existing "total state" as the fulfillment of Christian aspirations, Dietze called for theology to serve as a moral resource for a new legal and political order. The many responses Dietze received to privately circulated copies of his lecture indicated a widely shared desire among Protestant intellectuals to deepen lay-theological exchange on these terms. Heinz-Dietrich Wendland, now a naval pastor, had softened his attitude toward natural law, writing to Dietze in March 1942 that Protestants had to grapple with the problems "out of which the old Christian natural law emerged," even if the concept of "nature" on which it rested was too "burdened and ambiguous" for Protestants to appropriate.¹²⁷

¹²⁵ Constantin von Dietze, *Nationalökonomie und Theologie* (Tübingen: Furche-Verlag, 1947), 31-32, 40-41. According to Dietze's introduction, the essay was revised only minimally for postwar publication; planned publication in *Theologische Blätter* 1942 was made impossible with the closure of the journal.

¹²⁶ *Ibid.*, 40.

¹²⁷ Heinz-Dietrich Wendland to Constantin von Dietze, May 28, 1942, Universitätsarchiv Freiburg (UAF), Nachlass Constantin von Dietze, C 100/580. See also the responses to Dietze's lecture in this folder from Helmut Gollwitzer, Helmut Thielicke, and other acquaintances.

In response to Dietze's "cry for help," Karl-Heinz Becker, stationed as a military pastor in Romania, arranged for two pamphlets on the relation between theology and law to be circulated secretly in five hundred copies each to members of the Society for Protestant Theology via Dietze and Ernst Wolf during the spring of 1942.¹²⁸ Becker's wartime writings reiterated the connection between orders of creation theology and the teachings of Nazi jurists such as Hans Gerber, while advancing on Dietze's attempt to establish a Protestant grounding of law in "a *thoroughly morally determined bond* that positivism has hitherto lacked."¹²⁹ While Becker's influence cannot be measured precisely, given the paucity of wartime correspondence, his essays were received positively by leading theologians and jurists, and the themes he raised persisted in postwar debates on the relationship between law and Protestant theology.¹³⁰

The culminating document of the Freiburg opposition was a January 1943 memorandum produced at the behest of Dietrich Bonhoeffer on behalf of the Confessing Church Provisional Government. Via his brother-in-law, the jurist and former justice ministry official Hans von Dohnányi, Bonhoeffer had established contact with Moltke in December 1941 and was made aware of the Kreisau Circle's ongoing plans for a coup d'état against the Nazi regime. Bonhoeffer used his position in the military intelligence service to pass on information to the resistance, and he informed the Anglican Bishop of Chichester and ecumenical leader George Bell of the plot to assassinate Hitler during a private meeting in May 1942. Bonhoeffer remained a point of contact between ecumenical networks and oppositional circles inside Germany, including the Freiburg

¹²⁸ Karl-Heinz Becker to Constantin von Dietze, September 12, 1941 and Karl-Heinz Becker to Ernst Wolf, March 15, 1942, UAF C 100/780. Becker discusses his efforts to distribute his writings in wartime Germany in "Siebenkittel," 14.

¹²⁹ Karl-Heinz Becker, "Der Christ als Jurist," UAF C 100/780, emphasis added.

¹³⁰ See the positive responses to Becker's "Theologie und Rechtswissenschaft" by eight jurists and twenty-two theologians and pastors, including Friedrich Giese, Ernst Wolf, and the Lutheran theologian Edmund Schlink, collected in "Urteile über: Karl-Heinz Becker, Theologie und Rechtswissenschaft," LAELKB, Nachlass Becker, 100/58 – 2.

Circle, until his arrest and imprisonment in April 1943.¹³¹ The authors of the Freiburg memorandum thus intended the document as a contribution to a postwar ecumenical conference on the reconstruction of political order according to Christian principles. Drafted by the core Protestant members of the Freiburg Council in October 1942, the memorandum was discussed and revised in a series of clandestine meetings during the winter of 1942-43. Among the participants in these gatherings numbered leading Confessing Church theologians and central figures in the post-1945 Protestant Church, including Otto Dibelius, the Lutheran theologian Helmut Thielicke (representing the Württemberg bishop Theophil Wurm), and the theologian and pedagogue Friedrich Delekat. Carl Goerdeler, the former mayor of Leipzig and a conspirator in the plans of the Kreisau Circle, also joined the discussions.¹³² Although only three copies were printed at the time, the Freiburg memorandum would emerge as a signal document in post-1945 Protestant debates about political reconstruction and condensed the core problem of those debates—"the relation between *individual* and *community*."¹³³

Entitled "The Political Order of the Community," the Freiburg memorandum located the foundations of ethical political order not only in individual conscience but in the communities within which recognition of individual responsibility before God could take root. Dietze's contribution expanded on his earlier discussion of a right to individual personality, arguing that the Decalogue also revealed "natural and commanded communities" of family and *Volk* in which the "moral personality of the individual" was realized. While Protestant theology could not

¹³¹ Marsh, *Strange Glory*, 325-332. On Dohnányi's connections to Moltke, see Christoph Strohm, *Theologische Ethik im Kampf gegen den Nationalsozialismus: Der Weg Dietrich Bonhoeffers mit den Juristen Hans von Dohnanyi und Gerhard Leibholz in den Widerstand* (München: Kaiser, 1989), 343-344.

¹³² Rübsam and Schadek, "*Freiburger Kreis*", 77-86.

¹³³ Helmut Thielicke, ed., *In der Stunde Null: Die Denkschrift des Freiburger "Bonhoeffer Kreises"* (Tübingen: J. C. B. Mohr, 1979), 64, emphasis in original.

prescribe specific economic policies on the basis of natural law, it established that the economic order must not violate either the communities given through revelation or the "moral personality of the individual."¹³⁴ Erik Wolf's contribution on legal order similarly demanded that state authority find its limits before the integrity of other communities such as family, profession, and parish.¹³⁵ In these formulations, Freiburg Protestants were careful to distinguish between communal orders revealed through God's word alone from an illegitimate orders of creation theology; but controversy over the relationship between suspect Nazi-era theologies and a conception of divinely-mandated "institutions," in part pioneered by the Freiburg opposition, would animate Protestant debates about the theological foundations of law into the 1950s.

Gerhard Ritter, who authored the principal section of the Freiburg memorandum, did invoke the concept of "natural orders" in his contribution, and his student Klaus Schwabe has argued that Ritter's cooperation with Catholics in Freiburg resistance circles "sensitized him to the riches of Scholastic natural law traditions."¹³⁶ Far from endorsing natural law, however, Ritter's section of the memorandum repudiated both Catholic social doctrine for its rationalist belief in the possibility of world mastery in the absence of divine grace, as well as Protestant orders of creation theology for its reliance on natural revelation.¹³⁷ Instead, Ritter extended the criticisms of natural law advanced by the Barthian wing of the Confessing Church in a conservative direction. Noting that for centuries revolutionaries and fanatical movements had claimed to act on the side of God, Ritter argued that natural theologies too often led to the

¹³⁴ Constantin von Dietze, "Anhang: Wirtschafts- und Sozialordnung," in *Nationalökonomie und Theologie*, 43-44.

¹³⁵ Franz Böhm and Erik Wolf, "Richtschnuren der Bekennenden Kirche für die staatliche Rechtsordnung," in *Kampf der Bekennenden Kirche*, 83.

¹³⁶ Moyn, *Christian Human Rights*, 117.

¹³⁷ Thielicke, *In der Stunde Null*, 56-57. The cited passages come from the section "Foundations of a Political Order of the Community according to Christian Understanding," composed primarily by Ritter.

deification of mere worldly political communities. Reconstructing a social order on Christian foundations required the *uncoupling* of concepts of "personality," "justice," and "responsibility" from natural theology, in order to resituate them within a biblical theology grounded solely in God's revealed word. Echoing Dietze and Wolf, Ritter suggested that such a theology entailed the elevation of personal "conscience" as awareness of one's immediate responsibility before God: "*Where nature and history falter* as guides to conscience, there remains the voice of conscience itself." On the other hand, individual personality could flourish only within communities founded on the biblical principle of love of the neighbor. Divine revelation offered not fixed "legal norms" but "moral guidelines" to enable individuals to work toward these ideals.¹³⁸

The Freiburg memorandum offers evidence of how wartime Protestant intellectuals repurposed well-established theological motifs in the service of a critique of the total state. The memorandum retained the openness to historical contingency, as well as the skepticism about the achievement of absolute justice in the immanent world, that lay at the core of the Protestant rejection of natural law during the Nazi era. At the same time, Freiburg thinkers suggested a path beyond the impasse that had ensued with the capitulation of many Protestant jurists to apologias for the Nazi state. Although any secular legal system was the product of a fallen world, they suggested, precepts of conscience, individual personality, and divinely-revealed moral communities derived from biblical teachings established the limits of legitimate law. Moreover, the very notion of an inward sphere of free conscience, a longstanding trope of Protestant theological discourses, could be deployed to demand the "legally secured freedom of conscience, indeed as much religious conscience as political convictions" in a postwar German state.¹³⁹ The

¹³⁸ Ibid., 59-63, emphasis added.

¹³⁹ Ibid., 78.

Freiburg Circle thus moved from an inward conception of Christian ethics to the articulation of a Christian moral foundation for the political community, while adhering to the core confessional tenets that had guided Protestant politics since 1933.

While completing the memorandum during the early months of 1943, members of the Freiburg opposition deepened their contacts with the resistance movement around Moltke, Carl Goerdeler, and the military officer Claus von Stauffenberg. While not directly involved in plotting the assassination attempt on Hitler, Freiburg theorists provided economic expertise for the Kreisau Circle through frequent correspondence, and their writings informed the Circle's plans for a postwar political order.¹⁴⁰ On July 20, 1944, the long-awaited coup d'état failed; Stauffenberg planted a bomb in Hitler's "Wolf's Lair" field headquarters in East Prussia, but Hitler survived the explosion and within several days over 170 suspected conspirators were arrested and interrogated.¹⁴¹ Many would stand in show trials before the Nazi "people's court" [*Volksgerichtshof*] to be executed soon thereafter. In the fall of 1944, Dietze, Lampe, and Ritter were imprisoned in Berlin for their ties to the failed coup d'état, and Dietze was later sent to the Ravensbrück concentration camp north of the city. Dietze faced trial before the *Volksgerichtshof*, but was spared an almost certain death sentence by the death of the notorious Nazi judge Roland Freisler during an Allied bombing attack in February 1945. The Freiburg opposition leaders were released only with the liberation of Berlin by Soviet troops in April 1945.¹⁴² Other prominent participants in lay-theological intellectual networks under the Third Reich, notably Dietrich

¹⁴⁰ Daniela Rütter, "Der Einfluss der Freiburger Kreise auf die Widerstandsbewegung des 20. Juli 1944," in *Die Freiburger Kreise: Akademischer Widerstand und Soziale Marktwirtschaft*, ed. Hans Maier (Paderborn: Schöningh, 2014), 57-70.

¹⁴¹ Marsh, *Strange Glory*, 375-376.

¹⁴² Blegesen, "'Widersteht dem Teufel,'" 75.

Bonhoeffer, Hans von Dohnányi, and Friedrich Justus Perels, paid for their participation in the resistance with their lives.

Conclusion

Writing to his wife and brother from prison in October 1944, Constantin von Dietze traced his involvement in the anti-Nazi resistance to religious motivations:

Attitude toward National Socialism? Here I have very often avowed that as a Christian I regard contempt toward divine commandments (lawlessness, mendacity, anti-church, yes anti-Christian politics) as evil and calamitous; because God does not allow himself to be defied. This I also shared with [Carl] Goerdeler. We are both in agreement that this power, established through injustice and crime, has been the greatest national catastrophe; it must come to a dire end.¹⁴³

Dietze's combination of fatalism and self-congratulation reflected his status as a condemned man facing a likely death sentence, but also wider attempts at self-justification by Protestant intellectuals on the eve of German defeat. Recognizing the immanent Allied victory, Protestants read their belated resistance onto their actions throughout the Third Reich, claiming that they had always regarded the regime as unlawful and fated to defeat. This claim is at best a half-truth. Several of the figures who later became involved in oppositional circles, most notably Erik Wolf, were initially adherents of the orders of creation theology that harmonized all too well with Nazi theories of the total state. More importantly, both theologians influenced by Barth as well as the jurists and economists around the Freiburg Circle shared a number of assumptions with their counterparts who defended a theology of orders of creation and the total state. All of these thinkers prioritized a defense of the rights and privileges of the church over the victims of Nazism, often neglecting the latter entirely. Their writings were characterized by a consistent

¹⁴³ Constantin von Dietze to his family, October 28, 1944, ACDP, Nachlass Adolf Lampe, 01-256-059/4. Thanks to Dr. Christine Blumenberg-Lampe for identifying Dietze as the author of this letter.

critique of rationalism and natural law, as well as a situational ethics that provided little normative basis for a critique of totalitarianism beyond the judgments of individual conscience.

Nevertheless, important developments in Protestant theories of law did occur under the Third Reich, whose fuller implications would be realized after the war. The turn to Christian conscience as a bulwark against the claims of the Nazi state over inner faith—and in extreme circumstances as grounds for resistance—represented a significant departure from a Lutheran political ethics centered on the absolute obedience owed to the state. Jurists and political theorists around the Confessing Church, moreover, came to view not the "total state" but institutions such as marriage, family, profession, and religious community as the basis for just law in the absence of fixed legal norms in a fallen world. The political implications of this orientation would emerge only in the context of defeat and occupation, as Protestant intellectual life emerged from the shadows of secret meetings and privately circulated pamphlets to the forefront of public debates about the legality of the Allied occupation regimes and the political order of a post-Nazi Germany.

Chapter Two: Postwar Justice and the Origins of Protestant Rights Theories in Occupied Germany

Speaking on July 1, 1945 at the annual festival of a Protestant school in the Württemberg village of Korntal, the Lutheran theologian Helmut Thielicke, a member of the wartime Freiburg Circle who spent the final year of the war preaching anti-Nazi sermons around Stuttgart, enjoined the assembled community members to take an active role in public life.¹ The unity of "throne and altar" had broken down, but Christians could not retreat into private faith. Jesus also spoke to worldly authority, Thielicke reminded his listeners, citing Jesus' entreaty to Pontius Pilate before the crucifixion; therefore, "the kingdom of Jesus and the worldly kingdom do not lie side by side without touching, but they overlap."² In a memorandum submitted several weeks earlier to an American press officer for publication in U.S. newspapers, Thielicke linked his call for Christian political engagement to a description of National Socialism as the "*final and most terrible product of secularization*." The plight of postwar Germany exemplified not the moral and political collapse of a particular nation but the consequences of humanity's fall away from God. The victorious powers should avoid the comforts of a "false moral security," since they too were vulnerable to the "cancer" of secularization afflicting "the *entire* world." To reverse this malign trajectory, Thielicke argued, Europe's political and social reconstruction must proceed on the basis of Christian principles.³

Thielicke's comments exemplified a tension between obfuscation of the past and demand for reform characteristic of the political rhetoric of German Protestant leaders in the aftermath of

¹ On Thielicke's activities at the end of the war, see Hockenos, *A Church Divided*, 54.

² "'Über das Korntaler Erziehungswerk': Programmrede, gehalten am Jahresfest der Kindererziehungsheime in Korntal von Prof. Thielicke," July 1, 1945, ACDP 01-345-012/7.

³ Helmut Thielicke, "Die Kirche inmitten des deutschen Zusammenbruchs, ihre Beurteilung der Lage und ihre Ziele," June 15, 1945, in *Kirche nach der Kapitulation: das Jahr 1945, eine Dokumentation*, vol. 1, eds. Gerhard Besier, Jörg Thierfelder, and Ralf Tyra (Stuttgart: Kohlhammer, 1989), 203-209, quoted 204-205, emphasis added.

the Second World War, in the context of denazification, war crimes trials, the expulsion of Germans from East Central Europe, and national division. On the one hand, Thieliicke's call for a re-Christianization of society and politics, widely espoused by representatives of both the Protestant and Catholic churches in the early postwar years, served as an exercise in self-exculpation.⁴ By blaming the rise of National Socialism on secularization, Thieliicke neglected the complicity of Christians in the regime's crimes, the circumscribed nature of the Confessing Church's critique of Nazism, as well as the fact that secular Social Democrats and Communists, far more than Christians, had resisted the Nazi consolidation of power in 1933. Nevertheless, Thieliicke's theological reflections before the village school suggested, if not contrition, at least an acknowledgement of the complicity of Lutheran "two kingdoms" theology with many Protestants' weak-kneed response to the Nazi regime. From this standpoint, Protestants' assumption of public responsibility would require confrontation with the Church's past failings as well as theological and political reorientation.

The question of the relationship between nationalist apologia and efforts to chart a new political course, posed already by the Confessing Church pastor Hermann Diem in his 1946 tract "Restoration or New Beginning in the Protestant Church?" has become the *leitmotif* of scholarly debate about the German Protestant churches during the early postwar period.⁵ In the major English-language treatment of the subject, the historian Matthew Hockenos emphasizes divisions within the leadership of the postwar Protestant Church in Germany (*Evangelische Kirche in Deutschland*, or EKD), founded in August 1945 following the collapse of the Nazi-era German

⁴ More broadly on the postwar rhetoric of re-Christianization and its elisions, see Damian van Melis, "Strengthened and Purified through Ordeal by Fire": Ecclesiastical Triumphalism in the Ruins of Europe," in *Life after Death: Approaches to a Cultural and Social History of Europe during the 1940s and 1950s*, eds. Richard Bessel and Dirk Schumann (Washington, D.C.: German Historical Institute, 2003), 231-241 and Mitchell, "Materialism and Secularism."

⁵ Hermann Diem, *Restauration oder Neuanfang in der Evangelischen Kirche?* (Stuttgart: F. Mittelbach, 1946).

Protestant Church. Whereas the majority faction, dominated by representatives of the Lutheran churches that remained "intact" during the Third Reich, aimed to reestablish prewar church structures, a minority wing led by the outspoken anti-Nazi pastor Martin Niemöller, which sought to continue the tradition of the Confessing Church Provisional Government, demanded a robust confrontation with the failures of the churches under National Socialism. Hockenos highlights the two signal public declarations of postwar Protestant leaders, signed at Stuttgart and Darmstadt, as evidence of a persistent division between these camps. According to Hockenos, the "Stuttgart Declaration of Guilt" of October 19, 1945, issued by the executive Council of the EKD, represented a minimal consensus between the two factions.⁶ By contrast, the Darmstadt Statement of August 1947, signed only by members of the EKD Council of Brethren [*Bruderrat*], the postwar successor organization to the Provisional Church Government established at the Bad Oeynhausen synod of 1936, offered a stronger statement of Protestant responsibility for National Socialism.⁷ The distinctions between these camps were political as much as theological. Conservative Lutherans embraced the emergent Cold War alliance against the Soviet Union, whereas signatories of the Darmstadt Statement feared that strident anti-Communism would obscure Nazi crimes in the East as well as Christian responsibility for advocating peace and reconciliation in a newly polarized world.⁸

Other scholars, however, have emphasized that this division, while crucial for understanding political controversies within the EKD leadership, did not determine the positions

⁶ Hockenos, *A Church Divided*, 75-100.

⁷ *Ibid.*, 118-134; "Statement by the Council of Brethren of the Evangelical Church of Germany Concerning the Political Course of Our People (Darmstadt Statement, August 1947)," in Hockenos, *A Church Divided*, 193-194. On the connection between the postwar Council of Brethren and the wing of the Confessing Church that had spearheaded the Dahlem synod in October 1934 and the Second Provisional Church Government in February 1936, see Hockenos, *A Church Divided*, 44.

⁸ Hockenos, *A Church Divided*, 130.

taken by individual actors. On issues pertaining to national sovereignty and unity, as the revisionist historiography of the Confessing Church since the 1980s has demonstrated, former members of the anti-Nazi resistance joined with their collaborationist counterparts in criticizing the postwar occupation governments, both Western (U.S., British, and French) and Soviet.⁹ Most famously, Martin Niemöller rebuked both war crimes trials and denazification proceedings, to the dismay of U.S. occupation officials who sought out veterans of the Confessing Church as supporters of reforms meant to remove former Nazis from power.¹⁰ On the other hand, recent scholarship has argued that even conservative Lutherans did not simply fall back on pre-1933 traditions of political quietism and support for authoritarian regimes but sought out active participation in postwar reconstruction. Historians have pointed toward Lutheran involvement in the founding of Protestant Academies, political committees, and the biennial Church Assembly (*Kirchentag*) as evidence of a new orientation toward encouraging lay engagement in democratic politics, albeit often in pursuit of a socially conservative agenda.¹¹

This chapter argues that the debate about the theological foundations of law within the postwar Protestant intellectual milieu, whose origins during the Nazi era were traced in the previous chapter, provides an explanatory key to the relationship between political reorientation

⁹ Clemens Vollnhals, "Die Hypothek des Nationalprotestantismus: Entnazifizierung von NS-Verbrechen nach 1945," *Geschichte und Gesellschaft* 18 (1992): 51-69; Ronald Webster, "Opposing 'Victor's Justice': German Protestant Churchmen and Convicted War Criminals in Western Europe after 1945," *Holocaust and Genocide Studies* 15 (2001): 47-69; JonDavid K. Wyneken, "Memory as Diplomatic Leverage: Evangelical Bishop Theophil Wurm and War Crimes Trials, 1948-1952," *Kirchliche Zeitgeschichte* 19 (2006): 368-388. More broadly on the retrenchment of victimization narratives in post-1945 Germany, see Robert Moeller, "Germans as Victims? Thoughts on a Post-Cold War History of World War II's Legacies," *History and Memory* 17 (2005): 145-194.

¹⁰ JonDavid K. Wyneken, "Driving Out the Demons: German Churches, the Western Allies, and the Internationalization of the Nazi Past, 1945-1952" (PhD Dissertation, Ohio University, 2007), 169-176, 253-254, 266-267.

¹¹ Martin Greschat, *Die evangelische Christenheit und die deutsche Geschichte nach 1945: Weichenstellungen in der Nachkriegszeit* (Stuttgart: Kohlhammer, 2002); Pearson, "Faith and Democracy"; Thomas Sauer, *Westorientierung im deutschen Protestantismus? Vorstellungen und Tätigkeit des Kronberger Kreises* (Stuttgart: Kohlhammer, 1999).

and nationalist restoration in the postwar Protestant Church. The architecture of Western Allied policies for postwar reconstruction rested on the creation of new legal categories. Therefore, the question of the relevance of Christianity for law took on central importance in Protestant intellectuals' internal debates, public statements, and political actions in the early years of the Allied occupation.¹² The subject of an explosive number of publications, lectures, and conferences in the years immediately following the defeat of the Nazi regime, the postwar debate about the relationship between Christianity and law built on intellectual and institutional foundations laid during the Nazi period. The networks of Protestant jurists, political theorists, and theologians that formed under the Nazi regime expanded rapidly in the early postwar years, coming to include not only thinkers who reached intellectual maturity before or during National Socialism but also a younger generation of jurists who served in the Nazi-era civil service and turned to the churches after the war as sources of political expiation, employment, and intellectual renewal. Newly-formed institutions, commissions, and periodicals, freed from the confines of wartime oppositional circles, facilitated the expansion of this lay-theological dialogue.

Postwar discussions about the relationship between theology and law provided the intellectual and institutional locus for the emergence of a new political language of *Christian responsibility* and *human rights*, categories that would prove decisive for Protestants' later engagement in and defense of West German constitutional democracy. The first term signaled a rejection of a political passivity derived from orthodox interpretations of Luther's two kingdoms

¹² The legal historian Lena Foljanty has situated Protestant debates about law within the wider natural law discourse in postwar Germany: Foljanty, *Recht oder Gesetz: Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit* (Tübingen: Mohr Siebeck, 2013), 137-173. However, Foljanty's nuanced exploration of the theological intricacies of the Protestant debate, with a particular focus on Erik Wolf, does not treat its important political consequences. For an overview of the positions of individual thinkers, see Herr, *Naturrecht*. A more recent interpretation, focusing on Barth and Thielicke, is Bohn, *Herrschaft ohne Naturrecht*, 130-160.

doctrine. In the wake of the National Socialist regime, Protestants across theological fault lines insisted on the importance of political engagement, especially of lay Christians. Their particular conception of responsibility was structured by theological argumentation. Building on theological innovations of the Nazi era, Protestant theologians and jurists of the early postwar period understood Christian responsibility as an alternative to, rather than proxy for, the construction of a Christian social order based on natural law principles.

The meaning of human rights for postwar German Protestants was more complex, requiring attention to how their particular theological heritage was mediated through the politics of the postwar moment. Recent scholarship has illuminated the fundamental role of Christian ideas and movements in the international human rights politics of the 1940s, showing how Christian politicians and religious leaders throughout Western Europe emphasized the religious origins of human rights in order to bolster both their own political profiles and the conservative Christian parties that sprung up after the war. This literature has demonstrated that a shared language of human rights, deployed as a weapon against both totalitarianism and secularization, facilitated Catholic-Protestant reconciliation and international Protestant cooperation around the ecumenical movement.¹³ Close attention to the continuities of Protestant political thought from Nazi to early postwar Germany, however, suggests that German Protestants' deployment of rights language contained theological and political connotations largely distinct from the mainstream of Christian human rights thinking. German Protestants reoriented postwar rights discourse around the core problem that emerged during the legal-theological exchange under the Nazi regime, the question of how a Christian basis for political and social order could be

¹³ Duranti, *Conservative Human Revolution*; Greenberg, "Protestants, Decolonization, and European Integration"; Moyn, *Christian Human Rights*; Renaud, "Human Rights as Radical Anthropology." The literature on Christian politics in postwar Germany has also emphasized interconfessional cooperation: see especially Mitchell, *Origins of Christian Democracy*.

articulated in absence of recourse to natural revelation. Especially with the discrediting of "orders of creation" theology after 1945, Protestant political thought during the early postwar period witnessed an escalation, not attenuation, of confessional emphases on biblical revelation and divine justification by faith. In theorizing human rights, therefore, German Protestants drew on a distinct theological conception of personhood. Whereas their Catholic and Anglo-American Protestant counterparts tended to locate the source of human rights in innate human dignity or rationality, German Protestants sought to develop a theory of rights based on a theology of human *lack*, fallenness, and radical dependence on God's grace. This alternative rights discourse was motivated by and in turn shaped Protestants' approach toward Allied policies of postwar justice. Their critique of denazification and war crimes trials turned on an argument for the limits of human judgment in the face of divine authority.

The chapter opens with an overview of the wider discourse about the relationship between positive and natural law in early postwar Germany, followed by a discussion of Protestants' engagement with this question. Continuing the analysis of the previous chapter, I distinguish between successor organizations to the Confessing Church Provisional Government, influenced by theology of Karl Barth, and conservative Lutherans, represented above all by the Freiburg Circle. Ultimately, however, I emphasize points of continuity between these groups, arguing that a distinctive theological anthropology formed a common ground that Barthians and Lutherans shared against both Catholics and Anglo-American Protestants.¹⁴ The latter portion of the chapter shows how a shared theological orientation toward the pervasiveness of human sin and the divine origins of law led representatives of both wings of German Protestantism to

¹⁴ Throughout this chapter, I use "anthropology" to signify not the social science discipline but a concept of the nature of human beings and their relationship to the surrounding world, in the sense employed by the fields of "philosophical anthropology" and "theological anthropology" that gained prominence in interwar European thought. I do not mean to connote any particular doctrine of philosophical or theological anthropology but the general problem of defining the human being. See also Renaud, "Radical Anthropology," 3-4.

criticize the theological foundations of the ecumenical movement and to draw on alternative conceptions of human rights in their attacks on denazification and war crimes trials.

"Supra-Statutory Justice" in Occupied Germany

"Whoever in the past decade pursued the historical roots of the great confusions and aberrations," wrote the economist Otto Veit in 1947, "could already foresee that the end of the fascist epoch would mean a return to natural law."¹⁵ Natural law theorizing, as Veit and other contemporaries noted, was ubiquitous in intellectual debate in occupied Germany, extending far beyond circles of academic jurists. The defeat of the German Reich in May 1945 and the ensuing territorial expropriation, division, and occupation of the country by the victors of the Second World War—the United States, Britain, France, and the Soviet Union—brought questions about the normative foundations of law to the forefront of public discussion. On the one hand, the denazification proceedings and war crimes trials initiated by the Allied occupation governments raised questions about the legitimacy of retroactive punishment and of the emergent international legal system; on the other hand, the failure of the legal profession to prevent the crimes of the Nazi state motivated examination, sometimes critical but often disingenuous, of prewar legal thought. Not only jurists but social scientists, theologians, and political leaders of varying backgrounds produced an outpouring of pamphlets and short texts in the immediate postwar years interrogating the sources of the law's legitimacy and the goals of postwar legal reconstruction. In the aftermath of National Socialism, nearly all writers on the subject agreed that legitimate law must be rooted in higher norms whose authority exceeded the sheer power of

¹⁵ Otto Veit, "Die geistesgeschichtliche Situation des Naturrechts," in *Naturrecht oder Rechtspositivismus?*, ed. Werner Maihofer (Darmstadt: Wissenschaftliche Buchgesellschaft, 1962), 33.

the state.¹⁶ Protestants' distinctive contributions to postwar legal thought, building on their efforts under the Nazi regime to articulate an alternative to both legal positivism and natural law, should be understood in dialogue with this wider discourse.

The war crimes trials and denazification proceedings carried out in all four occupation zones provided the backdrop against which questions about the relationship between positive law and moral norms assumed acute political significance. The International Military Tribunal at Nuremberg prosecuted twenty-four leaders of the Nazi regime between November 1945 and October 1946, not only for "war crimes" as defined by existing international treaties but for "crimes against humanity" and "crimes against the peace," new categories of international law encompassing mass killing, deportation, and aggressive war. German jurists ranging from the disgraced Carl Schmitt to the liberal émigré Hans Kelsen seized upon the Tribunal's creation of new legal categories to accuse the trials of meting out retroactive justice, in violation of the principle of *nulla poena sine lege*—no penalty without a law. An ordinance of the Allied Control Council on December 20, 1945, which allowed occupation authorities to grant German courts in their respective zones jurisdiction over "crimes against humanity," added fuel to the public controversy.¹⁷ Denazification proceedings affected a far wider proportion of the German population, subjecting former Nazi Party members in all four occupation zones to questioning by special courts that determined whether defendants could remain employed in public service. Particularly after the U.S. military government authorized German staff in its zone to take over

¹⁶ A selection of key texts is offered in Maihofer, *Naturrecht oder Rechtspositivismus?*. For an overview of the postwar "natural law renaissance," see Arthur Kaufmann, "Die Naturrechtsrenaissance der ersten Nachkriegsjahre – und was daraus geworden ist," in *Die Bedeutung der Wörter: Studien zur europäischen Rechtsgeschichte: Festschrift für Sten Gagner zum 70. Geburtstag*, ed. Michael Stolleis (München: Beck, 1991), 105-132.

¹⁷ Lawrence Douglas, "Was damals Recht war...*Nulla Poena* and the Prosecution of Crimes against Humanity in Occupied Germany," in *Jus Post Bellum and Transitional Justice*, eds. Larry May and Elizabeth Edenberg (Cambridge: Cambridge University Press, 2013), 51-52; Devin O. Pendas, "Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945-1950," *Central European History* 43 (2010): 430-432.

the proceedings in March 1946, denazification invited similar charges of retroactivity by German jurists.¹⁸

The eminent Heidelberg legal philosopher Gustav Radbruch offered the most influential answer to the retroactivity problem in a brief essay published in the August 1946 issue of the *Süddeutsche Juristen-Zeitung*, "Statutory Injustice and Supra-Statutory Justice." Radbruch's essay came in the aftermath of a series of ordinances of the U.S. military government authorizing German courts to prosecute crimes committed during National Socialism under German criminal law, without regard to statutes of limitation; it focused on the problem of applying ordinary criminal law to Nazi-era crimes.¹⁹ Radbruch's response necessitated a confrontation with the legal origins and consequences of the Nazi regime. Adopting an explanation that emerged already in the writings of oppositional jurists and theologians under Nazism, Radbruch proposed that the German tradition of legal positivism, which recognized the state as the sole source of valid law, had left German judges "defenseless" against the Nazi regime's "laws of arbitrary and criminal content." In extreme circumstances, Radbruch argued, judges should ignore the written law in the name of justice. Radbruch did not advocate for adherence to natural law in all cases, however, but sought to balance the ideal of justice with the positivist demand for the consistent application of statutes:

The conflict between justice and legal security should be resolved such that the positive law, secured through statute and power, has priority even when its content is unjust and inexpedient; *it is only when the contradiction between the positive law and justice*

¹⁸ On German reactions to denazification, see Alexander Perry Biddiscombe, *The Denazification of Germany: A History, 1945-1950* (Stroud: Tempus, 2007), 183-215.

¹⁹ Foljanty, *Recht oder Gesetz*, 54-56. Allied Control Council Law No. 10 also allowed the occupation governments to authorize German courts to prosecute Nazi-era war crimes under the IMT statute, but because this occurred only "selectively" at the time Radbruch wrote his essay, he focused on crimes prosecuted under ordinary German criminal law.

*reaches such an unbearable level that the statute, as 'unjust law', must give way to justice.*²⁰

On the basis of the category of "statutory injustice," Radbruch defended the prosecution of "crimes against humanity" against conservative opponents of war crimes trials who cleaved to positivist protestations against violations of the *nulla poena* principle.²¹ Yet Radbruch was far from a robust natural law theorist. A Social Democratic Justice Minister during the Weimar Republic forced to resign from his teaching post in May 1933, Radbruch returned to the University of Heidelberg in late 1945 eager to reestablish the prestige of the legal profession. His famous thesis was weighted heavily toward legal security; his critique of positivism served primarily to exculpate judges for their failure to resist the Nazi state, rather than establishing an alternative foundation for postwar legal order.²²

More than only a response to dilemmas posed by the policies of the occupation governments, the natural law debate reflected the wider efforts of German intellectuals to grapple with the lessons of National Socialism for postwar reconstruction. A desire to recover fundamental moral principles as a basis of political order, in the wake of the obvious horrors of the Second World War, linked jurists to networks of religious intellectuals, both Catholic and Protestant. Many prominent postwar jurists, overwhelmingly political conservatives, shared with religious leaders the assessment that secularism was to blame for the rise of National Socialism and pioneered confessionally distinct discussions about the normative foundations of law. Even the writings of secular legal philosophers contained religious overtones. The Frankfurt jurist

²⁰ Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht," *Süddeutsche Juristen-Zeitung* 1 (1946): 107.

²¹ Foljanty, *Recht oder Gesetz*, 68-74.

²² Douglas G. Morris, "Accommodating Nazi Tyranny? The Wrong Turn of the Social Democratic Legal Philosopher Gustav Radbruch After the War," *Law and History Review* 34 (2016): 649-688. See also Foljanty, *Recht oder Gesetz*, 56-61.

Helmut Coing, who developed a theory of the "Highest Principles of Law" on the basis of the "value philosophy" of early twentieth-century phenomenology, described his central axiom of the "specific, undeniable dignity" of each individual person as the historical product of "Christianity and humanism."²³ In a follow-up essay to "Statutory Injustice," Radbruch himself argued that a secular constitution was not sufficient to ensure the justice of law in the absence of a "religious foundation."²⁴

For German Catholics, the tradition of neo-Scholastic social thought, rooted in the late nineteenth-century revival of Thomist natural law teachings, provided a basis for rethinking the normative foundations of law after the Second World War. According to the neo-Thomist teachings of the 1891 and 1931 papal social encyclicals, a seamless hierarchy linked God's eternal law to the natural law norms of human society, and natural law to the positive law of the state. In the mid-1930s, the Vatican condemned both National Socialism and Bolshevism as "totalitarian" heresies at odds with natural law. During the Second World War and early Cold War, prominent European Catholic thinkers and members of the Church hierarchy, including Pope Pius XII, embraced a language of "human rights" as the basis for an alliance with the U.S. against Nazism and then against Soviet Communism.²⁵ Catholics intellectuals offered a distinct vision of human rights departing sharply from liberal individualism. Neo-Thomist social doctrine, they believed, provided as an alternative to both atomistic liberalism and authoritarian collectivism a "personalist" ontology, which revealed the true nature of the human as a being in relationship to God, family, and community.

²³ Cited in Foljanty, *Recht oder Gesetz*, 185. See also Helmut Coing, *Die obersten Grundsätze des Rechts: Ein Versuch zur Neugründung des Naturrechts* (Heidelberg: Lambert Schneider, 1947).

²⁴ Gustav Radbruch, "Die Erneuerung des Rechts," in *Naturrecht oder Rechtspositivismus?*, ed. Maihofer, 1-10.

²⁵ Chamedes, "Vatican," 266-312.

The formative and most influential expression of the Catholic turn to human rights was the French neo-Thomist philosopher Jacques Maritain's *The Rights of Man and Natural Law* (1942). While Maritain's writings of the 1920s sought to blend neo-Thomist theology with an authoritarian, corporatist politics, his 1942 text marked the culmination of a transformation in Catholic politics that led him to posit individual rights as the apotheosis, rather than the antithesis, of Catholic personalist teachings.²⁶ For Maritain, a wide range of rights—to life, bodily integrity, property, freedom of conscience and association, but also to political participation and a just wage for one's labor—followed from the "dignity of the human person." Invoking a term that gained traction among Catholic intellectuals of the 1930s and 1940s in opposition to both totalitarianism and liberal individualism, Maritain insisted that human "dignity" inhered in each individual's "direct relationship with the absolute." His claim reflected the Thomist synthesis of reason and revelation: Human beings possessed dignity even in absence of knowledge of divine salvation, but "consciousness" of human dignity and its political implications was perfected in "the message of the Gospel."²⁷

Maritain's text was not translated into German until 1951, but a range of Catholic jurists in postwar Germany drew on neo-Thomist natural law as a means of connecting Christian faith to concrete problems of political reconstruction. The émigré jurist Heinrich Rommen issued a new edition his *The Eternal Return of the Natural Law* in 1947, arguing like Maritain that pre-political rights to life, liberty, and property, as well as the rights of collective bodies such as

²⁶ On the political reorientation of Catholic personalism in the interwar period and Maritain's pivotal role, see Moyn, *Christian Human Rights*, 68-89.

²⁷ Jacques Maritain, *The Rights of Man and Natural Law*, trans. Doris C. Anson (New York: Charles Scribner's Sons, 1943), 4, 64-68, 79-80. On Catholic uses of "dignity," see Moyn, *Christian Human Rights*, 25-64.

families and communities, followed from "the rational, social, essential nature of man."²⁸ The most vigorous champion of neo-Thomist natural law in early postwar Germany was the jurist Adolf Süsterhenn, who as a delegate of the Christian Democratic Union to the West German constitutional convention was largely responsible for the Catholic influence on the Basic Law.²⁹ Like Maritain and Rommen, Süsterhenn stressed the innate sociality of the individual, arguing that a just legal order must protect not only classical individual rights against the state, but also the natural rights of sub-state orders such as family, community, and church.³⁰ Süsterhenn also shared their emphasis on the interplay of reason and revelation in the illumination of natural law: The "core stock of moral norms" written on the hearts of all human beings could be known by the "light of reason," and "through the order of grace, the natural order of the world is not overcome but confirmed, fulfilled, and elevated."³¹

The revival of natural law theories during and after the Second World War, in particular in a Catholic guise, served as a foil against which German Protestants conceptualized the relationship between theology and legal order. Their lack of a strong natural law tradition did not leave German Protestants reliant on Catholic or ecumenical Protestant understandings of law and human rights, however. Rather, their widespread acknowledgement of the failure of political quietism under the Third Reich led Protestant jurists, theologians, and political intellectuals to

²⁸ Heinrich Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. Thomas R. Hanley (Indianapolis: Liberty Fund, 1998), 203-217, quoted 203. Hanley emphasizes the neo-Thomist perspective that Rommen shared with other European Catholic émigrés to the U.S., including Maritain: see Hanley, "Introduction," in Rommen, *The Natural Law*, xix-xx, xxv. For Rommen's contemporary reception in Germany, see Friedrich Wieacker, "Zur Erweckung des Naturrechts," *Süddeutsche Juristen-Zeitung* 4 (1949): 295-302.

²⁹ On Süsterhenn's role in the drafting of the Basic Law, see Foljanty, *Recht oder Gesetz*, 116-132 and Christoph von Hehl, *Adolf Süsterhenn (1905-1974): Verfassungsvater, Weltanschauungspolitiker, Föderalist* (Düsseldorf: Droste, 2012), 376-425.

³⁰ Adolf Süsterhenn, *Wir Christen und die Erneuerung des staatlichen Lebens* (Bamberg: Bamberger Verlagshaus Meisenbach & Co., 1948), 30-31.

³¹ *Ibid.*, 12, 14, 23.

call for a return to Reformation and biblical teachings in search of alternative models for the political role of Christianity. The result of the ensuing debates was a conception of human rights rooted in a different understanding of the human being, with decisive consequences for Protestant political engagement during the occupation period.

Theological Foundations of Protestant Legal Thought: Barth versus Brunner Reconsidered

German Protestant theologians and jurists turned to the question of the theological foundations of law for largely the same reasons as their Catholic counterparts. Both groups understood legal positivism as a product of the historical process of secularization that culminated in National Socialism and believed that the spiritual foundations of the postwar order lay in a return to Christianity. Nevertheless, the Protestant debate proceeded on different theological terrain, rooted not in a tradition of social doctrine but in competing interpretations of Reformation teachings of the relationship between law and gospel. The intellectual divergence that emerged under the Third Reich between Lutherans around the "intact" churches and figures influenced by Karl Barth around the splinter wing of the Confessing Church continued to structure debate after the war. Lutherans emphasized the temporal priority of law to gospel: God gave his law in order to save a sinful humanity from self-destruction, while the gospel's promise of the reign of Jesus Christ as one of pure love, in which the law no longer exerted authority, could not be fulfilled within the fallen world. In a series of essays written following his forced return to Basel in 1935, Karl Barth inverted this relation. Because Christ died to redeem humanity's sins, Barth argued, the present world already stood under the lordship of Christ as a sign of its ultimate redemption; gospel came prior to and formed the foundation for law.³² The

³² Karl Barth, "Gospel and Law," and "Church and State," in Barth, *Community, State, and Church*, 71-100, 101-148. These essays were written in 1935 and 1938 respectively. See also Hockenos, *A Church Divided*, 26, 58.

former theology gave rise to a conception of law rooted in God's *creation* of the world (often termed in the subsequent Protestant debate "Trinitarian"), the latter in Christ's *redemption* ("Christological" or "Christocentric").³³ While a sharp division between adherents of these theologies emerged already in the legal-theological exchange under the Third Reich, the debate in early postwar Germany took shape around seminal texts published in Switzerland around the end of the war: Emil Brunner's *Justice: A Theory of the Basic Laws of Social Order* (1943) and Barth's "The Christian Community and the Civil Community" (1946).

Brunner's *Justice* was rooted in the theology of "nature and grace" he developed in confrontation with Barth during the first half of the 1930s. A primal "law of nature" was inscribed in the conscience of human beings, but full knowledge of it was attained only through Scriptural revelation. For Brunner, the core of the law of nature, common to every use of the term extending back to Aristotle, was the ancient principle *suum cuique*, to everyone their due. Absent revelation, however, natural law doctrines fell into error. Ancient natural law permitted slavery as the just consequence of inherent inequalities among human beings, while modern natural law treated all individuals as abstractly equal, denying innate differences. A true understanding of natural law, Brunner argued, could be gained only through Christian revelation, which showed *suum cuique* to be a principle inherent in God's creation of the world. Brunner's dual emphases on divine creation and *suum cuique* led him to a conception of human rights that departed substantially from liberal individualism. All human beings possessed equal "dignity" before God, from which followed equal rights to life, bodily integrity, property, religious freedom, work, and education. However, the revealed "order of creation" placed the individual

³³ Ernst Wolf, "'Trinitarische' oder 'christologische' Begründung des Rechts?" in *Recht und Institution: eine Fortsetzung des Göttinger Gesprächs von 1949 über die christliche Begründung des Rechts: Referate, Verhandlungsbericht, Thesen*, ed. Hans Dombois (Witten-Ruhr: Luther-Verlag, 1956), 9-33; Foljanty, *Recht oder Gesetz*, 158-159.

"in definite relationships, institutions or systems" such as the state, marriage, and family, which determined each individual's particular obligations and constrained the means through which one could realize one's rights.³⁴

In his emphasis on divinely-endowed human dignity as the basis of human rights, the co-creation of individuals and communities, and the perfection of natural law in Christianity, Brunner shared common ground with Catholic personalist thinkers such as Jacques Maritain. Like Maritain, Brunner regarded Christian natural law as a palliative against "modern legal positivism," which ascribed absolute sovereignty to the state and therefore served as a harbinger of totalitarianism.³⁵ Building on his writings of the mid-1930s, Brunner's *Justice* combined a new focus on human dignity with the neo-Lutheran theology of "orders of creation" popularized in Germany by Paul Althaus. By the light of revelation, Brunner argued, God's will could be perceived in the structure of worldly communities and institutions, such that justice in the orders of politics, the family, and the economy could be attained through a set of principles rooted in divine creation.³⁶ Brunner's conception of the order of creation aligned him with the traditional Lutheran distinction between the worldly kingdom ruled by justice and the kingdom of Christ ruled by love. Institutions given by God for the preservation of humanity, in particular the state, could be governed only by principles of justice, not an interpersonal ethic of love; "in the world

³⁴ Emil Brunner, *Justice and the Social Order*, trans. Mary Hottinger (London: Lutterworth Press, 1945), 47-71, quoted 52. The original text was Brunner, *Gerechtigkeit: eine Lehre von den Grundgesetzen der Gesellschaftsordnung* (Zürich: Zwingli-Verlag, 1943).

³⁵ Brunner, *Justice*, 71.

³⁶ *Ibid.*, 85-86. For Brunner's discussion of justice in the political, familial, and economic orders, see Brunner, *Justice*, 120-163.

of systems," the Christian did not cease to be a "loving human being" but "cannot give effect to his love except by being just."³⁷

Barth's construal of the relationship between Christianity and law proceeded from an entirely different set of theological premises. If Brunner's foundational dichotomy between justice and love echoed the Lutheran doctrine of the two kingdoms, Barth emphasized the interrelation of divine and worldly order. The state was "not a product of sin"; rather, the state was ordained by God to ameliorate the human tendency toward sin and create the civil peace and order necessary to sustain Christian community. By fulfilling its divinely-mandated task, as described in Paul's Epistle to the Romans—to reward good and punish evil—the state stood under the sovereignty of Christ and bore witness to the coming of the Kingdom of God. In his 1946 text, Barth characterized the "Christian community" and the "civil community" (in which he included all members of a polity, both Christians and non-Christians) not as "two kingdoms" but as concentric "inner and outer circles," of which Jesus Christ stood at the center. Although state and church had different missions, one to preserve civil peace and order and the other to proclaim the Gospel, both stood as witnesses to divine grace. Because the "civil community" was not composed primarily of Christians, however, its members did not have access to the biblical revelation of the state's divine purpose. On this basis, Barth posited a co-dependence between the two communities. The Christian community, with its knowledge of Gospel and the coming of the kingdom of God, should exercise "political responsibility" by reminding the profane state of its place in Christ's reign, its "connection with the order of divine salvation and grace." Christians in

³⁷ Ibid., 114-118, quoted 116-117.

turn relied on the state to provide legal order as the basis of their own existence in a not-yet-redeemed world, "the visible means of [the] protection of human life from chaos."³⁸

Barth's rejection of Brunner's theology of Christian natural law rested on both epistemic and political claims. As in their debate of the 1930s, Barth insisted upon the purity of revelation and rejected any "bridge" between nature and grace.³⁹ Barth therefore eschewed any conception of a divinely-ordained "natural law" accessible to all. Moreover, he argued, in the absence of divine revelation, political claims based on natural law reflected at best ignorance, and at worst arbitrary assertions of power:

The civil community is reduced to guessing or accepting some powerful assertion of this or that interpretation of natural law. All it can do is to grope around and experiment with the convictions which it derives from "natural law," never certain whether it may not in the end be an illusion to rely on it as the final authority and *therefore always making vigorous use, openly or secretly, of a more or less refined positivism.*⁴⁰

Barth took particular aim at the Christian Democratic parties emerging across postwar Europe, which advocated for postwar reconstruction on a natural law basis along the lines advocated by Brunner, Jacques Maritain, and Adolf Susterhenn. According to Barth, such an approach positioned the church as a narrowly political interest group, neglecting its universal mission. Rather than putting forth a series of natural principles to which it claimed special knowledge, the Church should serve as "the model and prototype of the real State" and by its actions "set an example" for the political community.⁴¹ By way of concretizing his metaphor of "inner and outer circles," Barth proposed a range of analogies between the Church's message and political life.

³⁸ Karl Barth, "The Christian Community and the Civil Community," in Barth, *Community, State, and Church*, 153-160.

³⁹ Bohn, *Herrschaft ohne Naturrecht*, 138.

⁴⁰ Barth, "Christian Community," 164, emphasis added.

⁴¹ *Ibid.*, 186.

Because Jesus ministered to the poor and dispossessed, the Church should advocate for social justice rather than mere "equality before the law"; because the Church taught the equality of all before God, Christians must demand the political equality of all regardless of race, gender, or religious belief; because God's mercy outlasted his anger, the state should exhaust peaceful solutions to political conflict before turning to violence.⁴²

Brunner and Barth shared the postwar consensus on the bankruptcy of legal positivism as a basis of political legitimacy and on the importance of Christianity for the reconstruction of political life. Based on competing valuations of natural law, however, they offered starkly contrasting understandings of the role Christians would play. For followers of Barth, Brunner's reliance on natural law bespoke a crypto-Catholicism.⁴³ Brunner, by contrast, objected that Barth's "Christological" theory of the state posited too direct a connection between divine grace and political order.⁴⁴ Barth's vision of the Christian community as an ethical model for the polity strayed far from the traditional distinction made by German Protestants between the worldly order under the law and a Kingdom of God ruled by grace. His radical evangelicalism might seem less plausible as a starting point for Christian political thought than Brunner's blending of Scripture with a defense of natural human rights. Given the disrepute of Lutheran "orders of creation" theology after 1945, however, Barth exercised outsized influence on the conceptions of political responsibility put forth by Protestant intellectuals in early postwar Germany.

⁴² Ibid., 173-179.

⁴³ For instance, see the review of Brunner's *Justice* by the Tübingen theologian and natural law critic Heinz-Horst Schrey in the journal of the Society for Protestant Theology: Heinz-Horst Schrey and Otto Weber, "Wiederkehr des Naturrechts?" *Verkündigung und Forschung* 3 (1946/47): 206-215. At greater length, see Heinz-Horst Schrey, "Naturrecht und Gottesgerechtigkeit," *Naturrecht oder Rechtspositivismus?*, ed. Maihofer, 178-196.

⁴⁴ In the endnotes to *Justice*, Brunner argued that the "Christological foundation' for law and the State" made a "fantastic...deduction" when it "deduce[d] the order of law and State from the *historical fact* of Christ, or the cross of Christ": Brunner, *Justice*, 238-240 n34.

Ernst Wolf and the Politics of Barthian Theology in Postwar Germany

Barth's "Christological" theology exerted a significant impact in postwar Germany, not only by encouraging a deeper confrontation with the Nazi past among a minority of the Protestant leadership, but by adumbrating an approach to Christian political engagement that did not rely on natural law. The career of the most important exponent of Barth's theology of law in postwar Germany, the Lutheran theologian Ernst Wolf, sheds light on the relationship between Barth's thought and the politics of the successor organizations to the "Provisional Church Government" of the Confessing Church. The founding editor of the Confessing Church organ *Evangelische Theologie* in 1933 and founder of the Society for Protestant Theology in 1940, Wolf was drafted into the military as a medic in 1942 and joined the theological faculty at the University of Göttingen in 1945 following his release from internment.⁴⁵ Wolf stood at the intersection of several networks that claimed continuity with the tradition of the Barmen Declaration and the Confessing Church Provisional Government—the EKD *Bruderrat*; his own Society for Protestant Theology; and the *Kirchlich-Theologische Arbeitsgemeinschaft* (Ecclesiastical-Theological Society) in Württemberg, founded in 1933 by Wolf's close colleague, the Confessing Church pastor Hermann Diem. Building on his writings of the mid-1930s, which developed a dual critique of legal positivism and natural law in order to oppose "orders of creation" theology, Wolf played a crucial role in bringing questions of legal and political reconstruction to the fore of these networks.

Wolf read Barth's "Christological" theology through the lens of a confessional Lutheran. Rather than focusing on Barth's particular analogies between politics and Christian teachings,

⁴⁵ Sarah Jäger and Philipp Stoltz, "Wolf, Ernst," in Deutsche Forschungsgemeinschaft – Forschergruppe 1765, *Der Protestantismus in den ethischen Debatten der Bundesrepublik Deutschland 1949-1989*, <https://wiki.de.dariah.eu/display/F1P/Wolf%2C+Ernst> (accessed April 15, 2018).

Wolf drew from Barth the wider lesson that all human life was continually dependent on the grace of Christ, the sole point of intersection between humanity and the divine. For Wolf, Barth's critique of natural revelation harmonized with Martin Luther's emphasis on human nature's utter corruption by sin following the Fall. Via Barth, Wolf and his colleagues departed from the reading of Luther proposed by neo-Lutheran "orders of creation" theologians, which stressed the autonomy of the state and other worldly institutions, to instead develop a theological anthropology that emphasized human weakness, lack, and dependency before God. This perspective enabled Wolf and his colleagues to build upon their Nazi-era critiques of the political quietism of "orders of creation" theology, but provided a profoundly ambiguous basis from which to approach the politics of the Allied occupation.

Wolf's essays published immediately following the war exemplified the efforts of postwar *Bruderrat* theologians to synthesize Barth's "Christological" emphasis on the authority of Christ over the world with a theological anthropology of human sin and depravity. Wolf opened the first postwar issue of the revived *Evangelische Theologie* with a salvo against "humanism," a bracing attack on the idea that Christianity contained a doctrine of a shared humanity and human rights that could serve as the moral lodestar of the postwar order.⁴⁶ For Wolf, "humanist" ideologies that insisted upon the transcendence and autonomy of human reason ultimately fueled self-aggrandizing visions of human mastery of the world, leading to the dystopian ideologies of social Darwinism, and finally, of Nazism. While Wolf's critique resonated with other early postwar accounts of the self-destructive tendencies of rationalism and humanism—whether Theodor Adorno and Max Horkheimer's *Dialectic of Enlightenment* (1947)

⁴⁶ Christian humanism represented just one the "humanisms" that flourished in early postwar European thought: see Edward Baring, "Humanist Pretensions: Catholics, Communists, and Sartre's Struggle for Existentialism in Post-War France," *Modern Intellectual History* 7 (2010): 581-609.

from the left or Hans Freyer's *World History of Europe* (1948) from the right—Wolf imbued his narrative with a distinctly Protestant message.⁴⁷ Unlike thinkers who stressed Nazism's denial of innate human dignity, Wolf's genealogy honed in on the problem of human *self-justification*, a signal term for Protestant writers in early postwar Germany. Secular ideologies, Wolf argued, lost sight of the human being's absolute dependence on divine grace. Lutheran theology, with its doctrine of justification by faith, was not the fulfillment of humanism but precisely its opposite, demonstrating that "the honor of the creator, not the self-importance of human beings, remains the *causa finalis*." In a world ravaged by human self-justification, the Church must warn against the "self-assertion of the human being against God."⁴⁸ Only recognition of the human being's epistemic and moral limitations, not the neo-Thomist revival proposed by Heinrich Rommen and in "modified" form by Emil Brunner, could pave the way for a return to Christianity.⁴⁹

Wolf's writings of 1946-47 aimed to cut the ground out from under the categories that postwar Catholic writers employed to chart the political course of Christianity in a secular world: humanism, human rights, and natural law. For Wolf, these concepts, which in the hands of other thinkers linked Christian teachings to questions of worldly political and social order, bore the invariable mark of secularism, the banishment of true knowledge of God. Yet Wolf sought equally to avoid the political quietism that had dogged the German Lutheran tradition, stating at an October 1946 meeting of the Society for Protestant Theology that neo-Lutheran theology

⁴⁷ See Peter E. Gordon, "Interpretations of Catastrophe: German Intellectuals on Nazism, Genocide, and Mass Destruction," in *The Cambridge History of the Second World War, Volume 3: Economy and Society in Total War*, eds. Michael Geyer and Adam Tooze (Cambridge: Cambridge University Press, 2015), 641-645, and Muller, *Other God that Failed*, 336-339.

⁴⁸ Ernst Wolf, "Menschenwerdung des Menschen? Zum Thema Humanismus und Christentum," *Evangelische Theologie* 6 (1946/47): 4-25, quoted 24-25.

⁴⁹ Ernst Wolf, "Naturrecht und Gerechtigkeit," *Evangelische Theologie* 7 (1947/48): 239-240.

falsely assumed the autonomy of the state from the living word of God.⁵⁰ At this juncture, Barth's "Christological" theory of the state served as a crucial resource for Wolf and his colleagues in the *Bruderrat*. Barth offered an alternative model of Christian responsibility for political life, based on an analogy between the "Christian community" and the "civil community," which did not position the Church as a guardian of natural law.

A further link between Barth and the German successor organizations to the Confessing Church Provisional Government was the French Protestant jurist and philosopher Jacques Ellul. Wolf and his colleagues regarded Ellul's 1946 *Le Fondement Théologique du Droit* [*The Theological Foundation of Law*], translated into German in 1948, as a pathbreaking theological defense of the applicability of Christian teachings to secular law that transcended the opposition of natural law and legal positivism.⁵¹ Ellul shared Karl Barth's epistemic and political critique of natural law but placed greater emphasis than Barth on practical problems of political and legal reconstruction.⁵² According to Ellul, the Bible provided, if not a comprehensive system of natural law, then guidelines for worldly political order. Ellul identified three particular points of intersection between the revealed teachings of Jesus Christ and the world of law. First, the Bible revealed concrete *institutions* of social and political order, such as marriage and the state, that "are wholly independent of man's will, assent, or conception" and necessary for fulfilling Christ's

⁵⁰ Ernst Wolf, "Zur Selbstkritik des Luthertums," in *Evangelische Selbstprüfung: Beiträge und Berichte von der gemeinsamen Arbeitstagung der Kirchlich-theologischen Sozietät in Württemberg und der Gesellschaft für Evangelische Theologie, Sektion Süddeutschland im Kurhaus Bad Boll, vom 12. bis 16. Oktober 1946*, ed. Paul Schempp (Stuttgart: Kohlhammer, 1947), 131-133.

⁵¹ Wolf, "Naturrecht und Gerechtigkeit," 249-253. See also the review of Ellul's book in the journal of the Society for Protestant Theology: Schrey and Weber, "Wiederkehr des Naturrechts," 215-220.

⁵² Jacques Ellul, *The Theological Foundation of Law*, trans. Marguerite Wieser (New York: Seabury Press, 1969), 10-14. The German translation is Ellul, *Die theologische Begründung des Rechts* (München: Kaiser, 1948). The appearance of Ellul's work in German two decades before the English translation is telling of the relative interest in the text in German and Anglo-American contexts.

redemption of humanity.⁵³ Secondly, Ellul pointed toward *human rights* as divine endowments whose validity transcended the positive law. Unlike the "personalist" vision of human rights espoused by Catholics such as Jacques Maritain and Adolf Susterhenn, however, Ellul paradoxically linked human rights to the theological anthropology he shared with Ernst Wolf. Human rights were not abstract laws inherent in the order of creation but existed *only* in concrete situations, with respect to the particular purposes God had set for an individual. These rights were founded not on individual rationality and autonomy but on human lack, weakness, and dependence: "Whenever man pretended that he could found his rights on his own strength and contain them within himself, his pretension was built upon violence... This is the very opposite of what we have learned. It is the weak who receives his rights from God, which he may claim before God and before men."⁵⁴ Finally, Ellul argued that the notion of *justice* as a regulative ideal for law was unattainable without knowledge of divine righteousness as revealed in the Bible.⁵⁵ In all three instances, Ellul emphasized that Christian prescriptions for worldly legal order could be recognized only in concrete situations, not as fixed norms.

Barth's "Christological" theory of the state, along with its elaboration by Ellul, placed Wolf and his colleagues around the *Bruderrat* in a paradoxical position. These figures eschewed the notion of a "Christian natural law," espoused by Adolf Susterhenn and other Christian Democratic legal theorists, as a basis for political reconstruction. Yet following Barth, they also regarded the preaching of the Gospel as a political act, an announcement of Christ's lordship over the worldly order. During the first years of the postwar occupation, *Bruderrat* members most urgently confronted the question of how to reconcile their critique of natural law with a defense

⁵³ Ellul, *Theological Foundation*, 76-79, quoted 78.

⁵⁴ *Ibid.*, 79-84, quoted 84.

⁵⁵ *Ibid.*, 85-94.

of Christian political engagement in fierce public debates about German guilt and postwar justice. Given their Nazi-era critique of "orders of creation" theology and its links to the "total state," *Bruderrat* members were more prepared than the Lutheran mainstream to confront the Nazi-era failures of German Protestantism. However, their rejection of natural law and dignity-based conceptions of human rights also left them reluctant to accept Gustav Radbruch's standard of "supra-statutory justice" as a basis for defending Allied denazification and war crimes trials.

Barth's supporters faced their first political controversy of the early postwar years with the promulgation of the EKD Council's Stuttgart Declaration of Guilt in October 1945. The Council had been formed in August 1945 at a conference of regional Protestant leaders in the Hessian town of Treysa; it was to serve as the executive organ of a new federation of Germany's regional Protestant churches, the *Evangelische Kirche in Deutschland*, following the disintegration of the Nazi-era *Deutsche Evangelische Kirche*. With the German Christian movement discredited, Confessing Church veterans assumed leading roles at the Treysa conference. Divisions between representatives of the "intact" Lutheran churches and of the Confessing Church Provisional Government, succeeded in the postwar period by the EKD *Bruderrat*, remained pervasive. In a compromise solution, the Lutheran bishop of Württemberg, Theophil Wurm, was elected as the EKD Council's chair, while the *Bruderrat* leader Martin Niemöller was elected vice-chair and head of the EKD's Foreign Office.⁵⁶ The Stuttgart Declaration, the Council's first public declaration issued at the behest of an ecumenical delegation led by the English bishop George Bell, reflected ongoing political and theological

⁵⁶ On the Treysa conference, see Hockenos, *A Church Divided*, 42-54 and Wyneken, "Driving Out the Demons," 154-164. The constitution of the EKD was finalized three years later in the summer of 1948 at a conference at the Thuringian city of Eisenach.

divides.⁵⁷ In the Declaration's core statement, the authors declared themselves to be "in solidarity of guilt" with the German people, acknowledging that "Though us [the German people], endless suffering has been brought to many peoples and countries." However, the signatories went on to laud their own "[struggle] in the name of Jesus Christ" against National Socialism, faulting the Church not for failing to resist the regime but only "for not witnessing more courageously, for not praying more faithfully, for not believing more joyously, and for not loving more ardently."⁵⁸

Following the hostile reception of the Declaration by a wide segment of the Protestant clergy and laity, who worried that occupation governments would seize upon the document to support accusations of "collective guilt" against all Germans, the Lutheran theologian and chair of the newly-formed EKD chancellery Hans Asmussen composed a commentary distributed to all German Protestant pastors. Representing the views of the conservative Lutheran wing of the EKD Council, Asmussen's commentary insisted that the Church's acknowledgement of guilt be understood in strictly spiritual, not political terms. While the Stuttgart Declaration acknowledged the Church's failure in the Nazi years to proclaim the Gospel of Jesus Christ, the Church could not be held responsible for the regime's crimes. Therefore, the Stuttgart Declaration offered a message of repentance addressed to fellow Christians, not a political message to the occupation governments. A member of the Confessing Church, Asmussen was nevertheless a staunch critic of Karl Barth's inversion of the law-gospel dualism, and Asmussen's commentary on the

⁵⁷ For overviews of the history of the Stuttgart Declaration, see Gerhard Besier, "Zur Geschichte der Stuttgarter Schulderklärung vom 18./19. Oktober 1945," in Besier and Gerhard Sauter, *Wie Christen ihre Schuld bekennen: Die Stuttgarter Erklärung 1945* (Göttingen: Vandenhoeck & Ruprecht, 1985), 9-61 and Hockenos, *A Church Divided*, 75-100.

⁵⁸ "Stuttgart Declaration of Guilt (Evangelical Church of Germany council, October 1945)," in Hockenos, *A Church Divided*, 187.

Stuttgart Declaration was rooted in "the conservative interpretation of the Lutheran doctrine of two kingdoms," a strict separation of politics from the Church's message.⁵⁹

Ernst Wolf quickly emerged as a vociferous critic of Asmussen's interpretation of the Stuttgart Declaration and put forth an alternative vision for the political mission of the Church rooted in the tradition of Karl Barth and the Confessing Church Provisional Government. Echoing Barth's link between the "Christian community" and the "civil community," Wolf argued that the separation of theology and politics advocated by Asmussen and other Lutherans "betray[ed]...a conception of the nature of responsible ecclesiastical activity derived from false political commitments." For Wolf and other followers of Barth, including Martin Niemöller, critiques of the Stuttgart Declaration's violation of German "national dignity" represented a "flight...into self-justification," an effort to mark off secular politics from a Christian ethic of repentance.⁶⁰ As one of Wolf's Confessing Church colleagues wrote in *Evangelische Theologie*, in a quintessentially "Christological" formulation: The Stuttgart Declaration was an expression of the "prophetic speech of the Church" that "witness[ed] the authority of Jesus Christ and the validity of his commandments, to confess disobedience and to call to obedience." This speech had universal validity that overcame a dichotomy of "political" versus "spiritual" guilt.⁶¹

If *Bruderrat* members united around an expansive interpretation of guilt in the Stuttgart Declaration, however, their responses to denazification and war crimes trials were more varied.

⁵⁹ Hockenos, *A Church Divided*, 91-94. Asmussen's commentary on the Stuttgart Declaration is found in *Im Zeichen der Schuld: 40 Jahre Stuttgarter Schuldbekennnis: eine Dokumentation*, ed. Martin Greschat (Neukirchen-Vluyn: Neukirchener Verlag, 1985), 47-62. On the theological conflict between Barth and Asmussen, see also Gerhard Besier, "Die Auseinandersetzung zwischen Karl Barth und Hans Asmussen: Ein Paradigma für die konfessionelle Problematik innerhalb des Protestantismus?" in Besier, *Die evangelische Kirche in den Umbrüchen des 20. Jahrhunderts: gesammelte Aufsätze* (Neukirchen-Vluyn: Neukirchener Verlag, 1994), 121-142.

⁶⁰ Ernst Wolf, "Nationales Gewissen?" *Göttinger Universitäts-Zeitung* 1 (1945): 9-11.

⁶¹ Karl Gerhard Steck, "Schuld und Schuldbekennnis," *Evangelische Theologie* 6 (1946/47): 368-385, quoted 379, 381-382.

The *Kirchlich-Theologische Arbeitsgemeinschaft* in Württemberg, led by the Confessing Church pastor Hermann Diem, went furthest in linking the Stuttgart Declaration to a defense of denazification. The Society's June 1946 memorandum on "Church and Denazification," which appeared following the transfer of denazification in the U.S. zone to German control, implored Protestants to approach denazification from the higher aim of serving God, rather than merely positivist concerns about legal security. Confronting widespread critiques of denazification as "retroactive justice," the memorandum insisted that the principle *nulla poena sine lege* not be applied to "criminal laws," and refused to collapse the guilt of individual perpetrators into an amorphous "collective guilt" that could not be addressed by judicial means.⁶²

Other thinkers who followed Barth's "Christological" theology of law, however, drew alternative conclusions. A year following the appearance of *The Theological Foundation of Law*, Jacques Ellul published an excoriation of the Nuremberg International Military Tribunal that mirrored the tropes of "victor's justice" widely advanced by German nationalist jurists.⁶³ Martin Niemöller similarly criticized denazification proceedings on the basis of their violation of *nulla poena sine lege*, first in a letter to George Bell in November 1946 and later in a public statement of the Hesse-Nassau church leadership of February 1948 imploring parishioners not to testify at denazification proceedings.⁶⁴ Even the response of the *Kirchlich-Theologische Arbeitsgemeinschaft* to Niemöller, composed by Diem, concluded that denazification

⁶² Diethard Buchstädt, *Kirche für die Welt: Entstehung, Geschichte und Wirken der Kirchlichen Bruderschaften im Rheinland und in Württemberg 1945-1960* (Köln: Rheinland-Verlag, 1999), 103-110.

⁶³ Jacques Ellul, "Note sur le Procès de Nuremberg," *Verbum Caro*, August 1947, 97-112.

⁶⁴ Buchstädt, *Kirche für die Welt*, 126-127; Wyneken, "Driving Out the Demons," 253, 266-267.

proceedings had been so compromised by a collapse in popular legitimacy that the only choice was a "generous amnesty" for all but the most egregious perpetrators.⁶⁵

The tensions among Barthian theologians and jurists over Allied judicial policies stemmed not only from political disagreements but from unresolved conflicts within the "Christological" understanding of political responsibility. Barth's writings since the mid-1930s demonstrated for these thinkers the link between the Christian Gospel and the world of law; the Church could not simply relegate the law to an autonomous sphere of state sovereignty. The form that Church interventions in legal matters would take, however, remained contested. For Diem, the Church served as a witness to higher principles of justice exceeding state power; thus, Diem produced a theological defense of denazification that mirrored Radbruch's famous "formula." Diem's was a minority perspective, however, and a rare voice that criticized Protestant church leaders for their reluctance to carry out denazification within their own ranks.

Critics of denazification within the *Bruderrat* drew more consistently on Barth's analogical argument as well as the anthropology of human sinfulness and depravity advanced by thinkers such as Ernst Wolf. Niemöller claimed that the church could not preach reconciliation without also promoting reconciliation in the political realm. Ellul's essay on the Nuremberg Trials situated a critique of "crimes against humanity" as an arbitrary, political category within a wider theological frame. For Ellul, the underlying causes of wartime atrocities were the depraved "spiritual attitude of the contemporary human being" and the collapse of morality in the international state system, the result of a decline in religious faith. Drawing on a Protestant critique of "self-justification," Ellul argued that the efforts of the Nuremberg court to adjudicate

⁶⁵ "Evangelische Kirche und Entnazifizierung, 14.2.1948: Eine Stellungnahme des Ausschusses der Kirchlich-theologischen Sozietät in Württemberg," reprinted in Buchstädt, *Kirche für die Welt*, 465-469, quoted 468.

on the basis of an abstract concept of "humanity" reflected an untenable hubris. Instead, human justice could at best "preserv[e]" the world until Christ's coming.⁶⁶

The theological roots of Protestant arguments against denazification and war crimes trials can traced even to the Darmstadt Statement, the August 1947 declaration of guilt authored by the *Bruderrat* theologian Hans-Joachim Iwand and vigorously defended by Ernst Wolf. Strongly influenced by Karl Barth, who presented a lecture before the *Bruderrat* a month prior, the Darmstadt Statement displayed significant continuity with the Confessing Church's critique of German Christian theology.⁶⁷ *Völkisch* theologies, the statement argued, "prepared the way for the unrestricted exercise of political power," while the traditional "alliance of the Church with the forces that clung to everything old and conventional" facilitated the capitulation of German Protestantism to Nazi dictatorship." Less often noted, however, is that the Darmstadt statement criticized the Nazi-era Protestant Church not for its insufficient commitment to worldly justice, but for trying to achieve justice at all through political means. While commentators have focused on the Declaration's critique of German nationalism and allusions to East-West reconciliation, the political core of the statement was the fourth thesis, which offered not a call for a particular type of anti-Nazi politics but a critique of secular politics *as such*:

We went astray when we thought we ought to create a political front of good against evil, light against darkness, justice against injustice, and to resort to political methods. In so doing *we distorted God's free grace to all by forming a political, social and philosophical front, and left the world to justify itself.*⁶⁸

⁶⁶ Ellul, "Nuremberg," 107-108, 111-112.

⁶⁷ Hockenos, *A Church Divided*, 122-130. For Ernst Wolf's defense of the statement against its critics, see Ernst Wolf, "Zur politischen Verantwortung der Kirche," *Evangelische Theologie* 7 (1947/48): 187-192.

⁶⁸ "Statement by the Council of Brethren of the Evangelical Church of Germany Concerning the Political Course of Our People (Darmstadt Statement, August 1947)," in Hockenos, *A Church Divided*, 193-194.

The Statement's authors emphasized less principles of justice than the role of the Church as an ethical model whose duty it was to remind political leaders of the limitations of human sovereignty. Their commitment to a critique of "self-justification," stemming from a wider anthropology of human sinfulness, led *Bruderrat* members to conclude that political problems could not be solved through political means alone, but only through faith and reconciliation in Christ. In this light, Niemöller and Ellul criticized denazification and war crimes trials as flawed policies founded on human self-aggrandizement, merely political means of confronting the past that reproduced the mentality that had enabled the rise of Nazism.

The political theology put forth by followers of Barth in the postwar debate about German guilt was not oriented toward ideals of human rights, but instead rooted in an emphasis on human depravity in the absence of divine grace. Building on their Nazi-era arguments against the "natural" theology undergirding the "total state," postwar *Bruderrat* members continued to emphasize Protestant confessionalism over ecumenical cooperation. In a commentary on the Darmstadt Statement, the Confessing Church theologian and jurist Karl-Heinz Becker summarized what many German Protestants took to be the crucial distinction between the major Christian churches. Protestant theology, unlike its Catholic counterpart, viewed human "moral nature [*sittliche Natur*]" as totally "relinquished" after the Fall; Protestant thought did not offer "a church doctrine of human beings and their nature" but "deal[t] with the end of the human beings and their complete recreation."⁶⁹ The theological anthropology outlined by Becker provided members of the *Bruderrat* a shared point of orientation with more traditional Lutherans, against both Catholic natural law theorists and ecumenical Protestants.

⁶⁹ Karl-Heinz Becker, "Vorbemerkungen zur Frage einer evangelischen Rechtsethik," *Evangelische Theologie* 7 (1947/48): 303-313, quoted 311-312. On the context of Becker's essay, presented as a lecture at an ecumenical study conference that included Ernst Wolf and Erik Wolf, see Becker to Asmussen, January 22, 1948, EZA 2/32.

The Paradoxes of Lutheran Political Responsibility

If theologians around the *Bruderrat* and its affiliated societies developed a conception of political responsibility based on Barth's "Christological" theology of law, the collapse of the German state and imperatives of political reconstruction confronted Lutherans allied with the mainstream of the EKD leadership with yet greater challenges. The Lutheran wing of the EKD lacked not only a sustained tradition of political and social thought but also a seminal thinker on the order of Barth, whose reconceptualization of the relationship between the "Christian community" and the state exercised a profound influence over the successor movements to the Confessing Church Provisional Government. The occupation period did not witness a Lutheran retreat to a tradition of political quietism, however, but a vibrant political discourse among Lutherans that centered on the same problem confronting their counterparts around the *Bruderrat*: the construction of a model of Christian political responsibility that eschewed comprehensive Christian natural law doctrines.

The political reorientation of postwar Lutheranism took place within a cluster of newly-founded research institutes, academies, and political committees that aimed to deepen intellectual exchange between theologians and lay professionals. More than any formal ecclesiastical statement, the work of these institutions indicated Lutherans' new commitment to political engagement and an implicit acknowledgement of the failure of orthodox interpretations of the two kingdoms doctrine under National Socialism. Their mission reflected a Protestant critique of natural law doctrines. Protestant institutes aimed less to initiate a Christian party program or policy than to facilitate dialogue between religious and political leaders and encourage a generation of Protestant professionals to bring Christian values to bear upon their work.

The earliest and most important of the Protestant academies was founded in September 1945 in Bad Boll, a Württemberg village south of Stuttgart, by the theologian and pastor Eberhard Müller. A veteran of the Lutheran wing of the Confessing Church, Müller was the president of the German Christian Student Association from 1935 until its banning by the Nazi state in 1938, and served during the war as a military chaplain. After the war, Müller sought less a break with the past along the lines of the *Bruderrat* than a reestablishment of his network from the Student Association. Müller's vision of a lively exchange between the church and the world of politics exceeded a traditional deference to political authority and circumscription of the church's mission to proclamation of Gospel.⁷⁰ By 1954, thirteen Protestant academies (including Bad Boll) had been established in West Germany along a similar model, seven of them prior to the founding of the West German state in May 1949.⁷¹ In December 1946, the Lutheran theologian and member of the wartime Freiburg Circle Helmut Thielicke founded the Study Group of the Protestant Academies (*Studiengemeinschaft der Evangelischen Akademien*), a standing circle of theologians and lay intellectuals that aimed to deepen conversations initiated at the regional Protestant academies.⁷² The *Christophorus-Stift*, founded in February 1947 with the support of six state churches in the British zone, was a fully-fledged research institution that

⁷⁰ Sauer, *Westorientierung*, 54-60, 67-68; see also Günther Brakelmann, "Ein Wegbereiter für neue Formen kirchlicher Präsenz in einer anders gewordenen Welt. Über das Lebenswerk Eberhard Müllers," in *Protestanten in öffentlicher Verantwortung: biographische Skizzen aus der Anfangszeit der Bundesrepublik*, eds. Günter Brakelmann, Norbert Friedrich, and Traugott Jähnichen (Waltrop: Spenner, 2005), 79-93. The German Christian Student Association was associated with the Confessing Church, not the *Deutsche Christen*.

⁷¹ Ralf Jürgen Treidel, *Evangelische Akademien im Nachkriegsdeutschland: Gesellschaftspolitisches Engagement in kirchlicher Öffentlichkeitsverantwortung* (Stuttgart: Kohlhammer, 2001), 29. Three Protestant Academies were founded in East Germany between 1948-53.

⁷² *Ibid.*, 27; Tim Schedel, "Studiengemeinschaft der Evangelischen Akademie," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Studiengemeinschaft+der+Evangelischen+Akademien> (accessed April 15, 2018).

aimed to unite academic scholarship with Christian faith.⁷³ Its first director, the Lutheran theologian Friedrich Karl Schumann, argued that new forms of knowledge created through a synthesis of Christianity and the social sciences would facilitate Protestant engagement in politics and society, a task Protestants had traditionally not taken as seriously as their Catholic counterparts.⁷⁴

Standing at the intersection of theology and the practical tasks of postwar reconstruction, the question of Christian natural law was a principal focus of Protestant academies and research institutes in their early years. The Protestant Academy at Bad Boll organized annual conferences for jurists beginning in October 1945, garnering upwards of sixty participants in each of the first five years.⁷⁵ The *Christophorus-Stift* held its second plenary meeting on the problem of natural law in October 1948.⁷⁶ Beyond national-level institutions, regional working groups of Protestant jurists formed in Bavaria and the Palatinate to discuss analogous issues.⁷⁷ The first meeting of the Social Office of the newly-formed Protestant Church in Westphalia, whose attendees

⁷³ "Erster Jahresbericht des Christophorus-Stifts in Hemer i. Westf. über das Jahr 1948: Erstattet vom Stiftsrat," Archiv der Forschungsstätte der Evangelischen Studiengemeinschaft, Heidelberg (FEST), Box 134. The founding members were the historian Wilhelm Schüßler, publicist Helmut Lindemann, and Oldenbourg bishop Wilhelm Stählin. Their role is detailed in an untitled document on the founding of the institute in FEST Box 2.

⁷⁴ Schumann and Lücking to Kirchenleitung der EKD, August 6, 1948, FEST Box 134.

⁷⁵ The attendance lists for the Bad Boll conferences are found in Archiv der Evangelischen Akademie Bad Boll (EABB), Juristentagungen, 1945 (158 participants), 1946 (79 participants), 1947 (129 participants), 1948 (63 participants), and 1949 (62 participants).

⁷⁶ "Niederschrift zu der Aussprache über die Vorträge der 2. Plenartagung des Christophorus-Stiftes Hemer in Brackwede vom 8.-11.10.48" and Pastor Dr. Bluth, "Um die Grundlagen des Rechts," FEST Box 134.

⁷⁷ "Jura und Evangelium," *Evangelische Welt*, February 15, 1948; "Auftakt in der Pfalz," *Evangelische Welt*, March 15, 1949.

included the Confessing Church jurist and future West German cabinet member Gustav Heinemann, similarly focused on the relationship between natural law and biblical revelation.⁷⁸

An analysis of the discussion of law at the Protestant academies reveals significant overlap with the discourse around the *Bruderrat*. While some of the more practically-minded jurists who attended the Bad Boll conferences sought to draw on natural law precepts, the theologians who led the discussions shared the critique of natural law articulated most forcefully by Barth.⁷⁹ Some participants in academy discussions drew on Barth's "Christological" theology of law, while others sought to develop a Lutheran conception of political responsibility that overcame the failures of "orders of creation." Beyond these disagreements, however, theologians and lay intellectuals around the academies approached questions of law and politics through a distinctly Protestant conception of human sin and divine grace. Although some sought out a practical alliance with Catholics around emergent Christian Democratic parties, the more significant legacy of the early academy discussions was a confessionally-rooted conception of rights that enabled Lutheran theologians and jurists to overcome a traditional aversion to political engagement.

The foremost theorists of Christian political responsibility at the early Bad Boll jurists' meetings were members of the Freiburg Circle, who rose to prominence not only within the Protestant academies but in the larger political milieu around the postwar EKD, largely based on their claim to participation in wartime resistance networks. Gerhard Ritter produced the first publicly circulated copies of the wartime Freiburg memorandum in July 1945, three months after

⁷⁸ "Bericht über die 1. Arbeitstagung des Sozialamtes der Evangelischen Kirche von Westfalen vom 22. bis 25. September 1947," Archiv der Sozialen Demokratie, Bonn (ASD), Nachlass Gustav Heinemann, Box 490. Planned publication of the lectures from this meeting never occurred, likely due to a lack of funding.

⁷⁹ Hans Huber, "Die Juristentagung der Evangelischen Akademie in Bad Boll vom 11. bis 18.9.1947. Aufzeichnungen eines Teilnehmers," EABB, Juristentagungen, 1947.

his release from prison for involvement with the July 20 plot. The memorandum's new forward chronicled the activities of the circle under the Nazi regime, highlighting its connections to the resistance movement around Carl Goerdeler.⁸⁰ By September, Hans Asmussen, the president of the newly-formed EKD chancellery and staunch critic of Barth, solicited the help of Ritter, Constantin von Dietze, and Erik Wolf to "organize church life in Germany in various commissions" that would amplify Protestant voices in public debate on law and social policy.⁸¹ A Freiburg "Christian working group," formed in July 1945, brought together Protestant veterans of the Freiburg Circle with Catholic civil servants and local leaders for in-depth discussion of social and economic reconstruction. This group represented one of many efforts across occupied Germany by former Catholic and Protestant opponents of Nazism—or individuals who presented themselves as such—to overcome the confessional divide that pervaded German political history, leading to the formation of Christian Democratic movements in all four occupation zones by the end of 1945.⁸²

Notwithstanding their cross-confessional political work, Freiburg Protestants aimed to develop a defense of political engagement from within a distinctly Lutheran theological anthropology. Like followers of Barth, the plurality of the Freiburg thinkers and other speakers at the postwar Protestant academies held a set of assumptions about human fallenness that precluded a turn to Emil Brunner's invocation of human dignity inherent in divine creation. Building on their wartime writings, postwar Freiburg Protestants sought to develop a novel

⁸⁰ Gerhard Ritter, "Vorbemerkungen," July 1945, ACDP 01-256-049/1.

⁸¹ Asmussen to Dietze, Ritter, and Wolf, September 20, 1945, BArch Koblenz, N 1166/256.

⁸² Paul-Ludwig Weinacht, "Die christliche Arbeitsgemeinschaft in Freiburg," in *Wiederhergestellte Ordnungen: Zukunftsentwürfe Freiburger Professoren 1942-1948*, *Freiburger Universitätsblätter* 27, no. 102 (Dec. 1988): 53-68; Mitchell, *Origins of Christian Democracy*, 39-63, especially 57 on the Freiburg Circle. The "*christliche Arbeitsgemeinschaft*" in Freiburg formed the core of the early Christian Democratic party in South Baden.

conceptual vocabulary around notions of "responsibility," "conscience," and "biblical guidelines" for describing Christians' role in the state in the absence of a Christian natural law.

Gerhard Ritter's lecture at the first Bad Boll jurists conference in October 1945 defended Christian engagement in public life within a Lutheran framework, confronting a central paradox: a doctrine of Christian responsibility had to be founded on acknowledgement of human lack and dependence on divine grace. Ritter's lecture engaged the historian and theologian Wilhelm Kamlah's *Christianity and Self-Assertion* (1940), which suggested that the Christian had to choose between asserting the public role of Christianity as a "world-forming power" and acknowledging Christianity's denial of "the ability of human reason to form a proper understanding of the world." For Ritter, this alternative represented a false dichotomy. One could recognize humanity's dependence on God *without* accepting Kamlah's quietism, Ritter argued, if in "asserting myself against all danger or opposition...I do not really strive for my own cause but for God's cause." Building on his contributions to the wartime Freiburg memorandum, Ritter suggested that Christian ethics required "action in constant consciousness of responsibility before God." Christian responsibility for Ritter signified not the realization of a divinely preordained set of institutions, but recognition of the burden placed upon individual conscience to face the irreconcilable paradoxes of political life in cognizance of God's "final judgment."⁸³

Ritter followed his lecture at the Bad Boll academy with a pair of articles in the Lutheran journal *Zeitwende* that made clear his commitment to seeking out a new basis for political responsibility in Lutheran theology. Ritter praised the Catholic natural law tradition for encouraging Christian engagement in politics and society, but at the same time he decried Catholic conceptions of divine revelation in nature and history for their excessive optimism

⁸³ Gerhard Ritter, *Christentum und Selbstbehauptung* (Tübingen: Furche-Verlag, 1946), 5, 10-12.

about human reason.⁸⁴ For Ritter, the experience of total war vindicated the paradox at the heart of Luther's theology—the existence of evil in the world despite God's absolute mastery. This paradox could only be resolved through faith in divine salvation. Ritter discerned in Luther's writings an active rather than merely passive conception of this faith. By wrestling with the paradoxes of belief, Christians discovered their own responsibility for confronting evil in the world.⁸⁵ For Ritter, Luther's doctrine of the two kingdoms called the Christian to political responsibility, rather than demanding blind obedience. Luther clearly distinguished the fallen realm of politics and society, where the politician or professional took up an office to uphold law and worldly order in the service of God, from the "true community of true Christians, in which only the law of love rules."⁸⁶ By contrast, theologies that stressed the "unconditional sovereign claim of God" over the world—a reference to Barth's "Christological" theology of law—abdicated the political responsibility of human beings.⁸⁷

Helmut Thielicke, the Lutheran theologian and founder of the *Studiengemeinschaft der Evangelischen Akademien*, maintained a similar commitment to theorizing Christian political responsibility from within the Lutheran theological tradition. Speaking before the first plenary meeting of the *Studiengemeinschaft* in March 1947, which brought together many of the leading figures in Protestant lay-theological dialogue over the next two decades—including the future Social Democratic politician Adolf Arndt, the Göttingen jurist and later head of the EKD Commission on Public Responsibility Ludwig Raiser, as well as Dietze, Ritter, and Eberhard

⁸⁴ My emphasis here differs from Moyn, *Christian Human Rights*, 115-121, which focuses on the ecumenical dimension of Ritter's thought.

⁸⁵ Gerhard Ritter, "Luthertum, katholisches und humanistisches Weltbild," *Zeitwende* 18, no. 2 (Aug. 1946): 72-75.

⁸⁶ Gerhard Ritter, "Luther und die politische Erziehung der Deutschen," *Zeitwende* 18, nos. 10-11 (April-May 1947): 592-607, quoted 596.

⁸⁷ Ritter, "Luthertum," 82.

Müller—Thielicke sought to establish a Christian understanding of politics that avoided a retreat into quietism.⁸⁸ Like Ritter, Thielicke maintained that Christian *responsibility* for politics followed from recognition of human limitations. Acknowledgement that the state and economy represented only the "structural expression of this eon," not a divine will or "absolute norm," returned responsibility to human beings for shaping their own history.⁸⁹ Both Thielicke and Ritter rejected an abstract, timeless natural law as the interface between the Church and the world of politics. Instead, they stressed the responsibility of Christian public figures to act in light of their knowledge of God's ultimate redemption of the world, a responsibility that manifested itself only in concrete situations.

Despite their innovations in theorizing Christian responsibility for law, speakers at early conferences of the Protestant academies and at the Freiburg "Christian working group" did not draw on a language of human rights.⁹⁰ Emil Brunner's defense of rights derived from the God-given dignity of all human beings found few adherents among Protestants in early postwar Germany. Nevertheless, by the early 1950s, a defense of rights would become central to Protestant engagement in West German constitutional politics. The first lecture on human rights at the postwar Protestant academies, by the jurist Hans Dombois, sheds light on the role of Allied occupation policies in motivating German Protestants to reconcile a theory of rights with their theological anthropology.

⁸⁸ "Liste der Teilnehmer an der Studiengemeinschaft der Evangelischen Akademie vom 30.3 bis 1.4.1947," EABB, Studiengemeinschaft der Evangelischen Akademie, 1. Plenarsitzung. In total sixty-seven participants attended the conference.

⁸⁹ Helmut Thielicke, *Kirche und Öffentlichkeit: zur Grundlegung einer lutherischen Kulturkritik* (Tübingen: Furchen-Verlag, 1947), 63-64.

⁹⁰ For instance, human rights were not discussed at a September 1945 meeting of the Freiburg "*christliche Arbeitsgemeinschaft*" on the "political constitution," despite Dietze's and his wartime colleague Franz Böhm's emphasis on the reestablishment of the *Rechtsstaat*: "Christliche Arbeitsgemeinschaft Freiburg, Besprechung vom 18.IX.45. Thema: Politische Verfassung," ACDP 01-345-015/2

Born in 1907, Dombois belonged to a generation of Protestant intellectuals who rose through the ranks of the Nazi civil service and turned to the churches after 1945 in order to restore their professional and political credibility, not least in the eyes of denazification commissions.⁹¹ As a young attorney, Dombois spent six years as a state prosecutor at Berlin and Potsdam criminal courts, during which time he joined the Nazi Party, before being drafted into the military in 1939. Among Dombois' cases was the successful prosecution in November 1938 of a young Jewish attorney from Potsdam, Alfred Lehmann, for violation of Nazi miscegenation laws, leading to Lehmann's imprisonment and eventual death at the Gross-Rosen concentration camp in September 1941. Dombois omitted the episode in his denazification proceedings, where he presented himself as a careerist forced to join the NSDAP for reasons of professional advancement. The denazification tribunal assigned Dombois the status of "fellow traveler [*Mitläufer*]," rather than the more severe "offender [*Belastete*]," largely on account of his membership in the Confessing Church between 1934 and 1936 and the positive recommendation of his former pastor. Following Dombois' release from postwar internment in 1947, he was hired by the EKD Foreign Office as a researcher on war crimes trials and denazification, also serving as a frequent speaker at the Protestant academies on criminal and international law.⁹²

Dombois' debut lecture at the *Studiengemeinschaft der Evangelischen Akademien* in September 1947 on "Human Rights and the Modern State," before an audience that included

⁹¹ For other examples see Meinel, *Jurist in der industriellen Gesellschaft*, 241-253, 279-294 and Muller, *Other God that Failed*, 335-339, 355-360.

⁹² Lorenz Völker, *"War mein Großvater ein Nazi?": ein Enkel auf Spurensuche nach der Geschichte eines Staatsanwalts im Dritten Reich* (Hildesheim: Arete Verlag, 2015), 31-37, 66-74, 86-90, 99-110. For Dombois' addresses before Protestant audiences, see Hans Dombois, "Krise des Strafrechts, Krise des Richteramtes," in Hans Hermann Walz et al., *Gerechte Ordnung: Gedanken zu einer Rechts- und Staatslehre in evangelischer Sicht: vier Vorträge* (Tübingen: Furche-Verlag, 1948), 64-111; Dombois, *Politische Gerichtsbarkeit: Der Irrweg der Entnazifizierung und die Frage des Verfassungsschutzes* (Gütersloh: Verlag Kirche und Mann, 1950); Dombois, "Das Recht im evangelischen Verständnis," in *Kirche in Bewegung: Predigten und Vorträge gehalten auf der Deutschen Evangelischen Woche*, ed. Reinhold von Thadden-Trieglaff (Hannover: Lutherhaus-Verlag, 1949), 147-159.

Ritter, Thieliicke, as well as a number of prominent jurists, reconceptualized human rights as a means of advancing the EKD's opposition to policies of the postwar occupation governments. At the same time, Dombois offered a model for reconciling a defense of human rights with a Protestant critique of natural law.⁹³ Belying a strict distinction between the *Bruderrat* and the intellectuals around the Protestant academies, Dombois echoed Karl Barth's link between divine justification and worldly law, as well as the genealogy of human "self-justification" advanced by Ernst Wolf. Where (Protestant) Christianity and its teaching of justification by faith declined, Dombois argued, secular ideologies arose offering narratives of salvation through purely human efforts. National Socialism and Bolshevism were the pathological culmination of this process, pseudo-religions that promised an overcoming of "visible evil in the world" through programs of mass murder.⁹⁴ Moreover, postwar expulsions and internments by the victors of the Second World War, which Dombois discussed alongside the crimes of the Nazi regime, also reflected "radical self-justification": "The inability of humankind to conclude peace is a true and serious symptom of its inner state."⁹⁵ Following Ellul, Dombois grounded human rights in a critique of human "self-justification." For Dombois, such rights could be articulated only through a theology that recognized the paradoxical state of a fallen world that was nevertheless saved through the grace of Christ, the reality that "Christ stood before us as the true human being."⁹⁶ Subsequent discussions of human rights at Protestant academies, including a May 1949 lecture by the

⁹³ "Liste der Teilnehmer an der zweiten Plenarsitzung der Studiengemeinschaft der Evangelischen Akademie vom 19.-22.9.47," EABB, Studiengemeinschaft, 2. Plenarsitzung. In total, 62 participants attended the meeting, including the jurists Helmut Coing, Wilhelm Grewe, Erich Kaufmann, Hans Liermann, and Edmund Metzger, as well as the theologian Heinz-Horst Schrey and the secretary of the *Studiengemeinschaft*, later general secretary of the *Kirchentag*, Hans Hermann Walz.

⁹⁴ Hans Dombois, *Menschenrechte und moderner Staat* (Frankfurt: H. Cobet-Verlag, 1947), 17.

⁹⁵ *Ibid.*, 47.

⁹⁶ *Ibid.*, 44-48 (quoted 44).

director of the *Christophorus-Stift*, the Lutheran theologian Friedrich Karl Schumann, offered similar diagnoses.⁹⁷

Discussions of law and political responsibility at the Protestant academies inhabited a liminal space in the territory demarcated by Brunner and Barth—between human dignity inherent in divine creation and human fallenness overcome through the radical love of Jesus Christ. Most Lutherans around the Protestant academies concurred with Barth and the *Bruderrat* on the postlapsarian limits of human rationality and perception, which ruled out any theology of autonomous "orders of creation" that manifested a divine will. At the same time, they eschewed Barth's "analogies" and instead advanced models of political engagement based on the responsibility of Christian politicians for determining the meaning of "biblical guidelines" in concrete situations. Both groups adumbrated a theory of human rights as a concrete point of intersection between Christian teachings and worldly law. Yet German Protestants' distinctive theological anthropology resulted in their ongoing intellectual distance from discussions of human rights around the mainstream ecumenical movement and bolstered their critiques of the postwar occupation governments.

Human Rights and German Protestant Ecumenism

Debates about law and political engagement within newly-forged intellectual networks shaped the interactions of German Protestant leaders with the postwar Christian ecumenical movement around the World Council of Churches (WCC). The formation of the WCC was first

⁹⁷ Friedrich Karl Schumann, *Die Frage der Menschenrechte in der Sicht des christlichen Glaubens* (Hemer: Christophorus-Stift, 1950), 12-13; "Bericht über die erste Sitzung des Ausschusses der Akademie für Grundfragen des Rechts in Hemer vom 27.-29. Mai 1949," FEST Box 669. Gerhard Ritter's lecture on the history of human rights in Basel in November 1948 that has been perceptively analyzed by Samuel Moyn also fits into this genre, although Ritter was concerned less to provide a "theological foundation" for law than to formulate human rights as a proxy for a lost Christian social order. See Moyn, *Christian Human Rights*, 107-115.

proposed at the 1937 conference of the Life and Work movement in Oxford but achieved only after the war at an Amsterdam conference in August 1948. The establishment of formal relations between the EKD and the ecumenical movement following the Stuttgart Declaration, building upon covert wartime connections forged between the WCC Secretary General Willem Visser 't Hooft, Bishop George Bell, and the Confessing Church, gave the German church leaders access to valuable charitable networks and political connections.⁹⁸ Intellectually, however, the gulf between German Protestants and the leaders of the ecumenical movement, predominately Dutch, British, and American theologians, remained as great as in 1937. The reason was not only that the planned German delegation had been prevented by the Gestapo from attending the Oxford conference and remained out of step with developments in ecumenical theology during a period of wartime isolation. As importantly, both German Lutherans and followers of Barth continued to eschew the Christian natural rights theologies employed by leaders of the ecumenical movement.

Germans hardly remained on the sidelines of early attempts to form an international federation of Protestant churches. Veterans of the Confessing Church played a crucial part in structuring the institutional framework for the ecumenical movement. A central ecumenical office was established in Frankfurt in November 1946 through the efforts of the pastor Hans Schönfeld, the director of the WCC Study Department, with the goal of deepening the international role of the German churches.⁹⁹ The first director of the *Ökumenische Centrale*, the Rhineland pastor Wilhelm Menn, was a veteran of the interwar Life and Work movement whose

⁹⁸ Greschat, *Evangelische Christenheit*, 338-359. On the wartime connections between the Confessing Church and the ecumenical movement, see Armin Boyens, *Kirchenkampf und Ökumene 1939-1945: Darstellung und Dokumentation unter besonderer Berücksichtigung der Quellen des Ökumenischen Rates der Kirchen* (München: Kaiser, 1973).

⁹⁹ Karl Heinz Voigt, *Ökumene in Deutschland von der Gründung der ACK bis zur Charta Oecumenica* (Göttingen: Vandenhoeck & Ruprecht, 2015), 64.

connection with Schönfeld extended to the early 1930s.¹⁰⁰ At the recommendation of Martin Niemöller, the young German theologian Wolfgang Schweitzer, who had been dismissed from military service due to his classification as a "half-Jew" but permitted to complete his doctorate in 1944, was appointed as secretary in the Geneva-based WCC Study Department. Schweitzer served as the main liaison to the German Protestant milieu.¹⁰¹ Moreover, German contributions to preparations for the Amsterdam ecumenical conference were prolific. Schönfeld stood in contact with Hans Hermann Walz, the secretary of the *Studiengemeinschaft der Evangelischen Akademien*, who forwarded to Geneva essays prepared by academy members for consideration by the ecumenical community.¹⁰² Schönfeld and Menn organized several meetings in Frankfurt in 1947-48 for the planned German participants to discuss the themes of the upcoming conference, including one on the "Problem of Legal Design." Erik Wolf participated in the ecumenical Working Group on Law established by the World Student Christian Federation.¹⁰³

The active participation of German theologians and lay intellectuals in preparations for the Amsterdam conference, however, served to amplify rather than conceal underlying theological divides between German Protestants and the Anglo-American mainstream of the

¹⁰⁰ The earliest correspondence I have been able to find is Menn to Schönfeld, January 22, 1930, Archiv der Evangelischen Kirche im Rheinland, Düsseldorf (AEKR), Handakten Wilhelm Menn, 6HA008/4.

¹⁰¹ Sara Jäger and Teresa Schall, "Schweitzer, Wolfgang," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Schweitzer,+Wolfgang> (accessed April 15, 2018).

¹⁰² Walz to Schönfeld, April 14, 1947, AEKR, Nachlass Wilhelm Menn, 7NL014/34.

¹⁰³ The Frankfurt meetings are recorded in "Frankfurter Tagung zur Vorbereitung der ökumenischen Konferenz im Predigerseminar der bischöflichen Methodistenkirche vom 15.-17. April 1947," ACDP, Nachlass Otto Heinrich von der Gablentz, 01-155-045/2, "Frankfurter ökumenische Besprechung 25.-28. October 1947," ACDP 01-155-033/2, and "Tagung der deutschen Delegierten, Stellvertreter und Besucher der Weltkirchenkonferenz von Amsterdam am 29. und 30. April 1948 in Echzell," ACDP 01-155-045/4. For the meeting on "Legal Design," see Menn to Wolf, February 6, 1947, UAF, Nachlass Erik Wolf, C 130/989 and Wolf to Dietze et al, April 17, 1947, UAF C 100/590. For Wolf's participation in the University Commission see John Coleman to Members of Working Groups, December 13, 1947; Erik Wolf, "Die christlichen Grundlagen der Rechtsordnung"; and commentaries on Wolf by Bryan King and H. C. Dirkse-Bresters, World Council of Churches (WCC) Archives, Geneva, World Christian Student Federation, 213.13.26/6.

ecumenical movement. The question of natural law and its link to human rights remained a particular point of contention. Whereas Anglo-American theologians insisted upon a robust harmony of God-given and natural rights, German Protestants continued to stress the human being's radical dependence on divine grace. Therefore, they expressed deep reservations toward the "personalist anthropology" that the historian Terrence Renaud has rightly seen at the core of ecumenical human rights thinking in the 1940s.¹⁰⁴

A robust conception of natural law undergirded the human rights activism of leading Anglo-American Protestants around the ecumenical movement. John H. Oldham, the organizer of the 1937 Oxford conference and vice-chair of the Amsterdam section on "The Church and the Disorder of Society," developed in a series of papers circulated through the WCC Study Department a conception of the "responsible society" undergirded by a "universal moral law" standing above the positive law, "by which all are bound."¹⁰⁵ Christianity offered one form of expression of this law, but the ultimate corrective to self-destructive potential of modern technology was the reawakening of "the natural piety extending far beyond those who profess any positive religious beliefs."¹⁰⁶ Oldham's conception of a universal moral law was shared by the Philadelphia pastor O. Frederick Nolde, the director of the WCC Commission on International Affairs (CCIA) and the representative of the ecumenical movement to the United Nations Commission on Human Rights.¹⁰⁷ In a WCC Study Department paper, Nolde argued that while a Christian grounding of human rights could draw on the "faith that man is made in the

¹⁰⁴ Renaud, "Radical Anthropology," 22.

¹⁰⁵ J. H. Oldham, "A Responsible Society," in World Council of Churches, *Man's Disorder and God's Design: The Amsterdam Assembly Series*, vol. 3 (New York: Harper & Brothers, 1948), 149.

¹⁰⁶ J. H. Oldham, "Technics and Civilization," in *Man's Disorder*, vol. 3, 47.

¹⁰⁷ Renaud, "Radical Anthropology," 23.

image of God," at the same time Christians must promote "principles which will be universally applicable" and endorsed by "men of goodwill everywhere." The right of religious freedom could not favor Christians over adherents of other religions but would protect both the freedom of Christians to proclaim the Gospel and the freedom of others to choose to receive it.¹⁰⁸ Nolde successfully lobbied the drafters of the UN Universal Declaration of Human Rights to adopt an expansive definition of "freedom of religion," rather than the narrower "freedom of worship" proposed by the Soviet delegation.¹⁰⁹

By comparison to the dominant figures in the ecumenical movement, German Protestant theologians and jurists maintained a deflated view of the salience of human rights outside an explicitly Christian framework. Whereas Emil Brunner's personalist anthropology formed the theological core of the ecumenical movement and provided inspiration for the political interventions of Oldham and Nolde, the writings of Brunner's German counterparts went largely unnoticed by the broader ecumenical community.¹¹⁰ At a Frankfurt preparatory meeting for the Amsterdam conference, Brunner's exhortations that "we can only proceed from human rights and natural law" and that "Barth does not know...what human rights are" fell on deaf ears among German participants who instead stressed God's claim on humanity.¹¹¹ While the Geneva Study

¹⁰⁸ O. Frederick Nolde, "Freedom of Religion and Related Human Rights," in *Man's Disorder*, vol. 4, 147-149, 180-182. Nolde's essay was circulated through the WCC Study Department in November 1947: WCC Archives, 1st WCC Assembly, Amsterdam 1948, 31.015.7/3.

¹⁰⁹ For an overview of Nolde's work at the UN, see John Nurser, *For All Peoples and All Nations: Christian Churches and Human Rights* (Washington D.C.: Georgetown University Press, 2005), 126-171. The final draft of Article 18 on religious freedom adopted by the UN General Assembly in December 1948 included "freedom to change [one's] religion or belief, and freedom, either alone or in community with others and in public or private, to manifest [one's] religion or belief in teaching, practice, worship and observance."

¹¹⁰ On the influence of Brunner's personalism on the ecumenical movement, see Moyn, *Christian Human Rights*, 17, 125 and especially Renaud, "Radical Anthropology." However, I remain less convinced than Renaud about a rapprochement between Brunner and Barth after 1945. Barth continued to express disdain for Brunner's theology after the Amsterdam conference: Barth to Dietze, December 4, 1948, UAF C 100/585.

¹¹¹ Frankfurter Tagung zur Vorbereitung der ökumenischen Konferenz im Predigerseminar der bischöflichen Methodistenkirche vom 15.-17. April 1947," ACDP 01-155-045/2. Critical respondents to Brunner included Hans

Department circulated papers by Hans Dombois, Erik Wolf, and Ernst Wolf to prospective participants at the Amsterdam conference in early 1948, none were incorporated into the conference's published proceedings.¹¹²

Exemplary of the divide between German Protestant and mainstream ecumenical theologies is that even Gerhard Ritter, who regarded Brunner's *Justice* as the best theological account of "the [just] distribution of economic goods and political power," remained skeptical of a concept of human rights rooted in natural law.¹¹³ In a memorandum on "The Church and International Order" presented to the *Studiengemeinschaft der Evangelischen Akademien* in September 1947, Ritter regarded human rights, championed by "English-American declarations," as an "insufficient" bulwark against the threat of totalitarianism. Extending the anthropology of the wartime Freiburg memorandum, Ritter distinguished true Christian freedom, as the freedom to realize one's divinely-given purpose in responsibility before God, from the political freedoms declared in constitutions. The realization of the former depended upon respect for authority, both of the state that preserved legal security as well as of the moral communities within which the individual was embedded. Absent this larger framework, a defense of individual "human rights" could too easily devolve into "private egoism" and the "self-deification of power" that Ritter and other German Protestants located at the root of totalitarianism.¹¹⁴ Although Ritter's memorandum

Dombois, the Freiburg Circle veteran Friedrich Delekat, and the Barthian theologian Heinz-Horst Schrey. Unfortunately, the meeting minutes do not enable an in-depth reconstruction of this exchange.

¹¹² "Beitrag zum Problem der Menschenrechte von Staatsanwalt Dombois, Frankfurt am Main, April 1948," WCC Archives, 31.015.7/1; "Libertas Christiana (erster Entwurf) von Prof. D. Ernst Wolf, Göttingen, April 1948," WCC Archives, 31.016.7/1 (quoted); "'Biblische Weisung als Richtschnur des Rechts,' von Prof. Dr. Erik Wolf, Freiburg i.Br., Oktober 1947," WCC Archives, 31.016.7/3; "'Gerechtigkeit' von Prof. Erik Wolf, Freiburg i.Br., Januar 1948," WCC Archives, 31.016.7/2.

¹¹³ Ritter to Dietze, January 22, 1948, UAF C 100/590.

¹¹⁴ The memorandum was never published. A surviving manuscript is "Kirche und internationale Ordnung," UAF C 100/570. The cited passages are found on pp. 16-20. See also Hans-Georg Dietrich, "Kirche und Welt - Impulse aus Freiburg zur Weltkirchenkonferenz in Amsterdam 1948," in *Wiederhergestellte Ordnungen*, ed. Dietrich, 72 and

was sent to the ecumenical Study Department in Geneva and to the *Ökumenische Centrale* in Frankfurt, the document received little attention from Protestants outside Germany.¹¹⁵

In light of these ongoing divisions, German Protestant intellectuals exercised limited influence on the theological anthropology and political praxis of the Amsterdam conference. While thirty-six EKD members were selected as delegates to the Amsterdam meeting, including Constantin von Dietze and the bishops of Hannover and Berlin, this group was represented in the official conference report only with a single essay by the Lutheran theologian Edmund Schlink on "The Witness of the German Church Struggle." The report's organizers evidently found the drama of Confessing Church resistance narratives more compelling than German theological contributions.¹¹⁶ In a series of letters sent from Amsterdam to his wife in Freiburg, Dietze lamented that the conference focused more on developing a "sociological explanation of the disorder of the world" than on "working out principles of order." As one historian has noted, Dietze's few references to "natural law" at the conference should be understood as a "concession to the ecumenical interlocutors," standing in for his underlying focus on the "biblical guidelines and prohibitions" for social and economic order.¹¹⁷

Notwithstanding their theological disagreements with the Anglo-American mainstream of the ecumenical movement, many German Protestant intellectuals regarded the Amsterdam

Claudia Lepp, "Konservativ-christlicher Widerstand: Das Beispiel Gerhard Ritter," *Jahrbuch für badische Kirchen- und Religionsgeschichte* 2 (2008): 77-78.

¹¹⁵ Walz to Mitarbeiter und Freunde der Studiengemeinschaft, October 24, 1947, UAF C 100/568; Dietrich, "Kirche und Welt" 77. Ritter's memorandum appeared in neither the German nor the official volume of contributions to the Amsterdam conference

¹¹⁶ The list of German delegates is found in ACDP 01-155-035/1. In addition to the delegates, twenty-three members of the EKD served as consultants. For Schlink's contribution, see Edmund Schlink, "The Witness of the German Church Struggle," in *Man's Order*, vol. 1, 97-106. Wilhelm Menn arranged for the separate publication of the German contributions: Wilhelm Menn, ed., *Die Ordnung Gottes und die Unordnung der Welt: Deutsche Beiträge zum Amsetdamer Ökumenischen Gespräch 1948* (Stuttgart: Evangelisches Verlagswerk, 1948).

¹¹⁷ Dietrich, "Kirche und Welt," 77-78. The letters are found in "Abschrift aus Briefen von der Tagung der Oekumene in Amsterdam 1948," ACDP 01-345-015/1.

conference as an important contribution toward the construction of a postwar international order. The conference report on "The Church and the International Disorder," which called on the United Nations to uphold "the principles of progressive international law," stressed that human rights, while applicable to all individuals regardless of religious creed, found their historical and conceptual origin in the "freedom to obey God rather than men." The conference's "Declaration of Religious Liberty" went further in linking human rights to Christianity, defining religious freedom as "an implication of the Christian faith and of the worldwide nature of Christianity."¹¹⁸ Protestant periodicals in Germany celebrated the conference's recognition of the Christian basis of human rights and lauded Frederick Nolde for negotiating an expansive right of religious freedom in the Universal Declaration of Human Rights, adopted by the UN General Assembly in December 1948. While noting that the first article of the Universal Declaration located the origins of human rights in "nature," "reason," and "conscience" rather than God, these periodicals urged Christians to defend the protection of human rights "through national and international measures."¹¹⁹ But if the Amsterdam Conference and Universal Declaration marked a turning point in German Protestants' imagination of a global order based on universally recognized rights, they continued to understand human rights through the lens of a distinctive theological anthropology.

¹¹⁸ "Report of Section IV: The Church and the International Disorder," in *Man's Order and God's Design*, vol. 4, 221, 225-228.

¹¹⁹ "Die Kirche und die internationale Unordnung: Bericht der Sektion IV," *Evangelische Welt*, September 15, 1948; "Das Weltgespräch über die Menschenrechte," *Evangelische Welt*, December 15, 1948; Ha. [Oskar Hammelsbeck], "Die Kirche vor der Frage der Neugestaltung des Rechts," *Junge Kirche*, February 15, 1949.

"The Limits of Human Jurisdiction"

Whereas German Protestants exercised limited practical influence on the international human rights regime advocated by the World Council of Churches and inaugurated by the United Nations, discussions of law and human rights around the *Bruderrat* and the Protestant academies provided the theological language for the EKD's widely successful campaign against denazification and war crimes trials in the late 1940s. As Cold War fault lines hardened in 1947-48, the policy aims of the Western occupation powers, the U.S. in particular, shifted from political democratization toward economic reconstruction and the integration of a West German state into an anti-Soviet alliance. In a context in which popular support for denazification and war crimes trials waned, in both occupied Germany and the U.S., EKD representatives led a vocal campaign against Allied policies and petitioned occupation authorities for the cancellation of trials, the release of defendants, and the reduction of sentences.

Historical accounts of Protestant defenses of former Nazis have emphasized church leaders' nationalist and self-exculpating ambitions.¹²⁰ While such motivations should not be dismissed, greater attention to the relationship of Protestants' political interventions to ongoing debates about the theological foundations of law helps elucidate the significance of the war crimes episode within the longer trajectory of postwar Protestant politics. Protestant theologians, jurists, and lay intellectuals who defended convicted war criminals mobilized theological conceptions of Christian responsibility and human rights articulated in the immediate postwar years, stressing the origins of law in Christ's mercy, the responsibility of the Christian politician for determining the significance of biblical guidelines in concrete situations, and above all, the

¹²⁰ Katherina von Kellenbach, *The Mark of Cain: Guilt and Denial in the Post-War Lives of Nazi Perpetrators* (Oxford: Oxford University Press, 2013), 33-61 and Clemens Vollnhals, *Evangelische Kirche und Entnazifizierung 1945-1949: Die Last der nationalsozialistischen Vergangenheit* (München: Oldenbourg, 1989). More polemical is Ernst Klee, *Persilscheine und falsche Pässe: wie die Kirchen die Nazis halfen* (Frankfurt: Fischer Taschenbuch Verlag, 1991).

sinfulness and limitation of the human being. This common orientation destabilizes a dichotomy between a vindictive Lutheran wing and a conciliatory Barthian wing of the postwar EKD. Not only did Lutherans and members of the *Bruderrat* criticize Allied occupation policies, but as the discussion so far has shown, both groups had ample theological resources to do so. In light of their connections to ongoing discussions of law and human rights, Protestant attacks on denazification and war crimes trials should appear less as an early postwar aberration, to be superseded by reformist initiatives, than as a critical moment in the consolidation of Protestants' understanding of the relationship between Christianity and state power. This episode provided the vocabulary of Protestants' later interventions before the West German state.

Protestant criticism of the Allied occupation governments extended back to the earliest months following the war. The most outspoken critic was the Stuttgart bishop and chair of the EKD Council Theophil Wurm, but he was joined by Martin Niemöller and backed by a powerful network of national- and local-level church leaders and Protestant groups abroad. These networks lobbied governments throughout Europe to release German prisoners of war as well as alleged and convicted war criminals.¹²¹ Already at the EKD Council meeting of December 13-14, 1945, Wurm, along with his fellow Lutheran bishops, rejected the International Military Tribunal at Nuremberg based on its *ex post facto* definition of "crimes against humanity."¹²² In April 1946, after U.S. occupation authorities placed denazification under German control, Wurm

¹²¹ For overviews, see Vollnhals, "Hypothek des Nationalprotestantismus" and Wyneken, "Memory as Diplomatic Leverage." On the efforts of the Pfalz church president Hans Stempel, see Christophe Baginski, *Gnade den Bekehrten! Evangelische Kirche und deutsche Kriegsverurteilte in Frankreich (1944-1962)* (Speyer: Zechner, 2002) and Webster, "Opposing 'Victor's Justice.'"

¹²² "3. Sitzung Frankfurt/Main 13. und 14. Dezember 1945" in *Die Protokolle des Rates der Evangelischen Kirche in Deutschland*, vol. 1, eds. Carsten Nicolaisen and Nora Andrea Schulze (Göttingen: Vandenhoeck & Ruprecht, 1995), 211-212.

penned a letter to General Lucius Clay, the deputy military governor of the U.S. occupation zone, attacking denazification proceedings on similar charges of retroactivity.¹²³

The pace of Wurm's activities quickened in mid-1946 with the commencement of U.S.-led war crimes trials at Dachau and then at Nuremberg following the conclusion of the IMT, which together would result in 1,941 indictments and 324 death sentences.¹²⁴ Wurm directed particular ire at the so-called Malmédy trial at Dachau, where forty-three SS members were sentenced to death for the massacre of disarmed American soldiers in the Belgian town in December 1944.¹²⁵ Following a vicious exchange of letters with the deputy prosecutor at Nuremberg, Robert Kempner, in May 1948 Wurm rallied the other church leaders of the U.S. zone to appeal directly to Clay, now military governor, demanding a "re-examination" of all U.S.-led trials.¹²⁶ Citing documentation completed by his own staff and the EKD chancellery, Wurm and his colleagues, including Martin Niemöller, alleged that defense attorneys lacked full access to the evidence used against their clients; that the proceedings rested on *ex post facto* and imprecisely defined charges; and that the contexts of war and military obedience constituted mitigating circumstances for the alleged crimes. Most aggressively, they argued that postwar trials failed to restore a sense of respect for the law among the population because they continued the arbitrary and politically-motivated rulings of Nazi courts.¹²⁷ Reports on the war crimes trials in the Protestant press explicitly echoed the language used by Confessing Church jurists under

¹²³ Vollhals, "Hypothek des Nationalprotestantismus," 55; Wyneken, "Driving Out the Demons," 233-239.

¹²⁴ Wyneken, "Driving Out the Demons," 350.

¹²⁵ Norbert Frei, *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration*, trans. Joel Golb (New York: Columbia University Press, 2002), 99-103; Vollhals, "Hypothek des Nationalprotestantismus," 59-62.

¹²⁶ On Wurm's exchange with Kempner, see Wyneken, "Driving out the Demons," 354-357.

¹²⁷ Wurm, Meiser, Bender, Küstemann, and Niemöller to Clay, May 20, 1948, EZA 2/233.

National Socialism in an effort to establish continuities of injustice between the wartime and postwar periods.¹²⁸

In many ways Protestant criticisms of denazification and war crimes trials echoed those of conservative judges who rejected Gustav Radbruch's category of "supra-statutory justice." Wurm's petition to Clay also went beyond a positivist appeal to legal security, however. Like jurists and theologians affiliated with both the *Bruderrat* and the Protestant academies, Wurm sought out a position beyond legal positivism and natural law. Instead, Wurm emphasized Christians' responsibility for the preservation of justice in a fallen world, based on their knowledge of human fallibility and divine grace. As he concluded his letter to Clay: "The love of our Lord Jesus Christ urges us to make every effort that the desperate, skeptical and nihilistic humanity regains confidence in public order, in the realm of which the fundamental principles '*suum cuique*' and '*audiatur et altera pars*' [let the other side be heard] should be safeguarded to such an extent as is possible among human beings."¹²⁹ Wurm's invocations of theology were not simply shallow attempts to legitimate his nationalist politics but reflected the discourse on public responsibility at the *Evangelische Akademie* in Bad Boll, where Wurm had convened the jurists conferences since 1945.¹³⁰ In particular, Wurm went beyond traditional two kingdoms theology, with its separation of politics from ecclesiastical proclamations, to emphasize the role of the church as a guardian of the law. Like Barth, he insisted on the connection between worldly law and divine grace.

¹²⁸ "Kampf um das Recht," *Evangelische Welt*, September 1, 1948; see also the report by a Confessing Church jurist: Hans Meinzolt, "Recht und Dämon," *Zeitwende* 19, no. 5 (Nov. 1947): 257-267.

¹²⁹ Wurm et al to Clay, May 20, 1948, EZA 2/233.

¹³⁰ Wurm's participation at the Bad Boll jurists conferences is documented in the programs in EABB, Juristentagungen, 1945, 1946, 1947, and 1948, and in "Evangelische Akademie – Tage der Stille und Besinnung für Juristen vom 2. bis 9. Oktober 1949 im Kurhaus Bad Boll / Freitag, 4. Oktober 1946, Nachmittags," EABB, Juristengagungen, 1946.

While jurists such as Hans Dombois worked alongside EKD leaders to oppose war crimes trials from the early years of the Allied occupation, the first meeting of the national EKD synod in early January 1949 provided the impetus for a broader Protestant milieu to translate novel theologies of law into practical action. Reflecting the attention that Wurm and other EKD leaders had drawn to legal problems, the synod selected the Mainz theologian Friedrich Delekat, a co-author of the wartime Freiburg memorandum, to deliver a plenary lecture on "Church, Law, and Legal Consciousness," followed the next morning by a response from the *Bruderrat* theologian and Berlin professor Heinrich Vogel.¹³¹ Delekat's lecture encapsulated Protestant criticisms of "victor's justice" in response to postwar expulsions, denazification, and war crimes trials. Like his Freiburg colleagues, Delekat situated the present crisis within the long-term secularization of European culture, assigning a central role to the church in overcoming the debased legal positivism that had resulted. The church was charged to restore "morality," "belief," and "conscience," and to realize the "hidden will for order" among the people.¹³² Vogel's reply criticized the nationalist underpinnings of Delekat's discussion of the "crisis of law," noting that the occupation forces could hardly be blamed alone "in light of the years 1939 to 1945."¹³³ While Vogel's polemic reflected the political debate between Lutheran circles and the *Bruderrat*, however, he and Delekat shared an underlying theological anthropology. Both eschewed appeals to natural law, instead invoking "the absoluteness of God's law and court"

¹³¹ Vogel had been a member of the Confessing Church and a participant at the 1934 Barmen synod. After the war, he taught at both the *Kirchliche Hochschule* in West Berlin and at the Humboldt University in East Berlin. See "Vogel, Heinrich," in *Personenlexikon zum deutschen Protestantismus 1919-1949*, eds. Hannelore Braun and Gertraud Grünzinger (Göttingen: Vandenhoeck & Ruprecht, 2006), 265.

¹³² Evangelische Kirche in Deutschland, ed., *Bericht über die 1. Tagung der 1. Synode der Evangelische Kirche in Deutschland vom 9.-13. Januar 1949 in Bethel* (Göttingen: Vandenhoeck & Ruprecht, 1953), 82-103, quoted 100-101. Delekat later published his major arguments as "Kirche und Recht: Eine Thesenreihe," *Theologische Literaturzeitung* 74 (1949): 599-606.

¹³³ *Bericht über die 1. Tagung der 1. Synode*, 143-153, quoted 144, 148.

(Delekat) or "the law that God creates" (Vogel) as the measure against which all human law appeared relative and insufficient.¹³⁴ On this basis, both expressed skepticism toward the ideas of universal human rights propagated by the UN. For Delekat, the UN declaration failed to take into account the concrete needs of disparate individuals. For Vogel, "human rights" eschewed the theologically relevant question: not "how individuals in legal crisis come to their rights" but "how God's law comes *to us*."¹³⁵

The synod discussion sparked wider interest within the Protestant intellectual milieu about the Church's role in postwar justice. Delekat's and Vogel's lectures were reprinted and debated in the Protestant press, while the synod approved a motion calling on the EKD Council to prepare a memorandum for public release based on the issues raised by Vogel.¹³⁶ The key figure responsible for translating the ambitions of the synod into practical politics was the jurist and church employee Hansjürg Ranke, who from 1946 served as the administrator in the EKD chancellery responsible for denazification, prisoners of war, and war crimes trials. Ranke had worked as an administrator in the chancellery of the Nazi-era *Deutsche Evangelische Kirche* prior to his military service, and he followed the trajectory of Hans Dombois as a compromised jurist who returned to the postwar church as a source of both employment and political

¹³⁴ Ibid., 91, 144.

¹³⁵ Ibid., 96, 143.

¹³⁶ Ibid., 154. For the reception of the synod debate in the Protestant press, see "Die Kirche zur Krise des Rechts: Prof. Delekat sprach auf die Synode der EKD," *Evangelische Welt*, January 15, 1949; "Kirche und Recht," *Evangelische Welt*, February 1, 1949; Heinrich Vogel, "Der Christ und die Rechtsnot des Menschen heute" and "Laß ihn noch dies Jahr! Versuch eines Berichtes über die erste Synode der Evangelischen Kirche," *Unterwegs 2*, no. 6 (March 1949): 14-19, 27-30; Hermann Ehlers, "Die Frage nach dem Recht vor der Betheler Synode," *Junge Kirche*, February 15, 1949, and in the same issue, Fritz Söhlmann, "Kirche, Recht und Rechtsbewußtsein"; Reinhard Mumm, "Um eine evangelische Begründung des Rechts"; and Ha. [Oskar Hammelsbeck], "Die Kirche vor der Frage der Neugestaltung des Rechts."

redemption.¹³⁷ In early February 1949, Ranke recommended to the chair of the EKD Council, the Berlin bishop Otto Dibelius, the establishment of a committee to review the materials he had collected on war crimes trials and make corresponding recommendations to the occupation authorities.¹³⁸ A week later, Ranke wrote again to Dibelius, this time regarding the formation of a commission of leading theologians and jurists to discuss unresolved problems raised at the synod.¹³⁹ The EKD Council approved of both the review of war crimes trials and the theological commission on February 18.¹⁴⁰ Not only their origins but their common intellectual framework reveal the interconnection of the two projects.

The conference on "Church and Law" that convened in Göttingen on May 14-15, 1949, organized by Ranke over the preceding three months, marked a high point of postwar Protestant discussions of law and a consolidation of the network of theologians and jurists that had begun to form around the Protestant academies and the successor organizations to the Confessing Church. The conference also signified the centrality of Barth's "Christological" theology for reorienting postwar Protestant thinking about politics. Not only did Ranke select Jacques Ellul's *The Theological Foundation of Law* rather than Brunner's *Justice* as the starting point of discussion, but many of the participants, cutting across political differences, had already made public their sympathy for Ellul's text.¹⁴¹ Notably absent were the Freiburg Circle members Gerhard Ritter

¹³⁷ Tim Schedel, "Ranke, Hansjürg," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/pages/viewpage.action?pageId=47284346> (accessed April 15, 2018).

¹³⁸ Ranke to Dibelius, February 3, 1949, in *Die Protokolle des Rates der Evangelischen Kirche in Deutschland*, vol. 3, ed. Karl-Heinz Fix (Göttingen: Vandenhoeck & Ruprecht, 2006), 85-86.

¹³⁹ Ranke to Dibelius, February 12, 1949, *Protokolle*, vol. 3, ed. Fix, 67-69.

¹⁴⁰ "Sitzung Darmstadt, 17. und 18. Februar 1949," *Protokolle*, vol. 3, ed. Fix, 52-56.

¹⁴¹ Attendees whose prior writings demonstrated an affinity with Barth's "Christological" theology of law included Friedrich Delekat, Hans Dombois, Heinrich Vogel, Otto Weber, Ernst Wolf, the Confessing Church theologian Werner Wiesner, as well as Ranke himself. Of the attendees, the Göttingen jurist and rector Ludwig Raiser and pastor Reinhard Mumm published critical reviews of Ellul's book: see Reinhard Mumm, "Jesus Christus der Herr

and Constantin von Dietze, as well as Lutheran theologians such as Helmut Thielicke and Paul Althaus. Later complaints by conservative Lutherans about an imbalance, eventually leading to Gerhard Ritter's resignation from political work around the EKD in late 1949, only further indicated the growing importance of Barth in intellectual circles around the EKD.¹⁴²

Along with Ernst Wolf, whose opening talk reviewed the debate on the theology of law since the publication of Barth's foundational works of the mid-1930s, the jurist and close associate of Rudolf Smend, Ulrich Scheuner, presented a plenary lecture. Like Hans Dombois and Hansjürg Ranke, Scheuner was a jurist who came of intellectual age in the conservative legal milieu of the Weimar Republic, worked as a civil servant under the Nazi state, and sought political expiation in the Protestant Church after the war. As a member of the SA and Nazi Party, Scheuner worked as law professor at Jena and Göttingen through much of the Nazi period. He joined the EKD after returning from military service in 1945, where he found employment as a legal adviser to the Protestant aid organization for refugees and victims of war damage (the *Evangelisches Hilfswerk*) while aiding the Church's efforts on behalf of convicted war criminals.

alles Rechts," *Die Zeichen der Zeit* 2 (1948): 255-260 and Ludwig Raiser, review of Jacques Ellul, *Le fondement théologique du droit* in *Zeitschrift für evangelisches Kirchenrecht* 1 (1951): 181-187. The natural law theorist Helmut Coing also participated, but only following Rudolf Smend's objections to his invitation, likely indicative of Coing's intellectual distance from the Protestant milieu: Smend to Ranke, March 2, 1949, EZA 2/2802. The other participants were Otto Bleibtreu, a director in the Justice Ministry of North-Rhine Westphalia; the president of the EKD chancellery, Heinrich Brunotte; Rudolf Smend and Smend's assistant at the Institute for Protestant Ecclesiastical Law, Konrad Müller; and Hans Hermann Walz, secretary of the *Studiengemeinschaft der evangelischen Akademien*. See Rat der Evangelische Kirche in Deutschland, ed., *Kirche und Recht: ein vom Rat der Evangelischen Kirche in Deutschland veranlasstes Gespräch über die christliche Begründung des Rechts* (Göttingen: Vandenhoeck & Ruprecht, 1950), 3.

¹⁴² "Notizen über die Diskussion des Referates von Prof. Dr. Ernst Wolf – Göttingen – anlässlich der Sitzung der Kammer für öffentliche Verantwortung am 3. und 4. 12.1949 in Darmstadt über das Thema 'Kirche und Recht'" and Ritter to Ranke, December 28, 1949, EZA 2/1345. On Ritter's disillusionment with the politics of the EKD, see also Christoph Corneließen, *Gerhard Ritter: Geschichtswissenschaft und Politik im 20. Jahrhundert* (Düsseldorf: Droste Verlag, 2001), 413-415.

Scheuner would remain an important participant in intellectual circles around the Church even after assuming a professorship in Bonn in 1950.¹⁴³

Both Wolf's and Scheuner's lectures at the May 1949 Göttingen conference centered on the contemporary debate between the "Trinitarian" grounding of law proposed by Emil Brunner and the "Christological" approach of Barth and Ellul, ultimately siding with the latter.¹⁴⁴ Wolf's exegesis and defense of Ellul's *Theological Foundation of Law* concluded that natural law precepts could not serve as an ideological "system" but only as "practical...principles" for integrating biblical "dictates of justice" into law.¹⁴⁵ Scheuner offered a historicization of appeals to natural law as a series of efforts to approximate higher ideals of justice. Echoing Ernst Wolf's genealogy of natural law theories, Scheuner suggested that the secularization of natural law during the Enlightenment led to a form of legal positivism that derived law from the "will" of the state. Given this trajectory, a return to natural law principles was no longer possible. Rather, Scheuner regarded Ellul's text as a Protestant alternative to both natural law and legal positivism, which showed that divine justice served as the ultimately unattainable but necessary point of orientation for human law.¹⁴⁶

Discussion of Ellul's text brought to the fore the debate about Barth's "Christological" theology carried out between members of the *Bruderrat* and Lutheran critics since 1945. While

¹⁴³ Martin Otto, "Vom 'Evangelischen Hilfswerk' zum 'Institut für Staatskirchenrecht': Ulrich Scheuner (1903-1981) und sein Weg zum Kirchenrecht," in *Entwicklungstendenzen des Staatskirchenrecht und Religionsverfassungsrechts: ausgewählte begrifflich-systematische, historische, gegenwartsbezogene und biographische Beiträge*, eds. Thomas Holzner and Hannes Ludyga (Paderborn: Schöningh, 2013), 551-569. For Scheuner's participation in EKD amnesty campaigns, see Scheuner to Kirchenkanzlei der EKD, December 30, 1949, EZA 2/239.

¹⁴⁴ See also Foljanty, *Recht oder Gesetz*, 155-159.

¹⁴⁵ Wolf, "Rechtfertigung und Recht," in *Kirche und Recht*, 5-26, especially 25-26.

¹⁴⁶ Ulrich Scheuner, "Zum Problem des Naturrechts nach evangelischer Auffassung," in *Kirche und Recht*, 27-44, especially 35-36.

participants disagreed on the precise relationship between divine revelation and human law, they concurred on the importance of establishing Christian "responsibility" for politics without appealing to "sacral" or natural law. Even critics of Ellul shared his larger ambition to overcome human "self-justification."¹⁴⁷ The theses the participants agreed upon at the conclusion of the conference summarized the understanding of the Church's role in law that the intellectual milieu around the EKD developed during the early postwar period. While certain points reflected compromise rather than consensus—for instance the rejection of both "orders of creation" and strictly "Christological" approaches to law—the commission's position on natural law adopted a viewpoint that was broadly shared by Protestant theologians and jurists. The commission rejected human "self-justification," noting that, "God has an unconditional claim [*Anrecht*] on human beings. Insofar as human beings deny this claim of God, they destroy their own law." Nevertheless, God's claim on human beings did not foreclose Christian *responsibility* for law:

*The Christian is not permitted to withdraw from concrete decisions for the realization of justice on Earth. Through belief he knows of God's justice and of the right of men to life. From there he will also recognize and utilize, in gratitude and freedom, the principles of law that exist or are available in the legal consciousness of human beings, in the legal history of peoples, and also in the natural law recorded in the Decalogue. From here forth he is secured against both the hubris and helplessness of all natural law programs and evasions.*¹⁴⁸

By eschewing a metaphysical natural law apart from biblical revelation, participants at the Göttingen conference instead stressed individual responsibility for realizing the meaning of God's justice in concrete situations. In later years, Protestant intellectuals would build upon this position to deny that the Church possessed special knowledge of social institutions, but also to insist that the Church was charged to defend a wide range of individual freedoms.

¹⁴⁷ "Der Verlauf des Gesprächs," in *Kirche und Recht*, 45-50.

¹⁴⁸ "Thesen," in *Kirche und Recht*, 52, emphasis added.

The immediate significance of the Göttingen conference was also more than academic. The core claims that resulted from the discussion—the epistemic and political limitations of human law unmoored from divine justice, as well as the centrality of Christian responsibility for law—formed the basis for the EKD's interventions before the occupation governments on matters of postwar justice. Already in his address to the conference, Ernst Wolf pointed out that Ellul's critique of "any natural law ideology of other ideological foundation of law" found its practical expression in Ellul's "confrontation with the Nuremberg trials." Even Wolf, among the fiercest advocates for an expansive Protestant acknowledgement of guilt, evidently shared the reservations of his counterparts toward war crimes trials.¹⁴⁹

Most importantly, the Göttingen conference informed Hansjürg Ranke's simultaneous work on the EKD memorandum on war crimes trials compiled for presentation to the U.S. occupation government. Following the EKD Council's authorization of the project in February 1949, Ranke obtained support from the Heidelberg "jurists' circle" under the leadership of the conservative Celle judge Hodo von Hodenberg.¹⁵⁰ The Heidelberg circle, whose members included a number of defense attorneys from the Nuremberg trials along with Gustav Radbruch and the rector of Heidelberg University Karl Geiler, emerged in 1949 as a "quasi-official body" for coordinating the newly-founded West German state's opposition to Allied war crimes trials.¹⁵¹ Ranke attended the circle's meetings along with Bishop Wurm's deputy, the jurist Rudolf Weeber. By mid-1948, Weeber had established contact with prominent American attorneys and politicians who opposed the war crimes trials program, and in February 1949 he

¹⁴⁹ Wolf, "Rechtfertigung und Recht," in *Kirche und Recht*, 17.

¹⁵⁰ Vollnhals, "Hypothek des Nationalprotestantismus," 63.

¹⁵¹ Frei, *Adenauer's Germany*, 121-124.

provided documentation for a U.S. Senate investigation of the Dachau trials.¹⁵² The presence of EKD representatives provided the Heidelberg circle not only with moral capital but also with an expanded vocabulary, rooted in Protestant theologies of law. Hodenberg noted at the circle's first meeting in May 1949 that while jurists could only petition the occupation authorities for an impartial review of the convictions, churches could appeal for "total mercy."¹⁵³ At the next meeting in July, following a report on the EKD memorandum by Ranke, Weeber agreed with a Catholic representative that the churches could not comment on particular legal details but had to appeal to "Christian conscience."¹⁵⁴

Such invocations of a Christian alternative to legal positivism were not purely rhetorical but informed Ranke's composition of the memorandum on war crimes trials. As he compiled the memorandum during the summer of 1949, Ranke also aided Heinrich Vogel's work on a public declaration on the contemporary "legal crisis" in light of the synod discussion, receiving commentaries on the theme by Ulrich Scheuner and Hans Dombois.¹⁵⁵ Scheuner argued that the injustices of postwar Allied policies were the products of a legal positivism that made the state the "absolute master over law and justice."¹⁵⁶ Dombois similarly elaborated on the critique of "self-justification" he laid out in his 1947 lecture on human rights, suggesting that the application

¹⁵² "Memorandum zu den Kriegsverbrecherprozessen von Oberkirchenrat Dr. Weeber," February 21, 1949, EZA 2/234; Wyneken, "Memory as Diplomatic Leverage," 379-382.

¹⁵³ "Niederschrift über die Besprechung am 28. Mai 1949 in Heidelberg in den Räumen der Juristischen Fakultät," EZA 2/235.

¹⁵⁴ "Niederschrift über die Besprechung am 9. Juli 1949 in Heidelberg in den Räumen der Universität," EZA 2/236.

¹⁵⁵ Ranke to Vogel, July 30, 1949, EZA 2/2802. The declaration would be released by the *Bruderrat*, with an introductory note by Vogel, in October 1949: see "Kirche in der Bresche" (H. Vogel) and "Wort des Bruderrates vom 14.10.1949," *Kirchliches Jahrbuch für die Evangelische Kirche in Deutschland* 76 (1950): 95-103.

¹⁵⁶ Scheuner, "Gedanken zum Thema 'Rechtsnot der Gegenwart,'" EZA 2/2802.

of *ex post facto* law in war crimes trials was a consequence of the "deification of worldly rulers" that German Protestants had attacked already in the Barmen Declaration.¹⁵⁷

Ranke echoed Scheuner's and Dombois' language in the final version of the memorandum on war crimes trials, which he completed following further consultation with the Heidelberg circle.¹⁵⁸ Following a summary of the Church's grievances, the memorandum appealed not to natural rights or abstract principles of natural law but to recognition of human fallibility and divine sovereignty as the foundations of justice. As Ranke put it, "we wish to call attention in the name of the righteous and merciful God to the fact that the highest expression of justice is not necessarily sentence and punishment." On this basis, he requested

an act of mercy for all those who have committed deeds which are not punishable according to German criminal law, whose sentences are based solely on new legal principles which are not yet recognized as international law. We believe that it is only fair to give the convicts the benefit of the legal principle of *nulla poena sine lege* at least as far as the execution of their punishment is concerned.¹⁵⁹

Following approval by the EKD Council, Ranke, alongside Rudolf Weeber and the Württemberg Prelate Karl Hartenstein, presented the memorandum to John J. McCloy, the U.S. High Commissioner for Germany following Lucius Clay's retirement, on February 21, 1950.¹⁶⁰ McCloy responded favorably to many of the memorandum's criticisms and even to Weeber's suggestion that a commission of German judges might make recommendations to American boards established to review the Nuremberg cases. All agreed that the memorandum should not

¹⁵⁷ Dombois, "Material zu einem Wort des Rates der EKID zur Rechtsnot der Gegenwart," EZA 2/2802.

¹⁵⁸ Ranke, "Vermerk," November 10, 1949, EZA 2/238.

¹⁵⁹ Council of the Evangelical Church of Germany, *Memorandum on the Question of War Crimes Trials before American Military Courts: Published for the Council of the Evangelical Church in Germany by Bishop D. Wurm, Church President D. Niemöller, and Prelate D. Hartenstein* (Stuttgart: Stürner, 1949), 22-23.

¹⁶⁰ "Sitzung Dresden, 1. Juli 1949," in *Protokolle*, vol. 3, ed. Fix, 220.

be made public, in order to avoid inflaming nationalist sentiment against U.S. authorities.¹⁶¹

However, the EKD chancellery distributed the document widely among German and ecumenical religious leaders, suggesting that it played a part in a broad international disillusionment with war crimes trials following the founding of the West German state.¹⁶²

The theology of law articulated at the Göttingen conference also enabled German Protestant theologians and jurists to stake out a more assertive critique and corrective to the doctrines of human rights advocated by the UN and WCC. German Protestants played a limited role in the discussions about international human rights leading up to the Amsterdam conference and the UN Universal Declaration of Human Rights. However, in the summer of 1949, Frederick Nolde solicited feedback from the EKD Foreign Office on a draft of the UN Covenant on Human Rights, a document commissioned by the UN General Assembly to outline the conditions for implementation of the Universal Declaration.¹⁶³ In reflection of the importance and wide reception of the Göttingen theses, Elisabeth Schwarzhaupt, a legal adviser in the EKD Foreign Office and later a CDU parliamentarian, organized a second legal-theological commission based on the Göttingen conference to issue recommendations to Nolde.¹⁶⁴

¹⁶¹ "Niederschrift über die Besprechung anlässlich der Übergabe der Kriegsverbrecherdenkschrift der EKD an McCloy am 21. Februar 1950 o.O.," in *Die Protokolle des Rates der Evangelischen Kirche in Deutschland*, vol. 4, ed. Anke Silomon (Göttingen: Vandenhoeck & Ruprecht, 2007), 162-166.

¹⁶² For the EKD chancellery's distribution list, see Brunotte to Ratsmitglieder, January 14, 1950, EZA 2/240.

¹⁶³ Nolde to Kirchliches Aussenamt, August 10, 1949, EZA 2/2491; see also the attachments to Nolde's letter: "Fünfte Sitzung, UN Kommission für Menschenrechte, Lake Success, 9. Mai-20. Juni 1949," July 1949 and "Anhang I: Entwurf zu einer internationalen Satzung über Menschenrechte," EZA 2/2491. UN covenants on civil and political rights, and on economic, social, and cultural rights, were not issued until 1966 due to disagreements between member nations over the relationship between "positive" and "negative" rights, inflected by Cold War tensions; however, the General Assembly considered drafts of these covenants already in 1954. See Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), 25.

¹⁶⁴ Schwarzhaupt to Kanzlei der EKD, October 28, 1949 and Ranke to Kirchliches Aussenamt, November 17, 1949, EZA 2/2802; Felix Teuchert, "Schwarzhaupt, Elisabeth," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Schwarzhaupt,+Elisabeth> (accessed April 15, 2018).

The conference on the draft UN Covenant on Human Rights, held in January 1950 at the EKD Foreign Office in Frankfurt, offers further evidence of the centrality of war crimes trials for postwar Protestant theorizations of rights and Christian political responsibility. In addition to the participants at the Göttingen "Church and Law" meeting, the Foreign Office added three jurists active in the Heidelberg circle to the list of invitees.¹⁶⁵ The conference marked the first juncture at which the circle of political intellectuals around the EKD independently articulated a defense of human rights against the state, whose integrity the Church was charged to uphold. However, their theological anthropology enabled the attendees to link a defense of human rights to nationalist preoccupations about the fate of convicted and alleged war criminals. Following lectures by Rudolf Smend, Ernst Wolf, and the Heidelberg circle jurist and Nuremberg defense attorney Erich Kaufmann, the participants developed a position paper laying out their distinctive critique of natural law and of mainstream Christian human rights ideologies:

According to a Protestant understanding of the Gospel, we may in reality not speak of human rights, but in strict relation to the grace of God the creator and redeemer who, identifying himself in Jesus Christ with man, grants man a right he has forfeited... This conception preserves us from deriving our human rights from a doctrine of natural law that ignores the sinful nature of fallen man.¹⁶⁶

If human rights were founded not on natural law but on recognition of human sin before God, the position paper continued, then

¹⁶⁵ Stratenwerth to [Ranke], December 1, 1949, EZA 2/2491. Twenty-four theologians, jurists, and church officials were invited to the meeting, including all of the participants at the Göttingen "Church and Law" conference except Helmut Coing, who had been consistently at odds with Protestant critiques of natural law, as well as Reinhard Mumm and Konrad Müller, both of whom occupied lower-ranking positions than the other invitees. The Heidelberg circle jurists invited were the Munich international law scholar Erich Kaufmann, the Braunschweig judge Bruno Heussinger, and the Heidelberg jurist Eberhard Schmidt. Other invitees included Friedrich Schumann, Wilhelm Menn, as well as representatives of the EKD Foreign Office Elisabeth Schwarzhaupt and Gerhard Stratenwerth. I was not able to find an attendance list.

¹⁶⁶ "Tagesordnung für die Besprechung des Entwurfs der UNO für eine Satzung der Menschenrechte," FEST Box 814; "Stellungnahme zu dem Entwurf der UN-Kommission der Menschenrechte für einen Conventant on Human Rights," January 9, 1950, EZA 2/2491. On Kaufmann, see Frei, *Adenauer's Germany*, 122.

It therefore follows that cases, where guilt is involved that can be judged by God alone, may not be brought before human courts. This will help us to acquire that Christian soberness which remains conscious of the limits of all human endeavors and knows that human statutes and institutions as such will not guarantee the effectiveness of human rights.¹⁶⁷

The further emendations to the UN draft Covenant advocated by the commission included a right "to remain in one's native country," a "prohibition on retroactive penal laws," and a clause prohibiting states from "abolish[ing] human rights in occupied territories"—all clear references to the postwar Allied occupation.¹⁶⁸

Several participants worried that the incorporation of nationalist demands would lead the position paper to be dismissed out of hand outside Germany.¹⁶⁹ The document's formulation of human rights reflected a broad consensus among the participants, however, with Hans Dombois even arguing that the petition did not go far enough in emphasizing how the occupation authorities had "fallen to the same demonism that mark[ed] National Socialism."¹⁷⁰ Elisabeth Schwarzhaupt sent the committee's recommendations to Frederick Nolde in advance of the March 27 meeting of the UN Commission on Human Rights, with the agreement of the majority of the conference participants.¹⁷¹ The document exercised limited influence on conceptualizations of human rights within the UN commission, doubtless in part due to its nationalistic overtones, and also because UN work on human rights stalled by the early 1950s with mounting Cold War tensions. For German Protestant intellectuals, however, the project

¹⁶⁷ "Stellungnahme zu dem Entwurf der UN-Kommission der Menschenrechte," EZA 2/2491, emphasis added.

¹⁶⁸ Ibid.

¹⁶⁹ Ranke to Schwarzhaupt, January 20, 1950 and Heusinger to Schwarzhaupt, January 26, 1950, EZA 2/2491.

¹⁷⁰ Dombois to Stratenwerth, January 19, 1950, EZA 2/2491.

¹⁷¹ Stratenwerth to Teilnehmer der Sitzung vom 5. und 6. Januar 1950, March 2, 1950 and Schwarzhaupt to Ranke, March 17, 1950, EZA 2/2491.

consolidated a conception of human rights whose significance would outlast immediate postwar concerns with the legal politics of the Nazi past.

If its ideas found little resonance with Nolde and the UN, the network of theologians and jurist that formed around the Göttingen and Frankfurt conferences would soon launch a widely successful amnesty campaign for war criminals convicted at Nuremberg and Dachau, imprisoned at the Bavarian town of Landsberg. In March 1950, under pressure from the new West German state seeking to gain full sovereignty, as well as from American politicians concerned that punishing convicted war criminals would delay West Germany's integration into an anti-Soviet alliance, U.S. High Commissioner McCloy received permission from the U.S. Department of State to establish a War Crimes Clemency Board to review the sentences handed down at Nuremberg and Dachau. The Clemency Board, headed by the New York Supreme Court judge David W. Peck, spent the summer of 1950 reviewing ninety-three sentences. On August 28, Peck and his colleagues recommended the reduction of seventy-seven sentences, including "the commutation of seven of the fifteen death sentences."¹⁷² In response to these developments, beginning in early August 1950 the EKD Foreign Office planned a third meeting of theologians and jurists on the question of "historical guilt," to address "the borders of state jurisdiction over that guilt...which is not accessible to the ordinary categories of criminal law."¹⁷³ The meeting, which convened on November 19-20 in the village of Oberliederbach outside Frankfurt, brought together fourteen Protestant theologians and jurists, the majority of whom had attended the prior meetings on "Church and Law" and on the draft UN Covenant. For attendees such as Hans Dombois, Hansjürg Ranke, Ulrich Scheuner, Friedrich Karl Schumann, Elisabeth Schwarzhaupt,

¹⁷² Frei, *Adenauer's Germany*, 145-146; Thomas Alan Schwartz, *America's Germany: John J. McCloy and the Federal Republic of Germany* (Cambridge, MA: Harvard University Press, 1991), 160-163, quoted 163.

¹⁷³ Stratenwerth to Ranke, August 3, 1950 and Stratenwerth to Kaufmann et al, September 15, 1950 (quoted), EZA 2/2491.

Rudolf Weeber, and Ernst Wolf, direct participation in amnesty petitions marked the culmination of years of speculation on the theological basis of Christian interventions in law.¹⁷⁴

A lecture on the first day of the Oberliederbach meeting by the Reformed theologian and translator of Ellul's *Theological Foundation*, Otto Weber, laid the intellectual groundwork for the commission's amnesty petitions. Weber, who himself had been a member of the German Christian movement at the outset of the Nazi regime, adopted postwar Protestant motifs of the gap between divine and human justice. The work of a judge was not an autonomous act, Weber insisted, but always had to be carried out in acknowledgement of human responsibility and fallibility before God. Precisely because the boundary between human and divine jurisdiction could not be specified in the positive law, the church should "call on the justice and obligation of the sovereign act of mercy" in cases where human judges could not determine individual guilt. Following Dombois, Weber asserted that National Socialism and the Second World War were the result of humanity's fall away from God. Attempts to resolve the ensuing crisis through political means would reinforce the belief in "self-justification" that precipitated the collapse.¹⁷⁵

The Oberliederbach commission concluded its work the following day with the drafting of two statements, one to be presented to the governments of the fifteen countries where alleged or convicted German war criminals were still held and the other to church leaders of those

¹⁷⁴ For the list of participants, see Stratenwerth to Dibelius November 27, 1950, *Protokolle*, vol. 4, ed. Silomon, 391-392. Other attendees included Wilhelm Menn, the Marburg law professor and military defense attorney Erich Schwinge, and two additional representatives of the EKD Foreign Office, Gerhard Stratenwerth and Oberkirchenrat Dr. Harms. Other participants in the postwar legal-theological dialogue, including Otto Bleibtreu, Friedrich Delekat, Ludwig Raiser, Rudolf Smend, Heinrich Vogel, and the Heidelberg Lutheran theologian Edmund Schlink, were invited but unable to attend. For the list of invitees, see Stratenwerth to Kaufmann et al, September 15, 1950, EZA 2/2491.

¹⁷⁵ Otto Weber, "Geschichtliche und politische Schuld: Zum Problem der westeuropäischen Kriegsverbrecherprozesse," *Nachlass Otto Weber*, Johannes a Lasco Bibliothek, Emden. I received this document privately from Weber's biographer Vicco von Bülow. On the circumstances of Weber's involvement in the Oberliederbach meeting, see Vicco von Bülow, *Otto Weber (1902-1966): Reformierter Theologe und Kirchenpolitiker* (Göttingen, 1999), 308-309. On Weber's participation in the German Christian movement, see Bülow, *Weber*, 98-135.

countries. Both statements displayed clear continuities with Protestant discussions about the theological foundations of law since the formation of the Confessing Church. The petition to the fifteen governments called for amnesty for wide classes of convicted war criminals, including the young, old, and sick, as well as sentence reductions for prisoners convicted based on principles that had not been applied to non-German nationals. Stressing the "limits of human jurisdiction," the petition rehearsed the EKD's wide-ranging criticisms of the war crimes trials while invoking the Universal Declaration on Human Rights as a document through which these "principles have been newly advanced in the consciousness of humankind."¹⁷⁶

The commission's message "to the churches of the participating countries," drafted by Ulrich Scheuner, made more explicit the theological meaning behind the "limits of human jurisdiction." In Scheuner's usage, the phrase signified not only the practical challenges of judging crimes committed years prior but also the limitations posed by innate human sinfulness, especially in a post-Christian society. When judging an individual's guilt, Scheuner argued, Christians had to take into account both the positive law and "the confusion of conscience and the complexity of guilt in contemporary society." Humanity's alienation from God provided the wider spiritual context for the crimes of National Socialism. Christians should still demand "justice and atonement"; however, justice could not be achieved through purely legal means but "come[s] up against the question of social responsibility, which surely does not stand within the domain of the human judge."¹⁷⁷ Scheuner's petition to churches abroad, then, drew on a

¹⁷⁶ "Schreiben des Rates 'an die Regierungen der beteiligten Länder,'" December 6, 1950, *Protokolle*, vol. 4, ed. Silomon, 378-380.

¹⁷⁷ "'Entwurf [Scheuners] eines begleitenden Schreibens an die Kirchen der beteiligten Staaten,' Oberliederbach, 18. November 1950," *Protokolle*, vol. 4, ed. Silomon, 398-399. For the final version issued by the EKD Council, see "Schreiben des Rates 'an die Kirchen der beteiligten Länder,'" *Protokolle*, vol. 4, ed. Silomon, 380-393 (quoted).

Protestant language of sin and grace to invoke the limits of human judgment in cases where individual guilt merged into collective responsibility.

Following minor revisions by Ranke, the EKD Council approved the petitions produced by the Oberliederbach commission on December 6.¹⁷⁸ The EKD Foreign Office promptly facilitated their delivery to the relevant governments and churches, as well as to the U.S., British, and French High Commissioners.¹⁷⁹ The culmination of a series of political and intellectual shifts that enabled Protestant intellectuals to invoke human rights in defense of convicted war criminals, the petitions produced by the Oberliederbach commission found wide resonance particularly in churches abroad. Marcel Boegner, the president of the Protestant Federation of France, assured Martin Niemöller that he had already sought out an audience with the French Prime Minister on the matter.¹⁸⁰ The General Secretary of the British Council of Churches promised to bring the EKD's claims to the attention of "those concerned in our different constituent Churches with international affairs," while the Dutch ecumenical council undertook a study into the clemency program of the Dutch government.¹⁸¹ The Protestant weekly *Christ und Welt* captured the tenor of the Church's petition: "Millions of Germans have waited for this act of reconciliation; for the question of guilt and atonement is extinguished when one has given people such indescribable agony."¹⁸²

¹⁷⁸ "Niederschrift über die 18. Sitzung des Rates der Evangelischen Kirche in Deutschland am 5./6. Dezember in Stuttgart," *Protokolle*, vol. 4, ed. Silomon, 375-376.

¹⁷⁹ Stratenwerth to Kunst, December 16, 1950, EZA 2/2491.

¹⁸⁰ Boegner to Niemöller, December 21, 1950, EZA 6/165.

¹⁸¹ British Council of Churches, General Secretary to Niemöller, December 28, 1950, Linde to Niemöller, January 5, 1951, and Linde to Niemöller, September 6, 1951, EZA 6/165.

¹⁸² "Eine Frage an McCloy," *Christ und Welt*, January 4, 1951.

John McCloy's office obtained the Oberliederbach petition in the final weeks of 1950. The EKD's appeal for clemency was one of several issued to McCloy, alongside intercessions by German jurists, parliamentarians, and former military officers, as the High Commissioner considered the recommendations of the War Crimes Clemency Board.¹⁸³ One would overreach to conclude that the EKD petition exercised the decisive influence on McCloy's thinking about amnesty. Pressures from the West German government and from hawkish legislators in the U.S., as well as the beginning of covert discussions about West German remilitarization following the outbreak of the Korean War in June 1950, all played a role in his calculations. However, McCloy had already shown himself to be sympathetic to Protestant arguments for amnesty following his receipt of the EKD war crimes memorandum. Moreover, the Nuremberg defense attorney and Heidelberg circle member Erich Kaufmann, who participated at the Oberliederbach meeting, ensured that the Protestant petition "became known in the Justice Ministry and the President's office, among other places."¹⁸⁴

On January 31, 1951, McCloy made public his decision on the fate of the eighty-nine remaining Landsberg inmates who had been convicted at Nuremberg. He reduced seventeen of twenty life sentences and fifty-two of fifty-four prison terms, including thirty-two to time served, while commuting ten of fifteen death sentences. The five men who continued to face execution were among the most egregious SS perpetrators, including Oswald Pohl, head of the SS Main Economic and Administrative Office, and Paul Blobel, the SS commander who orchestrated the September 1941 massacre of Kiev's Jews at Babi Yar.¹⁸⁵ While McCloy denied that his

¹⁸³ Frei, *Adenauer's Germany*, 156-157.

¹⁸⁴ *Ibid.*, 363 n57. See also Stratenwerth to Kaufmann, December 15, 1950 and Kaufmann to Stratenwerth, December 21, 1950, EZA 6/165.

¹⁸⁵ On the events leading to McCloy's decision, see Frei, *Adenauer's Germany*, 147-65 and Schwartz, *America's Germany*, 157-68.

clemencies had been influenced by the arguments of the German anti-trial lobby, he acknowledged taking into account the large numbers of "letters and petitions for clemency" and emphasized the efforts of American jurists to find "mitigating circumstances."¹⁸⁶

Although the Lutheran Bishop of Bavaria Hans Meiser made a final effort to halt the five impending executions, the majority of the EKD leadership believed that McCloy's extensions of clemency reflected a Christian ethos.¹⁸⁷ Two days after McCloy announced his decisions, the Stuttgart prelate Karl Hartenstein wrote to the High Commissioner on behalf of the EKD Council, thanking McCloy for granting wide-ranging amnesties. McCloy had allowed mercy to prevail over law, signaling his "sense of justice." Indeed, Hartenstein concluded, precisely because "the image of man" had been so gravely violated in the concentration camps and in the "mass murder of Jews," McCloy could do no less in the name of justice.¹⁸⁸ If Hartenstein's remarks to McCloy callously equated the perpetrators and victims of genocide, his insistence on the foundation of justice in divine grace flowed from the theology of law developed in Protestant circles in wartime and early postwar Germany. Whereas German Lutherans before 1933 frequently divided the worldly realm of law from the spiritual pronouncements of the church, EKD leaders now rallied to the defense of convicted war criminals through the lens of a theology that positioned the church as the ultimate guardian of the individual's divinely-endowed rights.

¹⁸⁶ "Statement of the US High Commissioner," in Office of the US High Commissioner for Germany, *Landsberg: A Documentary Report* (Frankfurt: s.n., 1951), 3-4.

¹⁸⁷ Rüsam to Ranke, February 14, 1951 and Meiser to Lundquist, March 3, 1951, EZA 2/2502. On critiques of McCloy's decisions advanced by the wider anti-trial lobby and the West German press, see also Frei, *Adenauer's Germany*, 166-75.

¹⁸⁸ Hartenstein to McCloy, February 2, 1951, in *Die Protokolle des Rates der Evangelischen Kirche in Deutschland*, vol. 5, ed. Dagmar Pöppig (Göttingen, 2005), 139-41.

On March 6, satisfied with Hartenstein's report, the EKD Council resolved to no longer issue public statements on war crimes trials.¹⁸⁹

Despite the ostensible conclusion of its activism on behalf of convicted war criminals, a final salvo in the Protestant Church's amnesty campaigns came in the aftermath of the January 1953 "Oradour trial," where a Bordeaux war crimes court convicted six German and fourteen Alsatian Waffen-SS members for the June 1944 massacre of civilians at the French village of Oradour-sur-Glane. In response to a public outcry in France, the court quickly granted amnesty to the Alsatians but upheld the Germans' sentences, leading to equally vociferous protests in West Germany. German critics directed familiar charges of *ex post facto* lawmaking at the French "Lex Oradour" of 1948, under which each individual member of a military unit that had committed war crimes was eligible to be charged and convicted.¹⁹⁰ The EKD Foreign Office turned to its familiar circle of theologians and jurists to define the Church's stance. A meeting convened on March 16, 1953 to discuss the issue brought together not only mainstays of postwar amnesty campaigns like Martin Niemöller, Hansjürg Ranke, and Ulrich Scheuner, but also the Confessing Church theologian Helmut Gollwitzer. Predictably, the resulting report argued that amnesty for the Germans convicted at Bordeaux represented the only path toward reconciliation with Germany's former enemies. A theology of human limitation and ultimate absolution in Christ braided these motives seamlessly together: "Forgiveness only occurs where we human beings recognize in truth our own guilt. We praise God, who in Christ forgives our guilt and

¹⁸⁹ "Niederschrift über die 20. Sitzung des Rates der Evangelischen Kirche in Deutschland am 6. März 1951 in Hannover-Herrenhausen," *Protokolle*, vol. 5, ed. Pöppig, 106.

¹⁹⁰ On German criticisms of the Oradour trial, see Claudia Moisel, *Frankreich und die deutsche Kriegsverbrecher: Politik und Praxis der Strafverfolgung nach dem Zweiten Weltkrieg* (Göttingen: Wallstein, 2004), 183-195.

thereby makes us free to forgive others."¹⁹¹ As in earlier controversies surrounding the Landsberg prisoners, Protestant petitions coincided with the imperatives of West European diplomacy. All of the German defendants at the Oradour trial, including two originally condemned to death, were released by 1958.¹⁹²

Conclusion

The theologians and jurists who played crucial behind-the-scenes roles in Protestant amnesty campaigns did not question the legitimacy of their actions in the ensuing years. Rather, these figures drew on the theological frameworks deployed in amnesty campaigns in efforts to shape postwar West German politics and law. Hans Dombois, who would become a leader in EKD efforts to reform West German family law, opined in 1952 that Jacques Ellul's theology of law had provided "valuable services" for the Church leadership's campaign against war crimes trials.¹⁹³ Hansjürg Ranke, who beginning in 1950 served as the coordinator of the EKD's work on social policy, worked with the ultranationalist aid organization "Silent Help" to secure pensions for the widows of executed SS leaders as late as 1957.¹⁹⁴ Ranke also continued to participate in the lobbying efforts of the Heidelberg circle, petitioning West German Chancellor Konrad Adenauer to pursue a general amnesty in early 1952.¹⁹⁵ By August 1953, the Heidelberg circle successfully lobbied for the creation of a mixed parole board, including both Allied and West

¹⁹¹ "Vorlage des Kirchlichen Außenamtes für ein Wort des Rates zum Oradour-Prozess," in *Die Protokolle des Rates der Evangelischen Kirche in Deutschland*, vol. 7, eds. Dagmar Pöppig and Peter Beier (Göttingen: Vandenhoeck & Ruprecht 2009), 187-188.

¹⁹² Sarah Bennett Farmer, *Martyred Village: Commemorating the 1944 Massacre at Oradour-sur-Glane* (Berkeley: University of California Press, 1999), 169.

¹⁹³ Hans Dombois, *Naturrecht und christliche Existenz* (Kassel: Stauda-Verlag, 1952), 4.

¹⁹⁴ Klee, *Persilscheine*, 116.

¹⁹⁵ Ranke to Adenauer, January 30, 1952, EZA 2/2479. On the Heidelberg circle's meeting with Adenauer, see OKR Ranke, "Vermerk," January 26, 1952, EZA 2/2479.

German representatives, which gradually authorized the release the remaining Landsberg inmates.¹⁹⁶ Pressure from the West German government in the context of the Cold War eventually convinced the British, French, and U.S. governments to relinquish control over incarcerated war criminals, a process that accelerated with the end of the Allied occupation of West Germany in May 1955. In May 1958, U.S. authorities agreed to the release of the final four Landsberg prisoners, including three SS-*Einsatzgruppen* commanders responsible for mass murders in the occupied Baltic states and Soviet Union, and one SS-*Hauptscharführer* convicted of war crimes at the Mittelbau-Dora concentration camp in Thuringia.¹⁹⁷

Scholars have regarded Protestant efforts to undermine Allied war crimes trials as an exercise in dissimulation, one that distracted from questions of individual guilt and German responsibility for wartime atrocities. Such criticisms illuminate the immediate impact of Protestant arguments against the trials, but as the present analysis has suggested, the origins and consequences of Protestant ideas about rights are more complex. By emphasizing "the limits of human jurisdiction," Protestant theologians and lay intellectuals aimed not merely to criticize *ex post facto* lawmaking, but to orient human law around precepts of divine law revealed in the Bible and in the person of Christ. Such efforts in part reflected preoccupations internal to Protestant thought, in particular the problem of establishing a basis for political ethics in the absence of a firm natural law tradition. However, attempts to reconcile Protestant confessional tenets with a language of human rights also helped facilitate the adaptation of Protestant intellectuals to constitutional democracy. Indeed, the Protestant language of human rights that

¹⁹⁶ Frei, *Adenauer's Germany*, 216, 224. On Ranke's continued participation in the Heidelberg circle into the mid-1950s, see Ranke, "Vermerk," April 13, 1951, EZA 2/2502 and Ranke to Meiser, July 29, 1953, EZA 2/2503.

¹⁹⁷ Hilary Earl, "'Bad Nazis and Other Germans': The Fate of SS-*Einsatzgruppen* Commander Martin Sandberger in Postwar Germany," in *A Nazi Past: Recasting German Identity in Postwar Europe*, eds. David A. Messenger and Katrin Paehler (Lexington, KY: University Press of Kentucky, 2015), 71-74.

emerged in occupied Germany, if it departed in its anthropological foundations from the mainstream of the ecumenical movement, would come to underpin Protestant advocacy for the expansion of individual rights in the West German state. Setting Protestant campaigns against war crimes trials in a wider context thus leads to the perhaps more troubling conclusion that Protestant intellectuals linked amnesty and reconciliation not merely as a rhetorical ploy, but as the basis for a new political ethics.

Political deployments of Protestant human rights discourse in turn illuminate the significance of the debate about the relationship between theology and law that dominated German Protestant intellectual life in the early postwar years. Later commentators have regarded this debate as the product of postwar anxiety and self-aggrandizement, dwindling as the West German legal system stabilized in the course of the 1950s. Attempts at a "Christological" theology of law, this argument runs, reflected the churches' "moralistic" ambition to serve as guardians of social and political order, which could hardly be sustained beyond the early postwar years.¹⁹⁸ The reconstruction offered here, however, has sought to temper such a narrative. The foremost aim of postwar Protestant writers on law, in particular those influenced by Barth, was less to delineate a "Christian" social or political order than to recast the concept of human rights in light of a Christocentric anthropology. By presenting the churches as solvents to a postwar "crisis of law," Protestant theologians and jurists sought to defend Christian political engagement while maintaining a critical distance from dominant natural law doctrines. Protestant intellectuals did not resolve this balancing act in the immediate postwar years, but they would build on theological innovations of the turbulent years of war and occupation as participants in subsequent debates about the place of Christianity in the West German state.

¹⁹⁸ Anselm, *Jüngstes Gericht*, 23-26.

Chapters three and four turn from the intellectual framework for Protestant legal thought laid out in the first two chapters to consider Protestant interventions in West German constitutional politics during the late 1940s and 1950s, in particular on foundational questions of family law, schools, and military service. In this context, members of the lay-theological networks that emerged out of the Confessing Church were forced to reevaluate the political implications of their assertions of a Protestant theological grounding for law in light of a pluralist constitution that at least in principle guaranteed equal rights and freedoms for all religious groups. However, critiques of natural law and theorizations of rights grounded in human fallibility—tropes that transcended the distinction between Lutherans and followers of Barth around the EKD *Bruderrat*—continued to orient Protestant approaches to politics. In the space between Christian natural law and Pietist inwardness, Protestant intellectuals developed a set of concepts, including institutions, conscience, and reconciliation, which they sought to instantiate as frameworks for guiding the relationship between government, community, and individual in the new state.

Chapter Three: Institutionalizing Protestant Ethics: Families, Schools, and the West German Basic Law

When the Parliamentary Council representing the states of the Western occupation zones declared the establishment of the Federal Republic of Germany on May 23, 1949, the devastating consequences of war were far from ameliorated. The currency reform of June 1948 in the Western zones had alleviated the worst of postwar shortages, but inflation, high unemployment and stagnant wages remained a reality for many Germans.¹ By September 1950, nearly eight million refugees had poured into West Germany from Eastern Europe and the former East German territories, straining a housing stock already depleted by Allied bombing campaigns and stoking fears of political radicalization among West German elites.² National division and the specter of a Soviet invasion dominated politics and the press.³ The uncertainty of West Germany's formative moment was felt not least in the realm of law and jurisprudence. The founding legal document was termed a Basic Law, not a constitution, because its signatories still hoped for an impending reunification with East Germany, now a Soviet satellite state. Moreover, the Basic Law provided only a framework for government. Foundational questions about federalism, the division of powers, and the scope and nature of the "basic rights" remained to be resolved in the parliament and courts of the early Federal Republic.

For the milieu of theologians, jurists, and political intellectuals around the postwar *Evangelische Kirche in Deutschland*, the formation of the West German state lent practical

¹ Volker Berghahn, *Modern Germany: Society, Economy, and Politics in the Twentieth Century*, 2nd ed. (Cambridge: Cambridge University Press, 1987), 201-202.

² Ian Connor, *Refugees and Expellees in Post-War Germany* (Manchester: Manchester University Press, 2007), 18-57.

³ Public opinion polls from the mid-1950s found that "Twice as many Germans thought that a future nuclear war would be fought in Germany as thought it would be fought in the United States or the Soviet Union": Michael Geyer, "Cold War Angst: The Case of West-German Opposition to Rearmament and Nuclear Weapons," in *The Miracle Years*, ed. Schissler, 398.

urgency to questions about the relationship between theology and law that had occasioned vigorous debate since 1933. Protestant veterans of the wartime opposition to Nazism responded to the political problems of West German reconstruction through the lens of theological innovations of the Nazi and occupation periods. They continued to seek out a legal theory that could steer between the dual errors of Christian natural law currents that regarded the divine foundations of law as directly accessible to human reason and legal positivist doctrines that recognized the will of the state as the sole source of law. Within this framework, Protestant interventions in constitutional politics aimed at goals articulated by opponents of Nazism around the wartime Confessing Church: on the one hand, the protection of the autonomy of moral communities such as family and church; on the other hand, the cultivation of individual conscience as a sphere of apprehending one's responsibility before God.

The decade following the formation of the West German state was also a period of transition, as Protestant church leaders and intellectuals sought to realize their ideals within a fundamentally transformed political landscape. Not only had the Third Reich given way to Allied occupation and then a semi-independent constitutional republic, but confessional demographics had fundamentally transformed. Whereas Protestants had made up approximately two-thirds of the population of the pre-1914 German Empire, in post-1949 West Germany they comprised only half; Germany's Eastern regions, where Protestants constituted the overwhelming majority, now lay under Soviet control.⁴ Moreover, while the Christian Democratic Union that dominated West German politics in its first two decades was formed as an interconfessional party, the

⁴ On the proportion of Protestants in the German Empire, see Anthony J. Steinhoff, "Christianity and the Creation of Germany," in *The Cambridge History of Christianity: Volume 8, World Christianities c. 1815-c. 1914*, eds. Sheridan Gilley and Brian Stanley (Cambridge: Cambridge University Press, 2005), 293. On confessional statistics in the Federal Republic, see Statistisches Bundesamt, ed., *Datenreport 1992. Zahlen und Fakten über die Bundesrepublik Deutschland* (Bonn: Bundeszentrale für politische Bildung, 1992), 190-191, cited in "Decline in Religious Observance among Catholics and Protestants (1960-1989)," *German History in Documents and Images*, http://ghdi.ghi-dc.org/sub_document.cfm?document_id=846 (accessed April 15, 2018).

CDU's base remained centered in the Catholic Rhineland and its leadership dominated by members of the Weimar-era Catholic Center Party. Protestant anxieties about political fragmentation and intellectual incoherence vis-à-vis the Catholic milieu, aired already in oppositional circles under the Third Reich, grew only more acute with the formation of the Federal Republic. Yet new conceptions of human rights and Christian responsibility that emerged through wartime and postwar discourses would inflect the political projects of Protestant church leaders and intellectuals in West Germany. If German Protestant political thought during the years of National Socialism and Allied occupation centered around a critique of state overreach, deployed first against the Nazi "total state" and then against postwar denazification proceedings and war crimes trials, the enactment of the Basic Law occasioned newfound efforts to articulate a positive conception of the contributions of Protestant Christianity to worldly legal and political order.

Political debates during the late 1940s and 1950s about the reordering of family and education law served as a crucial vector of this shift. For the intellectual milieu around the EKD as for millions of West Germans, the postwar reconfiguration of national identity and political order turned on questions of the relationships between husbands and wives, and between parents and children. By 1949, wartime disruptions of traditional gendered divisions of labor, along with the disappearance of a generation of men from postwar economic life, gave rise to an acrimonious national debate about the reconstruction of the family. This debate extended from the private domain to public media to the bodies charged with writing state and federal constitutions. Whereas veterans of the interwar liberal and socialist feminist movements sought to advance on women's wartime gains in economic status to press for women's full equality in civil law, conservatives decried the decline of the patriarchal family as both a cause and effect of

Nazism. Popular images of valorous "women of the rubble" stoically rebuilding bombed-out cities coexisted alongside widespread anxieties about women's newfound independence.⁵

Conservative politicians and publicists increasingly linked National Socialism and the hardships of the immediate postwar years to sexual degeneracy and the decline of masculine authority.⁶

Demands for the preservation of traditional marriage went hand in hand with calls for the right of parents to send their children to single-denominational schools. Both represented longstanding conservative aims concerning the structure of authority within the family.

While participating in a set of debates that encompassed all levels of West German politics and media, Protestant theologians, church leaders, and lay intellectuals confronted issues of family law and education reform through a distinctive set of questions born out of the dialogue between theology and law that extended back to the Nazi period. First, what guidance did the Bible offer for the construction of worldly social order, in this case on questions of marriage, family, and education? Second, to what extent were Protestant Christians obliged to seek to realize biblical teachings in law, now in the context of an constitutional, putatively religiously neutral state? On the first question, Protestants divided along the persistent theological fault lines that had structured Protestant political debate since the period of National Socialism. For conservative Lutherans, marriage and family represented God-given, hierarchical orders that preserved a sinful humanity from its self-destructive tendencies. For members of the Barthian wing of the Nazi-era Confessing Church, these institutions were non-hierarchical communities of love, modeled on the relationship between Christ and the Christian church. However, their wartime critique of Catholic natural law doctrines, as well as fears of Catholic demographic and

⁵ Heineman, *Difference*, 75-107.

⁶ *Ibid.*; Herzog, *Sex after Fascism*, 101-107.

political dominance in the new West German state, prompted Protestants on both sides of this theological divide to reject efforts to translate Christian conceptions of marriage, family, and education directly into positive law. Rather, Protestant theologians, jurists, and politicians developed a novel approach to the place of Christianity in constitutional law. They defended Christianity as the guiding cultural matrix for the new West German democracy—the foundation for such values as religious tolerance, freedom of conscience, and love of one's neighbor—while insisting that the state could not impose a particular interpretation of Christian doctrine.

Protestant involvement in constitutional conflicts over family and education law during the 1950s therefore offers a corrective to dominant understandings of West Germany under the leadership of Konrad Adenauer's CDU as a Catholic-dominated state. Scholarship on gender and social policy in 1950s West Germany has focused on the role of the churches in seeking to reintroduce a patriarchal social order following the chaos of war and a brief moment of sexual liberalization during the first postwar years.⁷ Certainly, leaders of both major confessions perceived the reordering of families and schools, the core sites at which ostensibly Christian values could be fostered and propagated, as central to their newfound public role. Yet for the intellectual milieu around the EKD, postwar debates about family and education served as sites less of reaction than of reorientation. In the late 1950s, the Federal Constitutional Court would draw on arguments introduced by Protestant jurists to rule against Adenauer's government in

⁷ Heineman, *Difference*, 142-155; Herzog, *Sex After Fascism*, 73-80, 101-115; Robert Moeller, *Protecting Motherhood: Women and the Family in the Politics of Postwar West Germany* (Berkeley: University of California Press, 1993), 88-108; Poiger, *Jazz, Rock, and Rebels*, 46, 60-61. Important caveats should be noted; Herzog points out that Christian commentators also promised heightened sexual pleasure in (heterosexual) marriage, while Moeller touches on the role of the Protestant Women's Association discussed later in this chapter. Overall, these works reflect the larger emphasis of West German historiography on the political influence of the Catholic Church. For instance, no monograph has focused on the Protestant contribution to the reform of marriage and family law as a counterpart to Lukas Rölli-Alkemper, *Familie im Wiederaufbau: Katholizismus und bürgerliches Familienideal in der Bundesrepublik Deutschland 1945-1965* (Paderborn: Schöningh, 2000).

cases involving family law and denominational schools, precisely the issues on which CDU government policy most closely aligned with the positions of the Catholic hierarchy.

Confessional Interpretations of the Basic Law

The sixty-five delegates who convened the Parliamentary Council at the Koenig Museum in Bonn, the body that between September 1948 and May 1949 would compose the West German Basic Law, represented the eleven postwar West German states (West Berlin sent five additional non-voting members) and all of the major reconstituted parties, including twenty-seven Christian Democrats, twenty-seven Social Democrats, five liberals, and two delegates each from the Communist Party, conservative German Party, and revived Catholic Center. Despite disagreement on issues ranging from the division between federal and state powers to the incorporation of social and economic rights, the competing factions concurred on recognizing the inviolability of individual life as the foundational principle of the new state. Unlike the Weimar Constitution, whose second part enumerated the "Fundamental Rights and Duties of the German People" only as guidelines for future legislation, the Basic Law opened with nineteen articles listing "Basic Rights" that carried the force of binding law. Especially Article 1, the right to human dignity, and Article 2, the right to "life and physical integrity," responded directly to the catastrophic abuses of the Nazi state. The incorporation of pre-political rights into the Basic Law, moreover, was a matter of "complete agreement between the parties," and cannot be ascribed to the influence of the churches or Christian Democrats alone. If the conservative Catholic jurist and natural law theorist Adolf Süsterhenn championed human dignity as the most important of the constitutional rights, he found a partner in the leader of the Social Democratic faction, the

Baden jurist Carlo Schmid.⁸ Social Democrats even assented to the invocation of the German people's "responsibility before God and man" in the Basic Law's preamble.⁹

The efforts of the Catholic and Protestant churches to directly influence the Parliamentary Council concentrated around the more controversial domains of church-state relations, protection of marriage and the family, and religious education. Representatives of neither church supported religious disestablishment on the model of the U.S. Constitution or French *laïcité*. Both Protestant and Catholic legal scholars were heirs to the Weimar Constitution of 1919, according to which the state was to remain neutral in religious affairs but allow religious organizations to exercise a set of traditional prerogatives in the public sphere. For jurists of both confessions, it went without saying that "neutral" did not mean "secular," since secularism was as much a *Weltanschauung* as any religion. Therefore, the state should not only refrain from compelling a particular religious practice, but secure the conditions for religious organizations—generally conceived as the two major churches—to access the public sphere.¹⁰ Still, developments in Protestant and Catholic theologies since 1933 shaped both churches' competing claims before the Parliamentary Council, which served as a template for the confessional politics of the ensuing decade.

For the German Catholic hierarchy and its emissaries, the neo-Scholastic natural law tradition as revived in response to Nazism and Communism provided a straightforward basis for posing claims on the Parliamentary Council. At the Council itself, the position of the Catholic

⁸ Rudolf Uertz, "Christlich-demokratische Wertvorstellungen im Parlamentarischen Rat 1948/49," *Historisch-Politische Mitteilungen* 15 (2008): 109 (quoted); Hehl, *Süsterhenn*, 383.

⁹ Jocasta Gardner, "The Public Debate about the Formulation of the Basic Law in the Federal Republic of Germany, 1948-1949" (DPhil Dissertation, Oxford University, 2004), 218.

¹⁰ Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed. (Durham: Duke University Press, 2012), 571-572.

Church was represented above all by the CDU delegate Adolf Süsterhenn. Throughout the Parliamentary Council's negotiations, Süsterhenn maintained close contact with Prelate Wilhelm Böhler, an assistant to the Cologne Cardinal Joseph Frings and later the chief representative of the Catholic hierarchy to the West German government. Süsterhenn, Böhler, and Frings believed that natural law principles of subsidiarity and federalism should form the basis for the Federal Republic's social policy. The national government should not take on tasks that could be performed by less centralized institutions, whether *Land*, town, family, school, parish, or professional association. Following the 1944 Christmas eve address of Pope Pius XII, they argued that Catholics could accept constitutional democracy as a state form so long as these principles were safeguarded against the whims of majoritarian decisions.¹¹

If Protestants lacked a natural law tradition on the basis of which to make claims on the state, developments in Protestant theology since 1933 gave rise to alternative models of framing the Christian contribution to law, centered around an underlying ethos of political participation and responsibility in concrete situations, rather than fixed legal norms. Hermann Ehlers, a Confessing Church jurist from Oldenburg who would be elected president of the West German parliament (*Bundestag*) as a CDU delegate in 1950, played a key role in linking theological discourses to practical efforts in constitutional politics. An adviser to the EKD Foreign Office during the early postwar years, Ehlers delivered a lecture at the April 1947 *Evangelische Woche* in Bremen that framed Protestants' contribution to legal reconstruction in terms of longstanding efforts to theorize an alternative to both legal positivism and natural law. Ehlers denounced positivism, a product of the nineteenth-century secularization and "technicization" of the world,

¹¹ Kristian Buchna, *Ein klerikales Jahrzehnt? Kirche, Konfession und Politik in der Bundesrepublik während der 1950er Jahre* (Baden-Baden: Nomos, 2014), 184. On Süsterhenn's views in particular, see Hehl, *Süsterhenn*, 123-156.

and he urged Protestants to confront the long-neglected question of the normative ground of law. Nevertheless, the Thomist belief in an "unambiguous and clearly prescribed natural law that must be affirmed by every reasonable person" ultimately made human reason the measure of law, neglecting "the highly relevant story of the Fall." Luther and Calvin, Ehlers concluded, represented a "genuine Christian natural law," which taught that the "will of God" was accessible only to "reason instructed by faith," not the "unbeliever."¹²

The theological abstractions of Ehlers' critique of neo-Thomist natural law doctrines could not be translated directly into a positive conception of church-state relations under constitutional law. However, Ehlers and his Protestant colleagues focused their petitions to the Parliamentary Council less on demanding the instantiation of a particular social order, grounded in natural law, than on securing the free access of the churches to the public sphere. At a September 1947 meeting of representatives of the regional Protestant churches dealing with the new state constitutions, Ehlers suggested that the "ideologically neutral" state should, "for the sake of its own existence, create room for the effectiveness of the Christian proclamation in particular state tasks," including "school and education, colleges, welfare work, securing human rights, [and] guarantee[ing] access to legal protection." Each of these areas should be legally organized such that "the church can fulfill its mission."¹³ In October 1948, Ehlers, along with a group of church officials in the British zone, issued a set of recommendations to the Parliamentary Council, suggesting that the Basic Law incorporate the articles on church-state relations from the Weimar Constitution. Religious communities would be permitted to register as

¹² Hermann Ehlers, "Menschliches Recht und göttliche Gerechtigkeit, Bremen, 20.4.47," ACDP 01-369-035/5.

¹³ "Bericht: Am 22. und 23. September 1947 versammelten sich im Johannesstift in Berlin-Spandau auf Einladung der Kanzlei der EKD Referenten der Landeskirchen zu einer Besprechung über die Bedeutung der neuen Länderverfassungen," EZA 2/31.

"corporations of public law" in order to collect revenues through state taxes, the inviolability of church property would be guaranteed, and Sundays and holidays would be designated as "days of public worship." Public schools would offer religious instruction as a "regular subject."¹⁴ The EKD Council chair and Lutheran bishop Theophil Wurm, in his own letter to the Parliamentary Council, added the right of churches "to propagate and promote their beliefs in the new state," while the ecumenical Working Group of Christian Churches in Germany headed by Martin Niemöller requested that churches be guaranteed the right to take positions on matters of public life.¹⁵ Protestant petitions to the Parliamentary Council presented guarantees for the protection and public role of churches not merely as rights, but as necessary conditions for guarding the new political order against a reemergence of the total state. At the same time, they centered on the position of the churches themselves within public life, rather than on the regulation of other institutions, such as marriage, family, property, or labor relations, in accordance with putatively Christian precepts.

Confessional differences came to the fore in debates about the right of parents to determine the confessional character of their child's schools (termed *Elternrecht*, or "parents' rights"). On this issue, more than any other, representatives of the Catholic and Protestant churches became embroiled in negotiations with the Parliamentary Council. For representatives of both confessions, the questions of parents' rights and denominational schooling raised

¹⁴ "Aktenbemerck: Am 20.10.1948 fand in Bethel eine Konferenz der Landeskirchen in der britischen Zone unter dem Vorsitz von Herrn Präses Koch statt," EZA 2/32; "Vorschlag der Konferenz der Landeskirchen der britischen Zone für das Grundgesetz," October 25, 1948, *Die Protokolle des Rates der Evangelischen Kirche in Deutschland* vol. 2, eds. Carsten Nicolaisen and Nora Andrea Schulze (Göttingen: Vandenhoeck & Ruprecht, 1997), 641-643.

¹⁵ Wurm to Parlamentarischen Rat, November 9, 1948, *Protokolle* vol. 2, eds. Nicolaisen and Schulze, 686-687; "Eingabe der Arbeitsgemeinschaft christlicher Kirchen in Deutschland an den Parlamentarischen Rat," December 8, 1948, *Protokolle*, vol. 2, eds. Nicolaisen and Schulze, 688-689.

embittered historical memories, as well as long-standing anxieties about secularization, rooted in the particularities of religious education the German school system.

Education in Germany was traditionally provided by both denominational schools, staffed exclusively by teachers of one confession and at least in principle organized around the precepts of that confession, and by interdenominational "community schools." In most states, interdenominational schools still offered confessionally-segregated religious education, supervised by the respective denominations, as part of the regular curriculum. While the Weimar Constitution of August 1919 envisioned the interdenominational school as the standard school type, religious communities retained the right to establish private denominational schools. In practice, states with traditions of denominational schooling maintained public denominational schools.¹⁶ The Nazi state, by contrast, inaugurated a campaign for the "German interdenominational school" in 1935, part of its efforts to diminish the influence and independence of the churches in German society. In violation of the July 1933 Concordat with the Vatican, as well as the regional Protestant church-state treaties of the early 1930s, the Nazi regime barred clergy from offering religion classes, cut the number of weekly hours of religious instruction, and eliminated private denominational schools.¹⁷ In response, the Confessing Church mounted a letter campaign to the Reich Ministry of Education, while regional Confessing synods established school committees to fight for the preservation of denominational schools, often unsuccessfully.¹⁸ The postwar Western occupation governments, in particular the American and

¹⁶ Norbert Friedrich, "Der Kampf der Protestanten für Religionsunterricht und Bekenntnisschule in der Weimarer Republik – ein Paradigma für die Haltung zum Verfassungsstaat?" in *Auf dem Weg zum Grundgesetz: Beiträge zum Verfassungsverständnis des neuzeitlichen Protestantismus*, ed. Günter Brakelmann (Münster: Lit Verlag, 1999), 111-124.

¹⁷ Helmreich, *Religious Education*, 162-178.

¹⁸ Siegfried Hermle, "Bekennende Kirche und Religionsunterricht," *Monatshefte für evangelische Kirchengeschichte des Rheinlandes* 53 (2004): 243-251.

British, looked more favorably on denominational schools, and the new state constitutions in the Western zone tended to affirm prevailing regional traditions: denominational schools in Bavaria, interdenominational schools in Hamburg and Schleswig-Holstein, a combination of both in North Rhine-Westphalia and Lower Saxony, and secular schools in Bremen.¹⁹

The question of parents' rights did not come before the Parliamentary Council until the second reading of the basic rights catalogue in November 1948. Although the "Basic Questions Committee" responsible for this portion of the document had already determined to devolve questions of "cultural and religious rights" to the states, Adolf Süsterhenn introduced a motion for the incorporation of a constitutional "parents' right" to denominational schools, setting off a national debate that lasted until the enactment of the Basic Law in May 1949.²⁰ If both churches regarded schools as bulwarks in a battle against secularization, the ensuing controversy highlighted their competing theological conceptions of law. On the Catholic side, arguments for parents' rights to determine the education of their children were linked to a defense of Catholic confessional schools. The Catholic position was straightforward. According to Catholic leaders, the Nazi state had violated not only the Concordat but also the natural rights of parents by compelling Catholic parents to enroll their children in interdenominational schools. On August 26, 1948, the German Catholic bishops issued a pastoral letter stressing the "importance of the denominational school." In October, following discussions with Prelate Böhler, Adolf Süsterhenn moved to include parents' rights in the CDU/CSU platform.²¹ By the end of 1948, once it became clear that the Social Democratic, Communist, and liberal delegates might

¹⁹ Helmreich, *Religious Education*, 224-231.

²⁰ Gardner, "Public Debate," 230.

²¹ *Ibid.*, 229-230; Buchna, *Klerikales Jahrzehnt*, 152.

exercise their combined majority to prevent the incorporation of such a right into the Basic Law, Cardinal Frings sent a series of letters to the Parliamentary Council that anchored parents' rights firmly in natural law, a product of "God-given human nature." A West German state that promoted the interdenominational school as the standard school type, Frings argued, would continue to harbor totalitarian ambitions, like the Soviet-backed state in the East.²²

Not only did German Protestants lack a language of natural rights through which to defend denominational schools, but Protestant positions on the question of parents' rights reflected developments in the theology of law since 1933. The EKD *Bruderrat*, the postwar successor organization to the executive organ of the Confessing Church established at the 1936 Bad Oeynhausen synod, undertook the most dramatic transformation on the issue. Although the Confessing Church had spearheaded Protestant opposition to the Nazi-era "German interdenominational school," after 1945 its more radical wing eschewed strong institutional claims on state governments. The pedagogue and *Bruderrat* pastor Oskar Hammelsbeck, who chaired the EKD's Commission on Education and Schooling, issued a series of declarations already in late 1945-46 concluding that while the denominational school might remain an ideal, the reality of "dechristianization" had resulted in an insufficient number of qualified teachers. Under such circumstances, the introduction of public denominational schools could be perceived as infringement on freedom of conscience for teachers who did not identify strongly with one confession. Therefore, the Protestant Church should "affirm" the interdenominational school that maintained confessional religious instruction as a mandatory subject.²³ Moreover, Hammelsbeck

²² Frings to Adenauer, October 25, 1948, EZA 2/32; Frings to Parlamentarischen Rat, November 20, 1948, ASD, Nachlass Carlo Schmid, Box 1161.

²³ "Die Tagung der Bruderräte in Frankfurt am Main 21.-24. August 1945 I: Oskar Hammelsbeck: Zur Schulfrage," in *Evangelische Schulpolitik in Deutschland 1918-1958: Dokumente und Darstellung*, eds. Sebastian Müller-Rolli and Reiner Anselm (Göttingen: Vandenhoeck & Ruprecht, 1999), 410. On Hammelsbeck, see Gottfried Adam,

argued, advocacy on behalf of the denominational school would implicate the Protestant Church in party politics, abandoning its universal mission.²⁴

Hammelsbeck's argument in favor of the interdenominational school drew on Karl Barth's theology of law, laid out during and after the war, to develop a vision of religious renewal that did not rely on strong claims to political or legal representation. Reflecting Barth's emphasis on the Christian community as a model of political responsibility that reminded the state of its purpose in God's order, the EKD *Bruderrat* suggested that the Church should aim to infuse the people with a spirit of service and community. The Church would serve as a source of public values, not as a lawmaking body or political bloc in its own right. Hammelsbeck's vision for the Church's role in postwar society in no way constituted a relegation of Christianity to the private sphere; the *Bruderrat* was as hostile toward secular schools as toward mandatory denominational schools. Rather, the interdenominational school would promote an ethic of tolerance and mutual respect, encouraging a return to true Christianity without imposing on any individual's conscience.²⁵ As the *Bruderrat* declared in a statement of April 1949, the alternative between "denominational school or community school" missed the larger question of whether "the personal dignity of every student and colleague" were recognized. Protestants could accept any school form that respected the values of freedom, dignity, and responsibility.²⁶

Some members of the conservative Lutheran wing of the EKD leadership, in particular the Bavarian bishop Hans Meiser and the Berlin bishop Otto Dibelius, favored the establishment

"Oskar Hammelsbeck (1889-1975)," in *Klassiker der Religionspädagogik*, eds. Heinrich Schroerer and Dietrich Zillesen (Frankfurt: Diesterweg, 1989), 236-249.

²⁴ "Oskar Hammelsbeck: Die evangelische Verantwortung im Für und Wider der Bekenntnisschule," in *Evangelische Schulpolitik*, eds. Müller-Rolli and Anselm, 423.

²⁵ *Ibid.*, 421-422.

²⁶ "Der Reichsbruderrat: Zur Schulfrage" and "Oskar Hammelsbeck. Thesen zur Schulfrage," in *Evangelische Schulpolitik*, eds. Müller-Rolli and Anselm, 613-618.

of the denominational school as the standard school form, resuming the political battles of the interwar period. Dibelius in particular understood the right of parents to establish denominational schools as a bulwark against the reemergence of the total state.²⁷ However, like their counterparts around the *Bruderrat*, Lutheran church leaders, including Dibelius, tended to couch the case for parents' rights in a language of parental responsibility, rather than of natural law.²⁸ The notion of "responsibility," moreover, reflected less a fixed set of institutional demands than an effort to realize a vision of Christian moral community amidst new political realities. According to this view, parents should play a role alongside the state in determining their children's education, but parents' responsibility could be realized through multiple institutional forms, whether denominational schools, or involvement in school committees, or at home. As a consequence, while the Lutheran leadership did not affirm the interdenominational school in the manner of the *Bruderrat*, its position yielded similar practical implications. A report of the Hannover regional Lutheran church, led from 1947 by the bishop Hans Lilje, acknowledged that the church would prefer denominational schools for Protestant children. However, in light of shifting demographics, the church would accept a Christian interdenominational school that maintained confessional religious instruction and the freedom for Protestant children to participate in school prayer.²⁹ At a meeting of representatives of both churches with members of the Parliamentary

²⁷ "Hans Meiser: Memorandum zur Neugestaltung des Schulwesens," in *Evangelische Schulpolitik*, eds. Müller-Rolli and Anselm, 406-409; "Hans Meiser: Schreiben an die Militärregierung über die Schulreform in Bayern," in *Evangelische Schulpolitik*, eds. Müller-Rolli and Anselm, 480-484; Otto Dibelius, *Grenzen des Staates* (Berlin: Wichern Verlag, 1949), 87-98.

²⁸ "Wir sind freie Menschen," *Evangelische Welt*, February 1, 1949; Edo Osterloh, "Das Elternrecht in theologischer Sicht," *Evangelische Welt*, May 1 1950.

²⁹ "Heinz Brunotte: Grundsätzliches zur Frage der Schulform sowie praktische Fragen und Folgerungen (Auszug)," in *Evangelische Schulpolitik*, eds. Müller-Rolli and Anselm, 484-491.

Council in December 1948, Protestant delegates eschewed the use of natural law language and strong demands for denominational schools adopted by their Catholic counterparts.³⁰

Given these prior orientations, both the *Bruderrat* and the Lutheran wing of the EKD proved more willing than the Catholic hierarchy to compromise on confessional schools when debate over the issue threatened to debilitate the Parliamentary Council. In early February 1949, a subcommittee of two Christian Democrats, two Social Democrats, and one liberal proposed a compromise draft of the constitutional basic rights clauses that established religious instruction as a mandatory subject in public schools, but not parents' right to determine the confessional character of their child's school. The proposal reflected a compromise along the lines suggested by the Protestant churches. The Fulda Bishops Conference headed by Cardinal Frings issued a declaration denouncing the exclusion of the more expansive version of parents' rights. On February 8, a committee of the CDU/CSU, Catholic Center, and conservative German Party delegates, under the leadership of Adolf Süsterhenn, declared parents' rights to be anchored in natural law and rejected the subcommittee's compromise.³¹ Bishop Lilje, who served as the EKD liaison to the Parliamentary Council, took a more moderate position. In a letter to Adenauer, Lilje emphasized that parents' responsibility for the education of their children could not be abdicated to the state. However, this did not mean that Protestants demanded confessional schools as the only means to fulfill such responsibility. For Lilje, establishing "the relationship between church and school in 'freedom and responsibility'" meant curtailing both the claim of the

³⁰ Kristian Buchna concludes that Wilhelm Böhler, while emphasizing the confessional unity on the question of denominational schools, "used the opportunity to present the particular Catholic grounding of parents' rights as the ruling interpretation of both churches as well as the Christian population as a whole": Buchna, *Klerikales Jahrzehnt*, 204.

³¹ "Erklärung der deutschen Bischöfe zum geplanten Grundgesetz," February 11, 1949, EZA 2/964; Hehl, *Süsterhenn*, 410.

state to exercise absolute control over education and "the unreservedly absolute demand for confessional schools" on the part of the churches.³²

By early April, the entire Basic Law was in danger of collapsing over the issue of parents' rights, as the Christian Democratic and conservative parties insisted on the inclusion of a right to determine the school type of one's children, while Social Democratic and liberal deputies angled for the omission of cultural issues from the basic rights entirely. Protestants played an important role in achieving a final settlement. The two Protestant CDU delegates on the compromise committee, Robert Lehr and Theophil Kaufmann, did not believe parents' rights "to be of central importance" and were willing to compromise with their Social Democratic colleagues on the issue.³³ Moreover, at the end of April, the Rheinland prelate Heinrich Held, representing Bishop Lilje, met with CDU delegates and Prelate Böhler to help negotiate a compromise on parents' rights.³⁴ On May 4, a committee composed of Süsterhenn, the Social Democratic deputy Georg August Zinn, and the liberal Thomas Dehler arranged a final settlement.³⁵ Article 7 of the Basic Law guaranteed that "Religious instruction shall form part of the regular curriculum in the state schools...in accordance with the tenets of the religious community concerned," without incorporating a right to public denominational schools.

The Basic Law approved by the Parliamentary Council on May 8, 1949, and ratified by a majority of the West German states by May 23, met the expectations of the Protestant jurists and church leaders who had participated in the process. In addition to the compromise on the question of parents' rights that proved acceptable to both the *Bruderrat* and the Lutheran wing of

³² Lilje to Parlamentarischen Rat, March 3, 1949, *Protokolle*, vol. 3, ed. Fix, 148-149.

³³ Gardner, "Public Debate," 242-243.

³⁴ Held to Kanzlei der EKD, April 26, 1949, EZA 2/964.

³⁵ Hehl, *Süsterhenn*, 417.

the EKD, Article 6 guaranteed that "Marriage and the family shall enjoy the special protection of the state." On state-church relations, the Parliamentary Council had voted in favor of retaining the clauses of the Weimar Constitution that guaranteed the state's religious neutrality while permitting the churches a range of privileges in the public sphere, as Hermann Ehlers and other representatives of the Protestant churches proposed in 1948.³⁶

The Basic Law found an overwhelmingly positive reception in the Protestant press, from the reconstituted Confessing Church monthly *Junge Kirche* to the conservative Lutheran journal *Zeitwende*. For many Protestant intellectuals in the new Federal Republic, the Basic Law marked an important step beyond earlier German constitutions by acknowledging the supra-positive character of the basic rights and offering a strong affirmation of the public role of religion. Rather than claiming that provisions of the secular constitution mapped onto a divinely-ordained natural law, however, Protestant commentators focused on how the Basic Law provided a structure for Christian political participation within the framework of an officially religiously neutral state.

While the Fulda Bishops Conference could only reluctantly accept the Basic Law, still protesting its insufficient conception of parents' rights and lack of a "deeper religious foundation," Hermann Ehlers found much in the new constitution to praise.³⁷ For Ehlers, who as far back as 1947 had warned against efforts to ground the constitution in "Catholic natural law," the Basic Law's combination of official religious neutrality with freedom of religious belief and a strong public role for the churches represented a signal achievement. The basic rights did not

³⁶ Gardner, "Public Debate," 240.

³⁷ "Erklärung zum Bonner Grundgesetz am 23.5.1949," in *Dokumente deutscher Bischöfe. Bd. 1: Hirtenbriefe und Ansprachen zu Gesellschaft und Politik, 1945-1949*, eds. Günter Baadte, Anton Rauscher, and Wolfgang Löhr (Würzburg: Echter, 1986), 311-316; Frings to Adenauer, January 9, 1950, EZA 2/964.

presuppose a particular set of religious beliefs or ideological convictions but could be interpreted to rest on Christian or non-Christian foundations. The constitution itself provided a framework for the coexistence of Christians and non-Christians, while creating the opportunity and responsibility for Christian participation in political life.³⁸ The Freiburg historian and Confessing Church veteran Gerhard Ritter commended the Basic Law for moving beyond liberal individual rights to recognize the importance of "moral community," reflecting the influence of Christian conceptions of human rights.³⁹ At the same time, Ritter acknowledged that "Christian social ethics" were "now unavailable as a potentially direct foundation of collective European life."⁴⁰ For both Ehlers and Ritter, the Basic Law protected moral communities that preexisted the state, a precept consistent with Christian social ethics, but without presupposing that citizens recognize the validity of a natural law in order to accept the laws and governing institutions of the new Federal Republic.

The most significant Protestant jurist to develop a comprehensive theory of the place of Christianity in the Basic Law was the Göttingen constitutional scholar Rudolf Smend. The son of a prominent Reformed theologian, Smend gained renown during the 1920s for his theory of "integration," which emphasized the role of the constitution in uniting disparate political parties, branches of government, and civil society institutions around a common ethos of participation in and loyalty to the state. In both his interwar and postwar writings, Smend contrasted his conception of the constitution as part of the "process of integration" against formalistic and monolithic constitutional theories, most prominently Carl Schmitt's effort to locate the origin of

³⁸ Hermann Ehlers, "Evangelische Erwägungen zu den Grundrechten," *Junge Kirche*, August 15, 1949; Andreas Meier, *Hermann Ehlers: Leben in Kirche und Politik* (Bonn: Bouvier Verlag, 1991), 257.

³⁹ Gerhard Ritter, "Die Menschenrechte und das Christentum," *Zeitwende* 21, no. 1 (July 1949): 1-12

⁴⁰ Moyn, *Christian Human Rights*, 116.

the constitution in the moment of the "sovereign decision."⁴¹ After the war, Smend devoted himself exclusively to Protestant church law and church-state relations, serving as a member of the EKD Council and as the founding director of the EKD's Institute for Ecclesiastical Law at the University of Göttingen. Crucial to Smend's influence among Protestant thinkers was his appeal to the supra-positive values underpinning the constitutional text. The state, Smend argued, was a "spiritual community," not simply the sum of separate components or the expression of a unitary will. At the same time, Smend did not rely on a comprehensive code of natural law but invoked a more flexible, dynamic process of value formation by which multiple public and private institutional actors oriented themselves toward the common good of the state.⁴²

Smend laid out the consequences of his integration theory for state-church relations under the Basic Law in a 1951 essay for the opening issue of the *Journal of Protestant Church Law*, which Smend co-founded with the Confessing Church theologian Ernst Wolf. Smend's essay, which quickly became a touchstone for Protestant jurists in West Germany, offered a genealogy of German understandings of the place of the churches in political life, tracing a shift from a liberal separation of church and state under the Weimar Constitution to the Basic Law's recognition of the "public claim [*Öffentlichkeitsanspruch*]" of the churches. Central to Smend's argument was the contention that the articles of the Basic Law on religion, though adopted verbatim from the Weimar Constitution, took on new meaning in light of the struggle of the churches—the Confessing Church above all—against National Socialism. Under Nazism, the churches counterposed the "universal claim of the Kingdom of Christ" against the "demonization

⁴¹ For an overview of Smend's constitutional theory, see Frieder Günther, *Denken vom Staat her: Die Bundesdeutsche Staatsrechtslehre zwischen Deziision und Integration* (München: Oldenbourg, 2004), 39-44. On Schmitt's competing constitutional theory, see Günther, *Denken vom Staat her*, 35-39.

⁴² Rudolf Smend, "Integrationslehre," in Smend, *Staatsrechtliche Abhandlungen*, 475-481. On the connection between Smend's constitutional theory and his Protestantism, see also Caldwell, *Popular Sovereignty*, 121-126 and Koriath, "Evangelisch-theologische Staatsethik," in *Konfession im Recht*, eds. Cancik et al., 130-134.

of all domains of life in the total state." The Barmen Declaration's rediscovery of the public mission of the churches served not only to define the limits of the state, but also to help the state determine its own "fundamental nature." Under the new constitutional order, conflicts between church and state would be resolved not by state *diktat* but on the basis of "a critically purified and therefore responsible...foundation of discussion."⁴³ Smend's essay both reflected and helped to motivate a transformation during the first years after the enactment of the Basic Law, as Protestant jurists and theologians turned away from critiques of the Allied occupation governments and toward new efforts to participate in the formation of the West German legal order.

In laying out the "public claim" of the churches, Smend did not hesitate to distinguish between the proper spheres of church and state, going to far as to argue, "The fundamental guarantee of the liberties of the churches requires their simultaneous fundamental delimitation through state sovereignty."⁴⁴ The churches did not provide principles that could be incorporated directly into state law. Yet while eschewing Catholic natural law doctrines, Protestant jurists shared with their Catholic counterparts a thoroughgoing hostility toward legal positivism. Smend's integration theory drew on the narrative nearly universally accepted by the conservative West German jurisprudential establishment that linked positivism's vesting of legal legitimacy in the state to the collapse of law under National Socialism. Law was not self-legitimizing but needed to be rooted in higher values. The key difference was that Protestants such as Smend understood the constitution itself as an articulation of values that were informed but not determined by the churches, through a process of negotiation involving multiple institutional

⁴³ Rudolf Smend, "Staat und Kirche nach dem Bonner Grundgesetz," in Smend, *Staatsrechtliche Abhandlungen*, 411-422, quoted 416, 420-422.

⁴⁴ *Ibid.*, 419.

actors. Rather than measuring the validity of constitutional law against a higher legal order, Protestant jurists following Smend sought to incorporate religiously-inflected foundational values into constitutional jurisprudence itself, a strategy that would prove considerably more influential on a Constitutional Court putatively bound to religious neutrality. This distinction would underpin Protestant interventions in debates about contested constitutional provisions soon after the Basic Law's enactment.

Contesting Institutions: The EKD and the Equal Rights Debate

By far the most ubiquitous and consequential set of debates to take up the theoretical issues raised in Protestant interpretations of the Basic Law after 1949 involved the revision of the Civil Code provisions on marriage and family law. For Protestant theologians and jurists, the national debate about family law reform in the early 1950s brought into practical relief longstanding questions about the relationship between biblical teachings and secular law. Representatives of the EKD and the Protestant state churches shared with their Catholic counterparts concerns about secularization and the disintegration of traditional family structures, but they were also profoundly suspicious of the influence of the Catholic Church on West German politics. In the national debate about family law, both conservative Lutherans and Confessing Church members adapted theological understandings of law to the political realities of postwar constitutional democracy, as a means of extending their political influence and elaborating a Protestant social ethics relevant to contemporary life. In the process, they articulated what would become an influential understanding of the relationship between Christian teachings and constitutional law in the Federal Republic.

The Basic Law guaranteed that the reform of marriage and family law would become the subject of contentious political debate during the early years of the Federal Republic. Whereas Social Democratic and liberal delegates to the Parliamentary Council demanded a robust guarantee of women's equality, most Christian Democratic delegates sought to maintain the model of the Weimar Constitution, which guaranteed women's equality in civil and political, but not social and economic rights. Following months of debate, and largely under pressure from popular opinion and feminist civil society associations, the Parliamentary Council elected to move beyond the phrasing of the Weimar Constitution to declare in Article 3, Paragraph 2 of the Basic Law simply "Men and women have equal rights [*Männer und Frauen sind gleichberechtigt*]."⁴⁵ The Basic Law's guarantee of equal rights thereby came into conflict with numerous provisions of the 1900 Civil Code, including clauses that granted the husband the right to make final decisions in marital conflicts (§1354, 1634); gave the father the sole right to legally represent his children (§1629); obliged wives to prioritize housework over work outside the home (§1356); allowed a husband to unilaterally cancel his wife's employment contract if he believed that her employment interfered with her household duties (§1358); and accorded the husband the right to administer his wife's property acquired before or during marriage (§1363).⁴⁶ Article 117 of the Basic Law stipulated a deadline of March 31, 1953 by which time Parliament would enact a revised Civil Code in compliance with Article 3.

Catholic clergy and jurists framed their interventions in the national debate about family law around the Church's natural law precepts. Catholic canon law regarded marriage as one of seven sacraments, while the neo-Scholastic social teachings inaugurated in the late nineteenth

⁴⁵ On the debate in the Parliamentary Council, see Moeller, *Protecting Motherhood*, 38-75.

⁴⁶ Christine Franzius, *Bonner Grundgesetz und Familienrecht: Die Diskussion um die Gleichberechtigung von Mann und Frau in der westdeutschen Zivilrechtslehre der Nachkriegszeit (1945-1957)* (Frankfurt: Klostermann, 2005), 57.

century emphasized the husband's place as head of marriage and family. According to the early twentieth-century Catholic moral theologian Joseph Mausbach, whose treatise on social ethics remained the "standard work" into the postwar period, "The parents stand as bearers of authority together over children and servants. Of the marriage partners, the man is, according to his natural aptitude and according to the general moral and legal tradition, the true head of the family."⁴⁷ For Frank Bosch, a Catholic jurist who played a key role in advising the Fulda Bishops Conference during the 1950s, the principle of equal rights meant according to men and women their respective rights and privileges within their appropriate spheres.⁴⁸ The ranking members of the Catholic hierarchy agreed that the protection of marriage and family under Article 6 of the Basic Law formed the limiting condition for equal rights under Article 3.⁴⁹

For Protestants, postwar family law reform raised a different set of theological questions. Neither Lutheran nor Reformed theology regarded marriage as a sacrament. The problem of defining a theological stance on marriage in the absence of recourse to natural law therefore loomed large. The Pauline Household Codes enjoined wives to "submit yourselves unto your own husbands, as unto the Lord" (Eph. 5:22), but the meaning of the New Testament passage was far from unambiguous, let alone the legitimacy of drawing insights from a first-century text for problems of mid-twentieth-century legal reform. The theologian Heinz-Horst Schrey would later state the underlying problem in more general terms: "whether only Catholics have firm social-ethical norms, or whether Protestants also are familiar with something like this. One must always distinguish here between a complete release of norms from the historical situation...and a

⁴⁷ Rölli-Alkemper, *Familie im Wiederaufbau*, 44-49, quoted 47.

⁴⁸ Frank Bosch, "Gleichberechtigung im Bereich der elterlichen Gewalt," *Süddeutsche Juristen-Zeitung* 5 (1950): 627.

⁴⁹ Dieter Schwab, "Konfessionelle Denkmuster und Argumentationsstrategien im Familienrecht," in *Konfession im Recht*, eds. Cancik et al., 172.

complete commitment to antiquated social structures." According to Schrey, "There must be a third way between these extremes."⁵⁰

For many Protestant jurists and theologians in the early 1950s, the category of the "institution" promised to offer such a third way between a commitment to fixed natural law norms and historicist relativism. Jacques Ellul's *The Theological Foundation of Law*, which gained a wide reception in Germany following its translation in 1948, was among the first works to embed a theory of the institution in a Protestant theology of law. For Ellul, institutions such as marriage, state, and property were structures of social and political order "wholly independent of man's will, assent, or conception," whose divine creation was revealed in the Bible: "God's choice of these institutions was not arbitrary. The possibility of their being different was not left open." Yet Ellul also acknowledged the role of humanity in adapting God-given institutions to particular historical circumstances, noting that individuals "must only adjust [institutions] to the present situation."⁵¹ Its fusion of fixedness and flexibility made the category of the institution amenable for both conservative Lutherans and members of Confessing Church successor organizations concerned with family law reform.

Conservative Lutherans placed greater emphasis than their Barthian counterparts on the fixity of divinely-ordained institutions. The *Christophorus-Stift*, the Protestant research institute in the Westphalian town of Hemer founded in 1947, formed the locus for Lutheran engagement with Civil Code reform.⁵² The institute's director, the Lutheran theologian Friedrich Karl Schumann, convened a "Committee on the Foundations of Law" beginning in May 1949 that

⁵⁰ Schrey to Becker, November 5, 1962, LAELKB, Nachlass Becker, 101/58 – 5.

⁵¹ Ellul, *Theological Foundation*, 76-79.

⁵² On the institutional mission of the *Christophorus-Stift*, see "Erster Jahresbericht des Christophorus-Stifts in Hemer i. Westf. über das Jahr 1948: Erstattet vom Stiftsrat," FEST Box 134.

soon turned to consider marriage and family law, the most urgent set of constitutional questions facing Protestants following the promulgation of the Basic Law. Adopting an emphasis on human depravity and fallenness characteristic of German Lutheran theology, Schumann's inaugural lecture before the committee framed Protestant participation in legal reform as a means of bringing theological insights about human nature to bear on political life. According to Schumann, only a return to traditional social structures as a means of controlling sinful human impulses could stymie the reemergence of the "total state." Schumann regarded marriage law as a crucial domain for reestablishing postwar social order and worried that Protestants lacked a theological understanding of marriage comparable to Catholic natural law teachings. If the "religiously neutral" Federal Republic threatened to neglect the "fundamental indissolubility" of marriage, he argued, the Protestant churches found it incumbent upon themselves to champion the protection of the essence of marriage under state law.⁵³

A memorandum on Civil Code reform prepared for the *Christophorus-Stift* committee in late 1949 by the public law professor Karl August Bettermann exemplified conservative Lutherans' restrictive conception of the essence of marriage.⁵⁴ Bettermann accepted as axiomatic that the equality of men and women under Article 3 referred only to an equivalency of rights within men's and women's spheres.⁵⁵ In a discussion of the draft, commission members opined that Bettermann had offered *too* liberal an interpretation of equal rights by suggesting that the Basic Law left the division of responsibility within marriage to the choice of individual

⁵³ Schumann, *Frage der Menschenrechte*, 16. On the committee's meeting in May 1949, see "Bericht über die erste Sitzung des Ausschusses der Akademie für Grundfragen des Rechts in Hemer vom 27.-29 Mai 1949," FEST Box 669.

⁵⁴ Schumann to Kirchenkanzlei, "Bericht über die Sitzung des Ausschusses für Grundfragen des Rechts im Christophorus Stift der evangelischen Akademie," September 22, 1949, EZA 2/4344.

⁵⁵ K. A. Bettermann, "Der Grundsatz von der Gleichberechtigung der Geschlechter und das geltende Familienrecht: Ein Beitrag zu Art. 3 II und 117 I Grundgesetz," EZA 2/4344, p. 12.

couples.⁵⁶ In a subsequent version of the memorandum, Bettermann more robustly affirmed a patriarchal division of labor within the family, arguing that the Civil Code should retain the husband's right of the final decision in marital conflicts (§1354) and the obligation of wives to perform housework (§1356).⁵⁷ The jurist Hans Dombois, who had served as a leader in the EKD's postwar amnesty campaigns, joined the permanent staff of the *Christophorus-Stift* in 1950 after receiving his doctorate with Rudolf Smend, and offered a more elaborate theorization of the "institution" toward similar ends.⁵⁸ As an divinely-ordained institution, Dombois argued, marriage was "founded by God"; "the core of each institution, despite a certain mutability, lies in its pregiveness, its indisposability." After the Fall, "marriage comes under the law of domination and of sexual fallenness."⁵⁹ According to Dombois, efforts to eliminate the moment of hierarchy and domination in marriage reflected a dangerous attempt to achieve this-worldly "self-deliverance."⁶⁰

Alongside the *Christophorus-Stift*, a group of jurists around the EKD Protestant Women's Association [*Evangelische Frauenarbeit*] offered a far more expansive interpretation of equal rights that reflected not only an alternative political lineage but also the flexibility of the Protestant category of the institution. The *Evangelische Frauenarbeit* was the successor

⁵⁶ "Bericht über die Sitzung des Ausschusses für Grundfragen des Rechts vom 24.-26. Februar 1950 im Christophorus-Stift zu Hemer," EZA 2/4344.

⁵⁷ K. A. Bettermann, "Der Grundsatz von der Gleichberechtigung der Geschlechter und das geltende Familienrecht: Gutachten erstattet im Auftrage der Evangelischen Akademie (Christophorus-Stift) in Hemer," FEST Box 671, II.14. The memorandum was never published.

⁵⁸ Schumann to Dombois, May 6, 1950, FEST Box 152.

⁵⁹ Hans Dombois, "Das Problem der Institutionen und die Ehe," in *Familienrechtsreform: Dokumente und Abhandlungen*, eds. Hans Adolf Dombois and Friedrich Karl Schumann (Witten-Ruhr: Luther-Verlag, 1955), 132-142, quoted 134, 139, 141.

⁶⁰ Hans Dombois, "Gleichberechtigung der Geschlechter: Fortschritt oder Not?" in *Familienrechtsreform*, eds. Dombois and Schumann, 77-88, quoted 83, 87.

organization to the German Protestant Women's League, founded in 1899 as a "counterforce to the radical or moderate bourgeois women's movement."⁶¹ In the postwar period, the *Frauenarbeit* moved in a more liberal direction under the leadership of Elisabeth Schwarzhaupt, a member of the first generation of German women attorneys who trained in law in Frankfurt in the 1920s and served as a judge and member of the liberal German People's Party during the early 1930s. As a legal adviser to the national German Protestant church during and after the war, Schwarzhaupt sought to bridge the Protestant milieu and the liberal feminist movement, joining the CDU in 1952 in order to amplify the voices of Protestants within Christian Democracy.⁶² The *Frauenarbeit* began working on family law reform as early as 1947.⁶³ By July 1950, the association produced a series of recommendations for revising the Civil Code that included the elimination of the husband's right of the final decision, the introduction of equal rights to legally represent the household, and the reform of marital property law to allow wives a greater share of the property acquired during marriage in cases of separation.⁶⁴

Like nearly all participants in the debate about family law reform, including members of the liberal and socialist feminist movements, the *Frauenarbeit* emphasized the inherent differences between men and women. The association's recommendations stipulated that "The wife is the leader in household matters."⁶⁵ Nevertheless, the group's efforts to promote women's

⁶¹ Tim Schedel, "Deutsch-Evangelischer Frauenbund," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Deutsch-Evangelischer+Frauenbund> (accessed April 15, 2018).

⁶² Moeller, *Protecting Motherhood*, 199-200.

⁶³ "Vorschläge des Deutsch-Evangelischen Frauenbundes für die rechtliche Neuordnung des Eherechts," October 19, 1947, EZA 2/4344.

⁶⁴ "Vorschlag der Evangelischen Frauenarbeit für eine Reform des Eherechts," July 11, 1950, EZA 2/4344.

⁶⁵ *Ibid.* On the widely-shared emphasis on the inherent differences between the sexes in postwar debates about family law reform, see Alexandria Ruble, "Equality and Difference: Political Debates on 'Gender Equality' in West Germany, 1949-1958" (MA Thesis, University of North Carolina Chapel Hill, 2012).

equal rights in the family belie a simple correspondence between religious organizations and patriarchal conservatism in early postwar West Germany. Elisabeth Schwarzhaupt championed the legal equality of marriage partners in part on the basis of the social transformations of Germany since the promulgation of the Civil Code in 1900. In the course of two world wars, she noted, women had assumed increasingly prominent roles in the labor force and frequently served as heads of households following the absence, injury, or death of a husband.⁶⁶ The position of the *Frauenarbeit* also turned on different theological premises from that of the Lutherans around the *Christophorus-Stift*, including an alternative reading of contested New Testament passages. For Schwarzhaupt, the biblical analogy between the marital community and the relationship of Christ to the Church signified a bond of love rather than of hierarchy. As an expression of an "evangelical" ethic of love, moreover, the Ephesians verse enjoining wives to obedience should not be construed as a "'Christian conception' of marriage valid as a legal institution."⁶⁷ As the representative of the *Frauenarbeit* in the EKD chancellery Anna Paulsen argued, even if "The emphasis on the fundamental equality of the sexes must always remain connected to the emphasis on functional difference," the Bible placed women and men equally under the authority of God and in equal responsibility toward the community.⁶⁸

The Confessing Church theologian Ernst Wolf captured the theological core of the position of the *Frauenarbeit* in a memorandum commissioned by the EKD chancellery in

⁶⁶ Elisabeth Schwarzhaupt, "Die Stellung der Frau in Deutschland," *Stimme der Gemeinde*, October 1949; Schwarzhaupt, "Die Gleichberechtigung von Mann und Frau: Artikel 3, Absatz 2 des Bonner Grundgesetzes," *Stimme der Gemeinde*, January 1950.

⁶⁷ Elisabeth Schwarzhaupt, "Gleichberechtigung von Mann und Frau," *Evangelische Welt*, April 16, 1950.

⁶⁸ "Gleichberechtigung in biblischer Sicht," *Evangelische Welt*, October 1, 1951; Tim Scheidel, "Paulsen, Anna" *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Paulsen%2C+Anna> (accessed April 15, 2018).

September 1950 as a counterweight to the Bettermann text.⁶⁹ Relying on the discussion of marriage and family in the recently-published third volume of Karl Barth's *Church Dogmatics*, Wolf arrived at a different understanding of both the nature of the institution of marriage and of the implications of Christian teachings for legal reform. Like Schwarzhaupt, Wolf read the controversial fifth chapter of Ephesians to signify *not* the subordination of wife to husband but rather the "covenant" by which husband and wife merged into one spiritual body. Following Barth's Christological interpretation of law, which held all human legal orders to stand under the sovereignty of Christ, Wolf regarded the "institution of marriage" as a "divine ordinance" that bore "witness to the mastery of Christ in his community."⁷⁰ Marriage could not be entirely subsumed under a legal definition, and the inner structure of marriage could not be regulated by law. The law should respect the fundamental nature of marriage, but this could not be secured through law alone.⁷¹

The fault lines in Protestant discussions of marriage and family law took shape in the course of 1951, as the EKD chancellery authorized the *Christophorus-Stift* commission on marriage law, which evolved out of the earlier commission on law led by Friedrich Karl Schumann, to examine the Federal Justice Ministry's recommendations for the revision of the Civil Code.⁷² The Justice Ministry, headed by the liberal Free Democratic Party (FDP) jurist and parliamentarian Thomas Dehler, proposed a more extensive reform of the Civil Code than that

⁶⁹ Ranke to Wolf, September 19, 1950, EZA 2/4344; Ranke to Wolf, October 2, 1950, EZA 2/4345.

⁷⁰ Ernst Wolf, "'Evangelisches' Eherecht? Theologische Erwägungen zu einer aktuellen Frage," in *Rechtsprobleme in Staat und Kirche: Festschrift für Rudolf Smend zum 70. Geburtstag 15. Januar 1952* (Göttingen: Schwartz, 1952), 422-425.

⁷¹ *Ibid.*, 430.

⁷² The EKD chancellery received the three parts of the Justice Ministry's memorandum in March, September, and December 1951: Osterloh to Schumann, April 17, 1951, EZA 2/4345; Aktenvermerk, Dr. Petersen, September 12, 1951, EZA 2/4346; Ranke to Eherechtsausschuss, December 15, 1951, EZA 2/4346.

avored by the governing coalition's Christian Democratic leadership, including equal rights for wives and mothers.⁷³ The Protestant commission reflected the priorities of the conservative Lutheran camp around Schumann, who comprised a majority of the membership.⁷⁴ Nevertheless, representatives of the *Frauenarbeit* participated in the commission while petitioning the EKD hierarchy for a more serious engagement with their position.⁷⁵

Even the conservative wing of the EKD commission did not simply invoke theological categories to reject any reform of the Civil Code. To the contrary, over the course of the commission's meetings in 1951, Lutherans increasingly distinguished the "essence" of marriage and family that required the protection of the state from the legal form of these institutions subject to historical and social variation. At the core of this distinction lay the disjuncture between divine and human law in post-1945 German Protestant theologies. Following the discrediting of Nazi-era "orders of creation" theology, Lutherans emphasized that biblical revelation provided mere "guidelines" for worldly law, which could only serve as a pale reflection of divine justice. The Lutheran theologian Karl Heinrich Rengstorff argued in a lecture before the family law commission that the "home" was "molded by a particular fatherly authority, responsibility, and initiative," but at the same time he rejected the direct application of biblical passages to family law.⁷⁶ Edo Osterloh, a conservative Lutheran theologian and special

⁷³ Maria Hagemeyer, "Denkschrift über die zur Anpassung des geltenden Familienrechts an den Grundsatz der Gleichberechtigung von Mann und Frau (Art. 3 Abs. 2 GG) erforderlichen Gesetzesänderungen," FEST Box 671.

⁷⁴ Ranke to Brunotte, June 15, 1950, EZA 2/4344; Schumann to Dean of the Heidelberg theological faculty, July 6, 1950, FEST Box 671.

⁷⁵ Reports on meetings of April 14-15, 1951 and June 16-17, 1951, EZA 2/4345; Rudolph to Dibelius, February 13, 1952, in *Die Protokolle des Rates der Evangelischen Kirche in Deutschland*, vol. 6, eds. Dagmar Pöppig and Anke Silomon (Göttingen: Vandenhoeck & Ruprecht, 2008), 131-132.

⁷⁶ Karl Heinrich Rengstorff, "Vaterschaft im Neuen Testament," in *Familienrechtsreform*, eds. Dombois and Schumann 34-41, quoted 41.

adviser in the EKD chancellery, suggested that while the "essence of marriage" was unchanging, the "legal relationships" between husband and wife were historically contingent.⁷⁷

The constitutional scholar and Bonn law professor Ulrich Scheuner, who had served as a legal adviser to the EKD and participant in the Church's amnesty campaigns since 1947, recast this theological framework into a set of practical recommendations for family law reform. A close associate of Rudolf Smend and follower of Smend's integration theory, Scheuner argued that the principle of equal rights under Article 3 and the state protection of marriage and family guaranteed by Article 6 had to be brought into harmony with one another, and with the larger values underpinning the Basic Law. An interpretation that prioritized equal rights above the protection of marriage would violate the constitutional order. The Protestant emphasis on the historical rather than essential nature of the relationship between biblical prescriptions and secular law coincided with Scheuner's understanding of the place of Christianity in the new constitutional order. The Basic Law "cannot be interpreted on a particularly religious or ideological basis" and did not presuppose a "specifically Christian" understanding of marriage; nevertheless, the history and present form of marriage in Germany had been shaped by "Christian tradition." The state was obliged to protect the "essence of marriage" but could not interfere in the inner structure of marriage according to any prearranged set of norms. Scheuner contrasted this understanding of the place of Christianity in the Basic Law with the natural law formulations of Catholic jurists such as Frank Bosch.⁷⁸

⁷⁷ Osterloh, "Theologischer Beitrag zur Diskussion über die Eherechtsreform im Zusammenhang mit der Angleichung des Eherechtes an den Grundsatz der Gleichberechtigung von Mann und Frau," EZA 2/4345.

⁷⁸ Ulrich Scheuner, "Die verfassungsrechtlichen Grundlagen der Familienrechtsreform," in *Familienrechtsreform*, eds. Dombois and Schumann, 44-56, quoted 47, 52.

The Protestant marriage law commission began preparing its official recommendations to the Justice Ministry in January 1952, in advance of the Justice Ministry's submission of its draft law to the federal cabinet.⁷⁹ As Bishop Dibelius, chair of the EKD Council, declined to consider the position of the *Frauenarbeit* before the government officially concluded its draft, Schumann composed the report to reflect exclusively the views of the commission's conservative Lutheran wing.⁸⁰ The commission's recommendations, which appeared in March, endorsed not only fathers' prerogatives but even a version of §1354 that would retain the husband's right of the final decision in "cases of conflict." The recommendations cited Paul's letter to Ephesians as grounds for the "subordination of the wife" in the "worldly realm of marriage." Still, Schumann acknowledged that Article 3 constituted "immediately valid law" with which the Civil Code reform must comply.⁸¹

The marriage law commission's report in turn provoked an outcry from the *Evangelische Frauenarbeit*, which released a rejoinder reiterating the association's opposition to legislated patriarchy and its divergent interpretation of the relevant biblical passages.⁸² The *Frauenarbeit* issued an alternative set of recommendations for Civil Code reform, which included eliminating the husband's right of the final decision, allowing either partner to represent the household in legal matters, requiring the consent of both partners for the disposal of property, and requiring

⁷⁹ Report of the marriage law commission meeting of January 16-17, 1952, EZA 2/4346.

⁸⁰ "28. Sitzung Berlin-Spandau 13. März 1952," *Protokolle*, vol. 6, eds. Pöppig and Silomon, 82-83.

⁸¹ "Stellungnahme des Rates der Evangelischen Kirche in Deutschland zu den Fragen der Revision des Ehe- und Familienrechts (22.3.1952)," in *Familienrechtsreform*, eds. Dombois and Schumann, 9-15.

⁸² "7.3.1952: Stellungnahme der Evangelischen Frauenarbeit in Deutschland (Frankfurt/M.) zur Frage der elterlichen Gewalt," in *Gleichberechtigung als Verfassungsauftrag: eine Dokumentation zur Entstehung des Gleichberechtigungsgesetzes vom 18. Juni 1957*, ed. Gabrielle Müller-List (Düsseldorf: Droste, 1996), 190-193; "2.5.1952: Stellungnahme der Evangelischen Frauenarbeit in Deutschland (Frankfurt/M.) zum Gutachten des Rates der Evangelischen Kirche in Deutschland zu den Fragen der Revision des Ehe- und Familienrechts," in *Gleichberechtigung als Verfassungsauftrag*, ed. Müller-List, 211-217; "Um das neue Ehe- und Familienrecht," *Kirche in der Zeit*, June 1952; "Gegen die Unterordnung der Frau," *Evangelische Welt*, August 1, 1952.

parents to turn to a guardianship court in cases of disagreement over matters involving their child's welfare.⁸³ Moreover, although Schumann and his conservative Lutheran colleagues regarded gendered hierarchies as essential to the Christian concept of marriage, even they did not seek to bring this premise directly to bear on civil law. Already in an April 1952 article, Schumann recognized that the church could "agree to the elimination of the general power of decision of the husband," since the inner relationship between marriage partners was ultimately not accessible to "legislation and adjudication."⁸⁴

Catholic demands were far less ambiguous. According to the Cologne Cardinal Joseph Frings, who sent to Dehler the conclusions of the analogous Catholic commission on family law reform in January 1952, papal pronouncements, natural law, and the "word of God" converged on the vesting of authority over the family in the husband and father. Consequently, the German Catholic hierarchy advocated for the preservation of husbands' and fathers' prerogatives, as well as for provisions that required wives to obtain the permission of their husbands in order to work outside the home.⁸⁵

A pattern of insistence upon the "Christian" underpinnings of Basic Law, while denying that confessional or ideological affiliations should play a role in its interpretation, came to distinguish Protestant interventions in the debate about family law reform. This proved a considerably more successful strategy than the efforts of Catholic bishops and their emissaries to press their case based on the "natural hierarchies" of marriage and family. At an April 1952 meeting of representatives of the Protestant and Catholic family law commissions with Justice

⁸³ "Wie sollen die neuen Eherechtsparagrafen lauten?" *Evangelische Welt*, April 16, 1952; "18.11.1952: Stellungnahme der Evangelischen Frauenarbeit in Deutschland zum Gleichberechtigungsgesetz," in *Gleichberechtigung als Verfassungsauftrag*, ed. Müller-List, 263-265.

⁸⁴ "Gleichberechtigung und Eherecht," *Evangelische Welt*, April 1, 1952.

⁸⁵ Frings to Dehler, January 12, 1952, EZA 2/4346.

Ministry officials, Frank Bosch found many of his suggestions rebuffed by the government side. Although Justice Minister Dehler had personally convened the meeting, the Justice Ministry understood the role of the churches in a strictly advisory capacity. Similar to Rudolf Smend, Dehler and his colleagues viewed the churches as sources of civic values, not as legislators equal in rank to the state. According to the EKD representative Edo Osterloh, "the Protestant side felt it had been largely understood and stood under the impression that its concerns in the main points were positively received by the leadership of the Justice Ministry," whereas "the Catholic representatives bid farewell in an obviously somewhat depressed mood."⁸⁶ The Catholic hierarchy aimed to use the Civil Code reform to realize longstanding demands for the elimination of obligatory civil marriage, a suggestion rebuked by the Justice Ministry and regarded by most Protestants as a conflation of the proper spheres of church and state. Whereas the Catholic leadership insisted on the preservation of the husband's right of the final decision, moreover, the EKD Council determined not to intervene in the government's handling of this issue.⁸⁷

The draft law sent by the Justice Ministry to the federal cabinet at the end of May largely followed the EKD memorandum, eliminating the husband's right of the final decision in marital conflicts but maintaining the father's right of the final decision on matters pertaining to the child's education. Whereas the Catholic delegation pressed for the incorporation of papal pronouncements into the foundations of marriage law—often at the expense of the equal rights clause itself—the EKD commission's less stringent focus on preserving the "essence of marriage" or the "institution of marriage" accorded with the aims of a Justice Ministry that

⁸⁶ "Bericht Osterlohs über eine Besprechung im Bundesjustizministerium über Fragen des Eherechts," in *Protokolle*, vol. 6, eds. Pöppig and Silomon, 132-134.

⁸⁷ Osterloh, report on his conversation with Catholic representatives (Böhler, Bosch, Ermecke), April 9, 1952, EZA 2/4347.

sought to bring a deeply conservative social ideology into harmony with the Basic Law's guarantee of equal rights. One legal historian has aptly termed the Justice Ministry's proposal a "conservative Protestant solution."⁸⁸ At a cabinet meeting devoted to a discussion of the Justice Ministry's draft law, the Protestant Interior Minister Robert Lehr rejected the Catholic view that Article 3 represented only a special instance of Article 6, instead citing the "standpoint of the EKD" to the effect that the two provisions must be brought into harmony.⁸⁹

Despite Dehler's advocacy of the EKD proposal and Interior Minister Lehr's argument against the privileging of the father, Chancellor Adenauer ultimately elected to side with the Catholic position during cabinet negotiations over the federal government's draft law. He permitted only a token weakening of the wording of §1354, while maintaining all of the patriarchal provisions of the Civil Code.⁹⁰ The ensuing parliamentary debate pitted conservative Christian Democrats who supported the government's draft against Social Democrats and liberals who demanded that the constitutional right of full gender equality be reflected in family law. When the West German parliament was unable to conclude the reform of the Civil Code by the deadline of March 31, 1953 stipulated in the Basic Law, the Federal Republic's second national elections in September 1953 occasioned a sea change in the debate about family law reform.⁹¹ Elections brought to power an emboldened conservative coalition led by the Christian Democratic Union, whose share of the vote shot up from 31% in the 1949 national election to 45% in 1953. In his second cabinet, Adenauer appointed the arch-conservative Catholic parliamentarian Franz-Joseph Wuermeling to the newly created position of Federal Family

⁸⁸ Franzius, *Bonner Grundgesetz*, 61-62.

⁸⁹ Ranke to Mitglieder der Eherechtskommission, July 14, 1952, EZA 2/4347.

⁹⁰ Franzius, *Bonner Grundgesetz*, 61-63.

⁹¹ *Ibid.*, 130-131.

Minister. A member of the CDU since 1945, Wuermeling gained a reputation as a staunch partisan of conservative natural law rhetoric. During the negotiations leading to the enactment of the Basic Law, Wuermeling drew criticism even from Adolf Süsterhenn for his suggestion that the CDU should refuse to accept the Basic Law if it did not include an explicit right to confessional schooling.⁹²

Adenauer's new cabinet promulgated a revised draft of the Civil Code that delegated even greater authority to husbands and fathers and allowed couples to maintain their established property relations predating the Basic Law.⁹³ Amidst the acrimonious political debate about West German rearmament that inaugurated Adenauer's second term, the government linked the defense of the patriarchal family on the home front to the battle against a vast Communist bloc stretching from East Germany to Korea. Even a portion of the Social Democratic Party (SPD), the main opposition party in the West German parliament, subscribed to Adenauer's view that strong families, with clearly prescribed roles for men and women, were a prerequisite for confronting the "leveling" ambitions of "Asian" Communism.⁹⁴

Divisions between conservative Lutherans and their critics in the *Evangelische Frauenarbeit* and Confessing Church successor organizations structured Protestant responses to the new draft law. While both groups viewed the protection of marriage as a limiting condition for the equal rights clause, they diverged on where to draw the boundary between preserving the Christian essence of marriage and accommodating contemporary social realities. A December 1953 statement by Schumann and Dombois, representing the *Christophorus-Stift* marriage law

⁹² Moeller, *Protecting Motherhood*, 101-102.

⁹³ "Bericht der Eherechtskommission der EKD an den Rat," March 1, 1954, in *Die Protokolle des Rates der Evangelischen Kirche in Deutschland*, vol. 8, ed. Karl-Heinz Fix (Göttingen: Vandenhoeck & Ruprecht, 2012), 159-162.

⁹⁴ Moeller, *Protecting Motherhood*, 103-108.

commission, criticized the law's most egregious extensions of male privilege, in particular a provision granting the husband the exclusive authority to represent the household, on the grounds that "the earlier rule that the man was the earner has in so many cases been broken." On the other hand, the statement did not object to the retention of husbands' and fathers' privileges.⁹⁵

When the government's new Civil Code draft came up for debate in parliament in February 1954, however, it was the position of the *Evangelische Frauenarbeit* rather than that of the Lutheran wing of the EKD that dominated Protestant contributions. Elisabeth Schwarzhaupt, who had been elected to parliament as a CDU delegate in 1953, broke with her party to champion a broad application of the equal rights clause and emerged as a leading figure in the parliamentary debate. Beyond the interpretation of Paul's letter to the Ephesians advanced by the *Frauenarbeit*, which she reiterated at the outset of her address, Schwarzhaupt's argument rested on a more general point about the relationship between Christianity and law:

Here it is not a matter of what is to be said in pastoral care and sermons, and what perhaps still more...must be said to both husband and wife; here it is a matter of *the law set by the state*. The question is: What can the state say as legislator? State law distributes authority, it creates power, and it is based upon power. Not all *Christian guidelines [christliche Weisungen]* can be incorporated without further ado into state law. They lose their meaning with force.

Surely, Schwarzhaupt noted by way of analogy, the Christian injunction to "turn the other cheek" could not be made the basis for a legal system, which had to "punish the offender and defend the victim."⁹⁶ However, Schwarzhaupt hardly appealed to a liberal separation of religion and politics. Her speech in parliament lamented the spike in the divorce rate and the "loosening of the

⁹⁵ "Stellungnahme der Eherechtskommission der Evangelischen Kirche in Deutschland," in *Familienrechtsreform*, eds. Dombois and Schumann, 28-33, quoted 29; Kirchenkanzlei to Frauenarbeit, January 12, 1953, in *Gleichberechtigung als Verfassungsauftrag*, ed. Müller-List, 292-295. On Schumann's receipt of the draft law from the Justice Ministry, see Schumann to Dibelius, November 27, 1953, EZA 2/4349.

⁹⁶ *Verhandlungen des deutschen Bundestages* (VDBT), 2. Deutscher Bundestag, 15. Sitzung, 12. Februar 1954, 499, emphasis in original.

natural bonds of marriage" and family, which she traced to the decline of religious belief in industrial society. The collapse of the patriarchal order was a product of these larger social changes, hardly the work of "any strange suffragettes." Therefore, the government should enact social policies to create "new institutional connections" corresponding to contemporary social conditions, in particular tax restructuring to ease the financial burdens on large families.⁹⁷

Schwarzhaupt's position reflected concerns shared by the *Frauenarbeit* as well as Lutheran members of the EKD marriage law commission. Both groups emphasized the importance of marriage and family as foundational institutions of social life. However, they were more hesitant than their Catholic counterparts to regard the internal structures of these institutions as expressions of natural law principles that commanded binding force on the positive legal order. Protestant arguments against the husband's and father's right of the "final decision" were instead based on an appeal to the autonomy of these institutions from state interference. Schwarzhaupt concluded her parliamentary address by noting the salience of the confessional divide in the debate about family law reform. She found support for her own position in the overwhelming agreement of Protestant jurists and church leaders on the need to eliminate husbands' privileges, along with the lack of consensus on fathers' privileges.⁹⁸

Strikingly, the significance of Germany's Christian cultural background for the reform of family law was accepted by nearly all participants in the parliamentary debate, across party and confessional lines. Conservative, and especially Catholic CDU delegates made the strongest case for the "Christian" basis of the patriarchal structure of marriage and family encoded in the Civil Code. Family Minister Wuermeling, as well as the Catholic CDU delegate and close colleague of

⁹⁷ Ibid., 500-501.

⁹⁸ Ibid., 501-502.

Adenauer Helene Weber, invoked the "Christian-Western view of marriage" and the status of marriage as a "divine order of creation." Wuermeling elided interconfessional distinctions and the debate within the Protestant camp by claiming that both churches agreed in their "affirmation of the family as an institution."⁹⁹ But only the FDP delegate Thomas Dehler, who had broken with Adenauer following the September 1953 elections, offered a principled rejection of Wuermeling's invocation of Christian language. According to Dehler, the state could treat marriage only as a "social order," not a matter of divine law: "It is unthinkable to alter the principle of equal rights from the standpoint of the religious and church view of the nature of marriage."¹⁰⁰ Most parliamentarians who spoke in the debate, including members of opposition parties, were more reticent to draw such a divide between Christianity and family law. Ludwig Metzger, an SPD delegate and member of the Confessing Church under Nazism, insisted that his party "affirm[ed] marriage as an institution." Metzger cited the statements of the *Evangelische Frauenarbeit* as evidence that at least some Protestants rejected the "subordination of the wife under the husband." Indeed, Metzger noted, such sources were crucial because unlike the SPD, the Christian convictions of the *Frauenarbeit* could not be denied.¹⁰¹ Marie-Elisabeth Lüders, a Protestant FDP delegate and prominent liberal feminist since the interwar period, emphasized the equality of all before God. Relying on Christian sources as much as on the Basic Law, she argued that men and women should be granted equal rights within the family.¹⁰²

⁹⁹ Ibid., 488-489, 512.

¹⁰⁰ Ibid., 483.

¹⁰¹ Ibid., 498. On Metzger's biography, see Florian Büttner and Tim Schedel, "Metzger, Ludwig," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Metzger%2C+Ludwig> (accessed April 15, 2018). Metzger participated at the Barmen synod of May 1934.

¹⁰² VDBT, 2. Deutscher Bundestag, 15. Sitzung, 12. Februar 1954, 506. On Lüders, see Heineman, *Difference*, 140.

The references to Christianity advanced by delegates of all three major parties, as well as disagreement over what constituted a legitimate Christian position, signaled the limitations of Family Minister Wuermeling's claim to speak in the name of "Christian-Western civilization." Wuermeling's insistence that the Catholic and Protestant positions on the "institution" of the family fully aligned belied the distinctions between the churches' statements, and even more the objections to the government draft expressed by devout Protestants in parliament.¹⁰³ However, the parliamentary debate also demonstrates that Christianity served as a common cultural matrix through which parliamentarians understood the significance of marriage and family law. The participation of Protestants such as Ludwig Metzger, as well as the broader political convergence of the reformist wing of the EKD with the SPD during the mid-1950s, suggests that the invocation of Christianity by parliamentarians outside the CDU was not merely instrumental. Rather, references to Germany's "Western-Christian" culture by parliamentarians across the political spectrum served to distinguish the Federal Republic from the perceived social leveling and destruction of intermediary institutions underway in the GDR. At the same time, many parliamentarians who upheld the broad consensus on state support for marriage and the family bristled at the government's insistence on maintaining patriarchal norms in the Civil Code. The arguments of both CDU and SPD delegates who opposed the retention of husbands' and fathers' privileges aligned with one wing of the Protestant Church.

Ultimately, the EKD marriage law commission was not able to reach a unified position on Civil Code reform. Following an acrimonious debate at the EKD synod in March 1954 over the privileged position of fathers in the government's draft, the commission's concluding statement, sent to all West German parliamentarians on October 26, 1954, merely noted the

¹⁰³ VDBT, 2. Deutscher Bundestag, 15. Sitzung, 12. Februar 1954, 488-489.

unbridgeable divide within the commission on the question of fathers' rights. The Equal Rights Act, enacted into law on June 18, 1957, retained provisions that many Protestant jurists and theologians found objectionable, including the father's right of the final decision over matters pertaining to the child's education, notwithstanding the protestations of Elisabeth Schwarzhaupt at the final reading of the law in parliament.¹⁰⁴ Yet the longstanding debate between the conservative Lutheran faction of the commission and jurists around the *Frauenarbeit* was not without consequence. For one, even the conservative faction came to favor the elimination of the husband's right of the final decision, on the grounds that the state could not regulate "the inner relations of marriage."¹⁰⁵ More importantly, the arguments of those Protestants who opposed the government's position would form the basis for the Federal Constitutional Court's later decision to overturn portions of the Equal Rights Act.

Schools in a Christian-Secular State: Protestant Jurists and the *Reichskonkordat* Case

If the family law debate of the early 1950s was the opening round in a conflict that pitted defenders of Christian natural law against an emergent Protestant pluralism, confessional divisions regarding the role of Christianity in constitutional jurisprudence consolidated by mid-decade around the issue of denominational schools. The catalyst for renewed controversy over *Elternrecht* was the question of the validity of the July 1933 Concordat between the Vatican and the Nazi state. Signed following the enactment of the March 1933 Enabling Act, without the ratification of the German Parliament, the Concordat promised Catholics the freedom of

¹⁰⁴ VDBT, 2. Deutscher Bundestag, 206. Sitzung, 3. Mai 1957," 11773-11774; Moeller, *Protecting Motherhood*, 202-204.

¹⁰⁵ "Beschluss der Eherechtskommission der Evangelischen Kirche in Deutschland zur Eherechtsreform vom 24./25. September 1954," in *Familienrechtsreform*, eds. Dombois and Schumann, 61-66, quoted 64.

religious practice while barring clergy from engaging in political activity. Article 23 of the Concordat guaranteed "the preservation of existing denominational schools and the right to create new such schools should the parents request them," fulfilling a longstanding aspiration of the German Catholic hierarchy that had gone unrealized in the Weimar Republic. Not conclusively invalidated following the defeat of the Nazi regime, the 1933 Concordat remained an object of explosive controversy for decades after 1945, given the challenge it posed to narratives of Nazi-era resistance advanced by the postwar Catholic Church.¹⁰⁶ For Protestant jurists in the mid-1950s, the debate about Concordat's validity represented a further episode in a broader controversy over the relationship between secular law and Christian prescriptions for social order.

The interventions of the Protestant regional churches in state-level debates about religious education following the enactment of the Basic Law prefigured the arguments raised in the Concordat case. Consistent with their appeals to the Parliamentary Council, representatives of Protestant state churches were concerned to preserve the "Christian," more than the specifically Protestant character of public schools. In the new southwestern state of Baden-Württemberg, Protestant leaders supported the introduction of Christian interdenominational schools as the common school form, objecting only when an initial draft of the state constitution did not specify the Christian character of secondary schools.¹⁰⁷ In the CDU-dominated North-Rhine Westphalia, the regional Protestant churches accepted a constitutional article guaranteeing

¹⁰⁶ Ruff, *Battle*, 48-85, quoted 49. See also Antonius Hamers, *Die Rezeption des Reichskonkordates in der Bundesrepublik Deutschland* (Essen: Ludgerus Verlag, 2010).

¹⁰⁷ "Das Schulproblem im werdenden Südweststaat," *Evangelische Welt*, August 1, 1952; "Unbefriedigende Beschlüsse im Südweststaat," *Evangelische Welt*, May 1, 1953; "Zur schulpolitischen Lage nach den Bundestagswahlen," *Evangelische Welt*, November 1, 1953.

the "natural rights" of parents to determine the confessional education of their children.¹⁰⁸ In the state of Hesse, on the other hand, the regional Protestant church led by the Confessing Church pastor Martin Niemöller focused its efforts on training teachers to offer Protestant religious instruction, without contesting the reestablishment of Christian interdenominational schools by the Social Democratic state government.¹⁰⁹

Nowhere else in the early Federal Republic did the controversy over denominational schools reach the fever pitch of Lower Saxony, where the nexus of a Social Democratic state government, Protestant majority, and large population of Catholic expellees from the former Eastern German territories triggered a national debate about the validity of the 1933 Concordat. Created in 1946 out of a patchwork of formerly independent states, Lower Saxony was comprised of the Protestant-dominated Hannover province as well as the smaller territories of Brunswick, Lippe, and Oldenburg, the latter of which maintained a longstanding tradition of Catholic confessional schooling. Beginning in June 1951, the state government led by the SPD Minister President Hinrich Wilhelm Kopf embarked on an effort to standardize school administration across the state in light of postwar demographic shifts.¹¹⁰ The response of the Hannover Protestant leadership followed the model of other regional churches. In October 1951, the regional synod announced its willingness to cooperate with the state government on the school question, provided that existing denominational schools were maintained until new

¹⁰⁸ "Zurück zum totalen Staat?" *Evangelische Welt*, April 16, 1952; Joachim Kuroпка, "'Kulturkampf' in der Nachkriegsära? Zum Konflikt um die Konfessionsschule in Nordrhein-Westfalen und Niedersachsen 1945 bis 1954," in *Kirche, Staat und Gesellschaft nach 1945: konfessionelle Prägungen und sozialer Wandel*, ed. Bernd Hey (Bielefeld: Luther-Verlag, 2001), 180-182.

¹⁰⁹ "Das hessische Schulverwaltungsgesetz," *Evangelische Welt*, May 1, 1953; "Was bringen die neuen hessischen Schulgesetze?" *Evangelische Welt*, November 16, 1953.

¹¹⁰ Kuroпка, "'Kulturkampf,'" 182-186.

regulations were enacted.¹¹¹ In discussions with Kopf during the fall of 1953, the Hannoverian bishop Hans Lilje assured the Minister President that "The Protestant church is not bound to a dogmatic solution." Nevertheless, the "ideologically neutral state" could not alone determine the character of education but had to take into account the fact that "the cultural assets of our people are decisively determined by Christian belief."¹¹²

Discussions of a new school law commenced in the Lower Saxon state parliament on February 10, 1954. Most controversially, the draft law proposed by the social-liberal government stipulated that denominational schools were required to maintain a student population of at least 120 (or 240 in communities with over five thousand residents) and could not be smaller than other local schools, effectively outlawing denominational schools in ninety percent of school districts in the largely rural state.¹¹³ The CDU minority denounced the proposed legislation, while the responses of the Protestant and Catholic churches followed established patterns. Bishop Lilje, emphasizing that the key issue was not "parents' rights" but "parental responsibility," explained at a conference of teachers that the Lutheran church did not desire to engage in "ecclesiastical power politics." The Catholic bishops of Lower Saxony, by contrast, issued a petition to Minister President Kopf protesting the proposed school law, with the Bishop of Münster openly calling for resistance if the law were promulgated.¹¹⁴

To be sure, not only Catholics balked at the restrictions placed on the creation of denominational schools. The Protestant synod also objected that overwhelmingly Protestant

¹¹¹ "Von kommenden Dingen in Niedersachsen," *Evangelische Welt*, December 1, 1951.

¹¹² "Zur schulpolitischen Lage nach den Bundestagswahlen" *Evangelische Welt*, November 1, 1953.

¹¹³ Kuroпка, "Kulturkampf," 187.

¹¹⁴ "Der Schulkampf in Niedersachsen," *Evangelische Welt*, March 1, 1954.

regions should be permitted to maintain Protestant schools.¹¹⁵ But no action on the Protestant side matched the demonstrations of tens of thousands of Lower Saxon Catholics, organized by the clerical hierarchy, throughout the spring and summer of 1954.¹¹⁶ Following a final round of deadlocked discussions in the state parliament, the school law was passed on September 14 with the support of the social-liberal governing coalition. During the following weeks, over three-quarters of confessional schools in the state were converted to interdenominational schools.¹¹⁷ On March 12, 1955, a school strike brought "more than 60,000 Catholics on to the streets." Facing "unrelenting pressure from the papal nuncio, the bishops," and the CDU's "Roman Catholic base," the federal government, at the behest of Chancellor Adenauer, filed a petition with the Federal Constitutional Court alleging that the Lower Saxon school law contravened the school articles of the Concordat, thereby violating federal law.¹¹⁸ In the months that followed, the states of Hesse and Bremen brought countervailing claims before the Court, contesting the validity of the Concordat itself.¹¹⁹

During the years and months leading to the June 1956 hearing of the government's case before the Federal Constitutional Court, an acrimonious debate about the validity of the Concordat broke out among Protestant and Catholic jurists. This confessional divide reflected the competing conceptions of the relationship between religious norms and public law that had

¹¹⁵ "Für 'wahre Freiheit' in Niedersachsen," *Evangelische Welt*, June 1, 1954.

¹¹⁶ Kuropka, "Kulturkampf," 189.

¹¹⁷ Ruff, *Battle*, 48. For the statute, see "Das Gesetz über das öffentliche Schulwesen in Niedersachsen vom 14. September 1954," in *Der Konkordatsprozess*, eds. Friedrich Giese and Friedrich August Freiherr von der Heydte (München: Isar Verlag), 12-19.

¹¹⁸ Ruff, *Battle*, 70-71. For the government's petition, see "Der Antrag der Bundesregierung vom 12. März 1955," in *Konkordatsprozess*, eds. Giese and Heydte, 20-29.

¹¹⁹ "Die Beitrittserklärung von Bremen vom 25. Juni 1955" and "Die Beitrittserklärung von Hessen vom 15. Juli 1955," in *Konkordatsprozess*, eds. Giese and Heydte, 96-168.

gained ground since the establishment of the West German state. As in the controversy over parents' rights during the drafting of the Basic Law, Adolf Süsterhenn emerged as the public face of the Catholic position. Süsterhenn and his fellow Catholic jurists insisted that the 1933 Concordat did not represent an essentially National Socialist law but was compatible with the principle of religious freedom in a constitutional democracy.¹²⁰ Protestant jurists and church leaders, on the other hand, overwhelmingly criticized the Concordat not only out of concerns about confessional parity in schooling but as a further stage in the postwar debate about the permissibility of Christian natural law claims as a basis for positive law. Protestant commentators frequently invoked Rudolf Smend's integration theory in order to position the churches as guardians of organizing constitutional values, rather than progenitors of fixed legal norms and institutional structures.

Opposition to the Concordat cemented the identification of leading Protestant voices with the Basic Law and its guarantees of religious tolerance and freedom of conscience. The periodical *Stimme der Gemeinde*, founded in 1949 by veterans of the Confessing Church who identified with the tradition of the 1936 Bad Oeynhausen synod and the postwar EKD *Bruderrat*, lambasted the Concordat in a series of exposés replete with anti-Catholic rhetoric.¹²¹ Authors for *Stimme der Gemeinde* counterposed the insularity, closed-mindedness and authoritarianism of the Concordat's defenders against the tolerance and pluralism of its opponents. The Catholic denominational school, the journal asserted, in particular its exclusion of non-Catholic teachers, violated the values underpinning the Basic Law: "The interdenominational school is tolerant and

¹²⁰ Adolf Süsterhenn, "Reichskonkordat und Elternrecht: Das niedersächsische Schulgesetz entfesselt den Kulturkampf," *Rheinischer Merkur*, December 3, 1954.

¹²¹ *Stimme der Gemeinde: zum kirchlichen Leben, zur Politik, Wirtschaft und Kultur* identified itself as a "bimonthly journal of the Confessing Church." Its editors in 1956, at the time of the debate about the *Reichskonkordat*, were Martin Niemöller, Gustav Heinemann, Heinrich Grüber, Oskar Hammelsbeck, Hans Joachim Iwand, Erica Küppers, Ludwig Metzger, Herbert Mochalski, Karl Gerhard Steck, and Herbert Werner.

corresponds in its ideological foundations, which determine its spirit, to the requirements of the basic rights; the Catholic denominational school is, in its innermost essence, intolerant and contradicts a range of basic rights." Conjuring up the Catholic bishops' criticisms of the Basic Law in May 1949, as well as the specter of canon law coming to replace state law as the standard for interpreting the Concordat, the journal presented the Catholic Church as an opponent of the constitution and the Protestant churches as its defender.¹²² The director of the Institute for Confessional Research in Mannheim, an affiliate of the regional Protestant church of Hesse, framed the issue in similarly uncompromising terms. Behind the Concordat, he argued, stood the Catholic ambition of "making the world into the church." Protestants, by contrast, had an "unsurpassed interest in the modern confession-less state, which leaves the sphere of conscience of its citizens untouched."¹²³ Such arguments did not remain confined to publications edited by Confessing Church veterans. During the week of the hearings before the Constitutional Court, the journal of the northwestern Lutheran churches reprinted an opinion by the Tübingen jurist Eduard Kern that held the Concordat to be invalid on account of its origins under the Enabling Act.¹²⁴ Even the Hannoverian Bishop Lilje warned in late 1955 of a "major strategic offensive of the Catholic Church."¹²⁵

¹²² Matthäus Ziegler, "Ist das Hitler-Konkordat ein verpflichtendes Erbe?" *Stimme der Gemeinde*, March 15, 1956; "Gültigkeit und Zweckmäßigkeit des Reichskonkordates," *Stimme der Gemeinde*, Sonderheft March 1956; "Vor dem Karlsruher Konkordatsprozeß," *Stimme der Gemeinde*, June 1, 1956; "Der Konkordats-Prozeß," *Stimme der Gemeinde*, June 15, 1956.

¹²³ Wolfgang Sucker, "Evangelisches Interesse am Reichskonkordat," *Konfessionskundliche Mitteilung*, 3/1956, in EZA 2/2342. A year earlier, Sucker published an article situating the 1933 Concordat in a longer history of the Catholic Church's efforts to extract privileges from the state: "Über Konkordate: Materialien und Anmerkungen," *Materialdienst des Konfessionskundlichen Instituts* 6, no. 2-3 (1955): 17-43.

¹²⁴ Eduard Kern, "Das Reichskonkordat," *Informationsblatt für die Gemeinden der niederdeutschen lutherischen Landeskirchen*, June 6, 1956. The newspaper did not print a countervailing opinion. Prior to this, the journal had only published a summary of the legal and political issues at stake: Hansjürg Ranke, "Um das Reichskonkordat," *Informationsblatt für die Gemeinden der niederdeutschen lutherischen Landeskirchen*, August 2, 1954.

¹²⁵ Hans Lilje, "Strategischer Großangriff der Katholischen Kirche," *Stimme der Gemeinde*, December 1, 1955.

Protestant jurists, in particular the milieu around Rudolf Smend's Institute for Ecclesiastical Law at the University of Göttingen, framed the concerns expressed in the Protestant press in terms of a more general theory of the public role of religion in an ideologically neutral state. The Bonn constitutional law professor Ulrich Scheuner, a close associate of Smend, argued for a politics that understood the churches as repositories of the values that underpinned the postwar state rather than as law-shaping bodies in their own right. While applauding the Basic Law's recognition of the place of the two major confessions in public life, Scheuner argued that the "freedom of conscience" protected in the Basic Law referred only to the sphere of private beliefs. Therefore, the obligation to send one's child to an interdenominational school did not amount to a constitutional rights violation, as several prominent Catholic jurists had argued. Scheuner's argument implicitly rested on a view of tolerance that encompassed both loyalty to one's own innermost convictions as well as respect for the differing beliefs of others in public life. Scheuner thereby divided inner belief from outward expression in a manner characteristic of Protestant theologies.¹²⁶ At a confidential meeting convened by the EKD chancellery in November 1955, Protestant jurists including Scheuner, Elisabeth Schwarzhaupt, and Rudolf Smend's assistant Konrad Müller agreed that the Concordat could be judged solely based on its compatibility with democratic principles. On these grounds, the Concordat, as the price for the Catholic Church's acquiescence to Nazi rule, manifestly failed.¹²⁷

¹²⁶ Ulrich Scheuner, "Toleranz," *Evangelische Welt*, October 1, 1954; "Toleranz als Problem der Schulpolitik," *Evangelische Welt*, December 1, 1954. Scheuner's articles responded to the writings of the Catholic jurist Theodor Maunz.

¹²⁷ "Vertrauliche Besprechung über den Verfassungsstreit zum Reichskonkordat zwischen der Bundesregierung und den Landesregierungen von Niedersachsen, Hessen und Bremen," November 15, 1955, EZA 2/2342.

Smend himself entered the debate in mid-1956 with a series of articles in the flagship publication of the German legal academy. Smend's approach to the Concordat reflected his larger theory of constitutional integration, which made the interpretation of particular constitutional provisions dependent upon the fundamental values underpinning the Basic Law. Although the postwar Federal Republic remained the partner to the Concordat, Smend argued, the state did not owe loyalty to provisions that came into conflict with the values of the new constitution. Because schools played an important role in West Germany's "democratic reconstruction," education policy could not rely on pre-1945 provisions but should reflect the requirements of a postwar pluralist democracy. The school articles of the Concordat potentially restricted "the right of self-determination of the school form," which belonged to the "political core of the constitution," by imposing a set of regulations that "stemm[ed] from the authoritarian past."¹²⁸ Responding to a rejoinder by Adolf Süsterhenn, Smend added that the Basic Law's delegation of education policy to the states further undermined the validity of the school articles of the Concordat.¹²⁹ Loyalty to the values inscribed in the Basic Law took precedence over allegiance to a treaty signed by an earlier German state of a fundamentally different character.

The crucial jurist whose argument against mandatory denominational schools emerged victorious in the Constitutional Court's decision was Adolf Arndt, a Protestant SPD parliamentarian and veteran of Protestant opposition movements against National Socialism. As a Berlin attorney during the 1930s, Arndt defended trade unionists against political persecution, and as an ethnic "half-Jew," he was conscripted into forced labor and then imprisoned during the

¹²⁸ Rudolf Smend, "Reichskonkordat und Schulgesetzgebung," in Smend, *Staatsrechtliche Abhandlungen*, 487-494, quoted 494. The article originally appeared in *JuristenZeitung* in May 1956.

¹²⁹ Rudolf Smend, "Noch einmal: Reichskonkordat und Schulgesetzgebung," in Smend, *Staatsrechtliche Abhandlungen*, 495-499; appeared originally in *JuristenZeitung* in July 1956. For Süsterhenn's position, see Adolf Süsterhenn, "Beansprucht die Kirche ein Vorbehaltsrecht? Antwort auf einen Aufsatz von Prof. Dr. Rudolf Smend," *Rheinischer Merkur*, May 25, 1956.

final years of the war. Arndt maintained ties to Confessing Church pastors during the Nazi years and drew inspiration from the theology of Karl Barth.¹³⁰ After 1945, Arndt forged close connections to the Protestant intellectual milieu, participating in discussions on law at the *Evangelische Akademie* in Bad Boll and publishing a series of articles that echoed Protestant critiques of the legal positivism-natural law binary.¹³¹ In a 1954 lecture before a meeting of the national working group of Social Democratic jurists, Arndt contested the very idea of a theological "foundation" of law. Christians did not have access to a privileged knowledge of justice, he argued. All individuals were capable of developing a "legal consciousness," even without religious education. Arndt's universalism, however, reflected the influence of his Protestantism. According to Arndt, each individual could determine the moral system to which he or she felt "obliged by the moral law," yet all could agree on "a common approach, that the essence of law is in multiple respects being-with-others [*menschlich-mitmenschliches Sein*] and that law is always bound up with the human's being, historicity, communality, essence, and moral personality."¹³² As Arndt eschewed the universalism of a set of fixed principles of social order rooted in Christian natural law, he adopted a universalism of tolerance for others' beliefs and for the imperfections of the human legal order.

Hired in August 1955 by the SPD Minister President Georg August Zinn to represent the state government of Hesse before the Federal Constitutional Court, Arndt advanced his case for

¹³⁰ Dieter Gosewinkel, *Adolf Arndt: Die Wiederbegründung des Rechtsstaats aus dem Geist der Sozialdemokratie (1945-1961)* (Bonn: Verlag J.H.W. Dietz, 1991), 53-63. On Arndt's close identification with the theology of Karl Barth, see Gosewinkel, *Arndt*, 389-390.

¹³¹ "Teilnehmer an der Studiengemeinschaft der evangelischen Akademie vom 29.3 bis 1.4.1947," EABB, Studiengemeinschaft, 1. Plenarsitzung; Adolf Arndt, "Die Krise des Rechts," in *Naturrecht oder Rechtspositivismus?*, ed. Maihofer, 117-140. On Arndt's writings of the early postwar period, see also Gosewinkel, *Arndt*, 97-126.

¹³² Adolf Arndt, *Rechtsdenken in unserer Zeit: Positivismus und Naturrecht* (Tübingen: J. C. B. Mohr, 1955), 24-25.

the invalidity of the Concordat on the basis of constitutional law and historical evidence.¹³³ Nevertheless, Arndt's Protestant background was never far from the surface of his arguments, particularly on questions of "tolerance," "freedom of conscience," and the relationship between Christianity and secular law. In an exchange with Arndt in the press a year prior, the Catholic jurist Adolf Süsterhenn presented himself as a defender of "true tolerance in freedom of conscience" and Arndt as a "culture warrior." Süsterhenn assumed as axiomatic that "peaceful coexistence" in a confessionally mixed state required the right of parents to send their children to a denominational school. For Arndt, as for other Protestant commentators on the Concordat case, such a relationship did not obtain. Freedom of conscience, Arndt implied, referred to the sphere of inward beliefs. Süsterhenn undermined the foundations of the Basic Law by citing this principle in order to support an undemocratic, illegally-concluded treaty.¹³⁴ In March 1956, Arndt signed on to a "Large Query" submitted by a group of SPD and FDP parliamentarians to the federal government, which argued that the government's decision to bring the Concordat before the Constitutional Court "without adaptation to the new historical and constitutional-legal situation" had aroused "concern in circles of the Protestant population."¹³⁵ During the ensuing parliamentary debate, Arndt contrasted the "Concordat politics of the federal government," which represented only one segment of the German people, with the "indivisible freedom of conscience" that the Basic Law accorded to all.¹³⁶

¹³³ Ruff, *Battle*, 73.

¹³⁴ Adolf Arndt, "Reichskonkordat noch Gültig? Bundesregierung beschwört Gefahr eines Kulturkampfes herauf" *Neuer Vorwärts*, November 19, 1954; Adolf Süsterhenn, "Reichskonkordat und Elternrecht: Das niedersächsische Schulgesetz entfesselt den Kulturkampf," *Rheinischer Merkur*, December 3, 1954; Adolf Arndt, "Süsterhenn und das Konkordat: Eine Stellungnahme von Dr. Arndt," *Neuer Vorwärts*, December 10, 1954.

¹³⁵ VDBT, 2. Wahlperiode, "Große Anfrage der Abgeordneter Mellies, Dr. Reif, Feller und Genossen betr. Verfassungsklage wegen des Reichskonkordats," 23. März 1956, Drucksache 2258. See also Ruff, *Battle*, 78.

¹³⁶ VDBT, 2. Deutscher Bundestag, 146. Sitzung, 30. Mai 1956, 7740.

The oral proceedings before the Constitutional Court, which extended for five days in early June 1956, brought to the fore the competing understandings of the relationship between church and state that had structured the acrimonious debate in parliament and the press. On questions of tolerance and freedom of conscience, the Catholic CDU jurist Hans Peters articulated the position of the federal government, which relied heavily on natural law notions of subsidiarity. According to Peters, responsibility for the child's education lay first and foremost with parents and family and then with the school; the privilege of these institution to determine the confessional basis of the child's education could not be usurped by the state. For many Catholic parents, access to a Catholic denominational school was a matter of conscience: "The impact of education depends not a small part...on teacher, school, and home standing in correct relation to one another. Therefore it is of considerable importance that teacher and student have the same confession." The principle of religious tolerance, moreover, required that Catholic parents be permitted to send their child to a denominational school, without other children being forced to attend a Catholic denominational school against their parents' wishes.¹³⁷

Representatives of the state governments of Lower Saxony, Hesse, and Bremen countered these arguments with alternative conceptions of "conscience" and "tolerance" that called into question the compatibility of Catholic denominational schools with the values underlying the Basic Law. One jurist representing Hesse suggested that public denominational schools necessarily violated the constitutional principle of the state's religious and ideological neutrality, since a school that infused all aspects of education with the principles of a particular confession, whether or not the student's own, was inherently non-neutral.¹³⁸ Further debate,

¹³⁷ *Konkordatsprozess*, ed. Giese and Heydte, 1470-1472 (quoted), 1491-1499.

¹³⁸ *Ibid.*, 1445-1448.

however, revealed that the attorneys representing the opposition parties understood neutrality in a highly circumscribed sense, one that could encompass a non-confessional Christianity as a basis for public institutions. An exchange between the federal government representative Hans Peters and the Lower Saxon state secretary Eckhard Koch offered a telling illustration. Asked by Peters whether Lower Saxony would require "dissidents" to attend Christian interdenominational schools, Koch replied that practical realities prohibited the state from forming special schools for the two percent of non-Christians. However, the Christian interdenominational school was "tolerant" and therefore equally open to all students, including non-believers.¹³⁹ The jurist Werner Weber, also representing Lower Saxony, concurred that forcing Christian children to attend a school "permeated by the opposite confession" would represent a violation of "minority rights." However, this concern did not bear on the rights of non-Christian "dissidents" compelled to attend interdenominational Christian schools.¹⁴⁰ Adolf Arndt assured the Court that Martin Niemöller himself was a staunch defender of the Christian interdenominational school.¹⁴¹

Competing understandings of religious freedom further emerged in disagreements over Smend's writings on the school articles of the Concordat. Government representatives contended that Smend's argument against the validity of the school articles stood in violation of his own integration theory. According to this line of reasoning, Smend failed to recognize the respective rights of church and state by asserting unilateral state control over education.¹⁴² Adolf Arndt, however, captured the crux of Smend's argument: The fundamental nature of the constitutional change in Germany after 1945 required a reevaluation of Nazi-era treaties. Smend recognized that

¹³⁹ Ibid., 1554-1555.

¹⁴⁰ Ibid., 1563-1564.

¹⁴¹ Ibid., 1565-1566.

¹⁴² Ibid., 1239-1244.

concordats rested on a reciprocal relationship between state and church, not the "unilateral lawmaking" of either entity. Smend's critique of the Concordat, Arndt held, reflected not the arbitrary assertion of state power over the churches but the gravity of the transformation of the German state's "value order" in the postwar Federal Republic.¹⁴³

Arndt's concluding speech to the Constitutional Court drew together Smend's concerns about the Concordat's violation of the foundational values of the post-1945 West German state with a forthright defense of interdenominational schools. Insofar as Christians under National Socialism had not simply resisted the regime's policies but contested the legitimacy of the Nazi state as such, the Catholic Church could not claim that the Concordat remained valid based on the "actual order" of that time. West Germany's postwar transformation from dictatorship to constitutional democracy meant that the place of Christianity in public life must be affirmed on new grounds. Precisely the interdenominational school, according to Arndt, reconciled the postwar state's foundational values with the reality of religious pluralism. The Hessian constitution, he noted, recognized that the interdenominational school was not a "value-free or nihilistic school" but rather inculcated "fundamental values of education, reverence, altruism, respect, tolerance, uprightness, and truthfulness," not to mention "professional virtue and preparation for political responsibility."¹⁴⁴ This list of virtues, not least reverence, altruism, and tolerance, invoked a rhetoric of cultural Protestantism as a normative value order for the Federal Republic. Like Martin Niemöller, Arndt not only accepted the Christian interdenominational school as compatible with the state's purported religious neutrality but celebrated its contributions to political responsibility and civic virtue. Arndt's public insistence on his loyalty

¹⁴³ Ibid., 1276 (quoted), 1661-1662.

¹⁴⁴ Ibid., 1660-1664, quoted 1661.

to Christianity, often reiterated in his parliamentary addresses, was doubtless motivated in part by a political context in which the SPD remained hampered by associations with its Marxist past and the East German present. Nevertheless, Arndt's theoretical writings indicate that he took Protestantism seriously as an element of his jurisprudence. The links between the conceptual structure of Protestant legal thought and Arndt's arguments in the *Concordat* case were more than rhetorical.

Protestant Legal Thought and the Federal Constitutional Court

The rulings of the Federal Constitutional Court in the late 1950s on the Concordat and the Equal Rights Act echoed many of the arguments advanced by Protestant jurists in the public commentaries, parliamentary debates, and legal hearings preceding the judgments. Although one prominent judge on the Court, the legal theorist Gerhard Leibholz, maintained personal ties to Protestant networks—Leibholz was married to Sabine Bonhoeffer, the twin sister of Dietrich Bonhoeffer—the Court's adoption of Protestant structures of argumentation reflected more overlapping political aims than an institutional investment by the Court in the Protestant churches.¹⁴⁵ Protestant jurists and theologians provided Constitutional Court judges with a language for articulating the Christian values underlying the West German constitutional order, without resorting to claims of Christian natural law that would violate the Basic Law's injunction on establishing a state religion.

The Constitutional Court's Second Senate released its decision on the *Concordat* case in March 1957, following months of protracted negotiation. The decision, which split five to four along confessional lines, accorded with crucial portions of Adolf Arndt's and Rudolf Smend's

¹⁴⁵ On Leibholz's Protestant connections during the war, see Strote, *Lions and Lambs*, 160-167.

arguments for the invalidation of the Concordat's school articles.¹⁴⁶ The Court recognized the continuing validity of the Concordat, based on the legal continuity of the Federal Republic with the Third Reich. Nevertheless, only the federal government, not the states, was a party to the treaty; therefore, the Concordat applied only to federal, not state laws. Because the Basic Law made education a domain of state rather than federal policy, the provisions of the Concordat mandating Catholic denominational schools were nonbinding.¹⁴⁷

In adjudicating between the principle of loyalty to international treaties on the one hand and states' rights on the other, the Court applied a line of reasoning reminiscent of Smend's integration theory. Echoing Smend's published opinions on the Concordat, the Court ruled that even if the Federal Republic were the legal successor to earlier German states, the postwar political order rested on transformed foundations that came into conflict with the provisions of the Concordat on confessional schools. In particular, federalism constituted a fundamental principle of the postwar order, insofar as the states had preexisted and formed the federal government. The framers of the Basic Law had recognized this reality by according cultural autonomy to the states, while declining to adjudicate on the validity of the Concordat.¹⁴⁸

On the question of freedom of conscience, the Court ruled with Adolf Arndt and against the federal government's attorney Hans Peters. The fact that some students might be required to attend schools whose confessional or ideological orientation conflicted with the wishes of their parents did *not* constitute a violation of the Article 4 right to freedom of conscience. On the

¹⁴⁶ Ruff, *Battle*, 83. Although the Federal Constitutional Court did not begin to issue dissenting opinions until the early 1970s, and consequently the results of the *Konkordat* vote were not published at the time of the decision, private discussions between Second Senate justices and the Vatican diplomats Aloisius Muench and Bernhard Hack confirmed that four Catholic justices, including Willi Geiger and Ernst Friesenhahn, voted against the five-member majority.

¹⁴⁷ The full decision is reprinted in *Konkordatsprozess*, ed. Giese and Heydte, 1669-1712.

¹⁴⁸ *Ibid.*, 1706-1707.

surface, the Court's argument appealed to pragmatism and resource limitations: "It is not possible to make available to all parents schools that correspond to their wishes," in light of "the practical constraints on the number of different school types" in a particular location.¹⁴⁹ Yet implicitly, the Court also upheld states' rights to define public schools as interdenominational Christian institutions, in the manner of Arndt and Niemöller. The contested Lower Saxon school law stated, "Schools have the task of educating the students entrusted to them...on the foundation of Christianity, occidental culture, and German educational heritage to become independent and responsible citizens of a democratic, social *Rechtsstaat*." The majority on the Court found no reason to contest the school law's assertion of a strong link between Christianity, education, and democracy.¹⁵⁰ If a state's failure to provide denominational schools did not violate parents' constitutional rights, neither did the provision of interdenominational Christian schools violate such rights. Religious freedom, according to the Court, was not so expansive as to accommodate the grounding of constitutional rights in Christian natural law, but not so narrow as to relegate religion to the private sphere. Such a doctrine resonated with the Protestant notion of church-state relations formulated by Smend and elaborated in Arndt's argument before the Court.

Several months following the Concordat decision, key provisions of the June 1957 Equal Rights Act were challenged before the Federal Constitutional Court, leading to a decision that vindicated the wing of the EKD around the *Frauenarbeit*. Encouraged by the liberal feminist and parliamentarian Marie-Elisabeth Lüders, four women describing themselves as "wives and mothers of minor children" brought a petition before the Court declaring that the father's right to the final decision on matters of the child's welfare (§1628) and to sole legal representation of the

¹⁴⁹ Ibid., 1691-1692.

¹⁵⁰ Ibid., 1674-1677.

child (§1629), both maintained in the Civil Code under the 1957 law, constituted a violation of their equal rights under Article 3 of the Basic Law.¹⁵¹ The Court's July 1959 decision to strike down these provisions relied heavily on arguments introduced by Protestant jurists, including Elisabeth Schwarzhaupt and Ulrich Scheuner. As in the Concordat case, the Court sided with Protestant jurists who stressed the significance of Christianity for postwar German democratic culture but who rejected the invocation of natural law arguments to define the structure of social institutions.

The Constitutional Court followed a Protestant line of argumentation by affirming its commitment to protecting the "institutions" of marriage and family, both "come down from time immemorial and immutable in their core," without legally regulating their internal structures.¹⁵² Drawing on an article recently published by Schwarzhaupt, the Court argued that privileging the father would infringe upon the free decision of husbands and wives on how to share family responsibilities, by introducing a "general norm" putatively valid for all members of society. An "ideologically plural state such as the Federal Republic of Germany" had to allow its citizens the freedom to form "their marital and family lives" according to "their [own] religious and ideological commitments."¹⁵³ On the same grounds, the Court firmly rejected the invocation of natural law by Catholic jurists such as Frank Bosch as a basis for maintaining the primacy of the father. According to the majority, the Court could not decide among the "variety of natural law doctrines" but rather had to judge according to the "value order" set out in the Basic Law.¹⁵⁴ In

¹⁵¹ Moeller, *Protecting Motherhood*, 204; "Urteil des Ersten Senats vom 29. Juli 1959," *Entscheidungen des Bundesverfassungsgerichts* 10 (1960): 60.

¹⁵² "Urteil des Ersten Senats vom 29. Juli 1959," *Entscheidungen des Bundesverfassungsgerichts*, 66.

¹⁵³ *Ibid.*, 84-85.

¹⁵⁴ *Ibid.*, 80-81.

the case of parental authority, the principle of equal legal rights for mothers and fathers coincided with the Basic Law's guarantee of state protection for marriage and families.

Such concessions to ideological pluralism, as against the strong claims of natural law, only reinforced what the Court took to be the unchanging essence of marriage, rooted in a deep cultural background. The Court defined marriage as "the union of one man and one woman in a fundamentally indissoluble community" and family as "the comprehensive community of parents and children, in which the parents above all have the right and responsibility for the care and education of the children."¹⁵⁵ The marital relationship was rooted in the "objective biological or functional...differences" between men and women, on the basis of which the Court upheld the Civil Code provisions that expected wives to manage the household and husbands to work outside the home.¹⁵⁶ The Court even justified its decision to strike down the privileging of fathers over mothers with the argument that the "essence" of women was most "deeply rooted" in "the realm...of motherhood." The Court eschewed the CDU Justice Ministry's language of the "occidental-Christian" meaning of marriage and family, as such an overt appeal to Christianity would conflict with its formal commitment to religious neutrality.¹⁵⁷ Nevertheless, the reasoning of the majority hewed closely to the Protestant defense of marriage as an institution whose essence preexisted the state, rather than Social Democratic and liberal understandings of marriage as a socially defined, contractual relationship.

¹⁵⁵ Ibid., 66.

¹⁵⁶ Ibid., 73-75.

¹⁵⁷ Ibid., 63.

Conclusion

Debates within EKD church commissions and the Protestant press during the 1950s about the reform of family and school laws gave rise to an unlikely conjuncture of Protestant interpretations of the role of the churches in the new political order and the emergent religious freedom jurisprudence of the Federal Constitutional Court. The Court did not adopt Protestant arguments without qualification in either the *Concordat* or *Family Law* case, let alone cite official statements of the Protestant churches. Unlike parliamentary debates, where individual delegates were free to cite the churches as important participants in national discussions of social policy, judges on the Court, bound by the Basic Law's guarantee of the state's religious and ideological neutrality, were obliged to render decisions whose validity ostensibly did not hinge on a particular confession. It was precisely in the space between Christian natural law doctrines that positioned the churches as arbiters of social order, and liberal articulations of religious freedom as the absence of religion from the public sphere, that Protestant arguments proved effective. The writings of jurists such as Ulrich Scheuner, Adolf Arndt, and Elisabeth Schwarzhaupt, mediated by the background influence of Rudolf Smend, successfully presented a non-doctrinal Christianity as a basis for the values that underlay constitutional jurisprudence on the basic rights clauses.

Protestant jurists played an important role in informing West German constitutional interpretation on social issues of marriage, family, and schools, helping to facilitate Protestant adaptation to postwar constitutional democracy. An equally fraught set of constitutional debates, regarding the grounds of the citizen's loyalty to the state, further preoccupied Protestant intellectual circles during the 1950s. Questions of military service, conscientious objection, and the right of resistance, as the following chapter will show, motivated Protestant efforts not only

to reinterpret confessionally-informed conceptions of social order as secular norms but to develop an independent theological justification for constitutional democracy.

Chapter Four: To Obey God Rather than Men? Conscientious Objection and the Reevaluation of Resistance

On June 1, 1956, the Protestant pastor and official representative of the German Protestant Church to the West German government, Hermann Kunst, appeared before the Defense Committee of the Bundestag (parliament) to present a memorandum recently concluded by the EKD Council on the question of conscientious objection to military service. The Defense Committee had solicited the opinions of both major churches in its deliberations on a military conscription law, an urgent issue facing the Bundestag following West Germany's contested entry into the U.S.-led NATO coalition a year before. Kunst surprised the parliamentarians in attendance with his Church's support for wide-ranging exemptions for declared conscientious objectors, in particular by comparison with the representative of the Fulda Bishops Conference, the Jesuit priest Johannes Hirschmann. While both Kunst and Hirschmann implored the committee to expand the right of conscientious objection, their views diverged on the question of natural law, with appreciable political consequences. Whereas Hirschmann suggested that decisions of conscience could be evaluated against an objective moral order, Kunst held that such decisions could be judged by God alone. Therefore, Kunst contended, objectors to military service should be required to prove only that their actions followed from their conscience, not that this decision was rooted in prior normative principles.¹

That such a seemingly obscure theological distinction could take on momentous political significance reflected the ongoing salience of religious discourse in public debate about foundational constitutional questions during the years following the establishment of the Federal Republic. The emergence of EKD leaders, alongside Social Democrats, as among the most vocal

¹ Deutscher Bundestag, "Stenographische Protokoll (Sonderprotokoll) der 94. Sitzung des Ausschusses für Verteidigung," June 1, 1956, ASD, Nachlass Adolf Arndt, Box 239, especially pp. 1-17.

supporters of an expansive right to conscientious objection during the 1950s is a striking irony of the early postwar moment. Not only had the established Protestant churches long served as pillars of German nationalism, and oftentimes militarism, but during the two world wars both major churches refused to recognize a religious ground for conscientious objection. In Nazi Germany, where the 1935 military conscription law "made no provision for conscientious objectors," the overwhelming majority of conscientious objectors were Jehovah's Witnesses, at least 251 of whom were executed for refusing to serve in the military during the Second World War. Support for conscientious objectors was scarcely present among leaders of the established Protestant and Catholic churches. Even members of the Confessing Church often held traditional nationalist attitudes regarding the obligation of military service, despite their criticisms of the Nazi regime's incursions on the churches.² Protestant pastors, Confessing Church members among them, frequently served in the military, including 480 as chaplains.³ From his Sachsenhausen prison cell, the First World War submarine commander Martin Niemöller famously wrote a letter to the Grand Admiral of the *Kriegsmarine* at the outset of the Second World War offering to resume his naval service.⁴ Yet, as the Bundestag drafted a military conscription law in the summer of 1956, Protestant leaders from across the political and confessional spectrum, not only the wing of the church influenced by Barth, petitioned for a

² Jeremy K. Kessler, "A War for Liberty: On the Law of Conscientious Objection," in *Cambridge History of the Second World War*, vol. 3, eds. Geyer and Tooze, 463; Thomas Widera, "Kriegsdienstverweigerung und staatliche Herrschaft – NS-Regime, SED-Staat, Bundesrepublik Deutschland," *Totalitarismus und Demokratie* 5 (2008): 398-399. For a detailed account, see Peter Brock, "Jehovah's Witnesses as Conscientious Objectors in Nazi Germany," in Brock, *Against the Draft: Essays on Conscientious Objection from the Radical Reformation to the Second World War* (Toronto: University of Toronto Press, 2006), 425-448. On the attitudes of Protestant theologians toward the First and Second World Wars, see Martin Greschat, "Begleitung und Deutung der beiden Weltkriege durch evangelische Theologen," in *Erster Weltkrieg Zweiter Weltkrieg. Ein Vergleich. Krieg, Kriegserlebnis, Kriegserfahrung in Deutschland*, ed. Bruno Thoß and Hans-Erich Volkmann (Paderborn: Schöningh, 2002), 497-518.

³ On military chaplains, see Bergen, "Military Chaplains" 166, 181n6.

⁴ Dietmar Schmidt, *Martin Niemöller: Eine Biographie* (Stuttgart: Radius-Verlag, 1983), 150.

broad interpretation of Article 4, Paragraph 3 of the Basic Law. The clause declared, "No person shall be compelled against their conscience to render military service involving the use of arms."⁵

Scholars of the postwar EKD have treated Protestant efforts to shape West German legislation on conscientious objection as a consequence of the opposition of members of the church leadership to Konrad Adenauer's foreign policy of rearmament and Western integration.⁶ As the historian of theology Hendrik Meyer-Magister has shown, during the late 1940s and early 1950s, Protestant debates about the right of conscientious objection tended to follow divisions within the church over rearmament. Protestant leaders who opposed rearmament also put forth the most vocal demands for an expansive right of conscientious objection.⁷ Certainly, many Protestants who petitioned the West German government for conscientious objector rights shared the anxieties that motivated the broader popular movement against rearmament in the early years of the Federal Republic—in particular, the fear that West German rearmament would cement Germany's postwar division and provoke a nuclear conflict between the competing Cold War blocs on German soil.⁸ Following West Germany's contested entry into NATO on May 9, 1955,

⁵ "Basic Law of the Federal Republic of Germany," Art. 4, Para. 3, trans. Christian Tomuschat, David P. Currie, and Donald P. Kommers, *Deutscher Bundestag*, December 2014, <https://www.btg-bestellservice.de/pdf/80201000.pdf> (accessed April 15, 2018).

⁶ In surveys of postwar church history, the issue of conscientious objection has usually received a short treatment embedded in a larger discussion about the rearmament controversy. See Martin Greschat, *Protestantismus im Kalten Krieg: Kirche, Politik und Gesellschaft im geteilten Deutschland 1945-1963* (Paderborn: Schöningh, 2010), 256-257 and Johanna Vogel, *Kirche und Wiederbewaffnung: Die Haltung der Evangelischen Kirche in Deutschland in den Auseinandersetzungen um die Wiederbewaffnung der Bundesrepublik 1949-1956* (Göttingen: Vandenhoeck & Ruprecht, 1978), 221-223.

⁷ Hendrik Meyer-Magister, "Individualisierung als Nebenfolge: Das Engagement des Protestantismus für die Kriegsdienstverweigerung in den 1950er Jahren," in *Teilnehmende Zeitgenossenschaft*, eds. Albrecht and Anselm, 337-345.

⁸ For an overview of opposition to rearmament in 1950s West Germany, see Alice Holmes Cooper, *Paradoxes of Peace: German Peace Movements since 1945* (Ann Arbor: University of Michigan Press, 1996), 25-82 and Geyer, "Cold War Angst."

however, Protestant church leaders and lay intellectuals representing a wide spectrum of political views supported conscientious objector rights, not only those who had engaged in the campaign against rearmament. Hermann Kunst himself had been a member of the conservative Lutheran wing of the Confessing Church; the breadth of Protestant support for an expansive right of conscientious objection was evident not least in Kunst's June 1956 presentation to the parliamentary defense committee.⁹

While recognizing the significance of the immediate context of the rearmament controversy, this chapter resituates the Protestant debate about conscientious objection as a crucial episode in the longer history of the transformation of Protestant attitudes toward constitutional democracy in postwar West Germany. As an issue at the intersection of constitutional law and theological teachings about the state's authority over Christian subjects, conscientious objection captured the attention of the milieu of Protestant theologians and jurists who since 1933 engaged in intense reconsideration of the church's relationship to law and politics. The central questions at stake honed in on the nexus of theology and jurisprudence: To what extent could biblical prescriptions regarding the taking up of arms be brought to bear on state law? Did the New Testament oblige Christians to display unconditional obedience toward the ruling authorities, including during wartime? Was the Christian authorized to refuse military service only in the case of an "unjust war," and who determined a particular war to be unjust?

At the heart of the numerous articles, memoranda, and petitions penned by Protestant theologians and jurists in response to these questions was the problem of the meaning of "conscience" itself. Article 4 of the Basic Law guaranteed each citizen's "freedom of faith and of

⁹ "Kunst, Hermann," in *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Kunst%2C+Hermann> (accessed April 15, 2018). On Kunst, see also Buchna, *Klerikales Jahrzehnt*, 232-276.

conscience [*Freiheit des Glaubens und des Gewissens*]," with no explication of the term's meaning. For theologians and jurists around the postwar EKD, especially those who had participated in wartime opposition to National Socialism, "conscience" was a highly freighted term. During the Nazi period, theologians and lay intellectuals around the Confessing Church, in particular members of the Freiburg Circle, developed an interpretation of conscience as a realm of inward freedom to perceive God's message in the concrete moment. Freedom of conscience inhered in the relationship between God and the individual Christian and was therefore unfringeable even by a totalitarian state. In the early Federal Republic, heirs to the wartime Protestant opposition continued to advance an individualist and situational conception of conscience. However, whereas Confessing Church writers during National Socialism frequently cited the Christian obligation to passively suffer state repression when civil law clashed with the dictates of conscience, by the mid-1950s EKD leaders demanded an expansive sphere of freedom of conscience as a right guaranteed by a constitutional state. A state that required its citizens to suffer on account of their conscience, Protestant theologians and jurists now contended, contravened basic moral tenets and undermined its own legitimacy and authority.

This chapter argues that Protestant intellectuals' emergent defense of conscientious objector rights was closely bound up with efforts to rehabilitate the memory of the wartime opposition to the Nazi regime, especially the failed plot against Hitler's life of July 20, 1944.¹⁰ A series of judicial cases, ecumenical conferences, and anniversaries during the early 1950s spurred

¹⁰ Here, I depart from Hendrik Meyer-Magister's account, which attributes the increase in support for the right of conscientious objection within the Protestant Church to an "individuation" of values in the early Federal Republic: Meyer-Magister, "Kriegsdienstverweigerung," 327-334. Leftwing critics of the EKD have similarly argued that the EKD's decision to leave decisions about military service to the individual were an abdication of the social and political responsibility of the Church: see Bernd Kubbig, *Kirche und Kriegsdienstverweigerung in der BRD* (Stuttgart: Kohlhammer, 1974), 49-53. However, these arguments do not take into account how the concept of individual conscience was constructed in debates about conscientious objection, which did not simply reflect a wider societal process of "individuation" but were motivated by theologically specific interpretations of Protestant opposition to National Socialism.

Protestant veterans of the wartime opposition to defend the legitimacy of resistance against National Socialism, occasioning a reevaluation of traditional Lutheran conceptions of the two kingdoms doctrine and the relationship of the citizen to the state. Through reinterpretations of classical sources of Protestant theology, in particular biblical passages and Luther's writings on Christian obedience to authority, thinkers affiliated with both the Lutheran and Barthian wings of the EKD developed an expanded vision of the role of individual conscience as a bulwark against overbearing state authority. This theological matrix shaped how Protestants approached contemporary discussions about conscientious objection, scrambling lines of debate and contributing to the emergence of a more robust consensus on the right of conscientious objection by 1956. In particular, rather than treating conscience as a realm of fundamental moral decision-making removed from the everyday struggles of politics, defenses of the wartime resistance led Protestants increasingly to argue that questions of politics, and especially of military service, could also impinge on conscience.

Alongside controversies over family law and confessional schooling, the debate about conscientious objection occupied a pivotal place in the emergence of a defense of constitutional democracy among Protestant theologians and jurists in postwar West Germany. At stake in both sets of debates were efforts to define a state morality that could balance the integration of the polity around a common set of values with respect for the diversity of worldviews in West German society. As in the case of family and school laws, moreover, Protestants did not simply adapt to an extant postwar political reality but played a key role in shaping legislation and jurisprudence through petitions to the Bundestag and Federal Constitutional Court. In these efforts, Protestants drew on the political language of the Confessing Church opposition to National Socialism and on subsequent reinterpretations of that experience. The concept of

"conscience" provided one such crucial category, anchoring a shift that enabled Protestant intellectuals to develop a defense of constitutional rights in West German democracy without abandoning deeply-held theological commitments.

Conscientious Objection and the Politics of Rearmament, 1948-52

Rearmament and conscientious objection were explosive subjects in early postwar Germany. Following the cataclysmic defeat of 1945, many Germans remained wary of the prospect of a future German military. In a December 1949 survey conducted by the EMNID-Institute for public opinion research, nearly three-quarters of respondents replied negatively to the question, "Would you consider it right to become a soldier again, or for your son or husband to become a soldier again?"¹¹ On the other hand, Konrad Adenauer broached the possibility of a West German contribution to a West European defense force as early as December 1949 in a widely publicized interview with the *Cleveland Plain Dealer*. The chancellor remained committed to this goal despite early opposition from the Allied High Commissioners and the Bundestag.¹² West Germans' ambivalence toward rearmament was reflected not least in debates about the place of conscientious objection in the West German constitution. No previous German constitution recognized a right of conscientious objection, and even countries such as the United States, Britain, and Canada, which provided comparatively liberal provisions for conscientious objectors, dealt with the issue as a matter of administrative rather than constitutional law.¹³ In 1947-48, however, state parliaments in Bavaria and Württemberg-Baden passed laws

¹¹ Meyer-Magister, "Kriegsdienstverweigerung," 335.

¹² David Clay Large, *Germans to the Front: West German Rearmament in the Adenauer Era* (Chapel Hill: University of North Carolina Press, 1996), 54-56.

¹³ Kessler, "War for Liberty," 449-462.

guaranteeing a right of conscientious objection to military service, while the state parliament of Hesse incorporated this right into the state constitution. These measures found greatest support among Social Democrats.¹⁴

At the Parliamentary Council that drafted the Basic Law, SPD delegates to the Committee on Fundamental Questions introduced a petition to include a right of conscientious objection in the constitutional article on religious freedom, successfully defending its incorporation into the Basic Law against detractors from the conservative parties. Even its supporters in the Parliamentary Council conceived of the clause on conscientious objection in narrow terms, however. SPD delegates such as the jurist Carlo Schmid understood the right of conscientious objection primarily as a means of accommodating the pacifist "free churches," especially the Jehovah's Witnesses, whose members had suffered under the Nazi regime for their refusal to perform military service.¹⁵ The promulgation of the Basic Law coincided with a rediscovery of pacifist traditions *within* the free church denominations. Liberal members of the Mennonite Union, following a history of Mennonite service in German militaries extending back to the 1870s, aimed to revive their church's pacifist creed and "championed conscientious objection" and peace work in lectures and conferences during the late 1940s.¹⁶ At a meeting of the *Arbeitsgemeinschaft Christlicher Kirchen in Deutschland* in October 1950, Mennonite

¹⁴ Alessandra Ferratti and Patrick Bernhard, "Pazifismus per Gesetz? Krieg und Frieden in der westdeutschen Verfassungsdiskussion, 1945-1949," *Militär-geschichtliche Zeitschrift* 66 (2007): 52-58.

¹⁵ Patrick Bernhard, *Zivildienst zwischen Reform und Revolt: Eine bundesdeutsche Institution im gesellschaftlichen Wandel 1961-1982* (München: Oldenbourg, 2005), 27-30; Meyer-Magister, "Kriegsdienstverweigerung," 334-337.

¹⁶ Benjamin W. Goossen, *Chosen Nation: Mennonites and Germany in a Global Era* (Princeton: Princeton University Press, 2017), 187-189.

representatives ensured that a memorandum on conscientious objection requested by the Interior Ministry called for a guarantee of equal rights for soldiers and conscientious objectors.¹⁷

Even before the Basic Law was concluded, the established Protestant churches were far more reluctant than free churches such as the Mennonites and Jehovah's Witnesses to affirm conscientious objection to military service as a legitimate Christian decision. Doubtless this reflected in part the lack of a sustained historical tradition of pacifism within mainstream German Protestantism.¹⁸ But theological questions were also at stake. Corresponding to the metaphysics of Luther's two kingdoms doctrine, German Protestant theology in the first half of the twentieth century generally distinguished between the sphere of conscience, where the individual Christian was responsible before God alone, and the realm of public and political life, where Christians were expected to obey the laws and authorities valid for all. When the influential Luther scholar Karl Holl termed Lutheranism a "religion of conscience [*Gewissensreligion*]" in 1917, he referred to the private domain.¹⁹ The statements of the Confessing Church under National Socialism, including the more radical Provisional Church Government established in 1936, remained largely consistent with these antinomies, criticizing particular policies directed against free religious belief and practice rather than the legitimacy of the Nazi regime as such. In the late 1940s, moreover, Protestant commentators devoted little theological attention to Christian participation in the movement around the July 20 conspirators,

¹⁷ Stefanie Kuntz, "'Christus ist unser Friede': Die Erneuerung des Friedenszeugnisses im deutschen Mennonitentum nach 1945" (Unpublished thesis, Ruprecht-Karls-Universität Heidelberg, 2000), 24-25.

¹⁸ During the interwar period, a minority of Protestant pastors advocated pacifism, notably Friedrich Siegmund-Schultze and his International Fellowship of Reconciliation (*Internationalen Versöhnungsbund*), but this position remained marginal. See Julian Jenkins, *Christian Pacifism Confronts German Nationalism: The Ecumenical Movement and the Cause of Peace in Germany, 1914-1933* (Lewiston, N.Y.: Edwin Mellen Press, 2002).

¹⁹ Annegret Freund, *Gewissensverständnis in der evangelischen Dogmatik und Ethik im 20. Jahrhundert* (Berlin: W. de Gruyter, 1994), 9-18; Stephan Schaede, "Gewissensproduktionstheorien: Ein Überblick über Gewissenstypen in Positionen reformatorischer und evangelischer Theologie," in *Das Gewissen*, eds. Stephan Schaede and Thorsten Moos (Tübingen: Mohr Siebeck, 2015), 171-173.

which would seem to challenge an impermeable border between Christian conscience and political decisions. Even as they sought to gain legitimacy for the EKD's claim to an expansive role in public life, Protestant leaders distanced themselves from what many Germans still perceived as a traitorous act. The vocabulary of postwar Protestant theology, then, offered few resources for justifying conscientious objection to military service on political grounds.

Conscientious objection became the subject of debate in Protestant circles for the first time in early 1948, when the Stuttgart youth parliament submitted a petition to the Württemberg-Baden state parliament in support of a universal right of conscientious objection to both armed military service and auxiliary service. The response that the Württemberg Protestant church issued in June indicated a strong distinction between political decisions and the sphere of Christian conscience. According to the Württemberg *Oberkirchenrat*, the youth parliament's petition reflected the utopian illusion that "this world can become a kingdom of peace through human decisions and laws." In fact, "peace and justice" would "rule" only in the coming kingdom of Christ, where "God alone reigns." This antinomy served as grounds for the church's recognition of a far more limited right of conscientious objection. "Refusal of military service on grounds of conscience," the *Oberkirchenrat* argued, had to be distinguished from "cowardly shirking." The former pertained only when Christians who believed that war represented "an abominable evil" rejected military service in order to "erect a sign against the blatant fall of the world away from God in war."²⁰ Such a standard in effect restricted conscientious objection to Christian minority sects that traditionally espoused religious pacifism.

The EKD chancellery adopted a similar viewpoint in a memorandum on conscientious objection circulated among the leadership of the regional churches in September 1948. Church

²⁰ Notification in *Evangelische Welt*, June 15, 1948.

support for conscientious objectors had to be tempered with the acknowledgement that "in this world, the reclamation of a true kingdom of peace cannot occur." The chancellery went so far as to criticize the law on conscientious objection passed by the Württemberg-Baden state parliament as a mere "paper barrier" that could be easily overridden in emergency situations. Like the Württemberg church, the EKD chancellery regarded conscientious objection primarily as a legal loophole to be abused by shirkers rather than a fundamental right of all citizens.²¹ For the chancellery, conscientious objection was to be the purview primarily of Mennonites, Quakers, and Jehovah's Witnesses.²²

The EKD synod did not issue an official statement on conscientious objection until its second meeting in April 1950 at the East Berlin village of Weissensee, after a planned discussion of the matter at a session of the EKD Council in December 1948 was tabled.²³ Already by early 1950, Adenauer's policy of Western integration had caused a rift in the Protestant leadership that cast a shadow over the synod's discussions. Conservative Lutherans such as the EKD Council chair and Berlin bishop Otto Dibelius and the Hannover bishop Hans Lilje stood firmly behind Adenauer. Martin Niemöller, by contrast, had given a controversial interview in December 1949 arguing that a united Germany, even under Soviet domination, was preferable to Germany's current division.²⁴ As several scholars have noted, the Weissensee synod's concluding "Word on

²¹ "Denkschrift 'Kriegsdienstverweigerung und Friedensdienst,'" in *Protokolle*, vol. 2, eds. Nicolaisen and Schulze, 648-657, quoted 654-655.

²² "Zusammenstellung: 'Daten aus der Geschichte der religiösen kriegsgegnerischen Gemeinschaften,'" in *Protokolle*, vol. 2, eds. Nicolaisen and Schulze, 657-665.

²³ Kirchenkanzlei to Mitglieder des Rates, November 23, 1948, in *Protokolle*, vol. 2, eds. Nicolaisen and Schulze, 575; "Niederschrift über die Sitzung des Rates der EKD am 2. und 3. Dezember 1948 in Frankfurt/Main," *Protokolle*, vol. 2, eds. Nicolaisen and Schulze, 587.

²⁴ Andreas Permien, *Protestantismus und Wiederbewaffnung 1950-1955: Die Kritik in der Evangelischen Kirche im Rheinland und der Evangelischen Kirche in Westfalen an Adenauers Wiederbewaffnungspolitik – zwei regionale Fallstudien* (Köln: Rheinland-Verlag, 1994), 48-49.

Peace" was a vague and abstract declaration that reflected a compromise between these camps and offered little by way of practical guidance.²⁵ The synod declined to comment on rearmament or the permissibility of military service under current circumstances, but welcomed the incorporation of a right of conscientious objection in the Basic Law: "We greet thankfully and full of hope that governments protect through their constitutions those who refuse military service on grounds of conscience. We ask all governments of the world to grant this protection. *Whoever refuses military service on grounds of conscience should be certain of the advocacy and intercession of the church.*"²⁶ The synod membership, including conservative Lutherans such as the jurist Hans Meinzolt, widely affirmed this statement.²⁷ Yet while the Weissenensee synod recognized the possibility that EKD members might seek to register as conscientious objectors, the "Word on Peace" remained silent on the crucial question of the scope and definition of "conscience." The declaration did not clarify whether only principled pacifists counted as legitimate conscientious objectors, as the earlier statements of church representatives had argued.

The beginning of the Korean War in late June 1950 signaled a turning point in the West German debate about rearmament and conscientious objection. For Protestants such as Niemöller his colleagues around the EKD *Bruderrat*, the outbreak of war in partitioned Korea provided a clear signal that prolonged German division could similarly lead to conflict between the United States and Soviet Union on German soil. Konrad Adenauer, on the other hand, sought to use the destabilization of Korea to secure the Federal Republic's place in a Western defensive alliance. In July 1950, Adenauer met secretly with members of the Allied High Commission to discuss the

²⁵ Ibid., 50-51; Vogel, *Kirche und Wiederbewaffnung*, 103-116.

²⁶ Kirchenkanzlei der Evangelischen Kirche in Deutschland, ed., *Berlin-Weissenensee 1950: Bericht über die zweite Tagung der ersten Synode der Evangelischen Kirche in Deutschland vom 23.-27. April 1950* (Hannover: Schlütersche Verlagsanstalt und Buchdruckerei, 1953), 312, emphasis added.

²⁷ Ibid., 373-374.

establishment of West German "paramilitary reserves" and "home guards," still technically illegal under the occupation statute. In a security memorandum submitted to the NATO Foreign Ministers meeting in September, Adenauer's government called for the formation of a "federal police force."²⁸

Adenauer's covert dealings with the Western Allies and larger ambitions of rearmament led to the eruption of confessional tensions within the CDU. His principal intra-party opponent was the Protestant interior minister Gustav Heinemann, appointed to the position specifically to increase the confessional diversity of Adenauer's cabinet. A jurist and former director of the *Rheinische Stahlwerke* in Essen, Heinemann had been active in the Confessing Church during the mid-1930s, serving as a participant at the Barmen synod of May 1934 and a member of the governing council of the Confessing Church synod in the Rhineland. Heinemann returned to church politics after the war as an EKD Council member, signatory of the Stuttgart Declaration, and first president of the EKD synod.²⁹ An opponent of West German rearmament, Heinemann requested an official position paper on conscientious objection from the Church leadership in June 1950.³⁰ The EKD Council directed its Commission on Public Responsibility, the committee established in January 1949 to coordinate the Church's statements on political issues, to produce such a memorandum.³¹

²⁸ Large, *Germans to the Front*, 67-74.

²⁹ On Heinemann's activities during the Nazi period and the immediate aftermath, see Jörg Treffke, *Gustav Heinemann: Wanderer zwischen den Parteien. Eine politische Biographie* (Paderborn: Schöningh, 2009), 70-85. Treffke points out that although Heinemann shared the Confessing Church critique of Lutheran doctrines of obedience, he did not participate in the Protestant resistance against the Nazi regime toward the end of the war.

³⁰ Ranke to Mitglieder der Kammer für öffentliche Verantwortung, June 16, 1950, EZA 2/1346.

³¹ "Niederschrift über die 16. Sitzung des Rates der Evangelischen Kirche in Deutschland am 25. und 26. August 1950 in Essen," in *Protokolle*, vol. 4, ed. Silomon, 265n9; Michael Greder, "Kammer der EKD für Öffentliche Verantwortung," in *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/pages/viewpage.action?pageId=55512943> (accessed April 15, 2018). The committee arose out of the efforts of the first president of the EKD chancellery, Hans Asmussen, to organize a series of commissions

The legacy of the wartime opposition to Nazism bore heavily on Protestant debates about conscientious objection within the Commission on Public Responsibility during the fall of 1950. Both conservative Lutherans and heirs to the Barthian wing of the Confessing Church frequently invoked the notion of resistance in discussing the permissibility of refusing to serve in a future West German military following the outbreak of the Korean War. Rather than calling into question the boundary between politics and Christian conscience, both groups understood the refusal of military service to lie firmly within the latter realm.

The most prominent representative of the EKD's conservative Lutheran wing to serve on the Commission on Public Responsibility, the theologian Walter Künneth, submitted a memorandum in August 1950 describing conscientious objection as a "boundary and border possibility." Objection to conscription was not a political right, but a decision of conscience through which the Christian served as witness to "Christ's reign of freedom in opposition to the tyranny of a demonized worldly power." The Christian could only refuse military service in view of the final redemption of the fallen world through Christ; the true conscientious objector, therefore, had to demonstrate "readiness for martyrdom."³² Künneth, a prominent exponent of the "total state" following the establishment of the Nazi regime, had retreated from public life by 1937 following a dispute with the Nazi ideologist and proponent of *völkisch* paganism Alfred Rosenberg. Künneth emerged from the war with his reputation intact, appointed to a

to represent the churches in political life (see chapter 2). The initial membership included Oskar Hammelsbeck, Walter Künneth, the Confessing Church jurist Hans Meinhold, Ludwig Metzger, Gerhard Ritter, and the Church President in the Pfalz, Hans Stempel. See Ranke to Heinemann, April 26, 1949, EZA 2/1345. However, Ritter resigned by December 1949 over political and theological disagreements with the Barthian majority on the commission.

³² Walter Künneth, "Thesen zur Frage der Kriegsdienstverweigerung," August 1950, EZA 2/2574. Similar claims were advanced in a memorandum submitted to the Commission on Public Responsibility by the Lutheran *Landeskirchenrat* in Munich: Evangel.-Luth. Landeskirchenrat München, "Gutachten über die Frage der Kriegsdienstverweigerung," September 16, 1950, EZA 2/2574.

professorship at the University of Erlangen in 1946.³³ His theses on conscientious objection reflected his postwar theology of "orders of preservation," an only slightly modified version of his Nazi-era theology that abandoned his earlier notion of the German *Volk* as an "order of creation" but continued to insist upon the divine origins of the state as a bulwark against human sin.³⁴ Künneth's argument was not that Christians were absolutely forbidden to engage in acts of resistance, but that in matters of ultimate importance they could appeal to conscience in order to justify disobedience against the state, so long as they were willing to suffer the consequences. Treating conscientious objection a paramount act of disobedience, Künneth reiterated the logic of passive resistance articulated by the conservative wing of the Confessing Church in the early 1940s.

The Commission on Public Responsibility's plans to discuss conscientious objection during the fall of 1950 were punctuated by the emergence of outspoken opposition to the West German government's foreign policy within the EKD *Bruderrat*. Prompted by Adenauer's secretive communications with U.S. High Commissioner McCloy regarding West German defense, Gustav Heinemann officially resigned as interior minister on October 10. Heinemann was insulted by Adenauer's failure to consult with the cabinet and undemocratic maneuvering, but more importantly he expressed concern that West German rearmament would solidify German division and "strengthen antidemocratic tendencies" in the young Federal Republic.³⁵

³³ On the controversy between Künneth and Rosenberg, which concerned Rosenberg's *Myth of the Twentieth Century* (1930), see Uriel Tal, "Structures of German 'Political Theology' in the Nazi Era," in Tal, *Religion, Politics, and Ideology in the Third Reich: Selected Essays* (London: Routledge, 2004), 99-102. For biographical details, see Tim Schedel, "Künneth, Walter" *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/pages/viewpage.action?pageId=64954488> (accessed April 15, 2018).

³⁴ "Niederschrift über die 2. Sitzung des Rates der Evangelischen Kirche in Deutschland am 22. März 1949 in Wiesbaden," *Protokolle*, vol. 3, ed. Fix, 113; Evangelisch-Lutherische Dekanat Erlangen to Kirchenkanzlei, August 16, 1950, EZA 2/2574.

³⁵ Permien, *Protestantismus und Wiederbewaffnung*, 8-13, quoted 10.

Heinemann's resignation prompted Niemöller and his cohorts in the EKD *Bruderrat* to pen a series of public letters to Adenauer, published along with a "Statement of the Protestant *Bruderrat* on Rearmament," in late October. While opposing the political views of conservative Lutherans who backed Adenauer's aims, the *Bruderrat* similarly conceived of conscientious objection as an act of resistance. The *Bruderrat* defined conscientious objection as an ultimate decision of Christian conscience beyond the purview of normal politics, declaring "We are not representatives of a political pacifism." The *Bruderrat* statement implored Christians to defend the "preservation" of the right of conscientious objection in the Basic Law while stating, "In the current situation of Germany, we object to military service, *whether or not this right remains secured in the constitution*. We encourage everyone of good conscience to do the same."³⁶ The distinction between politics and the domain of conscience became the key point of contention in subsequent polemics over the society's actions, which aroused wide attention among Protestant pastors and lay activists. Conservative Lutheran critics argued that by using the platform of the church to advocate for conscientious objection, the *Bruderrat* illicitly mixed politics and the Christian mission.³⁷

If Protestant theologians tended to conceive of objection to military service as an act of resistance that could be justified in the final instance only by appeal to one's conscience, Protestant jurists were more concerned to develop a workable interpretation of the right of conscientious objection *within* the West German Basic Law.³⁸ The Bonn law professor Ulrich

³⁶ The documents in the October 1950 leaflet "An die Gewehre? Nein" are collected in *Kirchliches Jahrbuch 77* (1950): 167-176, quoted 171, emphasis added.

³⁷ For instance, "Stellungnahme des Theologischen Konvents der Bekenntnisgemeinschaft der Evangelisch-lutherischen Landeskirche Hannovers zu der Flugschrift 'An die Gewehre? Nein,'" *Kirchliches Jahrbuch 77* (1950): 196-210. On the controversy, see also Greschat, *Protestantismus in kalten Krieg*, 107-108.

³⁸ On this distinction, see also Hendrik Meyer-Magister and Tobias Schieder, "Zwischen Staatstheorie und Friedensethik. Zur Inkongruenz zweier Perspektiven auf eine Grundsatzproblem des Wehrpflichtgesetzes von

Scheuner, a close associate of Rudolf Smend, emerged in the 1950s as the most active Protestant jurist to engage in the public debate on the right of conscientious objection, framing the issue *in contradistinction* to the right of resistance. In a memorandum submitted to the Commission on Public Responsibility in early October, Scheuner suggested that whereas conscientious objection to military service represented a legal possibility under the West German constitution, resistance against the state necessarily stood outside statutory law, and must rest on an appeal to a moral order standing above the positive law of the state. The conscientious objector "elevates his conscience higher than the imperatives of the state" but did not call into question the "legal binding force" of the state's laws. Yet Scheuner, as much as his counterparts in the Commission on Public Responsibility, drew a sharp distinction between merely political reasons for objecting to military service and grounds of conscience. Only true judgments of conscience, rooted in religious or ethical-humanist principles and demonstrated unambiguously to the state, constituted legitimate grounds for release from military service. Scheuner echoed those members of the EKD chancellery who feared that the right of conscientious objection would be abused for "political" reasons, not least by opponents of rearmament. Since conscience corresponded to a sphere of fundamental religious and moral beliefs, Scheuner affirmed that the church should "guarantee the protection of the earnest conscientious objector." At the same time, the church should "not burden the conscience of those who are prepared to defend their country."³⁹

Ultimately discussions of the Commission on Public Responsibility in the fall of 1950 broke down after a majority of the committee defended an expansion of Article 4 to include

1956," *Zeitschrift für evangelisches Kirchenrecht* 61 (2016): 162-190. Meyer-Magister and Schieder tend to overemphasize the cleft between Protestant theologians and jurists, however, given the widespread adoption of theological argumentation by jurists defending conscientious objectors before the Constitutional Court after 1956, as I argue in the latter portion of this chapter.

³⁹ Ulrich Scheuner, "Zum Problem der Kriegsdienstverweigerung in der Gegenwart," October 4, 1950 and "Ergänzende Erläuterungen zu den Thesen von Prof. Scheuner," EZA 2/2574.

military service in peacetime as well as wartime, while a Lutheran wing, represented by Gerhard Ritter and Elisabeth Schwarzhaupt, emphasized the state's "right of defense."⁴⁰ Already in September 1951, however, the EKD Council elected to establish another committee to investigate the issue of conscientious objection, responding to demands from the *Bruderrat* for a clear statement on the issue in light of the government's ongoing negotiations for a West German defense force.⁴¹ By mid-1951, Adenauer had formed an office charged with planning for West German rearmament under the leadership of his new security advisor Theodor Blank, while discussions with the American, British, and French governments for West German participation in a European Defense Community (EDC) were underway.⁴² Via the general and military reformer Wolf Graf von Baudissin, an active lay Protestant who had volunteered for an "EKD-sponsored industrial relations program" before joining the Blank's office, the EKD chancellery remained appraised of developments in the rearmament negotiations and discussions of conscientious objector legislation.⁴³

The work of the EKD Council's committee on conscientious objection in late 1951 already reflected the emergence of a new approach to the issue, which aimed to integrate a putatively Protestant understanding of conscience *within* the Basic Law. The first meeting of the committee in October, whose members included Rudolf Smend, the EKD representatives to both the East and West German governments, as well as the conservative Lutheran theologian and

⁴⁰ "Ratsame Gutachten der Kammer für öffentliche Verantwortung zur Frage der Kriegsdienstverweigerung" and "Sondervotum zum ratsamen Gutachten der Kammer für öffentliche Verantwortung," EZA 2/2574.

⁴¹ Bruderrat to Rat der EKD, September 5, 1951, *Protokolle*, vol. 5, ed. Pöppig, 354; "Niederschrift über die Sitzung des Rates der Evangelischen Kirche in Deutschland vom 6.-7. September 1951 in Tutzing," in *Protokolle*, vol. 5, ed. Pöppig, 334-336.

⁴² Large, *Germans to the Front*, 111-124.

⁴³ Kunst to Dibelius, July 20, 1951, EZA 2/2574 and Ranke to Osterloh, October 11, 1951, EZA 2/2575. On Baudissin, see Large, *Germans to the Front*, 177-184, quoted 179.

EKD chancellery adviser Edo Osterloh, resulted in a position paper that retained the conventional distinction between political decisions and decisions of conscience: "The attempt, through the rejection of military service, to carry through a unique political decision, or to gain influence in a current political situation, cannot be recognized as a ground of conscience."⁴⁴ A week later, however, the EKD Council concluded that Osterloh's report, oriented toward the free church "sects," neglected the actual decisions that confronted members of the Protestant churches.⁴⁵ A new draft produced by the committee in November recognized that both a "fundamental stance" and an "individual decision" could represent matters of conscience:

As a Protestant church, we are particularly concerned with the possibility that the Christian makes a concrete decision in a concrete situation on the basis of his Christian conscience. As desirable as it appears to us to respect and secure such a decision, so it is also clear to us that the authenticity of such a decision cannot be established in an equal or similar manner. Nevertheless, there should be an attempt to do justice to such—true—objections of conscience among this group of objectors to military service.⁴⁶

The latter draft resonated strongly with the notion of conscience deployed by the Nazi-era Confessing Church: Conscience pertained to a realm of individual decision-making in which one bore responsibility only before God's ultimate judgment, not worldly authorities. Rather than drawing a direct connection between resistance against National Socialism and conscientious objection to military service in the Federal Republic, however, the EKD committee took a step toward advocating for the recognition of a Protestant notion of conscience within West German constitutional law.

⁴⁴ "Entwurf einer Antwort Osterlohs auf die Frage: 'Was heißt: 'Kriegsdienstverweigerer um des Gewissens willen?'" [Hannover, 18. Oktober 1951]," *Protokolle*, vol. 5, ed. Pöppig, 425-426. See also "Erster Entwurf Osterlohs für einen Beschluss des Rates der EKD über die Frage: 'Welchen Rechtsschutz erwartet die Kirche für die Kriegsdienstverweigerer um des Gewissens willen?'" [Hannover, 18. Oktober 1951]" *Protokolle*, vol. 5, ed. Pöppig, 425-426; Osterloh to Ratsmitglieder, October 18, 1951, EZA 2/2575.

⁴⁵ "Niederschrift über die 25. Sitzung des Rates der Evangelischen Kirche in Deutschland am 25. Oktober 1951 in Berlin-Spandau," *Protokolle*, vol. 5, ed. Pöppig, 391n27.

⁴⁶ "Entwurf für eine Stellungnahme des Rates der EKD zu Fragen der Gesetzgebung über Kriegsdienstverweigerung um des Gewissens willen [Hannover, 28. November 1951]," *Protokolle*, vol. 5, ed. Pöppig, 445-447.

A crucial impetus behind the EKD Council's call for an expanded right of conscientious objection in late 1951 was a series of efforts by jurists and theologians who opposed Adenauer's rearmament policy to call into question assumed distinctions between political actions and decisions of conscience. During the early Protestant debates on conscientious objection, these figures recognized that such a distinction was increasingly mobilized by the CDU to argue that opponents of West German remilitarization could not claim conscientious objector status. At a meeting between directors of the Protestant academies and Protestant political leaders in early October, opponents of rearmament challenged a strict delineation of political and spiritual spheres. Jurists including Gustav Heinemann, Lothar Kreyssig, and Hansjürg Ranke deployed a rhetorical weapon that had formed a hallmark of Protestant political and legal discourse in the years since National Socialism—an insistence on the "bounds of justiciability." A fallible, human judge could not precisely determine where a political opinion bled into a matter of conscience. "For similar reasons," Ranke argued, "the *status confessionis* of the church during the rule of National Socialism, as well as now in the Eastern Zone, was always adopted only in the face of very *concrete* decisions of the state." This alternative appropriation of the legacy of Nazism—an effort to translate the notion of conscience developed by the Protestant opposition to National Socialism into West German constitutional law—would emerge as a hallmark of Protestant argumentation following the entry of the Federal Republic into NATO in May 1955.⁴⁷

Confessional conflict, as much a motivating force in debates about conscientious objection as in contemporary disputes over family and school laws, played a further role in driving Protestants to embrace so-called "situational" objectors, who were not pacifists but rejected military service under the current political circumstances. By October 1951, Niemöller

⁴⁷ Ranke to Osterloh, October 2, 1951 (quoted), emphasis in original and "Treffen des Leiterkreises der Evangelischen Akademien mit westdeutschen Politikern," EZA 2/2575.

complained that Ulrich Scheuner's effort to restrict the right of conscientious objection to principled pacifists and members of the free church "sects" contravened "our entire Evangelical concept of conscience and the conscientious decision." Scheuner's lectures on the subject, according to Niemöller, proved that "these so-called Protestant Academies are sometimes paramount Catholic academies, in any case performing a biasing service for a Catholic interpretation in an entirely unbiblical manner."⁴⁸ The position of the EKD committee contrasted sharply with a contemporary statement released by the Fulda Bishops Conference, under the directorship of the Cologne Cardinal Joseph Frings. The Catholic statement drew on a tradition of just war theory, rooted in neo-Scholastic natural law teachings, to strictly delineate between unjust, aggressive wars, in which the Christian was forbidden from participating, and just, defensive wars, in which conversely the Christian was prohibited from claiming conscientious objection. Moreover, the Catholic Church, rather than the individual Christian, would determine whether a particular military conflict met the standard of a just war.⁴⁹ In reports to the EKD chancellery, Hansjürg Ranke noted that Catholic clergy took a reticent stance toward conscientious objection "after the Pope spoke out against [it] one time," implicitly contrasting Catholic subservience to authority against Protestant freedom of conscience.⁵⁰

In late 1951, however, such attitudes remained a minority position among the church leaders, theologians, and jurists responsible for articulating the Protestant Church's stance on

⁴⁸ Niemöller to Osterloh, October 8, 1951, EZA 2/2574. Niemöller responded in particular to a lecture by Scheuner republished in *Juristenrundbrief der Evangelischen Akademie*, No. 4, September 1951: Ulrich Scheuner, "Das Recht auf Kriegsdienstverweigerung: Vortrag in der Gesellschaft für Bürgerrechte in Freiburg am 22. Feb. 1951," EZA 2/2574.

⁴⁹ Fulda'er Bischofskonferenz, "Die christlichen Grundsätze über Krieg und Kriegsdienst," received by the EKD chancellery on November 27, 1951, EZA 87/144. This document was prepared by a committee under the Cologne Cardinal Josef Frings for consideration by the Catholic press: "Kriegsdienst: Sittlich erlaubt," *Der Spiegel*, November 1, 1950.

⁵⁰ Ranke to Osterloh, October 11, 1951, EZA 87/144 (quoted); Ranke to Kunst, November 27, 1951, *Protokolle*, vol. 5, ed. Pöppig, 474.

conscientious objection. Upon receiving the November 1951 memorandum of the EKD Commission for Public Responsibility, General Baudissin, the EKD's main contact in the office planning West German rearmament, expressed concern that the Protestant Church placed too great a burden on individual conscience.⁵¹ The Lutheran theologian Edo Osterloh shared similar concerns, despite acknowledging that "the Protestant Christian...could also feel compelled on the basis of conscience to exclude himself from military service in a concrete situation."⁵² Rudolf Smend suggested that the formulation advocated by the EKD memorandum would lead to "high numbers of objectors." Therefore, the second part of the recommendations, which endorsed conscientious objections based on both "a principled attitude" as well as "an individual decision," should be abandoned.⁵³ In early Protestant debates about conscientious objection, then, supporters of more liberalized legislation continued to face strong opposition from proponents of a strict delineation between politics and the sphere of individual conscience. The critical question facing Protestants was not only whether judgments of conscience pertained to firm moral norms or decisions made in irreducibly concrete circumstances, but whether the latter, "evangelical" concept of conscience could be incorporated into the positive law.

Revaluing the Twentieth of July

Intertwined with ongoing negotiations over rearmament, the emergence of a public memory culture around the failed coup d'état of July 20, 1944 served as a crucial impetus for Protestant efforts to rethink the role of conscience in the political domain. The issues of West

⁵¹ Osterloh to Baudissin, December 10, 1951, *Protokolle*, vol. 5, ed. Pöppig, 477; Baudissin to Osterloh, December 13, 1951, EZA 2/2575.

⁵² Edo Osterloh, "Kriegsdienstverweigerung um des Gewissens willen," *Evangelische Welt*, December 16, 1951.

⁵³ Smend to Osterloh, January 5, 1952, EZA 2/2575.

German rearmament and the memorialization of the wartime military resistance were closely linked in the public discussions of the July 20 plot that emerged during the early 1950s. While the CDU government offered little acknowledgement of socialist, communist, or Jewish resistance, many conservative politicians regarded a rehabilitation of the military resistance against Nazism as a promising tactic for garnering support for a West German military, both domestically and abroad. The July 20 conspirators offered a useful demonstration to the Western occupation powers that not all members of the German military had been loyal Nazis. Interview questions about the plot served as a means of weeding out ex-officers with Nazi sympathies from participation in rearmament, while many of those selected to plan of a West German defense force had ties to the wartime military resistance.⁵⁴ In early 1952, Major General Hermann von Witzleben, a member of the July 20 plot imprisoned by the Gestapo at the end of the war, organized a series of discussions on the right of resistance among leading officers, theologians, historians, and jurists, subsequently published with an introduction by President Theodor Heuss.⁵⁵ On the tenth anniversary of the conspiracy in July 1954, "West Germany's president, chancellor, and political elite paid homage to the Twentieth of July," with Heuss delivering a major address on the subject at the Free University in West Berlin.⁵⁶

The military resistance to the Nazi regime posed a challenge for the West German government, as much as it sought to use the memory of the events for its political advantage.

⁵⁴ Douglas Peifer, "Commemoration of Mutiny, Rebellion, and Resistance in Postwar Germany: Public Memory, History, and the Formation of 'Memory Beacons,'" *Journal of Military History* 65 (2001): 1035-1044. On the contested legacy of the wartime military resistance for postwar rearmament debates, see also David Clay Large, "A Gift to the German Future?" The Anti-Nazi Resistance Movement and West German Rearmament," *German Studies Review* 7 (1984): 499-529.

⁵⁵ David Johst, *Begrenzung des Rechtsgehorsams: Die Debatte um Widerstand und Widerstandsrecht in Westdeutschland 1945-1968* (Tübingen: Mohr Siebeck, 2016), 3. The discussions were published as "Deutsche Gespräche über das Recht zum Widerstand," in *Die Vollmacht des Gewissens*, ed. Europäische Publikation (München: Verlag Hermann Rinn, 1956), 13-133.

⁵⁶ Peifer, "Commemoration of Mutiny," 1041.

Political leaders had to appease Allied, especially French fears about West German rearmament, without alienating the veterans who would form the foundation for a future West German military.⁵⁷ The most expedient strategy proved to be a strong demarcation of Nazi dictatorship from the postwar *Rechtsstaat* where normal expectations for order, lawfulness, and military obedience had already been restored. Here, the traditional Lutheran distinction between politics and matters of conscience provided an expedient rhetorical tool. Heuss' speech marking the tenth anniversary of the July 20 plot lauded the "conscience" and Christian sensibilities of those who chose to obey the commands of God rather than the laws of the Nazi state. At the same time, Heuss emphasized the distinction between the National Socialist regime, in which the possibility of resistance appeared as a "border case," and the postwar West German *Rechtsstaat* that continued to demand "the power of commands and the claim of obedience."⁵⁸ Within the EKD, however, the new openness regarding the July 20 plot produced results largely opposite to those the government had intended. Rather than cementing a Protestant commitment to a *Rechtsstaat* against which any resistance was illegitimate, an emergent debate about the legitimacy of resistance under National Socialism led many theologians and jurists to challenge the binary between political judgments and decisions of conscience that structured the debate about conscientious objection during the first years of the Federal Republic.

A turning point for the reception of the July 20 plot among Protestant intellectuals came in the first months of 1952 from an unlikely provenance, the district court of the provincial Lower Saxon city of Braunschweig. In the years since the founding of the Federal Republic, Lower Saxony had emerged as a hotbed of radical right-wing nationalism, driven by revanchist

⁵⁷ Roman Steinke, *Fritz Bauer, oder, Auschwitz vor Gericht* (München: Piper Verlag, 2013), 144.

⁵⁸ Theodor Heuss, "Zur 10. Wiederkehr des 20. Juli," in *Widerstandsrecht*, ed. Arthur Kaufmann (Darmstadt: Wissenschaftliche Buchgesellschaft, 1972), 280-290, quoted 283.

veterans organizations that maintained close ties with high-ranking Nazi leaders. By 1951, the neo-Nazi *Sozialistische Reichspartei* (SRP), led by the *Wehrmacht* commander Otto Ernst Remer, had emerged as a significant political force in the region, receiving eleven percent of the vote in state parliamentary elections of May.⁵⁹ Remer, who had played a key role in leading the unit that defeated the July 20 plot, aroused the consternation of West German political leaders with a series of public speeches decrying the conspirators as traitors to the German nation. Remer's speeches gained national attention when Interior Minister Robert Lehr, himself an active lay Protestant who had participated in interconfessional oppositional circles in Düsseldorf during the war, brought charges against Remer to the state prosecutor's office for "defamation of the resistance fighters as 'traitors to the nation.'"⁶⁰ The prosecutor to take the case was Fritz Bauer, a German-Jewish attorney who had been forced to emigrate in 1935 and returned to his post at the Braunschweig district court after the war. The particularities of the charges brought against Remer, as well as the result of the trial—Remer's conviction in March 1952 for defamation and sentencing to three months' imprisonment—were less significant than the media spectacle generated by Bauer. The prosecutor effectively used the case to generate a public debate about wider questions of law, legitimacy, and resistance in Nazi Germany.

Bauer's argument in the Remer case dovetailed with the broad turn against legal positivism in postwar West German jurisprudence, motivated not least by the influence of Christian intellectuals. Rejecting the positivist assertion that the July 20 conspirators were guilty of violating the laws of the Nazi regime, Bauer appealed to "the eternally valid law, then and now" to argue that the National Socialist state as such was illegitimate—an *Unrechtsstaat*.

⁵⁹ Large, *Germans to the Front*, 128.

⁶⁰ Steinke, *Bauer*, 126. On Lehr, see also Stefan Marx, "Robert Lehr (1883-1956)," in *In Verantwortung vor Gott und den Menschen: Christliche Demokraten im Parlamentarischen Rat 1948/49*, eds. Günter Buchstab and Hans-Otto Kleinmann (Freiburg: Herder Verlag, 2008), 245-260.

Therefore, the crime of high treason could not be committed against the Third Reich.⁶¹ Bauer advanced three main points to this end. First, "disobedience against inhuman laws" was a "Christian" act. Second, the July 20 plot was "patriotic," since the conspirators sought to rescue the "fatherland" from the disasters of wartime. Finally, Germanic law extending back to the early medieval period provided for a right of resistance against tyranny. The actions of the July 20 conspirators, then, were not only legitimate but legal according to these higher sources of law.⁶²

A centerpiece of Bauer's case was a series of expert reports on the right of resistance, solicited from historians as well as Protestant and Catholic theologians. For the Protestant side, Bauer turned to Ernst Wolf and his Confessing Church colleague Hans-Joachim Iwand. Iwand, a theology professor at the University of Bonn and the principal drafter of the 1947 Darmstadt Statement of the EKD *Bruderrat*, emerged in the early postwar years as a vociferous critic of the traditional Lutheran demand for absolute obedience to state authority.⁶³ Bauer's biographer has suggested that Bauer was forced to turn to close associates of Karl Barth because the majority of Lutheran theologians still refused to endorse a right of resistance even after the defeat of the Nazi regime.⁶⁴ But the memorandum on resistance by Wolf and Iwand, themselves both Lutherans, represented only one moment of a broader shift in postwar Lutheran theology toward a recovery of Luther's writings on the right of resistance, which complicated conventional interpretations of the two kingdoms doctrine.⁶⁵ Wolf and Iwand drew attention above all to Luther's circular

⁶¹ Steinke, *Bauer*, 144. On this point, see also Johst, *Begrenzung des Rechtsgehorsams*, 73-79.

⁶² Steinke, *Bauer*, 144-151.

⁶³ Hans-Joachim Iwand, "Seid Untertan der Obrigkeit," *Stimme der Gemeinde*, November 1951 and "Seid Untertan der Obrigkeit," *Stimme der Gemeinde*, January 1952.

⁶⁴ Steinke, *Bauer*, 145.

⁶⁵ For instance, Hermann Diem, *Luthers Predigt in den zwei Reichen* (München: Kaiser, 1948); Gustaf Törnvall, *Geistliches und weltliches Regiment bei Luther: Studien zu Luthers Weltbild und Gesellschaftsverständnis*, trans. Karl-Heinz Beckert (München: Kaiser, 1947).

disputation of 1539 on Matthew 19:21, which introduced the notion of a "universal tyrant" who not only abused his power but abolished any distinction between his will and the law, resulting in "fundamental lawlessness." When a government sought "to put itself in the place of God, bind conscience, suppress the church, and make itself into the Antichrist," then the Christian could appeal to conscience as a basis for disobeying the state's laws. Moreover, the Christian was not confined to passive resistance in such circumstances, as conservative members of the Confessing Church around the Freiburg Circle had argued in the early 1940s. Rather, Luther's writings demonstrated that active resistance was permissible, especially to prevent a major war. For Wolf and Iwand, therefore, the July 20 conspirators had a legitimate right of resistance, even though they were unsuccessful and their intervention came too late. The "spiritual meaning" of their act inhered precisely in their defense of conscience against the demands of the total state, enabling a "true reconstruction of our political system, until then shattered to the ground."⁶⁶ Rather than viewing conscience and the ultimate decision to resist as a domain where politics left off, Wolf and Iwand treated the postwar West German political system as the direct product of the resistance.

Four months after the conclusion of the Remer trial, a lecture by the Norwegian bishop Eivind Berggrav at a conference of the Lutheran World Congress in Hannover further fanned the flames of German Protestant debate about the legacy of the wartime resistance. Berggrav, appointed bishop of Oslo in 1937, was a wartime stalwart of the Protestant opposition to the Quisling regime, imprisoned from 1942 until the end of the war after lecturing at pastoral

⁶⁶ Hans-Joachim Iwand and Ernst Wolf, "Entwurf eines Gutachtens zur Frage des Widerstandsrechts nach evangelischer Lehre," April 15, 1952, 192-199, quoted 195, 198-199. On the original context of Luther's 1539 disputation, see Shoenberger, "Luther and the Justifiability of Resistance."

conventions throughout the country on Luther's conception of the right of resistance.⁶⁷

Berggrav's address at the Lutheran World Congress in the summer of 1952 honed in on the most radical point of his wartime lectures: Christians owed obedience only to a *Rechtsstaat*, governed by law; moreover, Christians were not only permitted but *obliged* to disobey an "unlawful authority." As Berggrav argued, "The presupposition of the Lutheran teaching of state and church is and remains...that the state is a *Rechtsstaat*. Luther himself spoke out unambiguously against lawless tyranny. In short, in Lutheranism, the statement holds: Without law, no true authority."⁶⁸

Berggrav sharply confronted the traditional Lutheran objection that such an interpretation of the right of resistance improperly mixed the spiritual sphere of the church and the profane sphere of worldly politics. Instead, Berggrav relied on a reading of Romans 13 that stressed the obligation of the state to reward good and punish evil, similar to that advanced by Barth in his wartime and early postwar writings. According to Berggrav, both of Luther's two kingdoms were authorized to perform their proper tasks under "God's law." The church did not possess worldly authority, but at the same time the church's God-given mission, hardly one of passivity toward the world, involved "maintaining God's law."⁶⁹ Nevertheless, Berggrav quickly moved to qualify the apparent radicalism of his thesis. Because violence represented the realm of the worldly

⁶⁷ Florian Büttner, "Berggrav, Eivind," in *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Berggrav%2C+Eivind> (accessed April 15, 2018); on Berggrav, see also Gunnar Heine, *Eivind Berggrav: Eine Biographie* (Göttingen: Vandenhoeck & Ruprecht, 1997). For Berggrav's wartime lecture, see: Eivind Berggrav, "Wenn der Kutscher trunken ist. Luther über die Pflicht zum Ungehorsam gegenüber der Obrigkeit," in *Widerstandsrecht*, ed. Kaufmann, 135-151. The text was reprinted after the war in German translation in Eivind Berggrav, *Der Staat und der Mensch* (Hamburg: Claassen Verlag, 1946), 301-319, but Berggrav did not gain wide attention in postwar Germany until his 1952 lecture at the Lutheran World Congress.

⁶⁸ Eivind Berggrav, "Staat und Kirche in lutherischer Sicht," in *Offizieller Bericht der Zweiten Vollversammlung des Lutherischen Weltbundes, Hannover, Deutschland, 25. Juli-3. Aug. 1952*, ed. Carl E. Lund-Quist (Hannover: s.n., 1953), 78.

⁶⁹ Berggrav, "Wenn der Kutscher trunken ist," 145.

sword, the Christian could not deploy violence in defense of the Gospel but should be "prepared to suffer injustice."⁷⁰ In extreme cases of lawlessness and state violence, Christian citizens, though not the organized Church, could make the leap to active resistance. But such acts could be undertaken only by political officeholders rather than by private individuals and required the sanction of a surrounding community. Above all, while Berggrav, like Iwand and Wolf, referred to conscience as a court of final appeal above the dictates of an illegitimate state, he distinguished a Lutheran concept of conscience from mere subjectivism: "It must here be emphasized that from a Lutheran point of view, my conscience is everything other than my subjective opinion. Conscience should be 'under God,' that means led by God's word and also controlled by the opinion of the community of the holy."⁷¹

The writings of Iwand, Wolf, and Berggrav circulated widely in the Protestant press and exerted a powerful influence on subsequent debates about conscientious objection.⁷² While these authors discussed conditions of dictatorship far removed from the political realities of the postwar Federal Republic, their reappropriation of neglected Lutheran texts and reinterpretation of the two kingdoms doctrine addressed crucial questions about the relationship between conscience and political decisions. Berggrav, as well as Iwand and Wolf, sought to moderate a radically individualist notion of conscience with attention to the role of Christian community, scripture, and the revealed commands of God in shaping individual morality. Different theological and political traditions affected the precise balance the authors proposed between

⁷⁰ Ibid., 141.

⁷¹ Berggrav, "Staat und Kirche," 80.

⁷² Eivind Berggrav, "Die Kirche und der moderne Wohlfahrtsstaat," *Evangelische Welt*, August 1, 1952; "Staat und Kirche in lutherischer Sicht," *Evangelische Welt*, August 16, 1952; Eivind Berggrav, "Staat und Kirche heute in lutherischer Sicht," *Junge Kirche*, August 15, 1952; "Kirche und Staat in lutherischer Sicht," *Junge Kirche*, October 15, 1952.

these factors. In particular, whereas Berggrav restricted the right of resistance to individual Christians, Wolf and Iwand, coming out of the tradition of the Confessing Church, suggested that the Church itself could become a resistance organization.⁷³ However, building on Christological readings of the two kingdoms doctrine that stressed God's ultimate rule over the political sphere, both Wolf and Iwand's opinion as well as Berggrav's lecture acknowledged that an appeal to conscience could lead Christians to take political action. Resistance to unjust authority was not an act of passive martyrdom but a frankly political act that aimed to replace an illegitimate government with one that recognized the proper requirements and boundaries of the law. Revisiting Luther's writings on the right of resistance led Wolf, Iwand, and Berggrav to challenge a rigid dichotomy between political decision and matters of conscience.

Lutheran Theology and the Resistance Debate

The months and years following the March 1952 Remer trial and July 1952 Lutheran World Congress witnessed a proliferation of debate among German Protestant theologians and jurists on the right of resistance. While adherents of Barth's "Christological" theology of law could draw on a wider range of theological resources for theorizing the limits of Christian obedience to the state, the Wolf and Iwand memorandum, and above all Berggrav's address, also motivated a parallel process of self-reflection among Lutherans. Most would not go as far as Berggrav to assert that *only* a *Rechtsstaat* could compel Christian obedience, but the years after 1952 saw the emergence of a consensus on the preferability of constitutional democracy as a political form.

⁷³ Gerhard Ringshausen, "Der 20. Juli 1944 als Problem des Widerstandes gegen die Obrigkeit: Die Diskussion in der evangelischen und katholischen Kirche nach 1945," in *Der 20. Juli 1944: Bewertung und Rezeption des deutschen Widerstands gegen das NS-Regime*, ed. Gerd R. Ueberschär (Köln: Bund-Verlag, 1994), 198-199.

Conservative voices dominated the initial reception of Berggrav's lecture within the German Lutheran press and intellectual circles. At the EKD synod in October 1952 meeting three months later, Walther Künneth delivered a stinging rebuke to the "theologically vulnerable thesis of Berggrav." Relying on his theology of "orders of preservation," Künneth objected above all to Berggrav's *a priori* criterion for the activation of an obligation of resistance. According to Künneth, the Bible required the Christian to obey state authority not simply because the state guarded law and justice, as Berggrav maintained, but because it preserved order and prevented the incursion of chaos into worldly affairs.⁷⁴ The following year, the leadership of the United Evangelical-Lutheran Church in Germany (VELKD), an association of ten regional Lutheran churches headed by the Bavarian bishop Hans Meiser, arrived at a similar conclusion: "One cannot say from the outset that where there is injustice, there is the demand for disobedience. Because every authority takes its functions of establishing order [*Ordnungsfunktionen*] seriously."⁷⁵ Neither Künneth nor the United Lutheran Church denied that there might arise situations in which Christians felt compelled to "obey God more than men." But by prioritizing considerations of order over those of justice, they sought to restrict resistance to cases where Christians chose martyrdom in obedience to the dictates of conscience.

Beneath the surface of official statements, however, Berggrav's lecture catalyzed a transformative set of debates within German Lutheran circles about the relationship of the church to law and state power. A crucial locus for these discussions was the *Christophorus-Stift* in the Westphalian town of Hemer, led by the Lutheran theologian Friedrich Karl Schumann. Since its founding in 1947, the *Christophorus-Stift* had served as an important site of Protestant debate

⁷⁴ Walter Künneth, "Die öffentliche Verantwortung des Christen: Referat auf der Synode der Evangelischen Kirche in Deutschland, Oktober 1952," *Evangelisch-Lutherische Kirchenzeitung*, November 30, 1952.

⁷⁵ "Der Christ und die Obrigkeit: Evangelische Kirchenleitung befaßt sich mit dem Gehorsamsanspruch des Staates," *Süddeutsche Zeitung*, October 1, 1953.

and reorientation on questions at the intersection of theology and law, including the concept of natural law, the scope of Christian political responsibility, and legislation on marriage and family. Schumann alongside Hans Dombois, the institute's house jurist, initiated a series of meetings of prominent Lutheran theologians and jurists beginning in September 1953 to discuss "the problem of the state." Schumann and Dombois conceived of the project as a response to Berggrav's lecture, which according to Schumann's letter to the invited participants "raised more problems than it resolved."⁷⁶ As in other discussions around the *Christophorus-Stift*, the meetings on the "problem of the state" did not result in a wholesale rejection of prior traditions, but allowed participants to reinterpret received categories on the basis of postwar theological innovations and political developments. Schumann's lecture on the right of resistance acknowledged the legitimacy of resistance in circumstances where political authority directly contravened divine law. Schumann affirmatively cited Berggrav, as well as recent work by the Lutheran legal scholar, Johannes Heckel, recovering a right of resistance in Luther's theology.⁷⁷ Lectures by Dombois and the Lutheran theologian Eberhard Klügel similarly noted the openness of contemporary Lutheran theology to acknowledging a right of resistance, by contrast to the neo-Lutheran "orders of creation" theology dominant before the Second World War.⁷⁸

⁷⁶ Schumann to Elert et al, June 17, 1953, FEST Box 138. See also Dombois to [invited participants], May 31, 1954 and Dombois to [invited participants], January 18, 1955, FEST Box 607.

⁷⁷ Friedrich Karl Schumann, "Widerstandsrecht und Rechtfertigung," in *Macht und Recht: Beiträge zur lutherischen Staatslehre der Gegenwart*, eds. Hans Dombois and Erwin Wilkens (Berlin: Lutherisches Verlagshaus, 1956), 34-43. Heckel summarized his findings on the right of resistance in Johannes Heckel, "Widerstand gegen die Obrigkeit? Pflicht und Recht zum Widerstand bei Martin Luther," in *Widerstandsrecht*, ed. Kaufmann, 114-134. I have written at greater length elsewhere on Heckel's reading of Luther and his reception in postwar West Germany. See Brandon Bloch, "Justifying Democracy: Johannes Heckel, Ernst Wolf, and the Recasting of Luther's Theology of Resistance in Postwar Germany," in *Tagungsbände zum Kongress "Kulturelle Wirkungen der Reformation" / Proceedings of the Congress "Cultural Impact of the Reformation"*, eds. Christopher Spehr, Klaus Fitschen, and Ernst-Joachim Waschke (Leipzig: Evangelische Verlagsanstalt, forthcoming).

⁷⁸ Eberhard Klügel "Prinzipielles Recht zum Aufruhr? Fragen der politischen Aktivität des Glaubens," in *Macht und Recht*, eds. Dombois and Wilkens, 52 and Hans Dombois, "Politische und christliche Existenz: Bemerkungen zur lutherischen Staatslehre von heute," in *Macht und Recht*, eds. Dombois and Wilkens, 135-145.

Ulrich Scheuner, the Bonn jurist and close associate of Rudolf Smend, offered the most novel lecture at the group's first meeting in September 1953, an attempt to reconcile German Lutherans' traditional hostility to identify any particular state form as divinely sanctioned with a defense of the *Rechtsstaat*.⁷⁹ Scheuner continued to refer to the state as a "worldly emergency order [*weltliche Notordnung*]" in the manner of conservative Lutherans such as Künneth, and eschewed Bishop Berggrav's effort to define the *Rechtsstaat* as the sole state form that could command Christian obedience. However, Scheuner acknowledged that *Rechtsstaat*, a state governed by the rule of law that recognized a wide range of fundamental rights and freedoms, now appeared as a regulative ideal for Christian action in the political world. Despite the variety of state forms that could take on the task of preserving worldly order, Scheuner argued:

this does not mean that it would not be possible for the Christian to make a judgment of whether one has a just state, a government concerned with the good of its citizens, or a regime of violence, excess of power, and contempt for human beings. In this direction lies the concept of the *Rechtsstaat*. It does not establish a paradigm of the state that could alone be invoked as just authority by which obedience is demanded. But it provides guidelines for which institutions can help counteract the degeneration of state power and keep state power within limits.⁸⁰

As a jurist broadly educated in legal history, Scheuner drew on a wide range of historical examples, from English Common Law to the French Revolution to the American constitution, in order to highlight the historical development of the concept of the *Rechtsstaat* beyond the purview of German Protestantism.⁸¹ Moreover, while orthodox Lutherans such as Walter Künneth eschewed efforts to rethink traditional Lutheran teachings about the state, Scheuner advanced a new narrative whereby the writings of Karl Barth and experience of the "Church

⁷⁹ "Tagungsplan," September 16-18, 1953, FEST Box 607.

⁸⁰ Ulrich Scheuner, "Begriff und Entwicklung des Rechtsstaats," in *Macht und Recht*, eds. Dombois and Wilkens, 80.

⁸¹ *Ibid.*, 80-87.

Struggle" had occasioned a sea change in Protestant political thought. Protestants had been forced to reckon with a state that asserted itself as a "quasi-religious totality," and now recognized the importance of "the limitation of state power" and the "protection of human freedoms and rights."⁸²

The impact of the *Christophorus-Stift* meetings was evident in Scheuner's writings of the mid-1950s on the right of conscientious objection. Although Scheuner continued to characterize conscience as a sphere of "personal" and "moral [*sittlich*]" judgments, apart from "merely rational considerations and political opinions," his 1954 essay on the subject published by the Mainz *Institut für Staatslehre und Politik* displayed greater openness toward so-called "situational" conscientious objectors. Departing from his earlier writings on the subject, Scheuner now sought to extend the right of conscientious objection beyond traditionally pacifist Christian denominations.⁸³ Conscience, Scheuner now wrote, was determined more by "subjective viewpoint" than by "objective truth and tradition." Therefore, "it must be recognized that there can also be cases of true concerns of conscience *in the context of a particular war*, without this feeling being connected to a fundamental commitment to nonviolence."⁸⁴ Scheuner called upon the West German state to incorporate a broad spectrum of considerations of conscience into law, while at the same time imploring objectors to military service to consider their "responsibility as citizens."⁸⁵ Scheuner's essay on conscientious objection thereby drew on

⁸² Ibid., 78-79.

⁸³ Ulrich Scheuner, "Das Recht auf Kriegsdienstverweigerung," in *Der deutsche Soldat in der Armee von morgen: Wehrverfassung, Wehrsystem, inneres Gefüge*, ed. Institut für Staatslehre und Politik (Mainz: Isar-Verlag, 1954), 261-262, 274.

⁸⁴ Ibid., 265-266, emphasis added.

⁸⁵ Ibid., 258.

the dual defense of individual rights and the citizen's active political participation that he championed in his lecture on the *Rechtsstaat*.

The Lutheran legal-theological commission at the *Christophorus-Stift* was confined to a select group and did not find the wide resonance in the Protestant press of Berggrav's lecture at the Lutheran World Congress.⁸⁶ Nevertheless, several participants went on to play an active role in political debates about the limits of obedience within a *Rechtsstaat*, including on the question of conscientious objection. The discussions served as an important venue for rethinking traditional Lutheran tenets, and for framing a legitimating narrative for postwar Protestant politics.

Barthian Theology and the Politics of Conscience: Helmut Gollwitzer

If the work of Ulrich Scheuner and other members of the circle around the *Christophorus-Stift* represented an effort to rethink Lutheran teachings about the state in the aftermath of the Remer trial and Berggrav lecture, an analogous process took shape among theologians closely affiliated with Barth. During the early years of the Federal Republic, members of the most radical wing of the EKD *Bruderrat* asserted a direct line of continuity between the Protestant opposition to Nazism and postwar activism against rearmament, as demonstrated by Martin Niemöller's writings and speeches of the early 1950s. Although the *Bruderrat* fragmented in the course of 1952, due to disagreements over the extent of pastors' legitimate political activism, regional "brethren societies [*kirchliche Bruderschaften*]" founded immediately after the war continued to style themselves as heirs to a Confessing Church tradition

⁸⁶ The official periodical of the EKD covered the meetings only in a single notification: "Bischof Berggrav und das Staatsproblem in der Gegenwart," *Evangelische Welt*, October 16, 1953.

of Christian witness in the political world.⁸⁷ These organizations were represented at the EKD synod of October 1952 above all by Martin Fischer, a professor of theology at the *Kirchliche Hochschule* in West Berlin who along with Ernst Wolf had played a key role in founding the *kirchliche Bruderschaft* in the postwar Rhineland.⁸⁸ Continuing the line upheld by Niemöller in the initial debates about rearmament, Fischer called on West Germany's Protestant churches to guide the "conscience" of their members toward rejection of military service.⁸⁹

Fischer's rhetoric was increasingly rare, however, even among opponents of Adenauer's politics. Facing the challenge of polarization within the church, critical voices increasingly eschewed the language of Christian opposition and instead sought to draw on the putative lessons of the Nazi past to shape the legal and ethical foundations of the Federal Republic. For many, this meant an emphasis on translating a theological conception of conscience, as a realm of individual responsibility before the divine, into an expanded right of freedom of conscience within West German constitutional law. Ludwig Metzger, a Confessing Church veteran and SPD delegate to the Bundestag, made this point at the October 1952 synod: "We must give the members of our church the possibility of interpreting the facts as they believe they must interpret them by their conscience, and then to draw the corresponding consequences."⁹⁰ The jurist Ludwig Raiser summarized the sense, especially among lay members of the synod, that both the conservative Lutheran and radical *Bruderrat* camps lacked an adequate language for approaching

⁸⁷ On the fragmentation of the EKD *Bruderrat*, see Buchstädt, *Kirche für die Welt*, 250-255.

⁸⁸ "Fischer, Martin," in *Personenlexikon zum deutschen Protestantismus*, eds. Braun and Grünzinger, 76-77; Buchstädt, *Kirche für die Welt*, 52.

⁸⁹ Martin Fischer, *Die öffentliche Verantwortung des Christen heute* (Berlin: Lettner-Verlag, 1953), 2nd ed., 42-47.

⁹⁰ Kirchenkanzlei der Evangelischen Kirche in Deutschland, ed. *Elbingerode 1952: Bericht über die vierte Tagung der ersten Synode der Evangelischen Kirche in Deutschland vom 6.-10. Oktober 1952* (Hannover: Verlag des Amtsblatts der Evangelischen Kirche in Deutschland, 1954), 151-156, quoted 156. On Metzger's biography, see Florian Büttner, "Metzger, Ludwig," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Metzger%2C+Ludwig> (accessed April 15, 2018).

contemporary political realities. While Walter Kunneth relied on the antiquated "*Obrigkeit* [authority]" and Martin Fischer referred to the "ideological power state [*ideologisierte Machtstaat*]," neither side had adequately revised its understanding of the state to reflect the aspirations of West German constitutional democracy.⁹¹

The most influential pioneer of a shift in the political thought of the Confessing Church successor organizations, from wholesale opposition to the new West German government to novel efforts to anchor a Protestant ethical vocabulary in constitutional law, was the Bonn systematic theology professor Helmut Gollwitzer. Gollwitzer would go on to play an important role in defining the EKD's stance on conscientious objection following West Germany's entry into NATO. He belonged to the generation of Protestant intellectuals who came of age during the turbulent years of the late Weimar Republic and rise of National Socialism, alongside figures such as Ulrich Scheuner, Hans Dombois, Ernst Wolf, and Gustav Heinemann. Born in 1908 to a Bavarian Lutheran family, Gollwitzer studied theology under Karl Barth at the University of Bonn in the early 1930s and became active in the Confessing Church after 1933. Gollwitzer received his doctorate in 1937, already following Barth's forced departure for Basel, and he rose to prominence within the Confessing Church as a pastor at Martin Niemöller's congregation in Berlin-Dahlem following Niemöller's imprisonment in 1938.⁹² During the war, Gollwitzer maintained contact with Constantin von Dietze and other members of Freiburg Circle while serving as an medical sergeant in Romania and Ukraine.⁹³ In 1945, Gollwitzer was captured by Red Army troops and interred as a prisoner of war in the Soviet Union until December 1949.

⁹¹ *Elbingerode 1952*, 176.

⁹² No scholarly biography of Gollwitzer exists. For basic biographical information, see Philipp Stoltz, "Gollwitzer, Helmut," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Gollwitzer%2C+Helmut>, (accessed April 15, 2018).

⁹³ Gollwitzer to Dietze, April 19, 1944 and Gollwitzer to Dietze, July 16, 1944, ACDP 01-345-005/2.

Gollwitzer first came to wide attention in West Germany with the 1951 publication of his memoirs of Soviet imprisonment, written following his release.⁹⁴ By early 1952, Gollwitzer had aligned himself firmly with the wing of the EKD around Heinemann and Niemöller, defending Niemöller's meeting with the Orthodox Patriarch in Moscow against attacks from both the CDU government and conservatives within the Protestant leadership.⁹⁵ Many on the Lutheran right expressed astonishment that Gollwitzer went from being a sharp critic of the Soviet Union in his memoirs to an apparent apologist. But such a reading misunderstood the theological impetus for Gollwitzer's conviction that the church must remain a moral and institutional force "between East and West." In a lecture at the 1950 *Kirchentag*, the annual (later biennial) assembly of lay Protestants from both East and West Germany founded in 1949, Gollwitzer outlined a theological perspective on the Cold War consistent with Barth's critique of the political instrumentalization of Christianity. Christians were ultimately free "alone in his bond to Christ" and therefore could not seek salvation in mere worldly politics. Rather than simply affirming the given government as a divine order, Christians should seek to bring values of reconciliation, understanding, and dialogue to bear on political life, inhabiting the spaces between calcified ideologies. At the same time, Gollwitzer made clear that he was no apologist for Communist dictatorship. Similar to Scheuner, he suggested that while Christian theology could not endorse a particular state form as the sole bearer of legitimate authority, Christians should prefer a state that safeguarded a wide range of personal freedoms. Challenging the CDU's paeans to the "Christian West," Gollwitzer argued that Christians should affirm the West not as it currently

⁹⁴ Helmut Gollwitzer, *Unwilling Journey: A Diary from Russia*, trans. E. M. Delacour (Philadelphia: Muhlenberg Press, 1953).

⁹⁵ Greschat, *Protestantismus im Kalten Krieg*, 87.

existed, but for the ideals of freedom for which it stood—ideals for which citizens could still fight in the West, but not in the Communist East.⁹⁶

Gollwitzer laid out his revision of Lutheran political theology most comprehensively in a lecture at the Protestant Academy in Hofgeismar in April 1953, later published as *The Christian Community in the Political World*. Part Barthian manifesto for a vigilant "Christian community" as guardian of the state's divinely-ordained mission of preserving worldly justice, part commentary on contemporary West German politics, Gollwitzer's text displayed a pastor's talent for relating the abstractions of theology to pressing political realities. Gollwitzer opened with a bracing critique of contemporary Lutheranism, insisting that Lutheran two kingdoms theology had ossified into a conservative ideology that refused to rethink sixteenth-century teachings about state authority for the present day.⁹⁷ For Gollwitzer, however, cleansing Christianity of its ideological elements required less a modernization of theology than a return to biblical purity. In particular, Gollwitzer sought to extend Karl Barth's critique of Christian natural law as an alternative to legal positivism, carried forward in the early postwar period by figures such as Ernst Wolf. Citing Barth, Gollwitzer asked "why freedom, why law, why peace, why the *Rechtsstaat* are to be strived for—namely because God's love was revealed to true human beings in Jesus Christ, because 'in all human history...there is no other, no higher law than the law of divine mercy, that was established, adopted, and revealed in the sacrifice of the Lamb of Christ.'" ⁹⁸ Christians should interrogate categories of freedom and justice to demonstrate their

⁹⁶ Helmut Gollwitzer, "Der Christ zwischen Ost und West," in Gollwitzer, *Forderungen der Freiheit: Aufsätze und Reden zur politischen Ethik* (München: Kaiser, 1962), 125-141, quoted 133, 139.

⁹⁷ Helmut Gollwitzer, *Die christliche Gemeinde in der politischen Welt*, 2nd ed. (Tübingen: Mohr Siebeck, 1955), 30.

⁹⁸ *Ibid.*, 34.

ultimate origins in God, rather than merely accepting at face value claims by human institutions to represent an immutable natural law.

The political implications of Gollwitzer's critique of natural law became evident in his discussions of the right of resistance and conscientious objection. Gollwitzer's invocations of a Protestant alternative to Christian natural law reflected in part a transparent suspicion of the influence of the Catholic Church on the nascent Federal Republic. But confessional rivalry spurred Gollwitzer to develop a more theologically sophisticated conception of Protestant political ethics, rooted in the concept of "conscience":

While Catholic ethics is an expression of natural morality, on which mercy is based, Protestant ethics emphasizes that in conscience the internal dialogue of the individual human being occurs. It matters entirely whether this soliloquy takes place in the hearing of God's word or not. Because it depends on this hearing, conscience is on the one hand not autonomous, but on the other hand it must remain free.⁹⁹

Gollwitzer found a model of such an ethics of conscience in the Protestant resistance to National Socialism. Dietrich Bonhoeffer, he argued, rejected both pacifism as well as absolute obedience to the existing authorities, and instead "sought to free the commandment of truthfulness from the rigidity of principles."¹⁰⁰ Reliance on conscience rather than natural law as the final court of appeals for ethical and political decisions meant that Christians lacked recourse to abstract distinctions between just and unjust wars, or between passive and active resistance. Rather, Christians were required to evaluate the exigencies of the concrete moment against their ultimate responsibility before God, of which they became aware by the light of conscience. Bonhoeffer's example, as well as the recent theological interventions by Berggrav, Iwand, and Wolf, demonstrated that Christians could no longer be expected to passively suffer unjust authority

⁹⁹ Helmut Gollwitzer, "Gewissen," in *Evangelisches Soziallexikon*, ed. Friedrich Karrenberg (Stuttgart: Kreuz-Verlag, 1954), 446.

¹⁰⁰ Gollwitzer, *Christliche Gemeinde*, 44.

simply for fear that a government's overthrow would lead to chaos and disorder. When carried out in awareness of one's Christian responsibility, active resistance, "up to the killing of a tyrant," could represent an act of "loyalty to the state" against a "perverted authority."¹⁰¹

Turning to the question of conscientious objection, Gollwitzer sought to bring a conception of conscience whose moral significance had been demonstrated by the Protestant opposition to Nazism to bear on the reconstruction of West German democracy. Barth's "Christological" theology of law enabled Gollwitzer to challenge the distinction between political judgments and decisions of conscience that largely continued to structure the West German debate on conscientious objection in early 1953. If Christians were ultimately responsible before God in all dimensions of their lives, then conscience, as the manifestation of God's word within the individual, should serve as the ultimate guide to the Christian's actions in political life. Like the question of whether to engage in resistance against unjust authority, Christian decisions about military service should be made based on the dictates of conscience in concrete circumstances, rather than natural law principles. Following Barth's recently published volume of *Church Dogmatics*, Gollwitzer rejected absolute pacifism but held that Christian citizens could reject military service in a particular war if they acted out of a sense of public duty to the state. While Christian pacifism rested on a dogmatic, unevangelical reading of the Bible, Christians might conclude in particular instances that they could not participate in an "unjust war" in good conscience. Gollwitzer argued for the incorporation of such a conception of conscience into constitutional law. Paradoxically, he noted, while the conscientious objection legislation currently under consideration by federal government would encompass only principled pacifists, the Protestant churches would face greater difficulty defending pacifism than

¹⁰¹ Ibid., 46-47.

Christian opposition to a particular war. In the latter case, "the church will have to intervene before the state to demand legal protection, because *the state is not master over conscience*."¹⁰²

Gollwitzer's *The Christian Community in the Political World* found wide acclaim in the Protestant press, and not only among Confessing Church organs such as *Junge Kirche* or *Stimme der Gemeinde*.¹⁰³ The Confessing Church pastor and jurist Karl-Heinz Becker, who emerged in the postwar years as an acerbic critic of orthodox interpretations of Luther's two kingdoms doctrine, praised the book in the newspaper of the United Lutheran Church for "recognizing the necessity of bringing German Lutheranism from a quietist to a more responsible-active orientation."¹⁰⁴ Walter Künneth, by contrast, railed against Gollwitzer's text, claiming that Barthian theology neglected the distinct character of divine rule over each kingdom and turned the worldly political domain into a "Christocracy."¹⁰⁵ However, as demonstrated by the ongoing revisions to Lutheran theology underway at the legal-theological commission of the *Christophorus-Stift*, Künneth's tenacious adherence to an "orders of preservation" theology was becoming a minority stance even among Lutherans.

¹⁰² Ibid., 49-50, emphasis added. The relevant passage in Barth is Karl Barth, *Church Dogmatics*, vol. 3, pt. 4, eds. Geoffrey William Bromiley and Thomas Forsyth Torrance (Edinburgh: T & T Clark, 1977), 534-538.

¹⁰³ *Junge Kirche* was refounded in 1949 as the continuation of the eponymous journal of the Nazi-era Confessing Church published between 1933 and 1941. *Stimme der Gemeinde*, founded in 1949, identified itself as a "bimonthly journal of the Confessing Church" and was edited by the Confessing Church veterans (see also chapter 3).

¹⁰⁴ Karl-Heinz Becker, review of Helmut Gollwitzer, *Die christliche Gemeinde in der politischen Welt*, *Evangelisch-Lutherische Kirchenzeitung*, April 15, 1955. See also Becker's far more critical review of Walter Künneth's *Das Widerstandsrecht als theologisches-ethisches Problem* in the same issue and Karl-Heinz Becker, "Die Probleme des Widerstandsrechts in oekumenischer Sicht," *Nachrichten der Evangelisch-Lutherischen Kirche in Bayern*, January 10, 1955.

¹⁰⁵ Walter Künneth, "Zum Problem der politischen Ethik II," *Verkündigung und Forschung: Theologischer Jahresbericht 1953/55*, ed. W. Holstein et al. (München: Kaiser, 1956), 258-271, especially 264-266.

The EKD Council Commission on Conscientious Objection, 1955-56

While Protestant debates about resistance and the concept of conscience in the years 1952-54 frequently made reference to West German rearmament, the issue appeared less urgent because the Adenauer government's negotiations with the Western Allies proceeded haltingly, inconclusively, and largely in secret. However, the rearmament question emerged with renewed force in public debate in mid-1954, when the treaties for a European Defense Community (EDC) that would include West Germany, France, Italy, and the Benelux countries came up for ratification in West European parliaments.¹⁰⁶ While the Treaty of Paris established a plan for a common West European military already in May 1952, it was defeated unexpectedly in the French parliament in August 1954. For a brief moment, the entire project of West German rearmament seemed on the brink of collapse. British Foreign Secretary Anthony Eden sought to rally international support for West German accession into NATO as an alternative to the failed EDC, while French Prime Minister Pierre Mendès-France adamantly opposed his efforts. On Christmas Eve 1954, the French parliament voted against West German admission to NATO, dealing a further blow to plans for the Federal Republic's integration into a Western defensive alliance.¹⁰⁷ In this context, the motley group that had opposed West German rearmament over the past five years, including the SPD, unions, and youth group leaders as well as prominent academics, coalesced into a short-lived coalition that aimed to deliver a final defeat to Adenauer's foreign policy.¹⁰⁸

¹⁰⁶ Andreas Permien also identifies the fall of 1950 and the winter of 1954-55 as the periods of most intense debate about West German rearmament: Permien, *Protestantismus und Wiederbewaffnung*, 47.

¹⁰⁷ Large, *Germans to the Front*, 212-221.

¹⁰⁸ *Ibid.*, 229-230.

As representatives of the only German institution that crossed the East-West border, EKD leaders, especially the group around Gustav Heinemann and Martin Niemöller, had played a leading role in the anti-rearmament movement in the years prior to the final debates over the expansion of NATO. Following his resignation from Adenauer's cabinet, Heinemann established the All-German People's Party (*Gesamtdeutsche Volkspartei*, or GVP) in November 1952, with the express purpose of preventing West German rearmament. The party found its core base among Protestants caught between the CDU and the SPD, at the time still officially committed to the privatization of religion. Among Heinemann's co-founders were Confessing Church veterans, including the theologian and longtime peace activist Friedrich Siegmund-Schultze as well as the jurist and *Stimme der Gemeinde* contributor Diether Posser. Despite the party's dismal showing in the 1953 elections, receiving only 1.3% of the national vote, Heinemann continued to publish actively in Protestant organs and organize opposition to rearmament alongside SPD and union leaders.¹⁰⁹ He found particular support for his efforts from the *kirchliche Bruderschaft* in the Rhineland, the postwar successor organization to the regional Confessing Church synod that had formed in 1934 in alignment with the Barmen declaration.¹¹⁰

Protestant leadership in the anti-rearmament coalition that formed in late 1954 built on these earlier efforts. On December 8, a group of prominent Protestant theologians and church leaders, including the Rhineland *kirchliche Bruderschaft* chair Joachim Beckmann, as well as

¹⁰⁹ Permien, *Protestantismus und Wiederbewaffnung*, 15-17; Tim Schedel, "Gesamtdeutsche Volkspartei (GVP)," <https://wiki.de.dariah.eu/pages/viewpage.action?pageId=46433784> (accessed April 15, 2018).

¹¹⁰ "Erklärung der 'Kirchlichen Bruderschaft im Rheinland' Herbst 1952," in *Kirche und Kriegsdienstverweigerung: Ratschlag zur gesetzlichen Regelung des Schutzes der Kriegsdienstverweigerer, erstattet durch den vom Rat der Evangelischen Kirche in Deutschland eingesetzten Ausschuß und vom Rat der Evangelischen Kirche angenommen*, ed. Rat der Evangelischen Kirche in Deutschland (München: Kaiser, 1956), 53; "Erklärung der Kirchlichen Bruderschaft im Rheinland, im November 1954 in Leverkusen," in *Kirche und Kriegsdienstverweigerung*, 57-58. See also Buchstädt, *Kirche für die Welt*, 207-217. On the formation and activities of the Rhineland *Bruderschaft* during the Nazi years, see Buchstädt, *Kirche für die Welt*, 12-24; on the group's postwar reconstitution (first as the *Bruderschaft rheinischer Hilfsprediger und Vikare* in October 1945, until its renaming in June 1947), see Buchstädt, *Kirche für die Welt*, 46-76.

Friedrich Delekat, Helmut Gollwitzer, Martin Niemöller, and Ernst Wolf sent a letter to all Bundestag delegates imploring the legislature not to proceed with rearmament or military conscription.¹¹¹ The political activism of the anti-rearmament coalition culminated in a rally at the Frankfurt Paulskirche on the evening of January 29, 1955, broadcast on radio throughout West Germany. Lay Protestant jurists such as Heinemann, as well as theologians including Niemöller and Barth, played a prominent role in organizing the protest. Helmut Gollwitzer gave a speech calling for German reunification, and the rally concluded with the issuing of a "German Manifesto" demanding a four-power settlement that would end Germany's postwar division.¹¹² In the end, however, the Paulskirche movement had little effect on the outcome of West German rearmament. Following British threats to remove troops from the European continent, the French parliament finally approved of West German membership in NATO. The Bundestag ratified the Paris Treaties on February 27, followed by the Bundesrat on March 18, and President Heuss signed the treaties into law on March 24.¹¹³

The failure of the Paulskirche movement and of the subsequent Bundestag ratification of the Paris Treaties led to a concerted effort by conservative Lutherans to strip opponents of rearmament of their leadership positions in the Protestant Church. Supporters of Adenauer called for Gustav Heinemann's removal as EKD synod president, on the basis that a "party politician" could not represent the entire Protestant laity. At the synod meeting in early March 1955, Heinemann lost his bid for reelection by a vote of 77-40 to Constantin von Dietze. Following

¹¹¹ "Erklärung einer Gruppe evangelischer Persönlichkeiten an alle Abgeordneten des Bundestages vom 8.12.1954," in *Kirche und Kriegsdienstverweigerung*, 58.

¹¹² Helmut Gollwitzer, "Rede in der Paulskirche," *Junge Kirche*, February 15, 1955. On these events, see Greschat, *Protestantismus im kalten Krieg*, 170-171; Large, *Germans to the Front*, 229-233; and Permien, *Protestantismus und Wiederbewaffnung*, 56-59.

¹¹³ Large, *Germans to the Front*, 223, 232.

Dietze's election, the synod voted not to take a stance on rearmament, amounting to tacit consent given the vehement opposition that had previously emerged within segments of the Protestant churches.¹¹⁴ Simultaneously, leaders of the United Lutheran Church threatened to conduct their foreign relations independently if Niemöller were not removed as president of the EKD's Foreign Office, a demand to which the EKD Council acceded in June 1956.¹¹⁵

Although they suffered a series of political and ecclesiastical defeats with West German entry into NATO, opponents of rearmament succeeded in defining the Church's subsequent stance on conscientious objection. Support for conscientious objection was not a mere compensatory measure following political defeat on the rearmament question. Rather, these figures drew on new interpretations of the relationship between conscience and political decisions that arose in debates about the Christian resistance to Nazism over the preceding years, in order to defend an expansive right of freedom of conscience within West German constitutional democracy. Moreover, despite rifts among Protestant church leaders and lay intellectuals over rearmament, Lutherans widely concurred with the defense of conscientious objector rights, a product of their own theological reorientation.

At a meeting with members of Theodor Blank's rearmament office on March 4, 1955, EKD representatives including Niemöller, Gollwitzer, Scheuner, and Hermann Kunst, the EKD liaison to the West German government, embarked on a prolonged effort to expand the right of conscientious objection. Claiming to represent West Germany's Protestant laity, the Church's intellectual leaders drew explicitly on the notion of conscience that had gained wide acceptance among Protestant thinkers in the preceding years. Niemöller insisted that conscientious objector

¹¹⁴ Permien, *Protestantismus und Wiederbewaffnung*, 60-61.

¹¹⁵ Schmidt, *Niemöller*, 226-231.

status should not be reserved for those who made "fundamental decisions against any service in war," since such decisions rested on an "idealist, absolutely unevangelical and unreformed concept of conscience." Gollwitzer concurred that since the promulgation of the Basic Law, the state no longer controlled "which material grounds justify laying claim to the protection of Article 4, Paragraph 3." The crucial point of disagreement hinged on the relationship between conscientious objection and the right of resistance. Whereas members of the Blank's office expressed concern that an expansive reading of Article 4 could too easily bleed into a general right of resistance or civil disobedience, Gollwitzer and Niemöller in particular were at pains to explain the distinction. According to these Confessing Church veterans, Article 4 would accommodate individuals who would otherwise feel compelled on the basis of conscience to engaged in disobedience. Article 4 belonged, in Gollwitzer's words, to the "self-understanding of the state," providing a moral basis for politics that linked the will of the individual to the common good.¹¹⁶

The most influential body to articulate the emergent Protestant consensus on conscientious objection was the commission established by the EKD Council in March 1955 following the unanimous authorization of the synod.¹¹⁷ The synod committee that proposed the formation of an official EKD commission on the issue already recognized that "discretionary political questions" might require a "moral decision" and therefore remained "questions of

¹¹⁶ "Bericht über die Besprechung am 4. März 1955 über das Ausführungsgesetz zu Art. 4 Abs. 3 Grundgesetz," EZA 2/2576. See also Niemöller to Niemeier, March 31, 1955, EZA 2/2576. For the recommendations for a constitutional amendment submitted by the Hesse-Nassau *Landeskirche*, which the EKD Council elected not to adopt, see: "Beschluss der Kirchenleitung der Ev. Kirche in Hesse und Nassau zur Frage der Kriegsdienstverweigerung. O.O., 28. September 1953," *Protokolle*, vol. 7, eds. Pöppig and Beier, 555-557 and "Niederschrift über die Sitzung des Rates der Evangelischen Kirche in Deutschland vom 3.-4. Dezember 1953 in Hannover," *Protokolle*, vol. 7, eds. Pöppig and Beier, 555-557.

¹¹⁷ Kirchenkanzlei der Evangelischen Kirche in Deutschland, ed., *Espelkamp 1955: Bericht über die erste Tagung der zweiten Synode der Evangelischen Kirche in Deutschland vom 6. bis 11. März 1955* (Hannover: Verlag des Amtsblattes der Evangelischen Kirche in Deutschland, [1955]), 486.

conscience."¹¹⁸ Representing a wide range of political and confessional positions, the commission members included Ulrich Scheuner, Hansjürg Ranke, Hermann Kunst, the leader of the Rhineland *Bruderschaft* Joachim Beckmann, as well as representatives of West and East German regional churches.¹¹⁹ Despite their divergent backgrounds, a broad consensus on the meaning of "conscience"—a sphere of individual responsibility before God, necessarily impervious to instruction by the state—enabled the commission members to arrive at a unified position in their memorandum concluded in early December. The commission did not reiterate the Lutheran orthodoxy represented by Walter Künneth or the demand for conscientious objection issued by some members of the EKD *Bruderrat* during the early 1950s, both of which conceived of objection to military service as an act of resistance that could be justified by appeal to a sphere of Christian conscience above politics. Instead, discussion focused on anchoring a Protestant understanding of conscience *within* constitutional law.

Efforts to translate a Protestant conception of conscience into the terms of generally valid law drove the agenda of the conscientious objection commission. Already at the first meeting in May 1955, the members agreed that a declaration of conscientious objection did not simply indicate "an errant conscience that must be tolerated." Rather, individual conscience could come to a legitimate conclusion about the justifiability of military service that diverged from state policy. The state in turn could not assert itself as a "judge over conscience," although it was

¹¹⁸ Ibid., 345. Even the Lutheran pastor Hans Asmussen, the former director of the EKD chancellery and passionate detractor of the movement around Heinemann and Niemöller, reiterated this point in his critique of the Espelkamp synod: see Hans Asmussen, *Vom rechten Gebrauch des Gewissens in politischen Dingen* (Regensburg: Gebrüder Held GmbH [ca. 1955]). Asmussen incorrectly reported that only the views of those who rejected rearmament were represented at the synod.

¹¹⁹ *Espelkamp 1955*, 486-487. Ranke consistently participated as a guest.

permitted to establish standards for evaluating claims of conscientious objection.¹²⁰ At the following meeting in July, both Helmut Gollwitzer and Ulrich Scheuner addressed the committee to lay out positions largely consistent with their statements prior to the conclusion of the Paris Treaties. Gollwitzer called for an expansion of the right of conscientious objection beyond the "restrictive interpretation" advanced by the government. The participants agreed that the legitimate grounds for conscientious objection had to extend beyond principled pacifism, to include objection to military service "in light of modern weapons of mass destruction."¹²¹ Following a lecture by the Confessing Church theologian Friedrich Delekat in September, participants concurred that Article 4 of the Basic Law must not become a "falsehood" based on an overly narrow interpretation¹²² Finally, at their fourth meeting in November, commission members determined to support Niemöller's "evangelical" concept of conscience as "always conscience *in actu*," which must be "highlighted against the Catholic and moralist understanding." On this basis, the memorandum would propose an expansive right of conscientious objection, not as "clemency" but as an "act of statesmanlike wisdom and governmental self-restraint and self-regard."¹²³ A Protestant conception of conscience, the commission members concluded, would endow the state with a moral foundation that would in turn guard against the reappearance of a total state.

¹²⁰ "Niederschrift über die Verhandlungen des Ausschusses für Fragen der Kriegsdienstverweigerung in seiner 1. Sitzung am 17.5.1955 in Bonn," EZA 2/2596.

¹²¹ "Niederschrift über die Verhandlungen der 2. Sitzung des Ausschusses für Fragen der Kriegsdienstverweigerung am 12.7.1955 in Bonn," and Ulrich Scheuner, "Die Stellung der Kriegsdienstverweigerung im Rahmen der Grundrechte," EZA 2/2596.

¹²² Friedrich Delekat, "Was hat die Evangelischen Kirche zur Verwendung des Gewissensbegriffs in Art. 4, 3 GG zu sagen?" in *Evangelische Stimmen zur Frage des Wehrdienstes*, eds. Friedrich Karrenberg and Klaus von Bismarck (Stuttgart: Kreuz-Verlag, 1956), 24-42; "Niederschrift über die Verhandlungen des Ausschusses für Fragen der Kriegsdienstverweigerung auf seiner 3. Tagung am 29.9.1955 in Hannover," EZA 2/2596.

¹²³ "Niederschrift über die Verhandlungen der 4. Sitzung des Ausschusses für Fragen der Kriegsdienstverweigerung am 2. November 1955 in Bonn," EZA 2/2596. This document also outlines the division of the drafting of the memorandum among the committee members.

The memorandum produced by the commission, ratified by the EKD Council on December 19, 1955 with minimal changes, reflected the consensus developed over the course of the meetings.¹²⁴ The crucial sections were drafted by Gollwitzer and Scheuner. The memorandum outlined a framework that would expand conscientious objector rights considerably beyond principled pacifists, while recognizing the government's right to establish administrative boards to examine particular claimants. The document therefore rejected the extremes of both orthodox Lutherans, who likened conscientious objection to resistance for which the claimant should be prepared to suffer, and radical pastors who held that state administrative boards necessarily violated the individual's conscience.

The section of the EKD memorandum composed by Gollwitzer countered the objection that a "Protestant situational ethics" that looked beyond natural law principles was "purely actualistic." Orders and principles provided points of "orientation before the decision," but "the decision remains free." As in his 1953 lecture *The Christian Community in the Political World*, Gollwitzer insisted that such an understanding of conscience be incorporated into the government's conscientious objector legislation: "In light of the widespread misunderstanding that the obligations of conscience lie only in bonds to unchanging principles, [the Protestant Church] will have to present an evangelical understanding of the proper obligations of conscience and demand equal respect for it."¹²⁵ Scheuner put the point less confrontationally, requesting that "Individual consideration on the basis of the particular Protestant concept of conscience [should] not be excluded, even when it must be recognized that the legislator must establish a general standard applicable to different religious and ideological tendencies." For

¹²⁴ "7. Ratssitzung 15. u. 16.12.55 / Berlin," EZA 2/2596.

¹²⁵ *Kirche und Kriegsdienstverweigerung*, 18-20.

both Scheuner and Gollwitzer, the recognition of the Protestant notion of conscience within government legislation was a means of reconciling the state's authority to establish binding laws with the theologically-informed contention that "questions of conscience are not judicable."¹²⁶

Although Walter Künneth published a dissenting opinion, Protestants across the political spectrum, from the peace activist and leader of the German branch of the International Fellowship of Reconciliation Friedrich Siegmund-Schultze to the Lutheran bishop of Hannover Hans Lilje, greeted the EKD memorandum. Advocates of the EKD's position were united not by agreement over rearmament, but in their support for the incorporation of a Protestant conception of conscience into the conscription legislation.¹²⁷ Siegmund-Schultze reiterated a central contention of the drafters in the Confessing Church periodical *Junge Kirche*, arguing that the EKD had overcome the natural law distinction between just and unjust wars. By asking the state to allow each individual Christian to make a decision of conscience about military service, the Protestant Church helped ensure that the Federal Republic would not slide back toward a "total state."¹²⁸ Kunst relied on this argument in his presentation of the EKD memorandum to the Bundestag Defense Committee in early June 1956, in contrast to the natural law formulations of his Catholic counterpart Johannes Hirschmann.¹²⁹

¹²⁶ Ibid., 22-23.

¹²⁷ Walter Künneth, "Berufung auf das Gewissen? Eine theologische Besinnung über den Ratschlag der Evangelischen Kirche in Deutschland zu Kriegsdienstverweigerung," *Evangelisch-Lutherische Kirchenzeitung*, June 11, 1956; "Kirche und Wehrpflicht: Das Echo des 'Ratschlags' der EKD," *Evangelische Welt*, March 16, 1956. For the commentaries cited in the latter article, see "Entscheid des Gewissens," *Sonntagsblatt*, February 19, 1956 and Friedrich Siegmund-Schultze, "Die Evangelische Kirche in Deutschland zur Kriegsdienstverweigerung," *Junge Kirche*, February 15, 1956.

¹²⁸ Siegmund-Schultze, "Evangelische Kirche in Deutschland zur Kriegsdienstverweigerung."

¹²⁹ "Stenographische Protokoll (Sonderprotokoll) der 94. Sitzung des Ausschusses für Verteidigung" (see note 1).

Defending Conscience: Protestant Jurists and the Federal Constitutional Court

The conscription law that entered into force on July 25, 1956, with the support of the CDU-led governing coalition, adhered to the narrow definition of conscientious objector rights of the Defense Ministry's original draft. During the third reading of the bill in the Bundestag on July 6, the government parties voted down amendments introduced by SPD delegates to widen the criteria for conscientious objection along the lines proposed by the Protestant memorandum.¹³⁰ Paragraph 25 of the *Wehrpflichtsgesetz* established that the right of conscientious objection and alternative service outside the Bundeswehr was available only to "whoever on grounds of conscience rejects *participation in any use of weapons between states* and therefore refuses [to participate in] military service with weapons." Commissions established by the Defense Ministry would determine the validity of particular applications.¹³¹ The promulgation of the law immediately aroused consternation in Protestant circles, as the law excluded potential cases in which an applicant for conscientious objector status did not reject all interstate war *per se* but refused to participate in a war between West and East Germany, or a war in which nuclear weapons might be used.¹³² Ulrich Scheuner believed that while the conscription law was not unconstitutional, it "certainly stands at the lower limits of what is possible" and lamentably neglected the Protestant Church's recommendations.¹³³

The ensuing months and years witnessed a shift in the locus of Protestant activism on behalf of conscientious objector rights, from the Defense Ministry and Bundestag to the Federal

¹³⁰ VDBT, 2. Deutscher Bundestag, 159. Sitzung, 6. Juli 1956, 8856. On the debate about the conscription law, see also Large, *Germans to the Front*, 253-257.

¹³¹ "Wehrpflichtgesetz vom 21. Juli 1956," *Bundesgesetzblatt*, July 24, 1956, 657, emphasis added.

¹³² Beckmann to Niemeier, April 7, 1956, EZA 2/2577.

¹³³ Scheuner to [Niemeier], August 23, 1956, EZA 2/2577.

Constitutional Court. As in simultaneous debates about family and school laws, Confessing Church veterans found their arguments considerably better received by the West German judiciary than by the legislature. This comparable success was due not solely to the fact that Protestant jurists and theologians sought an alternative to the natural law models of legal reasoning still dominant within the governing Christian Democratic coalition. Also significant, Protestants' emphasis on defining universal values for the nascent Federal Republic resonated with a judiciary bound to the Basic Law's guarantee of religious neutrality.

Adolf Arndt, who had recently concluded his role as representative of the state of Hesse in opposing the validity of the *Reichskonkordat*, quickly emerged as the leading Protestant jurist to represent conscientious objectors before the Constitutional Court. Arndt drew on arguments derived in large part from the intra-Protestant debates about conscientious objection of the preceding years. As an SPD parliamentarian since 1949, Arndt had been among the most vocal opponents of rearmament in the Bundestag. In 1952-53, he filed a series of petitions with the Constitutional Court, claiming that the constitutional amendment passed by the CDU coalition to enable the ratification of the Paris Treaties violated the core principles of the Basic Law.¹³⁴ Defending an expanded right of conscientious objection at the Bundestag's third reading of the conscription law in July 1956, Arndt made continual reference to the EKD memorandum.¹³⁵

Arndt's argument for an expansive right of conscientious objection leaned heavily on Rudolf Smend's theory of objective constitutional values as the basis for fundamental rights, which was widely adopted by Protestant jurists during the early 1950s. No single conception of natural law, according to Arndt, could serve as the sole foundation for the basic rights, given the

¹³⁴ Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951-2001* (Oxford: Oxford University Press, 2015), 14-28.

¹³⁵ VDBT, 2. Deutscher Bundestag, 159. Sitzung, 6. Juli 1956, 8839.

confessional and ideological diversity of German society. Rather, "the basic rights are no longer only entitlements [*Berechtigungen*] but foundations of legitimacy and the order of the state itself, which regulate its self-understanding as a state." To such a self-understanding belonged the principle that "[the Federal Republic] is a state that does not make demands on conscience, not even for military service." Against this broad principle of freedom of conscience, the particular basis for a claim of conscientious objection—whether Catholic natural law doctrine, the "much farther reaching doctrine of faith of the Protestant Church," or a secular-humanist "'moral law within myself'"—receded in significance.¹³⁶ The constitutional value of "conscience" underwriting the identity of the state defined a framework within which particular definitions of conscience could coexist without threatening the legal order.

Smend's constitutional theory, as well as the broader Protestant argument for the rights of "situational" conscientious objectors, framed the petitions Arndt brought before the Court beginning in August 1956 on behalf of a group of university students who rejected military service only "in a divided Germany."¹³⁷ Arndt alleged that the recently enacted conscription statute constituted an immediate violation of these students' rights under Article 4 of the Basic Law. Citing a range of Protestant sources, including the EKD memorandum as well as Barth's *Church Dogmatics*, Arndt rejected the expectation that Christians suffer for following their conscience, the position articulated during the Church Struggle by both Confessing Church leaders and non-aligned Lutherans. Rather, Arndt argued, claims of conscience should be recognized within the legal order: State and church are "not comparable let alone exchangeable quantities. That the church demands of its believers the willingness to suffer in the fulfillment of

¹³⁶ Adolf Arndt, "Das Grundrecht der Kriegsdienstverweigerung," *Neue Juristische Wochenschrift* 10 (1957): 361-363, emphasis added.

¹³⁷ Arndt to Bundesverfassungsgericht, August 10, 1956, Bundesarchiv Freiburg (BAF) BW 1/313599.

its commands, even to suffer injustice, does not allow one to conclude that the state is also authorized to require a believer to incur suffering through state law on account of his belief. A state that desires this acts immorally."¹³⁸ Against the Defense Ministry's argument that Article 4 constituted a "right of exception [*Ausnahmerecht*]" exempting individuals from the requirements of generally valid law, Arndt posited a connection between Article 4 and the experience of National Socialism. The purpose of the right was to signal the Federal Republic's respect for the conscience of all its citizens, in contrast to "the emergency of conscience during the years of National Socialist tyranny and total war." Freedom of conscience gave legitimacy to the "communality" of the West German state, a feature that fundamentally distinguished the "free *Rechtsstaat*" from an "authoritarian and totalitarian political system." The right of conscientious objection therefore did not pit individual conscience against the national community but served as a means of integration, a fundamental pillar of the political community. According to Arndt, the Protestant conception of conscience was sufficiently expansive to serve as the basis for legislation that respected the equal rights of all citizens regardless of religious belief, in contrast to the Catholic notion of "objectively correct conscience."¹³⁹

Gustav Heinemann, along with his Essen law partner and former GVP colleague Diether Posser, issued a similar petition to the Constitutional Court in November 1956. Like Arndt, Heinemann and Posser drew deeply on Protestant sources, citing the EKD memorandum and calling for the Rhineland prelate Joachim Beckmann to be invited to speak at the Court's oral proceedings.¹⁴⁰ The inclination of these jurists to move freely and without distinction between

¹³⁸ Arndt to Bundesverfassungsgericht Erster Senat, December 10, 1957, BAF BW 1/49163. See also Arndt's petitions to the Bundesverfassungsgericht of January 23, 1957 and March 11, 1957 in BAF BW 1/313599.

¹³⁹ Arndt to Bundesverfassungsgericht Erster Senat, March 16, 1959, BAF BW 1/49163, quoted pp. 454, 457, 505.

¹⁴⁰ Heinemann and Posser to Bundesverfassungsgericht, November 22, 1956, BAF BW 1/94602. See also the petition by the attorney Martin Löffler to Bundesverfassungsgericht, July 27, 1956, BAF BW 1/94602, which cited

legal and theological arguments is indicative of the intense interpenetration of the two disciplines in intellectual circles around the EKD during the early postwar years. While Protestant jurists did not understand the church as a legislator that could pronounce binding claims on the state, they drew on theology as a repository of values that could be brought to bear on constitutional law in the service of worldly justice.

The eventual rulings of West Germany's highest courts on conscientious objection in the late 1950s and early 1960s modified the original conscription law in a direction consistent with the arguments of the Protestant jurists and church leaders who had long lobbied for a more expansive interpretation of Article 4. The Federal Administrative Court issued a series of rulings in 1958-59 that concurred with Adolf Arndt's arguments. Without striking down the conscription law as unconstitutional, the Administrative Court definitively rejected a restriction of conscientious objector rights to principled pacifists or members of the historic peace churches. Rather, the right of conscientious objection was available to all those who demonstrated an "earnest decision of conscience," one that "is a binding force for the person affected, such that acting against it would damage or destroy the moral personality." Like the EKD memorandum and Protestant jurists including Arndt, Heinemann, and Posser, the Administrative Court determined that what counted was the seriousness of one's appeal to conscience, not the particular criteria on which one objected to military service.¹⁴¹

The first Constitutional Court ruling on the matter came over a year later on December 20, 1960, in response to a petition for judicial review submitted by the Schleswig-Holstein

Rudolf Smend in an argument for the unconstitutionality of restrictions on conscientious objection. On Posser, see Philipp Stoltz, "Posser, Diether," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Posser%2C+Diether> (accessed April 15, 2018).

¹⁴¹ "Berechtigung zur Verweigerung des Kriegsdienstes mit der Waffe," *Neue Juristische Wochenschrift* 12 (1959): 353-356; "BVerwG, Urteil v. 24.7.1959," *JuristenZeitung* 14 (1959): 640-641.

Administrative Court challenging the constitutionality of paragraph 25 of the conscription law. In a convoluted piece of legal reasoning, the Constitutional Court neglected to invalidate the conscription law but offered a reinterpretation that went part of the way toward breaking down the barrier between "conscience" and political decisions for which Protestants had long argued. In addition to principled pacifists, the Court ruled, administrative boards must recognize as conscientious objectors individuals who rejected military service due to "experiences or considerations...that are valid only for the immediate historical-political situation, without needing to be valid for every time and for every war." In such instances, only the "motive" but not the "content, the immediate goal of the objection" was "conditional upon the situation."¹⁴²

The Constitutional Court's final ruling on the petitions of Arndt, Heinemann, and other attorneys who challenged the conscription law, representing forty-three plaintiffs in all, came on April 18, 1961. Upholding its decision of the previous December, the Court extended the right of conscientious objection to those who rejected *all* war in light of current political circumstances.¹⁴³ Heinemann greeted this decision as a crucial expansion of the right to freedom of conscience.¹⁴⁴ Although the Court did not fully recognize a "situational" conception of conscience as valid in constitutional law, it accepted Protestants' more general claim that decisions of conscience followed from a wide range of motivations, including political circumstances, not only from general principles.

¹⁴² "Beschluß vom 20. Dezember 1960," *Entscheidungen des Bundesverfassungsgerichts* 12 (1962): 45-61, quoted 60.

¹⁴³ "Urteil vom 18. April 1961," *Entscheidungen des Bundesverfassungsgerichts* 12 (1962): 311-318, especially 317-318. For the full list of petitions considered in this judgment, including those submitted by Arndt, Heinemann and Posser, and Löffler, see the invitation to oral proceedings that took place on May 10, 1960: Bundesverfassungsgericht Erster Senat to Bundesminister für Verteidigung, April 12, 1960, BAF BW 1/94601.

¹⁴⁴ Gustav Heinemann, "Der Verfassungsverstreit um die Kriegsdienstverweigerung," *Junge Kirche*, September 10, 1961.

Conclusion

Protestant participation in the public debate about the scope of conscientious objector rights, as in debates about family and school laws, served as an important bridge between the largely hostile attitudes of Protestant intellectuals toward constitutional democracy before 1933 and the movements for the expansion of participatory democracy that emerged around the *kirchliche Bruderschaften* in the 1960s. In both sets of debates, intellectuals around the EKD moved away from early postwar rhetoric of the "theological foundations" of law toward a new emphasis on instantiating theologically-rooted categories of "institutions" and "conscience" within constitutional law as the basis for common political life. Processes of theological-legal translation during the 1950s had a significant impact not only on the shape of West German constitutional law but on Protestant valuations of constitutional democracy. At the outset of the 1950s, Protestant intellectuals and church leaders who engaged in discussions of conscientious objection operated within a theological landscape in which worldly politics and the individual's connection to the divine, "discretionary political decisions" and "decisions of conscience," functioned as discursive antinomies. Yet the question of conscientious objection gave cause to challenge these binaries and in turn the larger framework of traditional interpretations of Luther's two kingdoms doctrine on which they rested. In particular, Protestant efforts to affirm the legacy of the July 20 movement against the political far right lent conceptual and rhetorical tools to the defense of a *Rechtsstaat* and the place of conscientious objector rights within it.

The conception of constitutional democracy to which Protestant intellectuals appealed in defending conscientious objector rights remained ambivalent, and often highly conservative. Protestant discussions of the Nazi-era resistance, in which the notion of conscience later championed before the Constitutional Court took shape, focused solely on Christian-dominated

movements around the military and aristocracy, whose postwar aspirations were decidedly undemocratic. The term "conscience" itself, moreover, invoked lone individuals proclaiming the limits of their obedience to the state based on their deepest personal convictions. As much as Protestant thinkers such as Helmut Gollwitzer emphasized that individual conscience could be sharpened by the Christian community, the very "evangelical" notion of conscience to which Protestant theologians and jurists appealed insisted that the individual's conscientious decision on military service was sacrosanct. This was firmly a language of individual rights, rather than of political participation. Nevertheless, Protestants' defense of an expansive right of conscientious objection aimed to endow the individual with a far greater measure of political agency than traditional two kingdoms theologies, which some Lutheran theologians continued to expound well into the 1950s.

The defense of the *Rechtsstaat* by Protestant jurists as a superior form of political and legal organization, a product of reflection on the wartime resistance and its lessons for the postwar state, represented a significant turn away from the deep suspicion toward constitutional democracy dominant among Protestant intellectuals before 1933 and especially during the Second World War. Rather than a cacophony of individual wills, constitutional democracy rooted in a strong guarantee of fundamental individual rights now appeared as a state form that reconciled Christian morality with the dictates of generally valid law. The citizen's rights before the state overlapped with the sphere of inviolable Christian freedom of conscience before God, facilitating the Christian's integration into the political community rather than sowing the seeds of dissent.

Chapter Five: The Law of Reconciliation: German Protestants and International Law in a Divided World

By the late 1950s, Protestant intellectuals confronted a political landscape that had changed markedly since the end of the Second World War. West Germans enjoyed the fruits of the 1950s "economic miracle," as Economics Minister Ludwig Erhard's program of high exports and industrial co-determination led to wide gains in consumption. Christian Democrats reached the height of their power with a historic absolute majority in the federal election of September 1957, a victory for the "social market economy" and Konrad Adenauer's foreign policy of Western integration. Yet notwithstanding the stability engendered by economic reconstruction, the 1950s were hardly a period of placid, consensus-based politics. As the previous two chapters have shown, beneath the veneer of interconfessional cooperation around the CDU, Protestant academies and political committees served as sites of impassioned debate over West German identity, the relationship between citizen and state, and role of religion in democratic politics. An increasingly prominent wing of the Protestant churches, which not only included the intellectual descendants of Karl Barth and the Confessing Church Provisional Government but extended well into the mainstream of the EKD, dissented from CDU positions on social policy and military conscription. At the judicial level, Protestants outside the CDU fold were beginning to find success by criticizing the natural law rhetoric of the Christian Democrats as incompatible with religious freedom in a pluralist democracy. They did not, of course, believe that jurisprudence should aspire to value neutrality. Inspired in part by Rudolf Smend, Protestant jurists, politicians, and theologians argued that an ethic of tolerance, responsibility, and freedom of conscience, more than the putatively natural hierarchies championed by contemporary Catholic natural law doctrines, formed the foundation for shared values of constitutional citizenship.

Confessional division, along with rising Protestant ambition to shape West German law around notions of Christian values, formed the context for the most trenchant critique of West German political culture undertaken by the Protestant Church. In November 1965, the EKD Council released a memorandum entitled "The Fate of the Expellees and the Relationship of the German People to its Eastern Neighbors," authored by the EKD Commission on Public Responsibility. The memorandum set off an arduous public debate, extending from West Germany's leading newspapers and political magazines to civil society associations to the halls of parliament and government. The *Ostdenkschrift*, as the memorandum became popularly known, called on the West German government to recognize the border along the Oder and Neisse rivers established by the Potsdam Agreement, effectively ratifying the expulsion of twelve million Germans living east of the Oder-Neisse line after the Second World War. The memorandum advanced a critique not only of the CDU but of West German politics as a whole. The opposition Social Democrats and Free Democrats, seeking to court the eight-million strong expellee vote, had joined the CDU in adopting an uncompromising stance against the Oder-Neisse border. The government's official policy held that determination of Germany's eastern boundary should await a final peace settlement concluded with an all-German government. In practice, West German leaders tacitly condoned the restorationist rhetoric of the expellee lobby.¹

Historians of the German expellees have regarded the *Ostdenkschrift* as a turning point in public debate about the postwar German border, paving the way toward the December 1970 Treaty of Warsaw.² Signed by the Polish Prime Minister Józef Cyrankiewicz and West German

¹ Pertti Ahonen, *After the Expulsion: West Germany and Eastern Europe, 1945-1990* (Oxford: Oxford University Press, 2003).

² Ahonen, *After the Expulsion*, 203-208; Katarzyna Stokłosa, *Polen und die deutsche Ostpolitik* (Göttingen: Vandenhoeck & Ruprecht, 2011), 122-131. Recently, Andrew Demshuk has criticized the historiography of expellee politics for its top-down focus on high-level lobbyists and government officials and its inattention to ordinary expellees, who, Demshuk argues, abandoned hopes for a literal return to the *Heimat* well before the Eastern treaties.

SPD Chancellor Willy Brandt, the treaty recognized the Oder-Neisse line and committed both countries to nonviolence. However, the significance of the memorandum's origins within the Protestant intellectual milieu is rarely considered. Scholars have accepted the EKD's self-proclaimed role as a moral arbiter of national politics, without taking into account the processes of theological debate and political reorientation that underlay—in light of the Protestant churches' history as bastions of German nationalism—the unlikely creation of the document.

In this chapter and the one that follows, I contend that Protestant political activism during the 1960s underwent a marked shift: from intervention in isolated domains of constitutional law, in efforts to assume a mediating role between Catholic and secularist political programs, toward the identification of Protestant ethical norms as the foundations of West German constitutional interpretation and political culture more broadly. According to an emergent political theology, which the *Ostdenkschrift* both exemplified and helped to shape, the Protestant churches must assume responsibility not only for the spiritual salvation of the flock but for the well-being of the state. The story of the creation of the *Ostdenkschrift* illuminates the dynamics of Protestant politics as the EKD articulated a claim to embody the core values of West German democracy amidst the social and cultural transformations of the 1960s.

Ongoing discussions about the relationship between divine justification and this-worldly justice provided the vocabulary through which Protestants contested the postwar international settlement. In part, the debates that led to the *Ostdenkschrift* reignited theological controversies over natural law and historical revelation that extended back to the Nazi era. The crucial legal

See Andrew Demshuk, *The Lost German East: Forced Migration and the Politics of Memory, 1945-1970* (New York: Cambridge University Press, 2012) and in particular Demshuk, "What was the Right to the *Heimat*? West German Expellees and the Many Meanings of *Heimkehr*," *Central European History* 45 (2012): 523-556. However, Demshuk does not explain why the expellee lobby continued to wield significant rhetorical power in the early Federal Republic, despite the absence of a popular base, and why West German policy on the Oder-Neisse border shifted rapidly in the late 1960s.

category that pervaded discourse about the Oder-Neisse border, the "right to the homeland [*Recht auf Heimat*]," sat at the nexus of theological and legal reasoning. Like the concepts of "institutions" and "conscience" that Protestants debated during constitutional law reforms of the 1950s, the "right to the homeland" served as a site of dispute between two theological camps. One sought to realize the church's mission in the world through the proclamation of laws of political order; the other advanced a more mutable, metaphorical, and historicist interpretation of rights, in light of human frailty and the ultimate unknowability of divine will. Adopting the former stance, a number of Christian expellee leaders, both Catholic and Protestant, sought to buttress the claim of postwar expellee associations to an international "right to the homeland" through a language of divine natural law. At the same time, alternative theological motifs provided Confessing Church veterans with a means of criticizing such claims. How could one be certain that God endorsed one's "right to the homeland," and that the expulsions themselves were not rather the product of divine will? Did not the assertion of an absolute right to a particular territorial domain violate the injunction against "self-justification" at the core of postwar Protestant theologies?

As much as debates about the "right to the homeland" proceeded along established fault lines of Protestant thought, they also exemplified a shift in political sensibilities and argumentative strategies. In the late 1940s, Protestant leaders had invoked motifs of divine sovereignty, the incompleteness of human law, and the importance of tempering justice with mercy in order to advocate for the granting of clemency to convicted war criminals. They asserted that mere human courts could not prosecute crimes committed under the calamity of war, which could be judged ultimately by God alone. By the early 1960s, however, numerous Protestant theologians and lay intellectuals, some of whom had participated in early postwar

clemency campaigns, drew on a similar language to renounce narratives of exclusive German victimhood. Certainly, the end of the Allied occupation in 1955, West Germany's rising material prosperity, and the beginnings of generational change created conditions that encouraged a reconsideration of Nazi crimes in broader European and international perspective.³ But the generational revolt that would lead to a sea change in popular attitudes toward the Nazi past was still years away. Rather, widespread Protestant support for the renunciation of the territories east of the Oder-Neisse line already by the late 1950s reflected new understandings of the churches as sources of shared political values. In debates around 1960 about East-West relations, Protestants intellectuals increasingly referred to "reconciliation [*Versöhnung*]" as precisely such a value. Rather than the antinomy of law—such that, for instance, criminal prosecutions of Nazi officials should be abandoned for the sake of postwar reconciliation—reconciliation was redefined as a constitutive and necessary component of law. Reconciliation became a category under which Protestant thinkers and church leaders asserted the role of the church as a source of ethical norms to guide political decision making.

The theological reorientation that resulted in the *Ostdenkschrift* transcended the divide between "Barthian" and "Lutheran" wings of the Protestant intellectual milieu. The "Working Group of Church Brotherhoods [*Arbeitskreis kirchlicher Bruderschaften*]," founded in 1958 as an umbrella association of the regional successor organizations to the Confessing Church, pioneered a theology of Christian reconciliation. Confessing Church veterans were not the only Protestants to engage critically with West German foreign policy, however. Even before the formation of the *Arbeitskreis kirchlicher Bruderschaften*, a group of theologians and jurists

³ On the impact of generational shift on West German memories of Nazism, see Philipp Gassert and Alan E. Steinweis, eds., *Coping with the Nazi Past: West German Debates and Generational Conflict, 1955-1975* (New York: Berghahn, 2006).

affiliated with Protestant expellee associations had already offered a theological critique of the *Heimatrecht* concept. Ultimately, a confluence of several events in the late 1950s—in particular, the opening of a new round of Nazi criminal trials in 1958 and Konrad Adenauer's renewed assertion of a hard line on the Oder-Neisse border in 1959—brought the concerns of expellee theologians to the fore of Protestant political discourse and to the attention of the *Arbeitskreis kirchlicher Bruderschaften*. Crossover figures affiliated with both the *Bruderschaften* and the more mainstream Commission for Public Responsibility raised the issue of the Oder-Neisse border with the EKD leadership. The *Ostdenkschrift* in turn reflected the Protestant Church's new claim to serve as an arbiter of national values.

Theologies of Law in Protestant Expellee Discourse

Protestant engagement in debates about Germany's postwar borders long predated the *Ostdenkschrift*. Well before the EKD Council and Confessing Church successor organizations became concerned with the issue, a small group of Protestant theologians and lay intellectuals who were themselves German expellees from Eastern Europe drew upon resources in contemporary Protestant theology to challenge the majority position of the organized expellee lobby. By the mid-1950s, the "Christological" theology of law pioneered by Karl Barth and his German allies provided a framework for expellee pastors who sought to reframe the *Heimat* concept in metaphorical rather than literal terms, and to promote an ideal of reconciliation rather than retribution as the basis of postwar international law. Expellee pastors translated theological innovations of the Confessing Church to the domain of international law, in ways that the EKD Commission on Public Responsibility would later adopt.

The wider landscape of expellee politics in West Germany was dominated by a small number of lobbying organizations headed by local notables of the pre-1945 Eastern German territories, many of whom had been NSDAP members. These associations vested their political interests not only in securing the wellbeing of expellees in West Germany, but in propagating narratives of victimhood and loss. Expellee leaders insisted on a right of resettlement in their former "homelands," often linking this claim to a demand for a peace treaty that would revise the borders established by the Potsdam Agreement. Expellee groups faced divergent legal situations. While Silesian, Pomeranian, and East Prussian expellees could argue for the restitution of Germany's pre-1937 territories, Sudeten Germans could only press their claim for the incorporation of the Sudetenland into a reunified Germany by asserting the validity of the September 1938 Munich Agreement, a point challenged even by the mainstream of West German jurists and politicians. Separate organizational networks and divergent political interests led to the founding of "homeland societies" [*Landsmannschaften*] to represent distinct regional expellee groups by the late 1940s. Nevertheless, twenty such associations formed an umbrella association, the *Vereinigte Ostdeutsche Landsmannschaften*, in August 1949, later renamed the *Verband der Landsmannschaften*, in order to represent expellee interests as a united front before the Bonn government.⁴

The earliest public advocates for a "right to the homeland" were international lawyers, a group whose professional fortunes declined precipitously during the Nazi years and who sought to reestablish themselves around the postwar *Jahrbuch für internationales und ausländisches öffentliches Recht*.⁵ Ideologically, continuities remained. For West German international lawyers,

⁴ Ahonen, *After the Expulsion*, 29-31.

⁵ On the revival of international law in West Germany, see Lora Wildenthal, *The Language of Human Rights in West Germany* (Philadelphia: University of Pennsylvania Press, 2013), 45-62.

a right to the homeland could be derived from the framework of national self-determination, a concept widely invoked during the Weimar and Nazi periods to champion the incorporation of German national minorities abroad into the Reich territory. Unsurprisingly, many international lawyers were vociferous critics of the Allied occupation, especially the denazification and war crimes trials programs, and they understood the expulsions as one element of "victor's justice." Echoing the wider legal critique of the occupation, these jurists insinuated that occupation policies rested on vindictive practices with no legal basis, appealing to prohibitions against expulsions in the Universal Declaration of Human Rights, the 1949 Geneva Convention, as well as earlier sources such as the Hague Conventions. They found further support in the provision of the Potsdam Agreement specifying that the final borders of Germany would be determined only in a future peace settlement. Left out of the discussion was an assessment of how such a right to the homeland was to be realized under Cold War conditions, especially given the rapid resettlement of East Prussia and the Sudetenland as well as the German Democratic Republic's ratification of the Oder-Neisse line in 1950.

The most vociferous advocate of expellees' "right to the homeland" was the Hamburg jurist Rudolf Laun, a co-founder of revived *Jahrbuch für internationales und ausländisches öffentliches Recht*. A proponent of "national self-determination" and of the federalist unity of Germany, Austria, and the Sudetenland before 1933, Laun continued to publish during the Third Reich without "alter[ing] his scholarly work to suit the new regime" and rose to prominence after 1945 as one of the few academic jurists whose reputation remained unscathed.⁶ Laun's postwar writings combined his earlier ideas of popular sovereignty and self-determination with an uncompromising critique of the postwar treatment of Germans. Speaking before the First Federal

⁶ Ibid., 47-51.

Congress of the *Vereinigte Ostdeutsche Landsmannschaften* in January 1951, Laun invoked the specter of the "collective guilt" charge. Many Germans had initially supported Hitler for "idealistic" reasons, he argued; moreover, individuals living under dictatorship could not be held responsible for the actions of their government. The postwar international order must be based not on a historical reckoning with German guilt, but on the rights that individuals and sub-national groups retained as subjects of international law. Even though the eight million expellees living in West Germany had immediately been granted West German citizenship, each should be able to claim, under Article 13 of the Universal Declaration of Human Rights, a right of "return to his country."⁷ The claims advanced by Laun and his colleagues at the *Jahrbuch* represented a dominant strand of human rights thinking in postwar West Germany. Appeals to universal rights went hand in hand with silence on the historical circumstances of the expulsions.⁸

The EKD, alongside the Catholic Church, participated in expellee politics from the beginning of the occupation period. Although the EKD insisted on the integration of expellees into the existing Protestant churches rather than permitting the former churches east of the Oder-Neisse line to reconstitute themselves, Church administrators encouraged the formation of Protestant expellee organizations under the umbrella of the EKD chancellery. In the early years of the Allied occupation, the Protestant Relief Association organized "aid committees" to provide for both the spiritual and material welfare of Protestant expellees, which in March 1949 joined to form the Eastern Church Committee (*Ostkirchenausschuss*) as a subsidiary organ of the

⁷ Rudolf Laun, *Das Recht auf Heimat* (Hannover: Hermann Schroedel Verlag, 1951). Article 13, Paragraph 2 of the Universal Declaration reads: "Everyone has the right to leave any country, including his own, and to return to his country." See United Nations, "Universal Declaration of Human Rights," <http://www.un.org/en/universal-declaration-human-rights/> (accessed April 15, 2018).

⁸ Hartwig Bülck, "Das Recht auf Heimat," *Jahrbuch für internationales und ausländisches öffentliches Recht* 3 (1950/51): 58-84; Rudolf Laun, *Die Menschenrechte* (Hamburg: Rechts- und Staatswissenschaftlicher Verlag, 1948).

EKD. Two years later, the Convent of the Dispersed Eastern Protestant Churches (*Konvent der zerstreuten evangelischen Ostkirchen*) was formed by Protestant expellee pastors as a more explicitly political organization. The Convent did not maintain official ties to the EKD but sought to bring a religious perspective to expellee work throughout West Germany.⁹

As in ongoing debates about war crimes trials during the early 1950s, Protestant theologians and lay intellectuals advanced arguments concerning the "right to the homeland" that went beyond the positivist pretensions of mainstream jurisprudence to stress the theological foundations of worldly justice. Moreover, jurists echoed the theological argumentation advanced in Christian circles to garner moral legitimation before domestic and international authorities. Thus, the Protestant attorney and Silesian *Landsmannschaft* chair Julius Doms argued in a 1953 lecture that "peoples [*Völker*]" were "created by God" according to "natural law," such that a natural right of national self-determination rested on divine legitimation.¹⁰ Yet Protestant expellee associations hardly espoused a unified theological framework. Within the *Ostkirchenausschuss* and especially the *Konvent der zerstreuten evangelischen Ostkirchen*, Protestant expellee leaders such as Doms put forth increasingly strident assertions of a divine "right to the homeland." At the same time, competing currents of postwar Protestant theology provided ammunition for pastors who prioritized reconciliation, even under Cold War circumstances, over the assertion of immutable rights.

On August 5, 1950, representatives of the regional German expellee associations gathered for their first common meeting, issuing a statement that exemplified the tension

⁹ Tim Schedel, "Konvent der zerstreuten evangelischen Ostkirchen," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Konvent+der+zerstreuten+evangelischen+Ostkirchen> and Schedel, "Ostkirchenausschuss," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/pages/viewpage.action?pageId=47284384> (accessed April 15, 2018).

¹⁰ Julius Doms, *Gedanken zum Recht auf Heimat*, 2nd ed. (Düsseldorf: Wegweiser Verlag, 1956), 11-12.

between competing theological appraisals of the *Heimat*. Proclaimed "in consciousness of our responsibility before God and humanity," the Expellee Charter [*Charta der Heimatvertriebenen*] blended the promise of reflection and reconciliation with a language of divine right. "We expellees renounce revenge and retaliation," the statement declared. "We will support this beginning with all means that are directed toward the creation of a united Europe, in which peoples can live without fear and force." Yet the Charter was also the first document of the expellee movement to proclaim a "right to the homeland":

We lost our homeland. The homeless are foreigners on this earth. God placed people in their homeland. Separating people from their homeland by force means to kill them in spirit. We have suffered and experienced this fate. Therefore, we feel called to demand that the right to the homeland be recognized and realized as one of the fundamental laws of humanity given by God.¹¹

This double move in the expellee Charter signaled a tension that would come to characterize the expellee movement's adoption of Christian theological rhetoric. On the one hand, expellee leaders invoked Christian reconciliation and European unity already in 1950. However, the expellee movement's simultaneous reliance on a language of divine right stood at least partially at odds with this message. By insisting that the territories east of the Oder-Neisse belonged to Germany, the Charter declined to address the rights of the current inhabitants, the historical precedents for the expulsions, and the violence that any future population transfer would entail. Depending on the point of emphasis, Christian theology could obscure the historical conditions of the expulsions as much as it could hold out the promise of peace and unity.

For some leaders of the Protestant expellee associations, especially in the mid-1950s, theology served as a resource for objecting to an immediate right of return. Building on Karl Barth's theology of law, with its emphasis on the radical gap between humanity and divinity as

¹¹ "Charta der Heimatvertriebenen (August 1950)," in *Das Recht auf Heimat*, vol. 1, ed. Kurt Rabl (München: R. Lerche, 1958), 117-118.

well as the absence of mediation through worldly "orders," these pastors sought to de-territorialize the category of *Heimat*. The most prominent expellee activist to adopt such a course was the theologian and administrative director of the *Ostkirchenausschuss*, Friedrich Spiegel-Schmidt. Born in Switzerland in 1912, Spiegel-Schmidt served as a vicar and pastor to German Protestant communities in Hungary beginning in 1936 and as a chaplain in the Hungarian army following the German occupation in 1944. He quickly became involved in expellee politics following his repatriation to Germany in 1945, serving as chair of the Aid Commission for Protestant Germans from Hungary and from 1948 as a member of the *Ostkirchenausschuss*.¹² To be sure, like virtually every public commentator on the postwar border in 1950s West Germany, Spiegel-Schmidt regarded the expulsions as a crime and did not foreclose the possibility of a return to the *Heimat* under future, more propitious circumstances. His theological framework, however, led him to deemphasize the territorial locus of *Heimat*.

Spiegel-Schmidt issued his first call for a new approach to the "right to the homeland" at a lecture before the *Ostpfarrertagung* in Constance in October 1953. Spiegel-Schmidt began his address from Protestant first principles, invoking the dualism of individual and God: "The biblical picture of the fundamental state [*Urstand*] is not the image of a collective order according to creation, but the picture of an individual, who has in God his You, and thereby becomes I."¹³ The individual could ultimately find *Heimat* only in freedom before God. Echoing Karl Barth, as well as the wing of the Confessing Church that had criticized the amalgamation of theology with German nationalism, Spiegel-Schmidt traced the "false development of the *Heimat* concept" to German Romantic writers who conflated the category of *Heimat* with that of the

¹² Tim Schedel, "Spiegel-Schmidt, Friedrich," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Spiegel-Schmidt%2C+Friedrich> (accessed April 15, 2018).

¹³ Friedrich Spiegel-Schmidt, "Das evangelische Christ und seine Heimat," *Evangelische Theologie* 14 (1954): 105-119, quoted 110.

Volk. Spiegel-Schmidt emphasized the relationship between God and individual, rather than worldly orders, as a guide to ethical life. His perspective could thereby appear quietist: "The Church of Christ does not have the task of saving, protecting, and renewing the orders, but to praise the Kingdom of Christ and to live in the orders in this freedom."¹⁴ However, according to Spiegel-Schmidt, the church should not retreat into an ostensibly apolitical, spiritual domain, but should promote the values gleaned from the divine message within the immanent world. Foremost among these was "the path of reconciliation, which overcomes individualistic thought and mass thought [*Massendenken*], leading toward true community." Spiegel-Schmidt's perspective remained deeply conservative, reminiscent of Christian polemics against mass society extending back to the nineteenth century. Yet his evangelical, rather than natural rights conservatism presented divine agency as the ultimate arbiter over human claims. Recognition of human fallibility and the limits of worldly justice meant that Christians could not claim a right to what was ultimately God's: "Taking the *Heimat* from God's hand also means to take *Heimat* how and where God gives it to us. We do not resist when he leads us to a new *Heimat*."¹⁵

Among the theological milieu that descended from the Confessing Church, Spiegel-Schmidt's arguments found wide assent. The Tübingen theology professor Heinz-Horst Schrey echoed Spiegel-Schmidt's perspective in his entry on *Heimat* for the 1954 *Evangelisches Soziallexikon*. A prominent interlocutor in theological-legal exchanges, Schrey had participated in postwar ecumenical conferences on the biblical foundations of law, and his writings of the 1950s extended the critique of natural law thinking pioneered by Barth and his allies.¹⁶ The

¹⁴ *Ibid.*, 114-116.

¹⁵ *Ibid.*, 118-119.

¹⁶ Heinz-Horst Schrey, "Wie haben wir vom Worte Gottes aus über 'Naturrecht' und 'Menschenrechte' zu urteilen?" *Kirche in der Zeit*, March 1952; Schrey, *Die Bedeutung der biblischen Botschaft für die Welt des Rechts* (Tübingen: J.C.B. Mohr, 1952); Schrey and Hans Hermann Walz, *Gerechtigkeit in biblischer Sicht: eine oekumenische Studie zur*

Christian, Schrey argued, was not bound to "blood and soil," but found *Heimat* in "church and society." Schrey regarded the expulsions of Germans from Eastern Europe as a crime, but at the same time he cautioned against the "idolization" of territory and rejected violent attempts at retribution.¹⁷ The pastor Herbert Girgensohn, an expellee activist and the inaugural chair of the *Ostkirchenausschuss* from 1946 to 1951, concurred with Spiegel-Schmidt in a reply published in the Protestant expellee journal *Der Remter*. The *Heimat*, Girgensohn wrote, existed not principally in a territory but "in human relationships with one another." *Heimat* was an "unearned gift of God's mercy. There is from this point of view no right from God to demand the fate of returning to the *Heimat*. God is not obliged to give human beings these things."¹⁸ The theologian Christian Walther adopted a similar position in the *Zeitschrift für evangelische Ethik*. Founded in 1957 and co-edited by Schrey, the journal sought to develop the biblical theology of the Confessing Church and to dispense with notions of "Christian-Western values" and the "Christianization of humanity" as the basis for Protestant ethics.¹⁹ Consistent with this perspective, Walther took aim at the Expellee Charter's language of natural rights. Protestants, Walther insisted, must recognize the ultimate unknowability of God's plan, rather than asserting that "man has a right before God to return to the lost *Heimat*."²⁰

To be sure, the position represented by Friedrich Spiegel-Schmidt and his allies was hardly dominant among Protestant expellee representatives, let alone the larger expellee lobby.

Rechtstheologie (Zürich: Gotthelp-Verlag, 1955). On Schrey, see also Tim Schedel "Schrey, Heinz-Horst," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Schrey%2C+Heinz-Horst>, accessed April 15, 2018.

¹⁷ Heinz-Horst Schrey, "Heimat – theologisch gesehen," in *Evangelisches Soziallexikon*, ed. Karrenberg, 483-484.

¹⁸ Herbert Girgensohn, "Das Recht auf Heimat als Menschenrecht," *Der Remter: Blätter ostdeutscher Besinnung* 1, no. 4 (1955): 21-26.

¹⁹ On the concept for the journal, see "An unsere Leser," *Zeitschrift für evangelische Ethik* 1 (1957): 1.

²⁰ Christian Walther, "Fragen zum Problem der Heimat," *Zeitschrift für evangelische Ethik* 2 (1958): 369-375.

Proponents of enduring currents of neo-Lutheran "orders of preservation" theology forthrightly advocated for a right of return to the homeland. Moreover, due to both internal organizational tensions as well wider political shifts, Spiegel-Schmidt's call for contrition lost ground in West German Protestant discourse by the late 1950s. In 1958, Spiegel-Schmidt resigned from his position as managing director of the *Ostkirchenausschuss*, likely due in part to conflict with the committee's chair, the expellee pastor Gerhard Gülzow.²¹ Gülzow took a far less compromising stance on the *Recht auf Heimat* than his predecessor Herbert Girgensohn and moved the *Ostkirchenausschuss* closer to the mainstream of the expellee lobby.²² Moreover, the national election of September 1957, in which the expellee party *Bund der Heimatvertriebenen und Entrechteten* lost twenty-five percent of its parliamentary seats, paradoxically had an "intensifying" effect on the efforts of the three larger parties to placate the expellee lobby, as they sought to attract newly available expellee voters.²³ In this environment, Protestant expellee associations stood to gain political clout by echoing the restorationist rhetoric of the wider expellee movement.

The dominant figure in the Protestant legal-theological networks that supported the "right to the homeland" in the late 1950s was the international lawyer Kurt Rabl, a professor at the *Hochschule für Politik* in Munich and a staunch proponent of an international "right of self-determination of peoples."²⁴ Beginning in April 1958, Rabl organized a series of conferences at

²¹ Schedel, "Spiegel-Schmidt"; Teresa Schall, "Gülzow, Gerhard," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/pages/viewpage.action?pageId=40217193> (accessed April 15, 2018).

²² For instance, see Gerhard Gülzow, "Unsere evangelische Verantwortung für die heimatpolitische Lage," in Joachim Beckmann et al., *Was sagt die Kirche zum Recht auf Heimat?* (Stuttgart: Kreuz-Verlag, 1961), 49-61.

²³ Ahonen, *After the Expulsion*, 145.

²⁴ Hartmut Rudolph, *Evangelische Kirche und Vertriebene 1945 bis 1972. Band II: Kirche in der neuen Heimat* (Göttingen: Vandenhoeck & Ruprecht, 1985), 359; Kurt Rabl, *Das Selbstbestimmungsrecht der Völker* (München: Korn, 1963).

the Protestant Academy in the Hessian town of Arnoldshain, where Protestant jurists and theologians, including longtime expellee activists such as Julius Doms, aimed to theorize a theological basis for the "right to the homeland."²⁵ As in earlier such exchanges, theological claims provided a facade of legitimacy for legal statements, even while they helped to deepen jurists' convictions of the righteousness of their claims. At the first Arnoldshain meeting, Walter Künneht, who continued to serve as a theology professor at Erlangen amidst his frequent political interventions, served as the lead Protestant speaker. To be sure, Künneht shared aspects of the theological framework of Barthians such as Spiegel-Schmidt; he too referred to the *Heimat* as a "gift of God" and warned against its "idolization." In an apparent repudiation of his Nazi-era writings, Künneht stated, "If there—in a people, a homeland, a fatherland—the true holiness of humanity is seen, such a conception means the end of the cross of Jesus."²⁶ Yet Künneht's postwar theology allowed greater latitude for worldly mediation between God and humanity, and consequently for a theological embrace of the *Heimat*. The homeland, he argued, was a "divine order of preservation," such that human beings were placed in a specific homeland by divine will. Expulsion from one's homeland constituted a "grave injustice."²⁷

The debate among Spiegel-Schmidt, Künneht, and their respective allies reflected deep fissures within the postwar Protestant intellectual milieu. Divergent theological premises shaped whether Protestant theologians and lay intellectuals regarded the *Heimat* as a divine right, or as a gift that could be granted or rescinded by the will of God. The origins of the *Ostdenkschrift*,

²⁵ For the complete set of lectures given at the meetings, see Kurt Rabl, ed., *Das Recht auf Heimat*, 4 vols. (München: R. Lerche, 1958-60).

²⁶ Walter Künneht, "Die Frage des Rechts auf die Heimat in evangelischer Sicht," in *Recht auf Heimat*, ed. Rabl, vol. 1, 19-21.

²⁷ *Ibid.*, 17, 38-39. See also Walter Künneht, "Die Heimat als theologisches Problem," *Evangelische Welt*, May 1, 1959.

however, cannot be attributed solely to debates confined within the expellee milieu.

Contemporary discussions about the relationship between theology and jurisprudence gave rise to a new framework for understanding reconciliation, rather than the pursuit of natural rights, as a regulative ideal for international law.

Theologies of Law and Theologies of Reconciliation

By the late 1950s, discussions of the theology of law grouped around two nodes: circles around the Protestant Academies, whose members often maintained ties to the CDU, and a more radical wing affiliated with the *kirchliche Bruderschaften*. As in earlier debates about the theological foundations of human rights and conscientious objection, however, numerous figures crossed between these circles. On crucial points of the historicity of law and the mutability of rights in concrete situations, members of Lutheran and Barthian circles found common ground that distinguished them from their conservative Catholic counterparts who embraced the political rhetoric of the CDU. Accounting for the origins of the *Ostdenkschrift* requires attention to the evolution and entanglements of both groups.

Within the mainstream Protestant Academies, ongoing debates about law during the late 1950s catalyzed a theological conception of property that would break from the natural law model dominant in Christian Democratic political discourse. The primary locus for these discussions was the *Forschungsstätte der evangelischer Studiengemeinschaft* (FEST), a research institution founded in 1957 in Heidelberg as a merger of *Studiengemeinschaft evangelischer Akademien* and the *Hemer Christophorus-Stift*. The FEST as well as its predecessor organizations were products of the flourishing of Protestant intellectual life during the early postwar years. Circles of theologians and lay intellectuals at the FEST aimed to extend the work

commenced by the *Christophorus-Stift* marriage law commission of the early 1950s, in turn rooted in prior efforts to apply the insights of Jacques Ellul and other Protestant theorists of law to West German legal reconstruction. Already in January 1955, the directors of the marriage law commission, the Lutheran theologian Friedrich Karl Schumann and the jurist Hans Dombois, organized a discussion group that brought together numerous participants in early postwar legal-theological exchanges, to extend the insights of that commission to broader domains of law.²⁸ This study group quickly grew into an "institution commission" that found a home at the FEST, where Dombois was able to maintain his position as the resident jurist.

The institution commission developed the theology of law adumbrated in earlier discussions about marriage and the family, contributing toward a liberalization of Protestant political thought. Like the family law commission of the early 1950s, the FEST institution commission sought to mediate between Catholic natural law discourses and liberal pretensions to extirpate religious influence from the law. In the earlier commission, Protestant theorists criticized Catholic efforts to derive the structure of the family from an unchanging natural law, while continuing to call for state protection of the "essence" of marriage and family given in biblical teachings. The FEST institution commission aimed to apply a similar model to a wide array of social forms. The commission viewed strong institutions of state, property, family, and marriage as the foundations of social life.²⁹ Yet its critique of ahistorical conceptions of justice also provided a basis for rejecting conservative deployments of natural law rhetoric and static

²⁸ The results of this discussion are recorded in Hans Dombois, ed., *Recht und Institution: eine Fortsetzung des Göttinger Gesprächs von 1949 über die christliche Begründung des Rechts: Referate, Verhandlungsbericht, Thesen* (Witten-Ruhr: Luther-Verlag, 1956).

²⁹ For an overview, see Rolf-Peter Calliess, "Institution und Recht: Bericht über das Rechtsgespräch in der Institutionenkommission der Evangelischen Studiengemeinschaft in der Zeit von 1956 bis 1961," in *Recht und Institution, 2. Folge: Arbeitsbericht und Referate aus der Institutionenkommission der Evangelischen Studiengemeinschaft*, ed. Hans Dombois (Stuttgart: E. Klett, 1969), 11-60.

understandings of social ethics. During the second half of the 1950s, the group moved toward an affirmation of active participation, rather than passive acceptance of divinely-mandated "orders," as the basis for the Christian's relationship to worldly institutions. At its 1957 meeting, the commission's concluding resolution determined that an "institution" was characterized by *both* "status [*Zustand*]" and a "process of formative action [*Vorgang gestaltenden Handelns*]." The individual assumed active "responsibility" for institutions through "continual acceptance [*immer wiederholten Annahme*]," rather than mere passive acquiescence.³⁰

Among the range of issues discussed by the institution commission, the problem of property rights proved the most significant for Protestant reassessments of the postwar international settlement. A related "property commission" first took up the question at the FEST in November 1957, facilitating a reconsideration of the theological basis for human rights that would inform Protestant conceptions of the "right to the homeland." Before an audience that included Hans Dombois, Friedrich Karl Schumann, Hansjürg Ranke, and the young theologian Wolf-Dieter Marsch, the Bethel systematic theologian Wolfgang Schweitzer offered the keynote lecture. Schweitzer's work as a member of the Study Department of the World Council of Churches during the early postwar years had familiarized him with the ongoing dialogue between theology and law, and his own contributions had espoused a "Christological" understanding of the state.³¹

Schweitzer's lecture before the property commission employed Protestant theological premises to attenuate the then-dominant link between private property fundamentalism and the

³⁰ "Thesen 1957," in *Recht und Institution*, 2. Folge, 62.

³¹ Sara Jäger and Teresa Schall, "Schweitzer, Wolfgang," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Schweitzer,+Wolfgang> (accessed April 15, 2018). See also Wolfgang Schweitzer, *Die Herrschaft Christi und der Staat im Neuen Testament* (Zürich: Gotthelf, 1948) and Alan Richardson and Wolfgang Schweitzer, eds., *Biblical Authority for Today: A World Council of Churches Symposium on "The Biblical Authority for the Churches' Social and Political Message Today"* (Philadelphia: Westminster Press, 1951).

rhetoric of the "Christian West" commonplace in postwar political discussions. Schweitzer noted that for Protestants, property rights were a matter of positive rather than natural law, shifting with changing historical relations among state, society, and economy. Protestant theology could not choose definitively between individual and collective property as the basis for organizing society; theology was instead responsible for ensuring that any property order respected the "Christian image of the human being."³² Schweitzer was not entirely neutral with respect to Cold War ideologies. His lecture built on a Protestant tradition of theorizing about property that prioritized individual freedom over collective self-determination.³³ Nevertheless, by denying theological primacy to any particular property arrangement, Schweitzer provided a basis for linking the work of the institution commission to a broader conception of East-West reconciliation. In pursuit of larger ethical goals, Schweitzer held, property rights could be rightfully curtailed. Schweitzer's presence at the "property commission" alongside conservative Lutherans such as Friedrich Karl Schumann exemplifies the interconnectedness of Protestant intellectual networks, where exchange among theological camps rather than isolation remained the norm in spite of continual eruptions of Cold War tensions at EKD synod meetings.

If the FEST provided a network through which a largely conservative milieu of Protestant intellectuals came to affirm the mutability and historicity of legal rights and institutions, more radical circles descended from the Confessing Church Provisional Government aimed to theorize the ethical principles that should guide the development of law in concrete instances. The *Arbeitskreis kirchlicher Bruderschaften*, formed in the summer of 1958, adumbrated a theory of Christian reconciliation as a guiding principle of law. The leaders of the *Arbeitskreis* numbered

³² "Niederschrift der Sitzung der von der Kanzlei der Evangelischen Kirche in Deutschland einberuene Eigentumskommission am 29. und 30. November 1957 im Christophorus-Stift in Münster/Westfalen," EZA 2/1504.

³³ See Friedrich Karrenberg, "Die Eigentumsdiskussion in der neueren evangelischen Theologie," *Zeitschrift für evangelische Ethik* 4 (1960): 136-148.

among the most vocal participants in postwar theological-political debates, including Ernst Wolf, Helmut Gollwitzer, and the Confessing Church theologian and chair of the *Zentralstelle für Recht und Schutz der Kriegsdienstverweigerer aus Gewissensgründen* (the umbrella organization for West German associations of conscientious objectors), Heinz Kloppenburg.³⁴ Jurists were crucial interlocutors, as they had been in Protestant lay-theological networks since the 1930s. Among the organizers of the *Arbeitskreis* was the young Düsseldorf *Landgericht* judge and future Federal Constitutional Court judge Helmut Simon, who completed his doctorate under Ulrich Scheuner in 1952 with a dissertation on postwar Protestant theologies of law.³⁵

The immediate background for the formation of the *Arbeitskreis kirchlicher Bruderschaften* was Konrad Adenauer's decision in the spring of 1957 to allow the establishment of a nuclear defense corridor powered by American tactical missiles along the Rhine, in conjunction with NATO's "New Look" plan. Confessing Church veterans formed one wing of a national anti-nuclear movement, alongside the SPD-affiliated civil society organization *Kampf gegen Atomtod*.³⁶ As in earlier debates about rearmament, opposition to the nuclearization of the West German military was driven less by principled pacifism than by fears of the outbreak of war on German soil and the desire for reunification.³⁷ Yet these political commitments demanded a reappraisal of theological convictions. Helmut Gollwitzer published the opening salvo in the

³⁴ Tim Schedel, "Kloppenburg, Heinz," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Kloppenburg%2C+Heinz> (accessed April 15, 2018); Philipp Stoltz, "Zentralstelle für Recht und Schutz der Kriegsdienstverweigerer aus Gewissensgründen e.V.," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/pages/viewpage.action?pageId=41419064> (accessed April 15, 2018).

³⁵ Philipp Stoltz, "Simon, Helmut," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Simon%2C+Helmut> (accessed April 15, 2018).

³⁶ Marc Cioc, *Pax Atomica: The Nuclear Defense Debate in West Germany During the Adenauer Era* (New York: Columbia University Press, 1988), 121; Holger Nehring, *Politics of Security: British and West German Protest Movements and the Early Cold War, 1945-1970* (Oxford: Oxford University Press, 2013), 63-86.

³⁷ Geyer, "Cold War Angst."

theological debate about atomic weapons in April 1957, questioning whether Augustinian "just war" theory was applicable in a nuclear age. Protestant detractors of CDU foreign policy grouped around the regional *Bruderschaften* confronted the competing theological framework of supporters such as Walter Künneth, who declared defense policy to be an autonomous domain of the state in which a Christian ethic of love could not apply.³⁸

The larger significance of the *Arbeitskreis kirchlicher Bruderschaften*, however, did not lie in its role in the nuclear controversy. By the end of 1958, with the failure of protests to win over a mass audience and the stationing of nuclear weapons in West Germany, the group's anti-nuclear policies lost momentum. Rather, the *Arbeitskreis* pioneered a theology of the "kingdom of Christ [*Königsherrschaft Christi*]" that unified the disparate strands of Barthian theology circulating in postwar Protestant debates into a systematic whole. Ernst Wolf proved the most prolific theologian of the *Arbeitskreis*, playing a central organizational and intellectual role. At the first joint conference of the regional *Bruderschaften* in Wuppertal in October 1957, Wolf laid out the crux of this theology: an effort to establish a Protestant theory of politics and political subjecthood in the absence of a tradition of natural law ethics. The targets of Wolf's lecture were twofold. On the one hand, Wolf rejected persistent forms of two kingdoms theology espoused during the 1950s by Lutheran theologians such as Paul Althaus, Werner Elert, and Walther Künneth, who regarded the political as an order independent of the otherworldly "kingdom of Christ." Of particular concern to Wolf were attempts to treat the state as a "natural order" that did not demand active Christian intervention.³⁹ At the same time, Wolf countered critics who

³⁸ Helmut Gollwitzer, "Die Christen und die Atomwaffen," in *Forderungen der Freiheit*, 289-301; Walter Künneth, *Rechtfertigung im Atomzeitalter: kritische Anfragen an H. Gollwitzer* (München: Claudius, 1958). For an overview of the Protestant debate about nuclear defense, see also Cioc, *Pax Atomica*, 92-115.

³⁹ Ernst Wolf, "Die Königsherrschaft Christi und der Staat," in *Königsherrschaft Christi. Der Christ im Staat*, eds. Werner Schmauch and Ernst Wolf (München: Kaiser, 1958), 20-61, at 28-36. For the major treatises of Lutheran social ethics of the late 1940s and 1950s, see Paul Althaus, *Grundriss der Ethik*, 2nd ed. (Guetersloh: C.

charged that Barthian political theology represented a theocratic imposition of religious norms onto the political sphere.⁴⁰ Rather than inquire into the "essence of the state"—the error of both "two kingdoms" and theocratic tendencies—Christians should concern themselves with the state's *actions* in relation to its divine mandate of serving justice and punishing evil. By recognizing divine sovereignty over the state, Christians were freed to place their ultimate allegiance in God, while assuming responsibility for the state in which they found themselves. The Christian's decisions and actions in the political world, Wolf argued, must be rooted in the final instance in responsibility and obedience before God.

After the EKD synod in April 1958 voted against adopting the proposal of the Wuppertal conference, which called on the West German government to reject NATO's nuclear defense program, Ernst Wolf spoke again at the first plenary meeting of the *Arbeitskreis kirchlicher Bruderschaften* in Frankfurt the following October.⁴¹ Criticizing the EKD for its failure to live up to his theological vision of the church, Wolf adopted a position on nuclear weapons that exemplified the wider concerns of his "kingdom of Christ" theology. The synod, Wolf now argued, made atomic weapons an issue of conscience in a purely individualist sense, leaving support or rejection of West Germany's military policy up to individual Christians. The EKD thereby sought to preserve the veneer of Church unity, without probing the theological grounds of Christians' competing beliefs.⁴² For Wolf, the EKD's stance reflected the longstanding danger

Bertelsmann, 1953); Werner Elert, *Das christliche Ethos: Grundlinien einer lutherischen Ethik* (Tuebingen: Furche-Verlag, 1949); and Walter Künneth, *Politik zwischen Daemon und Gott: eine christliche Ethik des Politischen* (Berlin: Lutherisches Verlagshaus, 1954).

⁴⁰ Wolf, "Königsherrschaft Christi," 23-24.

⁴¹ On the 1958 synod debate about nuclear weapons, see Cioc, *Pax Atomica*, 107-110; Greschat, *Kirche im kalten Krieg*, 282-284.

⁴² Ernst Wolf, "Die Einheit der Kirche in Glauben und Gehorsam," in *Christusbekenntnis im Atomzeitalter: Im Auftrag des Arbeitskreises kirchlicher Bruderschaften*, ed. Ernst Wolf with Heinz Kloppenburg and Helmut Simon (München: Kaiser, 1959), 30-77, at 35.

inherent in Protestant theology of cordoning off political matters as beyond the proper domain of the church. According to Wolf's "kingdom of Christ" theology, no such firm distinction obtained. Because it called the Christian to constant obedience before God's rule, conscience could establish an objectively correct political stance for all Christians. Atomic weapons, which represented precisely such a binding confessional stance: "a new question of the Sermon on the Mount in the light of the kingship of Christ, and certainly a present reality for belief and for the corresponding actualization of the Christian confession in word and deed."⁴³

Despite their divergent political affiliations, the institution commission of the Heidelberg FEST and the *Arbeitskreis kirchlicher Bruderschaften* both promoted the active political engagement of Christians on behalf of an ethic of reconciliation. Figures such as Wolf and Gollwitzer bridged the two groups, consistent with the underlying theological parallels also evident in debates on social policy and conscientious objection. The combined efforts of the Lutheran-dominated Protestant Academies and the Barthian-leaning *Bruderschaften* would enable the executive authorities of the EKD to call for the renunciation of the Oder-Neisse territories by the mid-1960s.

In the early 1960s, members of both groups converged around the FEST's "Marxism commission," which exemplified the political impetus behind the idea of reconciliation trumpeted by Protestant theologians and lay intellectuals. Formed in late 1953, the commission hardly endorsed the one-party state in East Germany, but equally eschewed a strident anti-Communism. Many participants sympathized with the aspiration of social and economic equality, if not with the political form of "actually existing socialism." By the late 1950s, members such as Helmut Gollwitzer argued that atheism was only a contingent, not essential

⁴³ Ibid., 66.

dimension of communist ideology.⁴⁴ The Marxism commission equally attracted left-wing social democrats such as Wolfgang Abendroth and Jürgen Habermas, who found themselves disaffected with the SPD's acquiescence to West German foreign policy in its reformist platform at the Bad Godesberg party congress of November 1959. But the commission members also included Lutheran theologians and jurists such as Friedrich Delekat, Hans Dombois, Hansjürg Ranke, and Heinz-Dietrich Wendland, whose tempered affirmation of West German foreign policy did not exclude a broader exploration of social ethics.⁴⁵

Like the institution commission, the FEST working group on Marxism developed a theological understanding of property rights that would inform the EKD's stance on the postwar international settlement. Drawing equally on the "Kingdom of Christ" theology, the Marxism commission refused to identify the church with any single, historically static vision of social order.⁴⁶ At a March 1961 meeting on "Property and Justice," Ernst Wolf criticized both liberal and communist conceptions of property.⁴⁷ According to Wolf, Protestant theology illuminated the tension "between power and renunciation" at the heart of the institution of property. Biblical narratives portrayed human dominion over the world, while at the same time recognizing God as the ultimate "owner of all goods," whose "claim to rule" human beings were required to "protect." Neither the "ideology of private property" nor the "ideology of social property"

⁴⁴ Helmut Gollwitzer, "Die christliche Kirche und der kommunistische Atheismus," in *Forderungen der Freiheit*, 211-220. Gollwitzer offered this lecture at a seminar on "Marxism and Christianity" at the Freie Universität Berlin in the winter semester of 1958-59.

⁴⁵ For instance, see the minutes for the session "Eigentum und Gerechtigkeit, 2. Folge, 6.-8. März 1961," FEST Box 709.

⁴⁶ Wolf-Dieter Marsch, "Evangelische Theologie vor der Frage nach dem Recht," *Evangelische Theologie* 20 (1960): 481-510. Marsch presented this address at the Marxism commission in March 1960: "Marxismus und Rechtsordnung, 10.-11. März 1960," FEST Box 709.

⁴⁷ "Eigentum und Gerechtigkeit, 2. Folge, 6.-8. März 1961," FEST Box 709.

adequately grasped this relationship.⁴⁸ Certainly, Wolf argued, both Protestant and Catholic thought, in the broadest sense, sought to mediate between absolute commitments to private property and to collective ownership. However, for Wolf and his colleagues in the Marxism commission, the hallmark of Protestant social ethics was its openness before changing historical circumstances: "The Reformation sermon, with its emphasis on the sharpening of social obligations and evangelical freedom from bonds as well as its admonition toward renunciation, stands in conflict with a Catholic doctrine of property that is built upon the laws of realization of the divinely-willed natural social order."⁴⁹

The result of the ongoing discussions around the FEST and the *Arbeitskreis kirchlicher Bruderschaften* was that by the early 1960s, many Protestant jurists and theologians were reluctant to accept claims to a divinely-mandated "right to the homeland" championed by international lawyers such as Rudolf Laun and Kurt Rabl. Protestant intellectuals affiliated with the FEST as well as Confessing Church successor organizations widely accepted the historically contingent character of property, its status as a "gift of God," as well as the active role of individuals in taking up and molding institutions. While no one thinker brought all of these ideas together into a systematic treatise, Protestant intellectual circles fostered an alternative political culture in which renunciation of the Oder-Neisse line, a taboo in mainstream politics, became not only a thinkable position but an objective of public advocacy.

⁴⁸ "'Eigentum und Freiheit' in Gedankenfracht: Professor Dr. Ernst Wolf sprach / Überfüllte Veranstaltung in Detmold," *Freie Presse*, October 20, 1961, in BAK N 1367/120. Wolf delivered a version of his theses on property before a wider audience in October 1961.

⁴⁹ Ernst Wolf, "Eigentum und Existenz," *Zeitschrift für evangelische Ethik* 6 (1962): 1-17, quoted 11.

Origins of the *Ostdenkschrift*

Amidst long-term developments of Protestant thought regarding institutions, East-West relations, and Christian political responsibility, the proximate cause for the Protestant intellectual milieu's engagement with the Oder-Neisse question was the intensification of expellee advocacy for a right of return during the late 1950s. The expellee lobby gained a heightened political voice in the aftermath of the 1957 elections, demonstrated most dramatically in the about-face of the Adenauer government at the Geneva Foreign Ministers Conference in the summer of 1959. Beginning in January 1959, the CDU Foreign Minister Heinrich von Brentano had championed, with Adenauer's approval, a pair of bilateral nonaggression treaties to be concluded with Poland and Czechoslovakia. While the government assured the expellee lobby that the treaties would contain no provision recognizing the Oder-Neisse line, representatives of the *Bund der Vertriebenen* opposed the initiative as soon as it was leaked in the press, arguing that the nonaggression agreements represented the first step toward "German acceptance of the post-war borders in the East." In July, largely due to concerns about the expellee vote in the upcoming 1961 elections, Adenauer dropped his support for the project, forcing Brentano to announce the reversal of the West German government's position at the Geneva conference.⁵⁰

Energized by these developments, the *Konvent der zerstreuten evangelischen Ostkirchen* elected to hold its biennial convention of September 1959 on the theme of "*Heimatrecht* and the Right of Self-Determination." In many ways a continuation of the conferences of Protestant jurists and theologians organized by the international lawyer Kurt Rabl, the meeting foregrounded restorationist voices. Theologians such as Friedrich Spiegel-Schmidt and Herbert Girgensohn continued to invoke a Protestant theological understanding of property in order to

⁵⁰ Ahonen, *After the Expulsion*, 147-154, quoted 150.

temper and historicize natural rights claims, but found their position increasingly marginalized.⁵¹ Kurt Rabl's keynote address dispensed with theological categories of repentance and renunciation, instead attempting to derive a basis for the *Recht auf Heimat* in positive international law as well as classical liberal individual rights.⁵²

In some ways, debates at the September 1959 meeting of the Protestant expellee Convent reconfirmed the fault lines that had formed during the 1950s, between those members who called for renunciation of the Oder-Neisse territories and those who asserted a divine right to the *Heimat*. Yet most surprisingly for the intellectual milieu around the FEST, the Convent of Dispersed Eastern Protestant Churches sought to claim the mantle of theological and political legitimacy by positioning itself as heir to the Protestant discussions about the theology of law since the late 1940s. The Convent's final declaration at the September 1959 meeting cited as its theological basis the Göttingen "Church and Law" conference on Jacques Ellul's *The Theological Foundation of Law* that took place a decade earlier.⁵³ The Convent relied on two theses of the Göttingen conference in particular: "Respect for human beings" constituted "a fundamental element of legal order"; and the Church was charged to "stand up for law where it is needed." Whereas the original "Church and Law" conference sought out a historicist, situational understanding of the Church's role in upholding worldly justice, however, the expellee Convent appropriated the earlier commission's conclusions to support an unwavering right to the *Heimat*. The *Heimat*, the Convent's final declaration read, was "grounded in God's order." The principle of "respect for human beings" could be realized only through individuals' "claim to an

⁵¹ Friedrich Spiegel-Schmidt, "Selbstbestimmungsrecht und Heimatrecht" in *Der Remter* 5, no. 4 (1959): 219-227; Herbert Girgensohn, "Das Recht auf Heimat als seelsorgerliches Problem der Gegenwart," *Der Remter* 5, no. 4 (1959): 197-202.

⁵² Kurt Rabl, "Diskussion um das Heimatrecht," *Der Remter* 5, no. 4 (1959): 203-212, especially 209.

⁵³ See chapter 2.

unchallenged life" in their *Heimat*. To defend the *Heimat*, the Church must "raise its voice in warning in preservation of its guardian office [*Wächteramt*]." ⁵⁴

For Protestant expellee leaders, this fusion of theological and legal claims appeared to wield significant rhetorical power. Following the September 1959 Königswinter conference, the *Ostkirchenausschuss* formed a "Committee on Ethics and Law" in order to further advance collaboration between expellee theologians and jurists in defense of the *Recht auf Heimat*. This committee continued to cite the 1949 Göttingen theses in order to champion the *Heimat* as an element of "God's merciful order," and to implore Christians to realize "justice on Earth" by restoring expellees to their *Heimat*. ⁵⁵

The Protestant expellee lobby therefore posed a challenge to the milieu of Confessing Church theologians and jurists that coalesced after the Second World War. Expellee committees deployed this group's statements to political ends that many of its members found erroneous, or at least in tension with their recent theorizations of property as a divinely-mediated "institution." Ultimately, the ensuing conflict motivated opponents of the "right to the homeland" to clarify and deepen their position. The earliest, and most controversial, rejoinder against the theology espoused by the expellee Convent came from the theologian Hans Joachim Iwand. Himself a native of Silesia, Iwand was a Confessing Church veteran and close associate of Karl Barth, who had served as the principal author of the August 1947 Darmstadt Statement of the Confessing Church *Bruderrat*. ⁵⁶ Writing in October 1959, just months before his death, Iwand called for a

⁵⁴ "Entschließung des Konvents der zerstreuten evangelischen Ostkirchen," in *Recht auf Heimat*, vol. 4, ed. Rabl, 162-163. For the theses of the Göttingen conference, see "Thesen," in *Kirche und Recht*, ed. Rat der Evangelischen Kirche in Deutschland, 51-52.

⁵⁵ "Erklärung des Ostkirchenausschusses und des Konvents der zerstreuten evangelischen Ostkirchen zur Frage des Rechts auf Heimat," EZA 17/532.

⁵⁶ Hockenos, *A Church Divided*, 125-130.

reckoning with the historical context of Nazi crimes, asking his fellow expellees to consider how the Nazis themselves invoked the concept of "*Heimatrecht*." Given that Germans originally deprived East Europeans of their "right to the homeland," in the aftermath of war the concept should be deployed only in the service of reconciliation, not re-colonization.⁵⁷ Friedrich Spiegel-Schmidt similarly criticized the *Ostkirchenausschuss* for treating the "right to the homeland" as a "false God." Instead, the "freedom to renounce" one's old homeland and adopt a new one served as an expression of the Christian's true freedom before God.⁵⁸ Karl Barth himself contributed a short piece to the expellee journal *Der Remter*, noting simply, "*Heimat*' is an unearned gift. There is no absolute 'right' to the homeland."⁵⁹

From the perspective of its critics, the theology of law advanced by the *Ostkirchenausschuss* appeared as little more than a return to a specious positivism. For members of the *Arbeitskreis kirchlicher Bruderschaften*, the guilt of some did not obscure the responsibility of all. Germans, whether or not they bore specific guilt for Nazi crimes, stood in "solidarity of guilt" and were required to exhibit signs of reconciliation as a condition of, not alternative to, a postwar legal settlement. In January 1961, building on this theology, the national leadership of the *Kirchliche Bruderschaften* submitted a petition to the EKD synod calling on the body to formally reject the *Recht auf Heimat*. The petition linked the "guilt" that Germans "have taken upon ourselves...and whose consequences we cannot reverse" with the imperative of

⁵⁷ Hans J. Iwand, "Das Recht auf Heimat," *Junge Kirche*, October 10, 1959. See also the controversy over Iwand's statements documented through letters to *Junge Kirche*: "Das Recht auf Heimat," *Junge Kirche*, October 10, 1959 and "Briefe an Professor Iwand," *Junge Kirche*, December 10, 1959.

⁵⁸ Friedrich Spiegel-Schmidt, "Stellungnahme zum Wort des Ostkirchenausschusses über das Heimatrecht," EZA 17/528.

⁵⁹ "Karl Barth: stelle uns folgende Sätze zur Verfügung," *Der Remter* 6, vol. 3 (1960): 140.

"showing a sign of readiness to reconcile with others."⁶⁰ While the synod did not accept the motion, the effort demonstrated the readiness of the *Bruderschaften* to conceptualize reconciliation in relation to a wider theological conception of guilt.

Critical stances toward the Protestant expellee lobby, moreover, did not remain confined to *Bruderschaften* circles. In the summer of 1961, the representative of the EKD to the West German government, Hermann Kunst, initiated a discussion with a group of lay intellectuals affiliated with the Heidelberg FEST—including the physicists Carl Friedrich von Weizsäcker and Günter Howe, along with the philosopher and education reformer Georg Picht—that by January would lead to a memorandum that broke many of the taboos in West German politics surrounding the postwar border. Kunst was a moderate Lutheran who in debates leading to the introduction of military conscription had defended the EKD's stance on conscientious objection against the more stringent legislation proposed by the CDU government. Kunst's agreement to serve as "military bishop" in 1957 signaled his acquiescence to West German rearmament, but Kunst remained critical of the CDU's reliance on natural law rhetoric to justify its political agenda.⁶¹ The circle involved in planning the FEST memorandum grew to include several prominent lay intellectuals: the jurists Ludwig Raiser and Hellmut Becker, the physicist Werner Heisenberg, and the journalist and social reformer Klaus von Bismarck, as well as the Rhineland Church President and regional *Bruderschaft* leader Joachim Beckmann.⁶²

⁶⁰ Leiterkonferenz der Kirchlichen Bruderschaften in Deutschland to Mitglieder der Synode der Evangelischen Kirche in Deutschland, January 12, 1961, EZA 613/15. The petition was reprinted for a wider audience in *Stimme der Gemeinde*, February 16, 1961.

⁶¹ On the military chaplaincy contract, see Greschat, *Protestantismus im kalten Krieg*, 256-264.

⁶² The primary source documentation of the creation of the Tübingen Memorandum is vast, but this episode has been well-covered in the historiography. What follows is drawn from Martin Greschat, "Mehr Wahrheit in der Politik!'. Das Tübinger Memorandum von 1961," *Vierteljahreshefte für Zeitgeschichte* 48 (2000): 491-513 and Andrea Strübind, "Das Tübinger Memorandum. Die politische Verantwortung der Nichtpolitiker," *Kirchliche Zeitgeschichte* 24 (2011): 360-395.

Following several rounds of discussion, the circle concluded a statement in January 1962 that decried the "irresponsible rhetoric" of all three major parties regarding the postwar border. In the aftermath of the construction of the Berlin Wall in August 1961, the statement argued, West German politicians had erred by linking legitimate demands for "the preservation of freedom in West Berlin" and "self-determination in the GDR" with "the national wish not only for reunification, but beyond this the reestablishment of the borders of 1937." The statement continued with its most controversial point: "We do not say anything new when we express the view that certainly freedom for those living in Berlin is an internationally recognized right, but that the national demand for reunification in freedom cannot today be realized, and that we will have to give up the claim of sovereignty over the territories beyond the Oder-Neisse line."⁶³ Initially, the signatories intended only to use the memorandum as a basis for discussions with Protestant parliamentarians—an indication of the elitist conception of politics held by Protestant intellectuals despite their pretensions to "public responsibility," as the memorandum's critics unfailingly noted. Given the close connections of the expellee organizations to the major political parties, however, the memorandum's call for recognition of the Oder-Neisse line invariably leaked to expellee activists by mid-February. The signatories elected to release the entire document in order to preempt charges of "conspiracy," first through the EKD Press Service and then in the popular *Die Zeit*, prompting a national debate.⁶⁴

A closer examination of the signatories of the "Tübingen Memorandum," named after the residence of the principal author Ludwig Raiser, reveals how discussions of the theology of law around the FEST and the *Arbeitskreis kirchlicher Bruderschaften* prepared Protestant theologians

⁶³ "Das Tübinger Memorandum," *Kirchliches Jahrbuch* 89 (1962): 75-78, quoted 76.

⁶⁴ Strübind, "Tübinger Memorandum," 385-386.

and lay intellectuals to speak publicly in opposition to expellee claims to a "right to the homeland." The Church President Joachim Beckmann had already attempted to convince the synod of the Rhineland *Landeskirche* to pass a motion recognizing the Oder-Neisse line in early 1961. When this failed, the Rhineland church under Beckmann's leadership issued a pastoral statement entitled "Paths toward Reconciliation," which called on Christians in Germany to exemplify "courage toward a new coexistence with our neighbors in Eastern Europe on the basis of reconciliation," since "God reconciled us all with himself in Jesus Christ."⁶⁵ Beckmann espoused a political theology that understood the act of reconciliation as a sign of obedience to God, ethically prior to the pursuit of worldly goods and ideologies. As Beckmann wrote in his introduction to the Rhineland pastoral statement, Christians facing the problem of Germany's postwar borders must shun "fanaticism" and "nationalism." Rather than demanding a divine right to the *Heimat*, they should instead recognize God's "claim" on humanity and expectation that human beings pursue an ethic of reconciliation and "neighborly love."⁶⁶

Beckmann's statements reflected his affiliation with the Barthian wing of the Confessing Church and the politically anomalous Rhineland *Landeskirche*. But the trajectory of the Tübingen Memorandum's principal author, the jurist Ludwig Raiser, demonstrates that the intellectual underpinnings of the EKD's postwar political reorientation were not developed solely by this minority wing.⁶⁷ Raiser hardly bore the signs of a political radical. Born in Stuttgart in 1904 and trained in law during the 1920s, Raiser was a member of the generation of Protestant jurists who came of age during the Weimar Republic and the early years of the Nazi regime,

⁶⁵ "Weg zur Versöhnung: Besprechungshilfe zum Vertriebenen- und Flüchtlingsproblem," in Beckmann et al., *Was sagt die Kirche*, 77-79, quoted 78.

⁶⁶ Joachim Beckmann, "Was sagt die Kirche zum Recht auf Heimat?" in Beckmann et al., *Was sagt die Kirche*, 3-7.

⁶⁷ Strübind, "Tübinger Memorandum," 374.

which included such figures as Adolf Arndt, Hans Dombois, Gustav Heinemann, and Ulrich Scheuner. During the late 1930s, Raiser worked as an attorney in Magdeburg before being drafted into the military, and he did not maintain ties to the Confessing Church. As the rector of the postwar University of Göttingen, however, Raiser assumed an active role in the *Studiengemeinschaft der evangelischen Akademien*. Following his move to the University of Tübingen, he became the first chair of the academic advisory commission of the Heidelberg FEST.⁶⁸ As a participant in the FEST "institution commission," Raiser was deeply invested in advancing legal-theological dialogue. The purpose of a Protestant theology of law, Raiser argued in an address to the commission in late 1959, was the search for the "supra-positive ground of law" through a "critical confrontation with natural law doctrines on the one hand" as well as formalist, neo-Kantian legal theories on the other. Protestant theologies of law sought to proceed not from abstract norms but from a "core stock of human relations [*Kernbestand mitmenschlicher Beziehungsformen*]" grounded in Scripture.⁶⁹ Such a perspective clearly informed Raiser's work on the Tübingen memorandum. The memorandum called for a new international settlement adapted toward the imperatives of peace and reconciliation amidst current historical circumstances, and eschewed doctrines of timeless natural rights.

While the *Ostkirchenausschuss* issued an indignant reply, the Tübingen statement provided momentum for the growing wing of Protestant intellectuals who lobbied the West

⁶⁸ Philipp Stoltz, "Raiser, Ludwig," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Raiser%2C+Ludwig> (accessed April 15, 2018). On Raiser's participation in the postwar *Studiengemeinschaft der evangelischen Akademien*, see chapter 2.

⁶⁹ Ludwig Raiser, "Institution und Rechtsnorm: Referat für die Institutionenkommission der Evangelischen Studiengemeinschaft, Sitzung vom 19./20. Oktober 1959," EZA 87/171. On Raiser's early participation in the "institution commission," see the letter of invitation to the first meeting by Scheuner, Schumann, Wolf, and Dombois, July 28, 1954, EZA 87/171.

German government to affirm the Oder-Neisse border.⁷⁰ Most influentially, a group of East Prussian Confessing Church veterans released a statement in October 1962 in support of the Tübingen Memorandum, drawing heavily on the theology of the *Bruderschaften*. Calling for a policy of "striving toward reconciliation with our eastern neighbors," the "convent" meeting in the Lower Saxon village of Beienrode cited Helmut Gollwitzer, by that time among the most prominent Confessing Church theologians: "It is not about the renunciation of something that we have, but about the recognition of an irreversible loss and a politics proceeding from this recognition, which...strives toward...the necessary break from an evil past full of mutual guilt for the sake of peace."⁷¹ Gollwitzer's statement exemplified the ambivalence of postwar discourses of Christian reconciliation. On the one hand, appeals to reconciliation in light of "mutual guilt" masked the specificity of German responsibility for wartime atrocities, as had the language of "human rights" during the occupation period. At the same time, however, the concept underpinned marked an important shift. Gollwitzer argued for an approach to international politics governed by an overarching ethical ideal, rather than the restoration of a previous state of affairs

In light of this public critique of its position on the "right to the homeland," the *Ostkirchenausschuss* "Ethics and Law" committee attempted to qualify its appeal to natural law discourse. At a meeting in October 1962, the *Ostkirchenausschuss* issued a "Statement on the Question of Natural Law in Protestant Theology." In response to the Beienrode Declaration, the

⁷⁰ For the response of the *Ostkirchenausschuss*, see "Stellungnahme des Ostkirchenausschusses zum Memorandum der Acht, vom 6. November 1961," *Kirchliches Jahrbuch* 89 (1962): 83-85; see also Spiegel-Schmidt to Ostkirchenausschuss, February 2, 1963, EZA 17/532. Attempts to mediate between the *Ostkirchenausschuss* and the authors of the memorandum broke down after an initial meeting with Joachim Beckmann, when Picht and Raiser refused to continue discussions. The *Ostkirchenausschuss* itself divided over the issue, with Friedrich Spiegel-Schmidt openly breaking from the committee's leadership.

⁷¹ "Erklärung des 'Beienroder Konvents,'" *Kirchliches Jahrbuch* 89 (1962): 85-86.

"Ethics and Law" committee recognized the limitations of natural law doctrines in light of human sin and fallenness, but nevertheless suggested that the Christian was charged "even here to recognize God's rule and order."⁷² The committee's chair Gerhard Gülzow sought out approval for this position from the original participants at the 1949 "Church and Law" meeting in Göttingen.⁷³ His effort backfired, however. Not only did the theologians and jurists who had gathered to discuss Ellul's *Theological Foundation of Law* believe that the theological debate about law had progressed considerably during the ensuing thirteen years, but they regarded the *Ostkirchenausschuss* appeal as representative of an obsolete Lutheran "theology of orders."

Ernst Wolf proved the most hostile toward the expellee commission's theological discourse. Protestant expellee representatives, Wolf replied to Gülzow, confused the biblical theology of the Göttingen meeting with a human-centered "anthropology." Instead, under circumstances of postwar division, Christians were charged to seek reconciliation rather than vengeance; international law had to adapt to contemporary realities rather than attempt to achieve absolute justice in this world.⁷⁴ Even the more politically conservative members of the original Göttingen commission, including Ulrich Scheuner and Friedrich Delekat, bristled at the suggestion that the right to an unchanging "homeland" could be grounded in Protestant theology. Scheuner suggested that rather than seeking a return to a prewar state of affairs, "perhaps it is only possible for our generation to initiate the path toward 'renewal,' for which Christian preparation is always present wherever difficult action is undertaken and dared." Echoing

⁷² "Stellungnahme des Arbeitskreises für Ethik und Recht zur Frage des Naturrechts in der evangelischen Theologie Okt. 1962," EZA 17/532. On the documents produced at this meeting, see Rauhut to Gülzow, November 6, 1962, EZA 17/531.

⁷³ Gülzow to members of Göttingen "Kirche und Recht" commission, February 12, 1963, EZA 17/532.

⁷⁴ Wolf to Gülzow, March 25, 1963, EZA 17/532. See also the further correspondence between Gülzow and Wolf in EZA 17/533.

Protestant discussions about the historicity of institutions, Delekat worried that a naturalized "right to the homeland" might lead to "dangerous complications," just as an absolute prohibition of divorce on grounds of natural law could have consequences more deleterious than divorce itself.⁷⁵

By the beginning of 1963, then, Protestant discussions of the *Recht auf Heimat* had reached a deadlock between expellee activists on the one hand and representatives of the intellectual milieu around the FEST and the *Arbeitskreis kirchlicher Bruderschaften* on the other. At its January 1963 meeting, the EKD Council rebuffed the request of the Church's Commission on Public Responsibility, headed by Ludwig Raiser, to consider the issue. The EKD leadership feared upsetting the tenuous balance between competing political factions that had threatened to divide German Protestantism since 1950s debates on rearmament and nuclearization.⁷⁶ For the same reason, the Council refused to endorse the "right to the homeland," as requested by leaders of the *Ostkirchenausschuss*.⁷⁷ Ultimately, only the opening of a new round of West German trials for Nazi-era crimes would motivate a broader segment of the Protestant leadership to endorse the recognition of the Oder-Neisse line by 1965. The issue of war crimes trials contained important theological, ethical, and political implications for larger discussions of German guilt, and in turn of the postwar territorial settlement.

⁷⁵ Scheuner to Gülzow, February 24, 1963, Mumm to Gülzow, February 27, 1963, and Delekat to Gülzow, March 6, 1963, EZA 17/532.

⁷⁶ "16. Sitzung des Rates der EKD am 17. und 18. Januar 1963," EZA 2/1807. On the efforts of the Commission of Public Responsibility to deal with the *Heimatrecht* question at its February 1963 meeting, see Niemeier to Gülzow, January 10, 1963, EZA 2/1354.

⁷⁷ Strübind, "Tübinger Memorandum," 392.

Protestant Ethics and the Revival of Nazi Trials: An Amnesty Campaign Redux?

At the same time that the Commission on Public Responsibility began considering a memorandum on the Oder-Neisse line, the recommencement of trials against alleged Nazi perpetrators in West Germany set off a renewed debate about guilt and responsibility for the Nazi past, within both the Protestant milieu and the broader West German public. In the late 1940s, the EKD leadership joined the attack on allegedly *ex post facto* law that dominated German responses to war crimes trials conducted by the Allied occupation powers. By the early 1960s, however, Protestant church leaders and jurists invoked a historicist conception of justice in order to criticize the pseudo-positivist arguments that dominated the EKD's earlier statements on war crimes trials. According to the Church's new position, Nazi trials might serve the cause of justice, regardless of their statutory basis. Theological developments around the turn of 1960 both reflected and enabled a more chastened confrontation with Nazi crimes than had been possible a decade earlier. Acknowledgement of the need for the Nazi past to shape law and justice in postwar West Germany demanded a more critical assessment of its consequences for international law as well.

The recommencement of Nazi trials in West Germany began with charges brought against the Wehrmacht Field Marshal Ferdinand Schörner in the fall of 1957 and the SS sergeant and concentration camp guard Martin Sommer the following year, leading to the creation of a central office for the prosecution of Nazi-era crimes in the Württemberg city of Ludwigsburg.⁷⁸ In April 1959, Fritz Bauer, now serving as Attorney General of Hesse, was granted full jurisdiction over the prosecution of the Auschwitz commander Wilhelm Boger, recently discovered in hiding, leading to the high-profile prosecution of twenty-two Auschwitz personnel

⁷⁸ Marc von Miquel, "Explanation, Dissociation, Apologia: The Debate over the Criminal Prosecution of Nazi Crimes in the 1960s," in *Coping with the Nazi Past*, eds. Gassert and Steinweis, 50-52.

in Frankfurt beginning in December 1963.⁷⁹ West German Nazi trials were limited by the constraints of the domestic criminal code. As soon as their state gained sovereignty, West German political leaders rejected the legal categories of the Allied war crimes trials and demanded that individuals be prosecuted only for ordinary crimes under the domestic Criminal Code, necessarily resulting in distortions of the collective and state-driven character of genocide. Nevertheless, the trials provoked a wide public reaction and unprecedented level of engagement with the Nazi past. In contrast to war crimes trials during the early occupation period, which were met with overwhelming denials of guilt, reactions to the trials of the 1960s reflected a widening generation gap and increasing openness to public discussion.⁸⁰ Greater willingness to accept trials conducted by German rather than Allied authorities doubtless played a role as well.

Beginning in July 1962, the EKD Council planned a public statement on the renewed war crimes prosecutions, with the purpose of providing spiritual guidance to prison chaplains and the families of convicted war criminals, as well as addressing public criticism.⁸¹ While remaining narrowly addressed to German society, the statement began from distinct premises from the EKD's denunciations of the Allied war crimes trials over a decade earlier. The final version of the statement, released on March 13, 1963, contained the familiar allusions to the gap between divine law and human justice, particularly in the face of the radical nature of Nazi crimes: "The guilt which is to be punished here (with all that lies behind it) far exceeds anything that can be included in and punished by the usual standards and punishments of human law." Courts should consider the political and spiritual contexts in which Nazi crimes were committed, including

⁷⁹ Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law* (Cambridge: Cambridge University Press, 2006), 46-47.

⁸⁰ *Ibid.*, 249-287.

⁸¹ "Bevorstehende Prozesse wegen Verbrechen aus der nationalsozialistischen Zeit," EZA 2/2480; "13. Sitzung des Rates der EKD am 30. und 31. August 1962," EZA 2/1806.

"what a powerful influence was exerted at that time by the terror of the party and the State." Nevertheless, the statement refused to obscure individual guilt behind invocations of universal human sin. Perpetrators should still be held personally accountable, "especially given the even greater responsibility of those entrusted with authority over others." Moreover, by calling attention to Christian complacency (albeit not complicity) in the genocide of European Jewry, the statement contained an unprecedented acknowledgement of German guilt, going beyond the October 1945 Stuttgart Declaration: "Whereas it would have been the duty of all Christians to confront us with the Word of truth entrusted to us, by publicly confessing the irrevocable Lordship of God over every sphere of life, thus protecting the victims of [the Nazi] system, especially the Jews living in our midst, very few [Christians] had the insight or the courage to resist."⁸²

The statement was promulgated widely throughout the Protestant churches in Germany. The Rhineland church alone ordered 500,000 copies from the EKD chancellery for distribution at Sunday services. In Westphalia, where the regional Protestant church ordered 180,000 copies, Church President Ernst Wilm instructed pastors to present and explain the statement to their congregations on Palm Sunday.⁸³ The EKD Foreign Office commissioned English and French translations for distribution throughout the member churches of the World Council of Churches.⁸⁴ The statement on war crimes trials garnered a largely positive response from the West German press, with one newspaper hailing it as a "new high point" of Protestant politics following on the heels of the Tübingen Memorandum. The statement also drew the ire of the

⁸² "Statement of the Council of the Protestant Church in Germany on the Trials of Nazi Criminals," March 13, 1963, EZA 2/2480.

⁸³ "Sonderdrucke der Betheler Erklärung des Rates der EKD," *Evangelische Welt*, April 16, 1963.

⁸⁴ "EKD-Wort zu den NS-Prozessen dreisprachig," *Evangelische Welt*, June 1, 1963.

trials' critics, who accused the EKD of reviving a specious "collective guilt" charge. As a jurist writing to the Hannover *Sonntagsblatt* complained, the EKD statement's insinuation of collective German responsibility for Nazi crimes was equivalent to holding all East Germans accountable for the actions of the ruling forces in the "Soviet occupation zone."⁸⁵

More significant than the statement itself, then, the ensuing public debate compelled Protestant intellectuals to advance an underlying theological justification for the EKD's newfound support for war crimes prosecutions. Ludwig Raiser, the lead author of the Tübingen Memorandum and chair of the EKD's Commission on Public Responsibility, alongside the pastor Erwin Wilkens, head of the press office of West Germany's United Lutheran Church, played the principal roles in this effort.⁸⁶ Both eschewed the ubiquitous attacks on war crimes trials of the late 1940s, instead articulating a new understanding of the relationship between mercy and justice. In the earlier debates, Protestant leaders presented the churches as heralds of mercy over retribution, arguing that in light of the limits of human judgment, ultimate justice had to await a divine court. By the early 1960s, however, Protestant intellectuals were prepared to take a more this-worldly approach. Raiser and Wilkens continued to believe that ultimate judgment for Nazi crimes could be issued by God alone. Nevertheless, human societies were not absolved of the responsibility of pursuing justice; the Christian's pursuit of worldly justice required the tools not only mercy but of law. The more sanguine view of law adopted by Protestant intellectuals by the early 1960s reflected not least a decade of Protestant engagement in constitutional politics.

For Ludwig Raiser, law could serve as a tool for advancing worldly justice not only by authorizing the punishment of criminals, but by fostering introspection about the Nazi past

⁸⁵ "Echo der Erklärung des Rates der EKD zu den NS-Prozessen," *Evangelische Welt*, June 1, 1963.

⁸⁶ Sarah Jäger, "Wilkens, Erwin," in *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Wilkens%2C+Erwin#> (accessed April 15, 2018).

among a wider German public. In a May 1963 radio broadcast on *Norddeutsche Rundfunk*, Raiser addressed the objection that the EKD had endorsed the dreaded accusation of collective guilt. Surely, Raiser argued, Nazi trials could hold only individuals, not an entire society, as legally liable for the perpetration of egregious crimes. Nevertheless, the trials' focus on individual responsibility served a larger public lesson, forcing Germans to confront their own consciences and ask themselves "how much of his own guilt each individual, even if only through allowing the reversal of fundamental concepts of morality and law, has contributed toward making possible such crimes." Even as Protestants recognized the chasm between divine and merely human justice, "the hope for such reconciliation with God does not release us from the task of traveling toward worldly justice and the reestablishment of violated law."⁸⁷ The Christian pursuit of reconciliation became a prerequisite rather than substitute for law.

Erwin Wilkens adopted a similar stance in a defense of the EKD's statement released the following year, responding to critics who charged the Church with inappropriate meddling in politics. Echoing earlier Protestant discourses about Nazi trials, Wilkens maintained that in light of the "apocalyptic character of the atrocities of the war years with the unleashing of irrational powers, not too much from the capability of the earthly judge" could be "expected." However, rather than delinking divine and human punishment, Wilkens emphasized their connection: "Punishment is the final and most extreme worldly aid toward recognition of [one's] guilt before God; [punishment] should not be withheld from the criminal for the sake of his humanity and the offer of forgiveness. A criminal law based on the ideas of guilt and atonement is unthinkable without this theological dimension." According to Wilkens, appeals to Christian mercy as an

⁸⁷ Ludwig Raiser, "Kommentar zum Wort des Rates der Evangelischen Kirche in Deutschland zu den NS-Kriegsverbrecherprozessen," *Norddeutscher Rundfunk*, Funkhaus Hannover, Kirchenfunk, May 4, 1963, EZA 2/2480.

alternative to punishment fundamentally misunderstood the theological basis of criminal law.⁸⁸ Instead, the system of criminal law had to do its part in securing the conditions of worldly justice, "with strength where it is indispensable; with equitableness and mildness where it is necessary for the sake of justice."⁸⁹ Consistent with ongoing Protestant discussions about Christian responsibility for law, Wilkens argued that criminal punishment was a matter of discretionary human judgment, not divine fiat.

Raiser and Wilkens' defense of Nazi trials lent practical credence to the emergence of "reconciliation" as a normative category of Protestant political action, a development that had begun in the milieu of the *Bruderschaften* during the late 1950s but which, via the Heidelberg FEST and Commission on Public Responsibility, gained influence within mainstream Protestant circles as well. Reconciliation was no longer a task that could be achieved through the suspension of law, but a guiding principle of law itself. The church, according to Raiser and Wilkens, should serve as a purveyor of this-worldly political values, of which intersubjective reconciliation assumed pride of place. This new framework for Christian political action linked the renewed West German Nazi trials to the problem of Germany's eastern border and would inform the roles of Raiser and Wilkens as the respective authors of the *Ostdenkschrift* sections on international law and theology.

Theologies of Reconciliation and the *Ostdenkschrift*

After rejecting the initial requests of the Commission on Public Responsibility to take up the question of the "right to the homeland," the EKD Council reversed this prohibition at its

⁸⁸ Erwin Wilkens, *NS-Verbrechen: Straffjustiz, deutsche Selbstbesinnung* (Berlin: Lutherisches Verlagshaus, 1964), 25-26.

⁸⁹ Erwin Wilkens, "Schlußstrich unter die NS-Verbrechen? Die Wiederaufrichtung des Rechts soll der sittlichen Genesung des deutschen Volkes dienen," *Rheinischer Merkur*, June 7, 1963.

meeting in March 1963, permitting a discussion on the subject that would begin in November. The Council continued to adopt a facade of neutrality in the ongoing debate between the Protestant expellee lobby and its critics, attempting to preserve the ever-precarious unity of the Church. Crucial for the Council's deliberations was the request by Philipp von Bismarck, a spokesperson for the Pomeranian *Landsmannschaft*, that the Commission on Public Responsibility undertake a "clarifying conversation" on the issue.⁹⁰ In order to allay the EKD Council's initial concerns, the Commission's leadership was certain to invite expellee activists to its meetings.

However, for all of the Commission's pretensions to ideological pluralism, the marginalization of the expellee position in favor of calls for reconciliation with Eastern Europe was in many ways a foregone conclusion. The permanent members of the Commission on Public Responsibility following its reconstitution in early 1963 included numerous participants in discussions of the theology of law around the FEST, including Ludwig Raiser, Erwin Wilkens, Elisabeth Schwarzhaupt, Hermann Kunst, the Pfalz Church President Hans Stempel, as well as the Berlin sociologist and Confessing Church veteran Dietrich Goldschmidt.⁹¹ Moreover, at a meeting in February 1963, commission members had discussed the ongoing Nazi trials and voiced wide assent for Raiser's call to recognize the legitimacy of the trials as a means toward postwar reconciliation.⁹²

⁹⁰ Rudolph, *Evangelische Kirche und Vertriebene. Band II*, 97-104, quoted 98. See also Bismarck to Scharf et al., March 12, 1963, EZA 2/1353.

⁹¹ Goldschmidt participated in the FEST institution commission. See "Gesetz und Institution. Tagung der Institutionen-Kommission im Christophorusstift (Heidelberg) am 19./20. Oktober 1959," BArch Koblenz, N 1367/249.

⁹² "Niederschrift über die Verhandlungen der Kammer für öffentlichen Verantwortung anlässlich ihrer Sitzung am 16. Februar 1963 in Frankfurt/Main," EZA 2/1354. The Commission on Public Responsibility was re-formed in mid-1962, partly in response to the Tübingen Memorandum, but it did not meet until February 1963 due to logistical problems. See Wilkens to Raiser, February 26, 1962 and the minutes of the Ratssitzung, 30.-31. August 1962, EZA 2/1353.

Alongside meetings of the Commission on Public Responsibility, the composition of the *Ostdenkschrift* in late 1964 was shaped by renewed debate about the Tübingen Memorandum and the Oder-Neisse line in the Protestant press. Wolfgang Schweitzer, who would serve as a guest throughout the Commission's meetings leading to the *Ostdenkschrift*, outlined the central issues at stake in a January 1963 article for the *Zeitschrift für evangelische Ethik* that received wide attention within the Protestant intellectual milieu.⁹³ Schweitzer's essay linked the debate about the *Recht auf Heimat* to larger Protestant controversies about the character of divine revelation extending back to the 1930s. The Lutheran theologian Walter Künneth's writings on the question came in for special criticism. Schweitzer noted a contradiction between Künneth's critique of the "deification of the *Heimat*," with which Schweitzer could surely agree, and Künneth's definition of the *Heimat* as a "bequest [*Vermächtnis*]" of God—a reflection of the old "theology of orders" that Künneth himself espoused during the early years of the Nazi regime. In contrast, Schweitzer turned to Protestant legal thought as a means of uniting considerations of justice with the political realities of the moment. Rudolf Smend's theory of the state as an "process of integration," according to Schweitzer, demonstrated the law's historical character over a "timeless idea of law." The Catholic principle of "human dignity" as the ultimate condition of justice, Schweitzer asserted, neglected the fact that the very conditions that could be understood to constitute a dignified life changed over time, and expressed as a *right* what was ultimately "enjoying the gifts of God that we have not earned."⁹⁴ Yet Protestant theology could

⁹³ For instance, Carl Brummack sought to commission rejoinders to Schweitzer, and later to Ludwig Raiser, for the *Zeitschrift für evangelische Ethik*: Brummack to Künneth, June 28, 1963, EZA 17/533; Brummack to Korkisch, January 13, 1964, EZA 17/534.

⁹⁴ Wolfgang Schweitzer, *Gerechtigkeit und Frieden an Deutschlands Ostgrenzen* (Berlin: Käthe Vogt Verlag, 1964), 32-33. See also Wilhelm Dantine, "Die Geschichtlichkeit des Rechts als ethisches Problem," *Zeitschrift für evangelische Ethik* 6 (1962): 321-340 and Hans Dombois, "Zur Geschichtlichkeit des Rechts," *Zeitschrift für evangelische Ethik* 7 (1963): 316-320.

not simply recognize law as the reflection of a *fait accompli*—the accusation leveled against Schweitzer by his critics in the expellee lobby. Rather, Schweitzer called for the interrogation of conscience in pursuit of the meaning of justice in the concrete instance. In the case of the Oder-Neisse line, Schweitzer argued, a right of return to the *Heimat* would surely create "new injustice for innocent people."⁹⁵

Ludwig Raiser expressed substantial agreement in his response to Schweitzer in the *Zeitschrift für evangelische Ethik* several months later. The Protestant understanding of law's historicity and dependence on concrete situations, Raiser argued, applied all the more in the domain of international law, whose statutory and contractual underpinnings necessarily shifted with transformations of international politics. As Raiser noted, revolutions necessarily violated existing domestic law, but if successful, created new political realities that international law had to accommodate. Precisely such a new reality had emerged after Nazi Germany's failed bid to conquer Europe. Without denying the injustice of the postwar expulsions, Raiser contended that the competing rights claims of Germans and Poles should be overcome through the creation of a new legal settlement, one "better than the broken old order." Relying on a Protestant rhetoric of guilt, fallibility, and reconciliation, Raiser suggested that acknowledgement of historical injustices, more than inflexible principles, should inform the construction of international law.

⁹⁵ Wolfgang Schweitzer, "Ideologisierung des 'Rechts auf Heimat'? Dargestellt im Zusammenhang mit den Auseinandersetzungen um das 'Tübinger Memorandum der Acht' vom November 1961/Februar 1962," *Zeitschrift für evangelische Ethik* 7 (1963): 36-61, quoted 54. See also the replies to Schweitzer by representatives of the Protestant expellee lobby: Joachim Freiherr von Braun, "Deutschlands Ostproblem: Eine Antwort an Wolfgang Schweitzer," *Zeitschrift für evangelische Ethik* 7 (1963): 234-245 and Kurt Rabl, "Diskussionsbeitrag zum Thema 'Recht auf Heimat,'" *Zeitschrift für evangelische Ethik* 7 (1963): 245-262. For Schweitzer's rejoinder, see Schweitzer, "Erste Erwiderung zu einigen Diskussionsbeiträgen," *Zeitschrift für evangelische Ethik* 7 (1963): 262-268.

As in his writings on Nazi trials, Raiser viewed law as a means of pursuing this-worldly justice and reconciliation.⁹⁶

With these intellectual foundations in place, and with Raiser and Erwin Wilkens taking leading roles, the composition of the *Ostdenkschrift* proceeded quickly. Representatives of Protestant expellee associations attended the meetings of the Commission on Political Responsibility, and Raiser, as the commission's chair, continued to espouse a desire to mediate between competing factions. In practice, however, power on the commission lay with those who called for a theology and politics of reconciliation. The first meeting of November 1963 centered on the "Bielefeld theses" produced by representatives of the *Arbeitskreis kirchlicher Bruderschaften* led by Schweitzer, which laid out the theological case for abandoning the Oder-Neisse territories.⁹⁷ Discussions at a February 1964 meeting pitted representatives of the expellee associations, who warned against recognizing an illegal situation and stoking radicalism among expellees, against Raiser and Schweitzer's calls for a new legal settlement with Poland.⁹⁸

Further months of work did little to bridge the cleft between the two groups. Wilkens prepared a memorandum for discussion at the Commission's October 1964 meeting, which would become the basis for the *Ostdenkschrift* itself. While purporting to take a mediating stance, Wilkens' report referred to the *Recht auf Heimat* as a "cipher," noting the difficulty of actualizing such a right in international law. Wilkens cited Raiser's writings on the subject to

⁹⁶ Ludwig Raiser, "Das 'Recht auf Heimat' als Schlüssel zum deutschen Ostproblem?" *Zeitschrift für evangelische Ethik* 7 (1963): 384-390.

⁹⁷ "Protokoll über die Sitzung der Kammer für öffentliche Verantwortung in Frankfurt/Main, Dominikanerkloster, am Freitag, den 29. November 1963," EZA 2/1354. For the Bielefeld theses, see "Die Versöhnung in Christus und die Frage des deutschen Anspruchs auf die Gebiete jenseits der Oder und Neiße: Eine vom Bielefelder Arbeitskreis der Kirchlichen Bruderschaften zur Diskussion gestellte Thesenreihe," *Junge Kirche*, December 16, 1963.

⁹⁸ "Niederschrift über die Sitzung der Kammer für öffentliche Verantwortung in Frankfurt/Main, 21./22. Februar 1964," EZA 2/1354.

suggest that a new international settlement required a "historical-situational judgment."⁹⁹ At the October meeting, participants ranging from longtime Commission members Raiser and Elisabeth Schwarzhaupt to expellee representatives Carl Brummack and Gerhard Gülzow could agree on little else than presenting Wilkens' memorandum to the EKD Council, which promptly approved of Wilkens' proposal to produce a volume on expellees and the Oder-Neisse line.¹⁰⁰ At the following Commission meeting in December, an address by the Bielefeld *Oberkirchenrat* Werner Danielsmeyer was met by the theological divisions that had pervaded discussions of the *Recht auf Heimat* since the late 1950s. Participants concurred that the provocative phrase should be avoided in the upcoming memorandum, as should references to the "renunciation" of territory. Raiser promised that the expellee lobby's position would be taken into account. Nevertheless, the majority of the commission members agreed that "In a contribution of the church, it is appropriate to see the 'right to the homeland' principally under the sign of reconciliation between Germany and the peoples of the East."¹⁰¹ This conclusion encapsulated recent developments within Protestant political-theological debate. While insisting that they did not aspire to shape policy details, Commission members presented the Protestant Church as a source of foundational values for the West German political community, promoting the mission of reconciliation as a guiding light for government policy.

The year 1965 opened with commemorations of the twentieth anniversary of the end of the Second World War across West Germany. Expellee organizations were quick to capitalize on

⁹⁹ E. Wilkens, "Das Recht auf Heimat," EZA 2/1356.

¹⁰⁰ "Kurzprotokoll über die Sitzung der Kammer für Öffentliche Verantwortung Frankfurt/Main am 2./3. Oktober 1964," EZA 2/1357; Wilkens to Ratsmitglieder, October 13, 1964, EZA 2/1356; Ratssitzung, 15./16. Oktober 1964, EZA 2/1357.

¹⁰¹ "Kurzprotokoll über die Sitzung der Kammer der EKD für öffentliche Verantwortung am 18. und 19. Dezember 1964 in Berlin," EZA 2/1357.

the memorializations to push back against attempts to raise the Oder-Neisse border as a legitimate topic of public discussion. The *Ostkirchenausschuss* chair Gerhard Gülzow used a January speech before the *Bund der Vertriebenen* announcing a "year of human rights" to link the territorial claims of the expellee organizations to the protection of human rights worldwide.¹⁰² Such arguments, however, did little to dampen the alternative theology of law developed within FEST and *Bruderschaften* circles, which formed the basis for Raiser and Wilkens' continued work on the *Ostdenkschrift*. The EKD Council voiced approval for a near-final version of the memorandum in May 1965, with all members supporting the sections on international law and theology, and authorized the memorandum's publication in August.¹⁰³

The *Ostdenkschrift* was released in November 1965, with a forward by the EKD Council Chair and Berlin Bishop Kurt Scharf, and proved immediately controversial. The document gained a wider reception in the press and among politicians than any statement of the Protestant Church before, and perhaps since. Liberal media outlets such as *Die Zeit* and *Der Spiegel* hailed the memorandum as an important step forward in the debate about the Oder-Neisse line and lauded the EKD for using its moral capital to press for a more daring policy than politicians were willing to support. Critics, primarily within the expellee lobby, attacked the EKD for meddling in political affairs and for speaking out on an issue on which only expellees themselves had the right to decide. Moreover, as the historian Pertti Ahonen has noted, the major political parties proved surprisingly amenable to the EKD's recommendations, departing from their unwavering acquiescence toward the expellee lobby during the fifteen years prior. SPD politicians in particular "saluted the church leaders' good intentions and their positive contributions to serious

¹⁰² "Jahr der Menschenrechte," *Evangelische Welt*, February 16, 1965.

¹⁰³ Rudolph, *Evangelische Kirche und Vertriebene. Band II*, 139-146.

public debate," not going so far as to endorse the memorandum's call for territorial renunciation but abandoning their earlier mimicry of expellee polemics.¹⁰⁴

In light of the theological-legal exchanges during the 1950s and early 1960s, culminating in widespread Protestant affirmations of the historicity of law and the connection between reconciliation and justice, the *Ostdenkschrift* was hardly a novel document. The section on international law, composed by Ludwig Raiser, called for "sobriety in the use of international legal arguments." Although the expulsions were illegal, Raiser argued, the combination of German atrocities and Poland's territorial losses as a result of the Hitler-Stalin pact created a novel legal situation whereby the Polish state could assert a legitimate claim to the Oder-Neisse territories, based on the Polish people's rights to "life" and "security."¹⁰⁵ Erwin Wilkens' concluding section on "Ethical and Theological Considerations" explicated the theological basis for Raiser's treatment of international law. The *Heimat* was a gift of God, Wilkens contended; God could equally choose to take away what he had provided. Protestant ethics dealt only with "historical orders," not with "orders that are pre-given by nature in eternal, unchanging design."¹⁰⁶ Wilkens did not advocate passive submission to God's will in history, however. Rather, Christians were called upon to take responsibility for working toward justice within the fallen world, in light of the circumstances in which they found themselves. Certainly the expulsions were an injustice, but an injustice whose origins could be traced back to Germany's

¹⁰⁴ Ahonen, *After the Expulsion*, 206.

¹⁰⁵ Rat der Evangelischen Kirche in Deutschland, ed., *Die Lage der Vertriebenen und das Verhältnis des deutschen Volkes zu seinen östlichen Nachbarn: Eine evangelische Denkschrift* (Hannover: Verlag des Amtsblattes der Evangelischen Kirche in Deutschland, 1965), 25.

¹⁰⁶ *Ibid.*, 34.

prosecution of the war. West Germans must therefore acknowledge their guilt while assuming responsibility for "reconciliation."¹⁰⁷

Within the Protestant milieu, the publication of the *Ostdenkschrift* did not transform established fault lines of debate, but did signify a victory for those theologians and lay intellectuals who had championed the Oder-Neisse line and the creation of a new international legal situation.¹⁰⁸ The journal *Stimme der Gemeinde*, whose lead editor in 1965 remained Martin Niemöller, called on the authors of the memorandum to present their argument with even greater force.¹⁰⁹ Critics charged that the memorandum would enhance Moscow's position and undermine the viability of West German membership in the NATO coalition—an implausible claim given that the Western Allies had long grown weary of the Bonn government's willingness to entertain the restorationist designs of the expellee lobby. Beneath the frustration of Protestant critics, however, lay a deeper theological argument. In an open letter to Bishop Lilje of Hannover, the expellee historian Gotthold Rhode worried that the "fundamental tenor" of the memorandum was determined by its overemphasis on "guilt" and "judgment," and corresponding downplaying of "love" and "mercy." By recognizing reconciliation as a principle of international law, Rhode argued, the *Ostdenkschrift* conflated law with mere political judgment.¹¹⁰ Such a reading recognized the express intention of the authors but missed the underlying theological framework that provided the memorandum's treatment of law with its conceptual coherence. For Raiser and

¹⁰⁷ Ibid., 40-41.

¹⁰⁸ Wolfgang Schweitzer, "Bemerkungen zum Denkschrift," *Junge Kirche*, November 10, 1965.

¹⁰⁹ Renate Riembeck, "Zur Ost-Denkschrift der EKD," *Stimme der Gemeinde*, November 16, 1965; see also Walter Dignath, "Gibt es ein göttliches Recht auf Heimat?" *Stimme der Gemeinde*, March 1, 1966 and Theodor Michaeltscheff, "Wer hat eigentlich die Deutschen vertrieben?" *Stimme der Gemeinde*, March 1, 1966.

¹¹⁰ Peter Nasarski, "Einführung," in *Stimmen zur Denkschrift der EKD: Die Lage der Vertriebenen und das Verhältnis des deutschen Volkes zu seinen östlichen Nachbarn*, ed. Peter Nasarski (Köln: Verlag Wissenschaft und Politik, 1966), 9. This volume contains a collection of critiques of the *Ostdenkschrift*.

Wilkens, the principle of reconciliation formed the foundation of international law. Therefore, historical situations might arise in which the tenets of positive law required revision to be brought into harmony with the dictates of true justice and legality.

Conclusion

The *Ostdenkschrift* brought to the fore multiple strands of postwar Protestant thought. On the one hand, the milieu around the FEST contributed a new appraisal of property rights and a reassessment of the historicity and contingency of international law. Theologically more radical circles around the *Arbeitskreis kirchlicher Bruderschaften* advanced a theology of the "Kingdom of Christ" that identified the ultimate goal of political life as service to God rather than the pursuit of worldly goods. The impetus for Protestant calls for the renunciation of the Oder-Neisse territories was not solely theological, of course. As historians of the German expellees have noted, by the mid-1950s, and especially with the construction of the Berlin Wall in 1961, most politicians in the mainstream parties recognized that expellee demands could not be realized in practice. Appeasing the expellee lobby by invoking the *Recht auf Heimat* became a matter more of political expediency than of serious policy.¹¹¹ By openly calling expellee rhetoric into question, on this interpretation, Protestant intellectuals simply made public what was already recognized by most politicians. Yet such a reading does not grasp the full significance of the transformation of Protestant understandings of international law tracked in this chapter. As in the 1950s, Protestant associations provided an alternative intellectual and institutional milieu for discussions about the legacy of Nazism and the Second World War that remained taboo elsewhere in the public sphere. The Protestant debate about the Oder-Neisse territories, in which

¹¹¹ Ahonen, *After the Expulsion*, especially chap. 6.

the ethical and political arguments of the *Ostdenkschrift* first took shape, expanded the boundaries of public discourse on the question of Germany's postwar borders.

Discussions of the Oder-Neisse line, moreover, both signified and helped bring about a transformation within Protestant political thought itself. While Protestant legal-theological exchanges of the 1950s aimed at defining a theological basis for law that could navigate between the equally problematic alternatives of natural law and legal positivism, by the early 1960s Protestant intellectuals proposed the concept of reconciliation as an answer to this impasse, at least within the domain of international law. By defining reconciliation as the guiding value for a postwar international settlement, Protestant theologians and jurists sought to mediate between considerations of rights and concrete political circumstances. They suggested that worldly justice was achieved not through the attainment of a static, rationally discernible set of goods, but through action on behalf of the needs of others in cognizance of concrete circumstances. This new framework enabled Protestant intellectuals to advocate for Christian participation in the pursuit of worldly justice, without abandoning long-held convictions regarding the unknowability of God's ultimate plan for humanity, the inherent sinfulness of human beings, and the impossibility of achieving absolute justice in this world.

The debate about postwar international law brought together Protestants affiliated with the FEST and the EKD Commission on Public Responsibility as well as the *Arbeitskreis kirchlicher Bruderschaften*, belying an absolute distinction between the politics of these groups. Nevertheless, members of the *kirchliche Bruderschaften* did advance the theological and legal motifs discussed in this chapter in a distinctive direction through their engagement with leftwing politics during the 1960s. Merely affirming the primacy of reconciliation over static conceptions of rights did not ally Protestant intellectuals with a particular form of government. But the

legitimacy of both the East and West German states was a highly contested issue in 1960s West Germany, as opponents of government policies were increasingly accused of Communist sympathies and disloyalty to the West German state. As members of an emergent New Left coalition, theologians and jurists affiliated with the *kirchliche Bruderschaften* applied the theological innovations of the postwar years to a wider appraisal of constitutional democracy. These figures would not call for the overthrow of a proto-fascist Federal Republic, in the manner of more radical New Left currents. Rather, they articulated a novel defense of the democratic *Rechtsstaat* as a form of government that served precisely as a bulwark against revolutionary fervor. These developments will be the subject of the next and final chapter.

Chapter Six: *Rechtsstaat* or Revolution: Protestant Intellectuals and the New Left in 1960s West Germany

In January 1964, a group of theologians, pastors, and lay intellectuals gathered at the annual plenary meeting of the *Arbeitskreis kirchlicher Bruderschaften* in the Hessian town of Friedrichsdorf. The political situation was tense. Both major parties found themselves in the midst of ideological transformations. Three months earlier, the CDU economics minister and architect of West Germany's postwar economic reconstruction, Ludwig Erhard, had assumed the chancellorship following the resignation of an aging Konrad Adenauer, two years before the official end of his term. After the CDU won a historic absolute majority in the elections of 1957, Adenauer's government had been roiled by a series of crises, culminating in a government-backed raid on the popular newsmagazine *Der Spiegel* in late 1962. Erhard's rise signaled a shift from religion to economics as the source of the CDU's legitimacy, made essential by declining church attendance and decreasing participation in Christian, especially Catholic associational life by the mid-1960s.¹ The SPD had undertaken its own turn at the Bad Godesberg party congress of November 1959, renouncing Marxist ideology and accepting the fundamentals of the Federal Republic's foreign policy. With the convergence of both major parties around a platform of capitalist growth and support for NATO, leftists worried that meaningful parliamentary opposition had been neutralized. The loose coalition of student associations, unions, and protest

¹ On the transformation of the CDU during the mid-1960s, see Ronald J. Granieri, "Politics in C Minor: The CDU/CSU between Germany and Europe since the Secular Sixties," *Central European History* 42 (2009): 1-32. On the erosion of West Germany's Catholic milieu, see Mark Edward Ruff, "A Religious Vacuum? The Post-Catholic Milieu in the Federal Republic of Germany," in *Die Gegenwart Gottes in der modernen Gesellschaft: Religiöse Vergemeinschaftung in Deutschland*, eds. Michael Geyer and Lucian Hölscher (Göttingen: Wallstein, 2006), 351-379.

movements that would become known as the Extra-Parliamentary Opposition (APO), later the New Left, emerged around 1960, just following the Godesberg platform.²

The Protestant Left that coalesced around the *Arbeitskreis kirchlicher Bruderschaften* had experienced its own series of defeats in the prior years, mirroring the wider experience of the Extra-Parliamentary Opposition. As the previous chapter showed, protests against the "nuclearization" of the *Bundeswehr* failed to transform West German foreign policy. The federal government (as yet) refused to recognize the legitimacy of the East German state or chart a policy of reconciliation with Poland. Yet the lectures at the 1964 Friedrichsdorf convention hardly endorsed revolutionary action, German reunification on the basis of Cold War neutralism, or abdication of the Federal Republic's constitutional system in favor of more "direct" modes of democracy. Rather, the meeting marked the affirmation of constitutional democracy by Confessing Church successor organizations, precisely at the moment when the wider West German Left felt itself to be shut out of the political system. The meeting, on the theme of "The Rule-of-Law Order [*rechtsstaatliche Ordnung*] of the Federal Republic," featured lectures by a cross-section of the Protestant intelligentsia: not only *Bruderschaften* mainstays such as the theologian Ernst Wolf and the jurist Helmut Simon, but also Ulrich Scheuner, the conservative constitutional scholar and close colleague of Rudolf Smend. Their lectures aimed both to elucidate the *Rechtsstaat* as a fundamental structure of West Germany's postwar legal order, and to defend this model from the standpoint of Protestant theology.³

This chapter analyzes how Protestant intellectuals by the mid-1960s came to articulate an ideal of constitutional citizenship, exemplified not only by the 1964 conference on the

² On "The Origins of the APO," see Nick Thomas, *Protest Movements in 1960s West Germany: A Social History of Dissent and Democracy* (Oxford: Berg, 2003), 31-45.

³ Ernst Wolf, ed., *Der Rechtsstaat: Angebot und Aufgabe: Eine Anfrage an Theologie und Christenheit heute* (München: Kaiser, 1964).

Rechtsstaat, but by Protestant activism in a series of political campaigns that aimed to protect the constitution against overzealous extensions of executive authority. In doing so, it disrupts prevailing assumptions about the West German New Left, about the place of Protestant organizations within the oppositional politics of the 1960s, and about the trajectory of secularization in Germany since that pivotal decade. Much of the literature on 1960s protest movements in West Germany neglects religious involvement, building on the implicit assumption that the churches served as sources of monolithic conservatism.⁴ Other works group leaders of the *Kirchliche Bruderschaften*, the regional successor organizations of the Confessing Church, with a far-left milieu that failed to recognize the fundamental distinctions between the Nazi state and the postwar Federal Republic, and at worst collaborated with the East German Socialist Unity Party (SED).⁵ More specialized studies of the Protestant churches in 1960s West Germany focus on generational change, rather than the ongoing influence of the generation that came of age within the Confessing Church.⁶

Understanding the impact of Protestant intellectuals on 1960s oppositional politics requires a more differentiated picture of the leftwing Protestant milieu. Protestant critics of Christian Democracy, who unified during the 1950s against West German rearmament and CDU

⁴ For instance, the author of the most comprehensive, and otherwise excellent survey in English acknowledges that he does not treat "the role of religion in German politics and society" as a "central theme": Thomas, *Protest Movements*, 7. Other major works on the West German New Left that pay little or no attention to religion include Timothy Scott Brown, *West Germany and the Global Sixties: The Antiauthoritarian Revolt, 1962-1978* (Cambridge: Cambridge University Press, 2013); Martin Klimke, *The Other Alliance: Student Protest in West Germany and the United States in the Global Sixties* (Princeton: Princeton University Press, 2010); and Karl A. Otto, *Vom Ostermarsch zur APO: Geschichte der ausserparlamentarischen Opposition in der Bundesrepublik 1960-70* (Frankfurt: Campus Verlag, 1977).

⁵ Dirk Mellies, *Trojanische Pferde der DDR? Das neutralistisch-pazifistische Netzwerk der frühen Bundesrepublik und die Deutsche Volkszeitung, 1953-1973* (Frankfurt: Peter Lang, 2007), 132-139; Holger Nehring, "Die nachgeholte Stunde Null: Intellektuelle Debatten um die Atombewaffnung der Bundeswehr 1958-1960," in *Streit um den Staat: Intellektuelle Debatten in der Bundesrepublik 1960-1980*, eds. Dominik Geppert and Jens Hacke (Göttingen: Vandenhoeck & Ruprecht, 2008) 229-250, especially 236-242.

⁶ Fitschen et al., eds., *Politisierung des Protestantismus*; Hermle, Lepp, and Oelke, eds., *Umbrüche*.

policies on the family and confessional schooling, found themselves divided along cleavages that mirrored the fragmentation of the wider West German Left after 1960. Protestant SPD parliamentarians including Adolf Arndt and Gustav Heinemann, who joined the SPD following the collapse of his *Gesamtdeutsche Volkspartei* in 1957, not only remained loyal Social Democrats but pioneered the party's Godesberg platform. More radical critics of the CDU, led by stalwarts of the anti-rearmament campaigns such as Martin Niemöller and the Darmstadt pastor Herbert Mochalski, deplored the Godesberg statement as a capitulation to remilitarization and German division. A third group, however, sought to navigate between mainstream politics and radical calls for resistance against the West German state. Leaders of the *Arbeitskreis kirchlicher Bruderschaften*, such as Ernst Wolf and Helmut Simon, shared the radicals' skepticism about the Godesberg platform but sought to continue the project of building a West German democracy grounded in Protestant political ethics. These figures formed part of the cluster of West German intellectuals that the historian Terrence Renaud has termed "left socialists," who aimed to carve out a political space between reformist social democracy and resurgent communism or Cold War neutralism.⁷ Protestant "left socialists" prevented the complete disintegration of the Protestant opposition to the CDU, and by the end of the decade facilitated the convergence of Protestant leftwing intellectuals around an affirmation of Western constitutional democracy.

A series of perceived challenges to the Basic Law over the course of the 1960s, culminating in government efforts to introduce "emergency laws" that would authorize the suspension of constitutional basic rights, became the impetus for contentious debates on the West German Left about the nature and viability of constitutional democracy. Protestant critics of emergency laws responded to these challenges not by declaring the Federal Republic a sham and

⁷ Terrence Renaud, "Restarting Socialism: The New Beginning Group and the Problem of Renewal on the German Left, 1930-1970 (PhD Dissertation, University of California Berkeley, 2015), 11.

working toward its overthrow—the strategy adopted by more radical student leftists by the late 1960s—but by redefining the *Rechtsstaat* as the political expression of Christian values. Advancing on their argument for the right of conscientious objection during the decade prior, as well as evolving revaluations of the right of resistance, leaders of the *Arbeitskreis kirchlicher Bruderschaften* now claimed that willingness to engage in disobedience in defense of the rule of law and human rights marked a central value of democratic citizenship. While opponents of emergency laws ultimately failed to prevent a version of the amendments from being passed, they facilitated the introduction of a right of resistance against breaches of democracy into the Basic Law. Protestant *Bruderschaften* members thereby helped reconcile broad segments of the New Left to working within rather than against the West German state. In the longer term, they developed novel conceptions of Christian political identity that could be sustained even as the religious conservatism dominant in the 1950s diminished in popular appeal.

Protestants and the Path toward Godesberg

The Godesberg program of the Social Democratic Party, concluded on November 15, 1959, constituted a watershed moment for the West German Protestant Left. Hardly an exogenous change to which Protestants merely responded, the Godesberg turn laid bare competing visions of West Germany democracy within the Protestant milieu itself. The reorientation of the SPD was spearheaded by lay Protestants who joined the party during the 1950s, often following the collapse of more radical movements for German reunification—including Adolf Arndt, Gustav Heinemann, the parliamentarian Fritz Erler, as well as Erhard Eppler, a former anti-rearmament activist and colleague of Heinemann in the now defunct GVP.⁸

⁸ On Erler, see Renaud, "Restarting Socialism," 147-158; on Erler's participation in the 1959 Protestant *Kirchentag* as a defender of the moderate turn of the SPD, see Benjamin Pearson, "The Pluralization of Protestant Politics:

These figures embraced a model of constitutional democracy rooted in Christian values, reflecting the ideals and jurisprudential strategies Protestant jurists advocated over the course of the 1950s.⁹ The transformation of the SPD thus did not represent a capitulation to CDU policies, as contemporary critics on the Left charged, nor was it simply a ploy to broaden the party's electoral base. Rather, Protestant SPD leaders understood the party as a vehicle for integrating Protestant ethical categories into the West German political discourse, a core aim of Confessing Church veterans since the creation of the Federal Republic.

The jurist Adolf Arndt, a leading intellectual force behind the Godesberg platform, symbolizes the transformation of Protestant Social Democrats from gadflies to political insiders. As previous chapters have shown, Arndt served as a major influence on Federal Constitutional Court rulings on the *Reichskonkordat*, family law, and conscientious objection between the mid-1950s and early 1960s. In each of these cases, the Court drew on the jurisprudential writings of Rudolf Smend, mediated by Protestant jurists such as Arndt, Gustav Heinemann, and Elisabeth Schwarzhaupt, to eschew natural law arguments while embracing a standard of pre-political "values." The Court's emergent understanding of the Basic Law as an "order of fundamental values [*Grundwerteordnung*]" resonated with the equally influential concept of "militant democracy [*streitbare Demokratie*]," according to which democracies must implement mechanisms to guard against the co-optation of democratic processes by anti-democratic

Public Responsibility, Rearmament, and Division at the 1950s *Kirchentage*," *Central European History* 43 (2010): 298-300. On Eppler, see Tim Schedel, "Eppler, Erhard," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Eppler%2C+Erhard> (accessed April 15, 2018).

⁹ For a detailed reconstruction of the role of lay Protestants in the reform of the SPD, see Michael Klein, *Westdeutscher Protestantismus und politische Parteien: Anti-Parteien-Mentalität und parteipolitisches Engagement 1945 bis 1963* (Tübingen: Mohr Siebeck, 2005), 337-357.

forces.¹⁰ First theorized by the émigré political scientist Karl Loewenstein in the mid-1930s, such a doctrine underlay the Constitutional Court's decisions, in 1952 and 1956 respectively, to uphold government bans on the neo-Nazi *Sozialistische Reichspartei* and the German Communist Party (KPD). The Court declared both parties to be incompatible with the identity of the Bonn republic as a "democratic and social federal state" laid out in Article 20 of the Basic Law.¹¹

The Court's development of a robust jurisprudential framework that restrained the Adenauer government's invocations of natural law convinced Arndt, along with his fellow Protestant SPD jurists, of the durability of West German constitutional democracy. Moreover, Arndt and his colleagues welcomed the concept of "militant democracy," defended by a strong authority of judicial review, insofar as the constitutional order to be protected from radical threats rested on values of human dignity, religious tolerance, and the protection of conscience derived from Protestant thought. The Constitutional Court's "value" jurisprudence culminated with the *Lüth* judgment of January 15, 1958, which confirmed Arndt's understanding of West German constitutional democracy just prior to the beginning of negotiations that would lead to the Godesberg platform. The case, which came before the Court as early as December 1951, involved a dispute between the filmmaker Veit Harlan and the head of the Hamburg state press office, Eric Lüth, over Harlan's Nazi past. A leading proponent of Christian-Jewish reconciliation and the founder of an organization that supported West German reparation payments to Jewish survivors, Lüth had called on film distributors to boycott Harlan's first postwar production,

¹⁰ For a conceptual history of "militant democracy" and its deployment in the Federal Republic, see Karrin Hanshew, *Terror and Democracy in West Germany* (Cambridge: Cambridge University Press, 2012), 34-68. On the concept's link to transatlantic currents of Cold War anti-Communism, see Udi Greenberg, "Militant Democracy and Human Rights," *New German Critique* 42, no. 3 (Nov. 2015): 169-195.

¹¹ Sebastian Gehrig, "Recht im Kalten Krieg: Das Bundesverfassungsgericht, die deutsche Teilung und die politische Kultur der frühen Bundesrepublik," *Historische Zeitschrift* 303, no. 1 (Aug. 2016): 73-77, 81-90.

Immortal Lover, in light of Harlan's role as director of the antisemitic Nazi propaganda film *Jud Süß*. The Constitutional Court, weighing Harlan's libel lawsuit against Lüth's appeal to the constitutional right of "freedom of opinion," ruled in Lüth's favor. The decision was strongly inflected by Rudolf Smend's constitutional jurisprudence. Basic rights, the Court determined, were rooted in an "objective order of values"; that is, rights did not simply protect the individual against state overreach, but reflected a set of norms that bound all members of the political community, including private citizens.¹² The case was a major victory for Protestant Social Democrats. Adolf Arndt had represented Lüth before the Constitutional Court, drawing on Smend's interpretation of "freedom of opinion" to argue that this right applied equally in disputes between private parties. Arndt's assistant, Wilhelm Hennis, was himself a student of Smend.¹³

The interventions of Arndt and his Protestant colleagues at the SPD's Godesberg congress reflected the framework of Protestant political ethics they helped to develop over the course of the 1950s, and which had been instantiated in constitutional jurisprudence. In addresses before the *Evangelische Akademien* in Loccum and Arnoldshain in the years leading up to the 1959 party congress, Arndt continued to reject the idea of an ecclesiastical party based on natural law, citing his non-recognition of natural law as a crucial departure from Catholic legal thought. The electoral lobbying of Catholic (and some Protestant) clergy for the CDU, according to Arndt, falsely assumed that one political party could declare a monopoly on Christian virtue. Yet citing Ernst Wolf, and reflecting the broader tradition of the Confessing Church, Arndt also opined that church representatives could speak on politics "in the name of the church" when moved toward a

¹² On the significance of the Lüth case, see Collings, *Democracy's Guardians*, 54-61 and Matthew G. Specter, *Jürgen Habermas: A Political Biography* (Cambridge: Cambridge University Press, 2011), 72-85.

¹³ On Arndt's role in the case, see Gosewinkel, *Arndt*, 493-502, in particular 495 on Arndt's relationship to Smend.

political position by religious convictions.¹⁴ Arndt continued to seek an alternative to legal positivism, and insisted that law was not self-securing but rested on a "basis of values." The "idea of law [*Rechtsidee*]" should serve as a "corrective to...the legal statute." Following Rudolf Smend, Arndt believed that this higher purpose of law was encapsulated in the opening articles of the Basic Law, which delineated citizens' fundamental rights.¹⁵

The Godesberg party platform itself echoed Protestant theories of constitutional democracy, juxtaposing an appeal to recognition of religious and ideological pluralism alongside a strong conception of the Federal Republic's value order. The platform's section on politics and law, drafted primarily by Arndt, contended that the fundamental rights outlined in the Basic Law not only guaranteed "the freedom of the individual against the state" but served as "rights that co-found the state and build community"—a clear reference to the Constitutional Court's *Lüth* decision.¹⁶ More broadly, Protestant visions of the Basic Law as a document that established the common values uniting citizens of divergent ideologies and interests harmonized with the conciliatory aims of the Godesberg Program. Rejecting the traditional self-understanding of the SPD as an "ideological party [*Weltanschauungspartei*]," the Godesberg Program laid the foundations for a broad-based "people's party [*Volkspartei*]" that would seek support from all sectors of the population. The program accepted the basic tenets of Adenauer's foreign policy and sought to balance state-led social welfare provisions with principles of subsidiarity and

¹⁴ Adolf Arndt, "Christentum und freiheitlicher Sozialismus" in Arndt, *Politische Reden und Schriften*, eds. Horst Ehmke and Carlo Schmid (Berlin: Dietz, 1976), 113-133 and "Das Toleranzproblem aus der Sicht des Staates," in *Politische Reden und Schriften*, 134-149. See also Gosewinkel, *Arndt*, 562-571. Arndt's reference to Wolf is also cited in Gosewinkel, *Arndt*, 563.

¹⁵ Cited in Gosewinkel, *Arndt*, 547.

¹⁶ "Grundsatzprogramm der Sozialdemokratischen Partei Deutschlands, beschlossen auf dem außerordentlichen Parteitag in Bad Godesberg, 1959," in *Programmatische Dokumente der deutschen Sozialdemokratie*, eds. Dieter Dowe and Kurt Klotzbach (Berlin: J.H.W. Dietz, 1984), 361-383, quoted 366. On Arndt's work on the Godesberg program, see also Gosewinkel, *Arndt*, 542-557.

individual responsibility. Moreover, it jettisoned longstanding SPD demands for the privatization of religion, recognizing the claim of the major churches to participation in public life.¹⁷

The Godesberg Congress opened up significant tensions within the Protestant Left. For Protestant jurists such as Arndt, Heinemann, and Wilhelm Hennis, the SPD's new program represented the apogee of a jurisprudence of "integration" that understood the constitution to articulate the fundamental values uniting the polity. They believed that the SPD had successfully navigated between the confessionalism of the Christian Democrats and the disastrous legal positivism that portended the demise of the Weimar Republic. However, an emergent leftist opposition within the SPD, led by the Marburg jurist Wolfgang Abendroth and the Berlin political scientist Ossip K. Flechtheim, continued to regard the constitution as an instrumental good toward the achievement of a socialist society, and to understand democracy in terms of participation rather than formal rights.¹⁸ For Protestants disaffected with the compromises of the Godesberg program, more direct forms of democracy represented a tempting option.

Bishop Dibelius, the GDR, and the Division of the Protestant Left

In addition to the Godesberg platform, a series of controversies surrounding the legitimacy of the East German state catalyzed the fragmentation of Protestant detractors of the CDU by the late 1950s. For the signatories of the Godesberg Declaration, the Communist German Democratic Republic formed the foil for an ideal of a constitutional democracy rooted in shared respect for individual human dignity. The Godesberg program aimed to completely dissociate Social Democracy from East German Communism, in part by signaling a

¹⁷ For an overview of the Godesberg program, see Renaud, "Restarting Socialism," 171-180.

¹⁸ On the emergence of a "left socialist" opposition, see Renaud, "Restarting Socialism," 183-186.

rapprochement with the churches, eliminating a rhetorical cudgel unfailingly wielded by the CDU at election seasons. Yet for members of the *Arbeitskreis kirchlicher Bruderschaften*, even those who held little sympathy for the Communist regime, such a stance threatened to fall back on the equation of Christianity with anti-Communist ideology that they deplored in the Christian Democrats. Ultimately, controversy over the stance of the Protestant Church toward the GDR exposed unresolved disagreements surrounding Karl Barth's "Christological" theology of law and notions of democracy and resistance, leading to new cleavages among Confessing Church veterans.

As the sole institution to officially operate in both German states, the EKD could hardly escape becoming both a pawn in and seismograph for Cold War tensions. During the mid-1950s, Protestant pastors in East Germany clashed with the state over the exclusion of religious education from the public schools and the mandatory *Jugendweihe*, a socialist coming of age ceremony instituted by the SED in 1955 to replace Christian confirmation. The "Military Chaplaincy Contract" between the EKD and the Federal Republic of February 1957, following the formation of the Bundeswehr, proved the final straw. East German officials declared the churches a fifth column against the socialist state, in obvious collusion with West Germany and NATO. On July 21, 1958, following a year of mutual recriminations, the bishops of the East German *Landeskirchen* signed a Declaration of Loyalty drafted by SED officials. The bishops agreed that the West German military treaty was invalid in the GDR, affirmed the GDR's "endeavors toward peace," and promised that Christians would respect the laws of the state.¹⁹ In November, Soviet Premier Nikita Khrushchev delivered a speech demanding that the Western

¹⁹ Greschat, *Protestantismus im kalten Krieg*, 201-225.

powers exit Berlin within six months, precipitating a "second Berlin crisis" that raised the stakes of debate about the GDR among West German Protestants.²⁰

Against this backdrop, the conservative Bishop of Berlin-Brandenburg, Otto Dibelius penned a letter to his Hannoverian counterpart Hanns Lilje, on the occasion of Lilje's sixtieth birthday, that would raise the ire of the Protestant Left. Dibelius' later insistence that he had intended the text only as a private reflection was belied by his own role in preparing five hundred copies for distribution to pastors throughout Berlin-Brandenburg.²¹ Ostensibly, the theme of Dibelius' letter, delivered to Lilje in August 1959, was the proper German translation of the famous passage from Romans Chapter 13 on obedience to state authority. According to Dibelius, democratic governments did not constitute *Obrigkeit* in the sense of "paternal authority" intended by Paul or by Martin Luther, because power continually shifted among political parties. Yet Dibelius' letter expressed more than the vestigial remnants of pre-1918 Protestant conservatism. The East German state, he argued, commanded an even weaker claim to Christian obedience than its Western counterpart, given the absence of the rule of law:

If in the so-called free world I see a street sign that requires me to drive only fifteen kilometers per hour, then I will follow it straight away. Because I know that this rule is valid for all, that therefore there is a reason for it, and certainly a reason that will protect me directly or indirectly from harm...But if I see the same sign on the highway in East Germany, already a Russian car rushes past me at one hundred, followed by an East-zone authority's car. They can do it; I cannot, because I am not a party functionary. And not only that! Why shouldn't I drive faster?

²⁰ Ibid., 187-193.

²¹ Ibid., 237.

For Dibelius, the "total state" that sought to establish the meaning of good and evil on its own terms directly contravened the Pauline definition of authority, which expected Christians to obey the state only as a "servant of God" in "fulfillment of the divine will."²²

When leaked to the public, Dibelius' letter set off a storm of debate, not only within Protestant periodicals but in leading West German weeklies, including a cover story in the popular newsmagazine *Der Spiegel*.²³ A group of pastors in Dibelius' own Berlin-Brandenburg church pointed out that due to travel restrictions imposed by East German authorities, Dibelius was isolated in his West Berlin residence with little grasp of the realities facing parishes in the GDR. For these pastors, supported by allies in West Germany, Dibelius' letter represented a setback to the necessary work of reconciliation and coexistence of the churches within the Communist state.²⁴ Dibelius attempted to backtrack, appealing to the private character of his letter and insisting that he never advocated disobedience against the GDR.²⁵ A debate at the subsequent EKD Synod in February 1960 did little to resolve the matter. The *Arbeitskreis kirchlicher Bruderschaften* introduced a resolution that reiterated the East German pastors' call for conciliation rather than opposition to the Communist regime, while the synod's conservative

²² "Obrigkeit"? Eine Frage an den 60jährigen Landesbischof von Otto Dibelius, Berlin 1959," in *Violett-Buch zur Obrigkeitsschrift von Bischof Dibelius: Dokumente zur Frage der Obrigkeit*, ed. Martin Fischer (Frankfurt: Stimme-Verlag, 1963), 3rd ed., 21-31.

²³ "Kein Mord im Dom," *Der Spiegel*, November 11, 1959. The cover of the issue displays a photograph of Dibelius above the caption, "Untertan im Widerstreit." See also Ernst Wolf, "Der Fall Dibelius ist nicht abgeschlossen: Die Stellung des Christen zum modernen Staat," *Deutsche Woche*, November 11, 1959; "Die Einheit der Kirche gewahrt: Massiver Druck der SED blockierte die Klärung der gesellschaftspolitisch bedeutsamen theologischen Streitfragen," *Vorwärts*, March 4, 1960. Further newspaper reports on the controversy are collected in BArch Koblenz, N 1367/309.

²⁴ "Brief an Bischof Dibelius von Professoren und Pfarrern aus der berlin-brandenburgischen Kirche vom 21. September 1959," in *Violett-Buch zur Obrigkeitsschrift*, ed. Fischer, 38-43. See also the statements of the Berlin-Brandenburg church leadership, which sought to distance itself from Dibelius: "Stellungnahme der Kirchenleitung Berlin-Brandenburg," in *Violett-Buch zur Obrigkeitsschrift*, ed. Fischer, 44-45 and "Beschuß der Kirchenleitung: Berlin-Brandenburg vom 22. Oktober 1959," in *Violett-Buch zur Obrigkeitsschrift*, ed. Fischer, 46-47.

²⁵ "Antwort des Bischofs auf diesen Brief vom 24. November," *Violett-Buch zur Obrigkeitsschrift*, ed. Fischer, 43-44.

Lutheran wing supported Dibelius' statement.²⁶ In the end, the synod reaffirmed its 1956 resolution calling on Christians to view the state as a "merciful order of God," regardless of its "political form," in effect promising loyalty to both the East and West German states.²⁷ This was a practical solution, attempting to stem the damage done to the East German churches by Dibelius' statement without working toward a resolution of theological disagreements.

Dibelius' letter opened difficult questions, however, that would continually resurface in debates among Protestant critics of the CDU in the coming years. Most fundamentally, he raised the issue of comparison between National Socialism and the Communist GDR. Was East Germany an unlawful state like its Nazi predecessor, and if so were Christians obliged to evacuate their obedience? While Dibelius had hardly been an exemplar of Christian opposition to Nazism, this question went to the core of the resistance narrative devised by Confessing Church veterans in postwar West Germany and deployed to bolster their claim to serve as the moral conscience of the new state.

Debate within the *Arbeitskreis kirchlicher Bruderschaften* centered on competing interpretations of Karl Barth's "Christological" theology of law, the cornerstone of the group's political ethics since its formation around the nuclear armaments controversy. In August 1958, a year before the Dibelius controversy, Barth had issued a famous letter to East German pastors, calling on the East German churches to abandon oppositional fantasies and seek out modes of coexistence and even cooperation with the Communist state. The East German state's claim to

²⁶ For the petition of the *Arbeitskreis kirchlicher Bruderschaften*, see Helmut Gollwitzer, "Unser Antrag zur Obrigkeitsfrage," *Junge Kirche*, April 10, 1960. See also "Offener Brief an die Synode der Evangelischen Kirche von Berlin-Brandenburg und an den Herrn Bischof D. Dr. Dibelius von Prof. D. Heinrich Vogel vom 26. January 1960," in *Violett-Buch zur Obrigkeitsschrift*, ed. Fischer, 105-116 and "Zur Obrigkeitsdebatte der Provinzialsynode von Berlin-Brandenburg von Martin Fischer," in *Violett-Buch zur Obrigkeitsschrift*, ed. Fischer, 117-124.

²⁷ Martin Greschat, "Römer 13 und die DDR: Der Streit und das Verständnis der 'Obrigkeit' (1957-1961)," *Zeitschrift für Theologie und Kirche* 105 (2008): 88.

espouse a comprehensive worldview, Barth acknowledged, posed a challenge to Christians; but so too did Western anti-Communism and nuclear armament, which Barth regarded as much in conflict with the Christian message as doctrinaire Communism. In fact, the overt repression of the churches in the East was easier to confront directly than the "creeping totalitarianism" of the West. Barth's letter maintained strong overtones of the critique of rights-based and "legalist" thinking that infused the Confessing Church's theology of law in the early postwar years. Christian critiques of East German secularism, Barth insisted, remained bound to an ossified paradigm of religious establishment. The true, spiritual church could not claim before the state a "right to...receive a public hearing," but received "the freedom to speak out" only "as a gift of God's free grace." At a practical level, given that the Christian's freedom lay ultimately before God, Barth saw no contradiction between the signing a declaration of loyalty to the East German state and preserving the "freedom of thought over against the ideology, and the right of opposition, even of resistance to particular implications and applications of the given system." East German Christians could form a "loyal opposition" oriented toward the improvement of the East German state. Barth strongly implied that he envisioned a similar role for the churches in the West, rather than one of ideological alignment and legal privilege.²⁸

In the aftermath of the Dibelius controversy, Barth's ideas on loyalty and resistance took on new urgency. One group of Protestant pastors in the Federal Republic, centered around the regional *Bruderschaften* of Württemberg and Hesse-Nassau relied on Barth to diminish the relevance of the political differences between the West and East German regimes from a Christian standpoint. At a June 1960 plenary meeting of the *Arbeitskreis kirchlicher*

²⁸ Karl Barth, "Letter to a Pastor in the German Democratic Republic," in Barth and Johannes Hamel, *How to Serve God in a Marxist Land*, trans. Henry Clark and James D. Smart (New York: Association Press, 1959), 45-80, quoted 52, 68-69.

Bruderschaften in East Berlin, both East and West German pastors insisted that the "ideological and political oppositions" between East and West not be reduced to a conflict of "Christ and anti-Christ."²⁹ According to Helmut Gollwitzer and his East German counterpart Johannes Hamel, Dibelius continued to think in the binaries of absolute obedience and absolute disobedience, based on an outmoded "metaphysical" view of the state. Rather than fixating on whether a particular state form corresponded with Paul's concept of "authority" and thereby commanded Christian obedience, Christians should instead inquire into Christian responsibility *for* and *within* the state, under concrete circumstances.³⁰ In July 1960, the *Bruderschaften* pastors Herbert Werner of Württemberg and Herbert Mochalski of Hesse-Nassau formulated a declaration with input from Barth, which aimed to remind Christians of the ultimate source of their freedom in the Gospel. Signed by fifty-one pastors and church officials in Heidelberg in July 1960, the declaration on "Christians and Their *Obrigkeit*" insisted that Christians are "freed, either in the East or the West, from participating in the Cold War and in agitation against other states...From the point of view of the Bible, there is no reason to stand in the way of a mutual recognition of the two German partial states."³¹

Both at the height of Cold War tensions around the late 1950s and in the decades since, Barth has been frequently criticized for his naiveté and complicity toward the GDR, at worst for outright hypocrisy. Yet Barth's advocacy for Christian adaptation toward Communism remained

²⁹ "Entwurf einer Erklärung der Kirchlichen Bruderschaften auf ihrer Tagung in Ostberlin im Juni 1960," EZA 613/14.

³⁰ Helmut Gollwitzer, "Die Gestalt des Lobes Gottes in der politischen Welt der Bundesrepublik," in *Forderungen der Freiheit*, 220-245; "'Die Gestalt des Lobes Gottes in der DDR,' Vortrag von Johannes Hamel am 16.6.1960 in Berlin-Weissensee," EZA 686/8672. A commission of the Pomeranian *Landeskirche*, in which both Gollwitzer and Hamel participated, dealt explicitly with the question of Barth's theology of law in January 1959, developing the framework that would guide their interventions in the debate about Dibelius' letter: see Greschat, "Römer 13," 70-71.

³¹ "Die Christen und ihre Obrigkeit," EZA 686/8672. On the "Heidelberg conferences" that led to the statement, see Buchstädt, *Kirche für die Welt*, 393-396, 401-405, 421-422.

consistent with, rather than an opportunistic abandonment of, the theology of law he had developed since the 1930s. In political debates during the early Federal Republic, Barth and his followers insisted that Christian action in the political world could not be rooted in abstract principles of natural law, but only in concrete judgments of individual conscience, made in light of Scripture and knowledge of God's ultimately authority over worldly affairs. Barth's decision to advocate for sustained pastoral work alongside church-state rapprochement within the GDR represented such a situational judgment.³² Through the lens of the "Kingdom of Christ" theology, Barth alongside leaders of the West German *Bruderschaften* eschewed an absolute distinction between the West German *Rechtsstaat* and the East German *Unrechtsstaat*.

Barth's position was hardly universally shared, however, even within the Protestant Left. The implicit erasure of distinctions between Christian political action in East and West Germany in the July 1960 "Heidelberg" statement struck some members of the *Arbeitskreis kirchlicher Bruderschaften* as inattentive to the political role that Protestants had already played in the reconstruction of West German democracy. This wing included above all participants in the EKD's partially successful efforts during the mid-1950s to expand the right of conscientious objection to military service, including the theologians Ernst Wolf and Heinz Kloppenburg, as well as the jurist Helmut Simon. For these figures, the statements of Barth and his followers did not go far enough in making explicit the progress toward the integration of Christian values that had occurred in the West German state. While they disagreed with the politics of the Godesberg Declaration, in particular its support for West German foreign policy, they concurred with its larger vision of upholding religious values as a bedrock of public life, opening a path between reformist Social Democracy and unabashed neutralism.

³² On this point, see also Rudy Koshar, "Where is Karl Barth in Modern European History?" *Modern Intellectual History* 5 (2008): 359-60.

Critics of the more radical elements of the *Bruderschaften* developed a notion of Christian political responsibility for democracy that linked criticism of the West German government to identification with the deeper values of the state. The Baden Theological Society, a regional branch of the *Arbeitskreis kirchlicher Bruderschaften* whose members adopted a more critical stance toward the GDR, issued a rejoinder to the Württemberg and Hesse-Nassau *Bruderschaften* in September 1960, prepared in part by Helmut Simon. While concurring that Christian politics should not be reduced to Cold War anti-Communism, the Baden society insisted that "the assumption of co-responsibility for the state by Protestant Christians in the FRG was and is with historical necessity connected to a decision against the Communist state form." The affirmation of "parliamentary, rule of law democracy" required a "calm and hate-free decision against a Communist state order." Moreover, the Bible did not oblige East German Christians to blind obedience, but rather responsibility for their state required them to protest when the Communist regime violated its own legality—including the rights of the churches.³³ Without denying the legitimacy of the East German regime, the Baden Society took leave from the equivalency between East and West posited by Barth, instead suggesting that political circumstances required different forms of Christian responsibility in each state.

Criticism from *Bruderschaften* members who sought to affirm the West German state only further spurred the more radical wing to break from the political mainstream. By the later months of 1960, the appearance Godesberg program, compounded by the controversy surrounding Dibelius' letter, led the "Heidelberg" wing of the *Bruderschaften* to take a leading role in national effort to form a new political party that blurred the line between criticism of

³³ "Consens? An die Unterzeichner der Heidelberger Stellungnahme zu der Frage: 'Die Christen und ihre Obrigkeit,'" *Kirche in der Zeit* 15 (1960): 378-381. On the meeting leading to this statement, see Buchstädt, *Kirche für die Welt*, 424-427. See also Helmut Simon, "Vorentwurf zur Frage nach dem Verhalten der Christen zum Kommunismus und zum kommunistischen Staat," EZA 686/8672.

government policies and opposition to constitutional democracy as such. At a subsequent Heidelberg conference in October, building on the meeting of the previous July, *Bruderschaften* members including Niemöller, Mochalski, and the pedagogy professor Renate Riemeck called for the "formation of a true opposition."³⁴ Over the following weeks, these figures participated in a series of meetings, funded by the East German SED and the illegal KPD, culminating in the founding of the German Peace Union (*Deutsche Friedens-Union*, or DFU) in Stuttgart on December 17.³⁵ The DFU aimed to bring together West Germans from the left to the right of the political spectrum who supported reunification and Cold War neutrality. The party's initial coalition brought together the conservative nationalist *Bund der Deutschen*, formed in 1953 in opposition to Western integration, with former members of the banned KPD, disaffected Social Democrats, and leftwing Protestants; its party platform centered almost entirely on foreign policy issues.³⁶ Opposition to West German foreign policy thus superseded an ideal of constitutional democracy.

The complex motives that brought Protestant intellectuals to the DFU and the wider milieu of the Extra-Parliamentary Opposition are best teased out through the career of the DFU's first party chair, Renate Riemeck. Riemeck cut an eccentric figure in West German politics. Having joined the Nazi Party as a student at Jena in July 1941 and received a doctorate in history in 1943, Riemeck successfully maneuvered through postwar denazification proceedings to obtain a post in the Pedagogy Faculty at the University of Oldenburg in 1950, becoming among West

³⁴ Rolf Schönfeldt, "Die Deutsche Friedens-Union," in *Parteien-Handbuch: die Parteien der Bundesrepublik Deutschland, 1945-1980*, vol. 1, ed. Richard Stöss (Opladen: Westdeutscher Verlag, 1983), 849.

³⁵ On the DFU's connections to the East German regime, see Heike Amos, *Die SED-Deutschlandpolitik 1961 bis 1989: Ziele, Aktivitäten und Konflikte* (Göttingen: Vandenhoeck & Ruprecht, 2015), 225-233; Mellies, *Trojanische Pferde*, 51-61.

³⁶ For an overview of the DFU coalition, see Schönfeldt, "Deutsche Friedens-Union," 848-876, at 854 on Confessing Church successor organizations. See also Greschat, *Kirche im kalten Krieg*, 309-310.

Germany's youngest professors at the age of twenty-nine. As a university student, Riemeck had found lodging with an older classmate and close friend Ingeborg Meinhof, whose teenage daughters Wienke and Ulrike—the future journalist and leader of the terrorist Red Army Faction—Riemeck adopted following Ingeborg's death of cancer in 1949. Riemeck's path from Nazi loyalist to radical pacifist was likely driven by concerns for German unity. Riemeck supported the SPD during the early 1950s, when the party took a nationalist stance in favor of reunification, before souring over the SPD's turn at Godesberg.³⁷ Riemeck was hardly a traditional Christian, but she developed contacts with the oppositional Protestant milieu by the mid-1950s over the remilitarization issue. Beginning in 1957, Riemeck became a frequent contributor to *Stimme der Gemeinde*, pioneering the journal's campaign for recognition of the Oder-Neisse line.³⁸ Featuring Riemeck in its cover story a month before the September 1961 elections, *Der Spiegel* marveled at the "courage" of the DFU leadership for "daring...to offer a woman as the party boss," and at the coalition Riemeck had assembled: "opponents of atomic death, militant pacifists, sectarian Christians, bourgeois contacts of the East, and Marxists."³⁹

Riemeck's political biography and network are indicative of the close connections and often blurred lines between leftwing intellectuals, SED collaborators, and future terrorists within the West German milieu from which the 1960s New Left emerged. Moreover, Protestant periodicals and institutions served as points of contact for diverse figures dissatisfied with the mainstream political spectrum after the Godesberg declaration. Not only mainstays of Protestant

³⁷ No biography of Riemeck exists. Valuable information on Riemeck and her early relationship to Ulrike Meinhof can be found in Bettina Röhl, *So macht Kommunismus Spaß! Ulrike Meinhof, Klaus Rainer Röhl und die Akte Konkret* (Hamburg: Europäische Verlagsanstalt, 2006), 144-184.

³⁸ Renate Riemeck, "Zum Problem der Oder-Neiße Linie," *Stimme der Gemeinde*, May 15, 1957; Riemeck, "Selbstbestimmungsrecht?" *Stimme der Gemeinde*, April 15, 1959.

³⁹ "Rot und Rosa," *Der Spiegel*, August 23, 1961.

opposition to the CDU such as Martin Niemöller, Helmut Gollwitzer, and Heinz Kloppenburg, but also lay intellectuals including Jürgen Habermas and the Marburg jurist (and Habermas' habilitation adviser) Wolfgang Abendroth, the union leader Otto Brenner, the prominent leftwing jurists Helmut Ridder and Jürgen Seifert, and radicals such as Riemeck and Ulrike Meinhof published in *Stimme der Gemeinde* and *Junge Kirche*. Having set out a coherent critique and organized opposition movement against Christian Democracy already in the 1950s, Confessing Church successor organizations proved attractive to a broad swath of leftist intellectuals who found themselves politically homeless following the reconciliation of the SPD to core elements of the CDU agenda.

Such entanglements in turn generated new challenges for Protestant "left socialists" who remained critical of the treatment of the churches under Communism. In particular, the idea of founding a new political party to the left of the SPD, whose backing by the Stasi and SED hardly remained a secret to West German observers, confounded those members of the *Arbeitskreis kirchlicher Bruderschaften* who advocated for principled allegiance to ideals of the democratic *Rechtsstaat*. As Ernst Wolf wrote in a letter to Helmut Gollwitzer, just prior to the founding of the DFU:

These 'Heidelbergers' have gone wild...joining the doubtful 'Union' [DFU] that...wants to organize against the SPD, supposedly even in a new party! We can't afford that, precisely when there is a certain prospect that just now the Protestant CDU will run out of breath. The short-sightedness of our Ultras is lamentable! That Niemöller also backs them, I cannot understand. At the Frankfurt meeting, Heinemann could not bring these people around!...We must at once do something in that circle of professors, I think.⁴⁰

For Wolf, the decision to found a party whose East German sources of patronage were well known raised the question of a breach with the *Rechtsstaat* itself.

⁴⁰ Wolf to Gollwitzer, November 26, 1960, EZA 686/8672.

The core challenge faced by Wolf and his colleagues was to articulate a defense of constitutional democracy that would overcome the apparent indifference of the DFU to the distinctions between West and East German forms of government, while at the same time avoiding the strident anti-Communism of Bishop Dibelius and the mainstream EKD leadership. The first month of 1961 marked a breaking point for the competing factions of the *Arbeitskreis kirchlicher Bruderschaften*, as attempts to work out a political catechism collapsed in disagreement over the stance of the churches toward East German regime.⁴¹ In May 1961, a meeting of the society's *Leiterkreis* erupted in conflict when Gustav Heinemann, whose very invitation was contested by more radical members, admonished Left Protestant opponents of the SPD to "get on the boat and off the lifeboat."⁴² The debate about the West German government's proposed emergency laws in the ensuing years proved a testing ground for members of the *Bruderschaften* who sought a middle ground between these positions. It was precisely in opposition to emergency laws that a group of theologians and lay intellectuals within the *Bruderschaften* would lay the groundwork for a Protestant affirmation of West Germany's constitutional democracy.

Emergency Laws and the Democratization of Resistance

If the 1960s New Left in Western Europe and the United States is associated primarily with protests against the Vietnam War and civil rights movements, the origins of the Extra-Parliamentary Opposition in West Germany around a series of seemingly obscure constitutional controversies during the 1960s is largely forgotten. Yet the coalition of ex-Social Democrats,

⁴¹ "Bericht über den Katechismus-Ausschuss auf der Sitzung in Frankfurt 4./5. Januar 1961," EZA 613/15.

⁴² "Protokoll der Leiterkonferenz der Bruderschaften am 24./25. Mai 1961 in Frankfurt/Main," EZA 613/15.

Christian pacifists, Communist sympathizers, students, and labor activists that would come to make up West Germany's New Left first coalesced during the early 1960s in opposition to "emergency laws [*Notstandsgesetze*]" proposed by the CDU government, a set of amendments to the Basic Law outlining the expansion of executive authority during declared emergencies. Activism against emergency laws constituted a red thread through the West German protest movements of the 1960s, until a version of the amendments was enacted by the Bundestag at the end of May 1968. No issue more poignantly exemplified the divide between the post-Godesberg SPD and the emergent Extra-Parliamentary Opposition. Within the *Bruderschaften*, debates about emergency laws raised the specter of resistance against state authority. While *Bruderschaften* members almost universally objected to the proposed amendments, disagreement about the basis for opposition and the legitimacy of resistance only deepened the fissures that had emerged in the previous years.

The controversy over emergency laws originated in the aftermath of West Germany's accession to NATO in May 1955. Already in January 1956, the CDU Interior Minister Gerhard Schröder introduced to the federal cabinet a "Law for the Expansion of the Basic Law" that would supplant normal parliamentary procedure in order to respond to emergency situations. Schröder's draft bill authorized a simple parliamentary majority to declare a state of emergency in the case of an internal or external threat. If the parliament was subsequently unable to convene, the chancellor could unilaterally suspend a range of basic rights, including freedom of the press, of assembly, and of movement, the right to choose or leave one's profession, and the right of workers to strike. The chancellor and federal cabinet could order the deployment of the military within the Federal Republic. The emergency, Schröder announced, was the "hour of the executive." Aware that "states of emergency" constituted a volatile issue for a population that

had experienced the fall of the Weimar Republic, Schröder waited until October 1958, a year after the CDU's overwhelming electoral victory, to announce his proposal at a conference of the West German police union.⁴³

Schröder's proposal aroused widespread and vocal opposition from the entire political spectrum left of the CDU, hardly from Protestant activists alone. Schröder argued that clear legal protocols for emergencies were necessary to remove the prerogative of the Western Allies to intervene in West German domestic affairs in protection of their troops. In the view of the CDU's critics, however, emergency laws were a means to bolster the executive at the expense of parliament, and to check the power of trade unions, peace activists, students, and other potentially oppositional groups. According to one such critic, the assertion that West German sovereignty remained curtailed by the Allies hardly reflected political realities, but served as a ruse to gain popular support for the expansion of executive power.⁴⁴ Above all, civil defense laws, which outlined requirements for the formation of local civil defense units, the construction of bunkers, and mass evacuations aroused widespread opposition and ridicule. As the historian Frank Biess has shown, civil defense initiatives, rather than providing a sense of security, inadvertently exposed the West German population's vulnerability and stoked popular fears. Military simulations demonstrated that the planned civil defense measures offered hopelessly inadequate protection in the case of a nuclear attack.⁴⁵

⁴³ Boris Spornol, *Notstand der Demokratie: Der Protest gegen die Notstandsgesetze und die Frage der NS-Vergangenheit* (Essen: Klartext, 2008), 12-17.

⁴⁴ Helmut Ridder, "Die Sache mit den Vorbehaltsrechten der Alliierten," in Eugen Kogon et al., *Der totale Notstandsstaat* (Frankfurt: Stimme-Verlag, 1965), 31-46, especially 39-41.

⁴⁵ Frank Biess, "'Everybody has a Chance': Nuclear Angst, Civil Defense, and the History of Emotions in Postwar West Germany," *German History* 27 (2009): 215-243.

For longtime Protestant critics of the CDU, the proposed emergency laws raised core issues of West German identity as a post-Nazi state and society. Like Germans across the political spectrum during the early postwar decades, Protestant intellectuals were invested in a historical narrative of a legal transition from Weimar democracy to Nazi dictatorship, legitimated by the emergency provisions of the Weimar Constitution. This narrative downplayed the social origins of Nazism, including in the churches. Proposals for West German "emergency laws" thus aroused deeply-ingrained suspicions. But Protestant critics of the CDU were hardly unified in their answers to the notorious question, "Is Bonn Weimar?" Their disagreements reflected divergent attitudes toward anti-Communism, as well as the meaning of the Basic Law's "value order" itself.

Within the post-Godesberg SPD, Adolf Arndt quickly emerged as a leading defender of emergency laws, relying on a distinctly Social Democratic theory of "militant democracy" inflected by Protestant notions of the "value order" of the constitution. Along with his fellow moderate SPD jurist Carlo Schmid, Arndt regarded emergency laws as a necessary legal means for preventing the collapse of the *Rechtsstaat* in the event of a crisis.⁴⁶ At the same time, Arndt objected that emergency laws must not violate the very democratic values that required their protection. On this basis, Arndt identified fatal flaws in Schröder's draft: It conflated internal and external emergencies; transgressed too strongly on too many fundamental rights; and potentially allowed a simple majority within a party that maintained a simple majority of delegates, as few as one quarter of Bundestag delegates, to declare a national emergency. According to Arndt, emergency laws should be invoked only against external threats, not as a means of addressing normal political and social conflicts. However, some version of emergency laws was both

⁴⁶ Arndt and Schmid were already "convinced" by mid-1955 that the constitution remained unequipped to deal with "crisis situations": Spernol, *Notstand der Demokratie*, 13.

legitimate and necessary precisely due to the transformation of democracy under the Bonn constitution. Unlike the Weimar constitution, which lacked any "value system" or *Staatsidee* at all, the postwar Basic Law established a common set of values that served the basis not only for constitutional interpretation, but for common civic and political life. Arndt's use of the "value order" concept sought to clearly delineate the legitimate bounds of the political order, casting suspicion on dissent outside the mainstream parties. Thus, Arndt argued that internal emergencies were unlikely to arise under the new political order, and that the Constitutional Court had already proven itself capable of dispensing with the threats posed by the KPD and *Sozialistische Reichspartei*.⁴⁷ In mid-1962, Arndt and Carlo Schmid led an SPD committee that drafted a six-point program for an alternative set emergency laws, which would distinguish between internal and external emergencies, guarantee the fundamental rights of workers, and maintain the prerogatives of the parliament and Constitutional Court.⁴⁸

On the other hand, the early critiques of the emergency laws put forth by the *Bruderschaften*, especially the regional branches closer to the DFU, reflected the ambivalence toward West German constitutional democracy that gained ground in the aftermath of the Godesberg platform and Dibelius controversy. For Protestant anti-rearmament and anti-nuclear activists, the only possible protection against a nuclear attack was a foreign policy oriented toward disarmament, peace, and reconciliation, not civil defense. "Resistance" quickly became a watchword of Protestant opponents of emergency laws, in particular after the DFU's disastrous showing in the September 1961 elections. The DFU received just 1.9 percent of the national vote, below the five percent threshold required to enter the Bundestag, while the SPD's moderate

⁴⁷ Adolf Arndt, "Demokratie – Wertsystem des Rechts," in Arndt and Michael Freund, *Notstandsgesetz – aber wie?* (Köln: Verlag Wissenschaft und Politik, 1962), 9-66, quoted 42; see especially 64-66 for Arndt's summary of his conclusions and recommendations.

⁴⁸ Gosewinkel, *Arndt*, 424; Spornol, *Notstand der Demokratie*, 21-22.

turn at Godesberg paid off with a second-place finish at 36 percent, the party's best result since 1919.⁴⁹ The meaning of resistance in the context of the postwar Federal Republic invariably proved ambiguous. In controversies over conscientious objection during the 1950s, Confessing Church veterans had marshaled narratives of wartime resistance against National Socialism to support an expansive interpretation of a right already guaranteed in the Basic Law. According to its Protestant supporters, the right of conscientious objection secured the individual's loyalty to the political community and foreclosed the possibility of resistance. *Bruderschaften* leaders who had participated in that earlier battle put forth similar arguments against the emergency laws, contending that conscription into local civil defense units violated the right of conscientious objection.⁵⁰ However, the government's plan to introduce emergency laws by amending the constitution raised the question of whether open violation of the law could be authorized in the name of the values undergirding the polity—even if these stood in conflict with the constitutional text. Critics of emergency laws thus defined the Federal Republic's "value order" in terms that went beyond "militant democracy" to allow for a wider gamut of dissent.

Protestant intellectuals played crucial roles in expanding the concept of resistance in ways that prefigured the New Left movements of the later 1960s. In early 1960s West Germany, despite gains made by Protestant defenders of the right of conscientious objection, the conception of legitimate resistance dominant in public discourse remained one of elite action against dictatorship. In mid-1961, the conservative Protestant Federal Court of Justice [*Bundesgerichtshof*] judge Hermann Weinkauff ruled against a group of conscientious objectors

⁴⁹ On the September 1961 election results and the reaction of the DFU, see Schönfeldt, "Deutsche Friedens-Union," 860-861.

⁵⁰ For instance, the Hannover *Bruderschaft* called for the introduction of a possibility for "peace service [*friedlichen Aufbaudienst*]" as an alternative to emergency service: "Erklärung zu dem geplanten Notdienstgesetz," March 26, 1962, EZA 613/16. For a defense of conscientious objection, see also Heinrich Treblin and Heiner Weitbrecht, "Anfrage an die Kirchlichen Bruderschaften," February 1962, EZA 613/16.

to military service under the Third Reich who had requested reparations for their suffering, on the grounds that conscientious objection could not have contributed toward the overthrow of the regime.⁵¹ For Weinkauff, only the July 20 movement, led by elites with a reasonable chance of overthrowing the Nazi state and establishing a new government, exemplified legitimate resistance.⁵² Like Dibelius' writings on "authority," dominant conceptions of wartime resistance sharply distinguished between the *Unrechtsstaat* of Nazi Germany, or of the Communist GDR, and the postwar West German *Rechtsstaat*.

In the years leading to the twentieth anniversary of the July 20 plot, participants and commentators continued to propagate narratives of resistance as the prerogative of a responsible elite.⁵³ At a ceremony at the University of Freiburg on July 20, 1964, Constantin von Dietze, one of the leaders of the wartime Freiburg Circle now age seventy-three, delivered an encomium to the military resistance against Nazism. Nazi-era civil servants, Dietze recalled, faced a genuine conflict of conscience, between one's obligations to the state under oath and one's moral obligations to God. Leaving no doubt as to the political consequences he drew from his own participation in anti-Nazi opposition, Dietze concluded his lecture by reminding his audience to consider the "peoples behind the [Berlin] wall and behind the Iron Curtain."⁵⁴

⁵¹ The *Bundesgerichtshof* was West Germany's highest court in the areas of criminal and civil law.

⁵² Tobias Schieder, "Der Einfluss protestantischer Ethik auf die Wiederbelebung des Widerstandsrechts nach 1945," in *Teilnehmende Zeitgenossenschaft*, eds. Albrecht and Anselm, 163-166. Adolf Arndt also published a critique of Weinkauff's decision in 1962: Arndt, "Agraphoi Nomoi (Widerstand und Aufstand)," in *Widerstandsrecht*, ed. Kaufmann, 525-538.

⁵³ Such ideas had also dominated the tenth anniversary commemorations of the failed coup d'état in 1954, in which Weinkauff himself had participated. Hermann Weinkauff, *Die Militäropposition gegen Hitler und das Widerstandsrecht* (Bonn: Bundeszentrale für Heimatdienst, 1954). See also chapter 4, in particular my discussion of the addresses by Gerhard Ritter and Theodor Heuss.

⁵⁴ Constantin von Dietze, *Pflicht im Widerstreit der Verpflichtungen* (Würzburg: Verlag Johann Wilhelm Naumann, 1980), quoted 14, 16, 21.

Protestant intellectuals who aligned with the West German Left, however, also maintained resources for a critique of elitist resistance discourses. A meeting of the *Kirchliche Bruderschaft* of Hesse in November 1961 in honor of Martin Niemöller's seventieth birthday took up the theme of resistance in terms that starkly departed from those of Weinkauff and Dietze. Fritz Bauer, the Jewish attorney responsible for the reintroduction of Nazi prosecutions in West Germany during the late 1950s, warned of restricting resistance to military leaders or civil servants, and to periods of extreme repression when no other means of opposition was possible. Rather, "critique and opposition are not tiresome troubles, but the life principle of a democratically organized people. Democracy invites permanent resistance and demands militant conflicts [*kämpferische Auseinandersetzungen*] over the oppositions embedded in all realms of human coexistence." Especially in a "constantly endangered *Rechtsstaat*," resistance was necessary to prevent a turn to the *Unrechtsstaat*, an allusion to ongoing controversies over the emergency laws, political justice, and state media in West Germany.⁵⁵

Bauer found an ally in Heinrich Hannover, a representative of a younger generation of leftwing Protestant attorneys who engaged alongside the *Bruderschaften* in 1960s controversies over executive authority. Born in 1925 and trained at the *Oberlandesgericht* in Celle after losing both of his parents in the war, Hannover gained notoriety during the 1950s as a defense attorney for alleged Communists accused of political crimes. Hannover forthrightly aligned himself with the values of West Germany's "free democratic *Rechtsstaat*," arguing that the CDU government's anti-Communism constituted a danger precisely for those values. Recounting his experiences as a defense attorney, Hannover bypassed the question of the actual presence of Communist

⁵⁵ Fritz Bauer, "Widerstandsrecht und Widerstandspflicht des Staatsbürgers," in *Kirchliche Bruderschaft in Hessen und Nassau, 3 Vorträge gehalten auf der Landestagung 1961* (Frankfurt: Stimme-Verlag, 1962), 41-64, quoted 56, 58.

collaborators to focus on the threat of the "political defamation of the opposition" through false charges of Communist conspiracy.⁵⁶ While he insisted that his own clients were hardly engaged in resistance against the Federal Republic, Hannover sought to expand the meaning of the category, suggesting at the Hesse meeting that conscientious objection expressed the "obligation to resist" illegal orders by the state.⁵⁷ In short, the *Kirchliche Bruderschaften* fostered an alternative memory culture, one that regarded resistance not solely as the prerogative of a "responsible" elite but as a warrant for democratic vigilance.

Resistance discourse also filled the Protestant press over the course of 1962, as the journals *Stimme der Gemeinde* and *Junge Kirche* emerged as leading organs of opposition to emergency laws, alongside the left Catholic *werkhefte*, the DFU-aligned *Blätter für deutsche und internationale Politik*, as well as the GDR-backed student magazine *konkret*, where Ulrike Meinhof worked as a journalist. Protestant journals published commentaries on the emergency laws not only by mainstays of the *Bruderschaften* but also by leading voices of the Extra-Parliamentary Opposition. Among the most frequent contributors to *Stimme der Gemeinde* were the "left socialist" professors Wolfgang Abendroth and Ossip K. Flechtheim, who along with the entire Socialist German Student League (SDS) had been expelled from the SPD following the September 1961 election for their disloyalty to the Godesberg Program. Some writers in Protestant journals rooted their opposition to Schröder's proposed emergency laws in criticisms also advanced by the Social Democrats—the possibility for as few as one quarter of Bundestag delegates to declare an emergency, the suspension of basic rights, and the authorization of a state

⁵⁶ Heinrich Hannover, *Politische Diffamierung der Opposition im freiheitlich-demokratischen Rechtsstaat* (Dortmund: Verlag Pläne, 1962), 5-11. See also Hannover's memoirs of his early legal engagements: Heinrich Hannover, *Die Republik vor Gericht 1954-1974: Erinnerungen eines unbequemen Rechtsanwalts* (Berlin: Aufbau-Verlag, 1998).

⁵⁷ Heinrich Hannover, "Die Verteidigung des Staates als Gewissensfrage," in *Kirchliche Bruderschaft in Hessen und Nassau, 3 Vorträge gehalten auf der Landestagung 1961*, 29-40.

of emergency in response to an "internal threat." Critics of the SPD voiced the additional concern that if parliament determined it were not able to meet during an emergency, then decisions would be taken by parliamentary "emergency committee" to be elected in advance by a two-thirds majority of the full parliament—meaning that smaller parties, let alone unrepresented parties like the DFU, would have no say.⁵⁸ But *Junge Kirche* and *Stimme der Gemeinde* also served as organs for the airing of more fundamental skepticism about the viability of West German democracy. According to Renate Riemeck, the emergency laws represented an even greater danger than the Hitler's Enabling Act, since they threatened to deprive not only leftwing activists but a broad range of society, particular workers, of fundamental rights. The never-ending foreign policy crises of the Federal Republic, Riemeck argued, had already placed the population under the strain of a "permanent emergency."⁵⁹

Within the *Bruderschaften* themselves, among the earliest organizations in West Germany to publicly oppose the emergency laws, debate centered on the boundary between conscientious objection and resistance. In March 1962, the *Kirchliche Bruderschaft* in Hannover called for conscientious objection against emergency civil defense and the introduction of an alternative "peace service [*friedliche Aufbaudienst*]."⁶⁰ The question of emergency laws was quickly taken up by the theologian and advocate for conscientious objectors Heinz Kloppenburg, who ensured that it took a central place on the agenda of the next meeting of the executive committee of the *Bruderschaften* in late November.⁶¹

⁵⁸ Ossip K. Flechtheim, "Gefahren der Notstandsgesetzgebung," *Stimme der Gemeinde*, December 1, 1962.

⁵⁹ "Notstandsgesetz? Nein," *Stimme der Gemeinde*, November 1, 1962.

⁶⁰ "Erklärung zu dem geplanten Notdienstgesetz," March 26, 1962, EZA 613/16.

⁶¹ Kloppenburg to Mitglieder der Leiterkonferenz, September 7, 1962, EZA 613/16; Beschlüsse der Leiterkonferenz der Kirchlichen Bruderschaften / Hannover, 26. November 1962," EZA 613/16.

The *Verband der Kriegsdienstverweigerer* made a decisive leap from calls for "refusal [*Verweigerung*]" to "resistance [*Widerstand*]" in discussions of proposed civil defense laws.⁶² The immediate cause was a vote in October 1962 by the representative assembly of the German Trade Union Confederation (*Deutscher Gewerkschaftsbund*, or DGB), the Federal Republic's largest labor organization, denying support for emergency laws.⁶³ In a report for the association praising the union's action, Heinrich Hannover endorsed a concept of resistance as a broad democratic right, not simply a prerogative of elites confronting a dictatorship: "Already today there arises for every citizen, for whom the free democratic order of our state lies near to the heart, the obligation to stand in opposition to the spirit of a draft law that would give the government a blank check to proclaim the total state." If public opposition failed to prevent the passage of emergency laws, then "one day resistance against the civil service law—similar to the right of conscientious objection—will be restricted to a small circle of citizens who are ready, at least for their own person, to bear the consequences of their conscience."⁶⁴

By January 1963, the executive committee of the *Arbeitskreis kirchlicher Bruderschaften* took as the theme for its annual meeting "The Limits of Obedience," with Wolfgang Abendroth and the theologian Otto Bauernfeind serving as the keynote speakers.⁶⁵ The meeting's concluding

⁶² Heinz Kloppenburg was the co-chair of the *Zentralstelle für Recht und Schutz der Kriegsdienstverweigerer aus Gewissensgründen*, an affiliate of the *Verband der Kriegsdienstverweigerer*. See the documents collected in EZA 613/180.

⁶³ On the vote, see Cooper, *Paradoxes of Peace*, 109.

⁶⁴ "Möglichkeit des Widerstandes," in Heinrich Hannover, *Zum Entwurf eines "Gesetzes über den Zivildienst im Verteidigungsfall" (Zivildienstgesetz)* (Offenbach am Main: Verband der Kriegsdienstverweigerer – Geschäftsstelle, 1962).

⁶⁵ Kloppenburg to Vorsitzenden der Kirchlichen Bruderschaften und die regelmäßigen Empfänger unserer Mitteilungen, December 21, 1962, EZA 613/16. The meeting led to a collection published by the *Stimme-Verlag* on Protestant theological views of the oath, to which Bauernfeind contributed: Hildburg Bethke, ed., *Eid, Gewissen, Treuepflicht* (Frankfurt: Stimme-Verlag, 1965).

resolution warned that the authorization of expanded executive power under the emergency laws would "threaten the substance of the constitution protecting our civil rights."⁶⁶

The first months of 1963 brought an eclipse of the public controversy over emergency laws, but not of the cleavages underlying Protestant debate. A second draft of the amendments, formulated by the new CSU Interior Minister Hermann Höcherl, was debated in the Bundestag on January 24, 1963, only to be sent to private committee hearings where it languished for two years. The new bill made substantial concessions to the SPD: It distinguished between external and internal threats, and it created a parliamentary emergency committee that "would meet in times of crisis when parliament could not" and serve as a check on the authority of the executive.⁶⁷ The negative vote of the *Deutscher Gewerkschaftsbund* in October 1962, still a core Social Democratic constituency, likely accounted for the SPD's hesitation to support the measures. Adolf Arndt nevertheless ridiculed the *Bruderschaften* for their indiscriminate opposition to emergency laws, dismissing the January 1963 resolution as "nonsense" based on "factual as well as legal" falsehoods. Arndt himself did not hesitate to turn the specter of "the fatal danger of the Weimar period" against those who invoked Weimar in opposition to the emergency laws, claiming that now the far left stood against the "well-intentioned and democratic forces."⁶⁸ Arndt thus continued to argue for a more restricted concept of legitimate resistance, based on ideas of "military democracy" and the Federal Republic's "value order."

⁶⁶ "Einstimmig beschlossene Erklärung der Leiterkonferenz der Kirchlichen Bruderschaften vom 4. Januar 1963 zur Notstandsgesetzgebung," EZA 613/16.

⁶⁷ Gerhard Braunthal, "Emergency Legislation in the Federal Republic in Germany," in *Festschrift für Karl Lowenstein*, ed. Henry Steele Commager (Tübingen: J. C. B. Mohr, 1971), 79-80.

⁶⁸ See the summary of Arndt's letter in Martin Rohkrämer, "Kirchliche Bruderschaft im Rheinland: Rundbrief Nr. 2/1963, Juni 1963," AEKR, Handakten Helmut Simon, 6HA016/10.

Moreover, fundamental disagreements persisted even within the *Bruderschaften*. At a meeting of the Rhineland *Kirchliche Bruderschaft* in April 1963, long-simmering disagreements came to a head. The core question remained whether Protestant theology and political practice offered any grounds at all for preferring the West German state over its East German counterpart. According to Helmut Simon, a member of the association's leadership committee, for all of the well-justified criticisms of the Adenauer government advanced by the *Bruderschaften*, "The 'Yes' to a free, rule-of-law democracy has not been sufficiently loud among us." Whereas the faction of the "Baden Consensus" sought "co-responsibility for the *Rechtsstaat* and for parliamentary democracy," the wing of the *Bruderschaften* aligned with the DFU "continually gave up this co-responsibility and called the acceptance of our state into question."⁶⁹ Simon's invocation of the *Rechtsstaat* reflected not only a professional divide between jurists and theologians. Rather, Simon sought a path between "militant democracy" and DFU neutralism. For Simon, Protestants should work toward the fulfillment of the Basic Law's ideals—not simply because all Christians were called upon to take responsibility for political life, but because Christian moral teachings bore an affinity with the democratic *Rechtsstaat*.

A Theology of the *Rechtsstaat*

Among Protestant intellectuals during the 1960s, the future Constitutional Court judge Helmut Simon was the most significant for bridging the gap between radical pastors who called for resistance while maintaining connections to the East German regime, and the jurists around Rudolf Smend who defended the Basic Law as an "objective value order." In particular during the years of parliamentary silence on the emergency laws, Simon played a key role in organizing

⁶⁹ "Kirchliche Bruderschaft im Rheinland: Rundbrief Nr. 2/1963, Juni 1963," AEKR 6HA016/10.

the January 1964 *Bruderschaften* conference that would offer a theological validation of the democratic *Rechtsstaat*. Simon's trajectory therefore sheds light on the entanglements of Protestant theology and legal debate during the 1960s, as well as the origins of the democratic theory that would come to underpin subsequent Protestant protest movements.

Simon can be considered an older member of what the historian Matthew Specter has termed the "'58er" generation. This generation experienced the Nazi regime as teenagers and entered public life during the mid-1950s, where they inaugurated early efforts at democratic reform and confrontation with the Nazi past.⁷⁰ Born in 1922, Simon served in the navy during the Second World War but undertook his university education after 1945. Simon's religious upbringing distinguished him from many of the returned soldiers. He had participated in an illegal Christian youth organization during the 1930s, and his parents were active in the Confessing Church.⁷¹ After the war, Simon looked upon the continued presence of former Nazis in the university system and unaltered curricula with suspicion.⁷² The formative influence on Simon's intellectual development was Karl Barth, whom Simon met as a visiting law student in Basel during the winter semester of 1946-47. According to his recollections years later, Simon had been immediately taken by the radicalism of Barth's call to ground theology in the irreducible event of revelation, as well as Barth's openness toward reconciliation with the generation of Germans who served in the war. For Simon, Barth's polemics against a "natural

⁷⁰ Specter, *Habermas*, 6-8.

⁷¹ Philipp Stoltz, "Simon, Helmut," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Simon%2C+Helmut> (accessed April 15, 2018).

⁷² Almut Röse and Wolf Röse, *Helmut Simon – Recht bändigt Gewalt: eine autorisierte Biografie* (Berlin: Wichern Verlag, 2011), 105-106.

law foundation of the state" did not represent a retreat to apolitical indifference but an insistence that the world could not stand on "autonomous laws" impermeable by the Christian message.⁷³

Barth also served as a key influence on Simon's early legal thought. Simon's Bonn dissertation on Protestant debates about the theology of law, submitted under the supervision of Ulrich Scheuner in 1952, adopted Barth's disdain for "natural law" as both a theological construct and political program.⁷⁴ A clerkship during the late 1950s under the *Bundesgerichtshof* judge Hermann Weinkauff, who frequently cited natural law principles in his decisions on family law, only sharpened Simon's conviction that natural law claims were driven by political agendas rather than an authentic loyalty to the message of Christianity.⁷⁵ As a polemicist against the "Catholicization of law," Simon pilloried early West German legislation and jurisprudence on the family and confessional schools. Political invocations of natural law, Simon insisted, were incompatible with the requirements of a pluralist society and reduced the churches to mere defenders of their self-interests.⁷⁶ At the same time, Simon greeted the Constitutional Court rulings that overturned CDU-backed legislation on family law (1959) and conscientious objection (1961), cases over which Protestant jurists exercised significant influence.⁷⁷

If natural law formulations were anathema to Simon, he maintained a stronger orientation to the construction of practical legal norms than the clerical majority within the *Bruderschaften*.

⁷³ Ibid., 111-119, quoted 114.

⁷⁴ Helmut Simon, *Der Rechtsgedanke in der gegenwärtigen deutschen evangelischen Theologie unter besonderer Berücksichtigung des Problems materialer Rechtsgrundsätze* (Ruh bei Waldbröhl, Bezirk Köln, 1952).

⁷⁵ Röse and Röse, *Simon*, 171. For Weinkauff's sympathetic views on natural law, which starkly diverged from those of the Barthian milieu, see Hermann Weinkauff, "Das Naturrecht in evangelischer Sicht," in *Naturrecht oder Rechtspositivismus?*, ed. Maihofer, 210-218 and Weinkauff, "Der Naturrechtsgedanke in der Rechtsprechung des Bundesgerichtshofes," in *Naturrecht oder Rechtspositivismus?*, ed. Maihofer, 554-576.

⁷⁶ Helmut Simon, *Katholisierung des Rechts? Zum Einfluss katholischen Rechtsdenkens auf die gegenwärtige deutsche Gesetzgebung und Rechtsprechung* (Göttingen: Vandenhoeck & Ruprecht, 1962), 50-51.

⁷⁷ Ibid., 37, 46-47.

Simon entered politics in the 1950s as a leader of Protestant campaigns for the right of conscientious objection and against the nuclearization of the Bundeswehr, and he served as a founding member of the *Arbeitskreis kirchlicher Bruderschaften* in 1958. Simon's political activism adopted the "Christological" ethics and strong orientation toward individual conscience characteristic of these movements. Yet Simon regarded the discretionary decision of conscience on questions of ultimate morality not simply as a hallmark of Protestant citizenship, but as a means of shaping the legal order itself. Protestant public officials, in particular judges, who refused to check their Christianity when they entered their office door, would inevitably face instances of "conflict between immoral law and higher morality." As Simon argued in a 1962 essay published in a *Festschrift* for Ernst Wolf, such conflicts were

in the final instance a conflict situation [*Kampfsituation*] that can hardly be wiped away through law. What we need are legal personalities who in these difficult cases admit of this conflict, and despite a fundamental bond to the positive law do that toward which they are obliged according to their conscience, *in the hope that the legal order will follow this opinion.*⁷⁸

Unlike his rivals who believed that natural law already formed the foundation of the positive legal order and was therefore judicable in courts, Simon made explicit the disjuncture between Christian ethics and the surrounding non-Christian society. His model appealed to Protestant jurists as a path beyond the impasse over "unwritten law" that fueled jurisprudential debate during the 1950s, while holding out the hope that the legal order could be transformed to reflect Protestant ethical norms. Through the example of responsible jurists, Protestant

⁷⁸ Helmut Simon, "Die evangelischen Christen vor der Frage nach dem Naturrecht," in *Hören und Handeln: Festschrift für Ernst Wolf zum 60. Geburtstag*, eds. Helmut Gollwitzer and Hellmut Traub (München: Kaiser, 1962), 359.

"guidelines" for Christian action in the political world "could be announced to others, to non-Christians, as an invitation to make them their own."⁷⁹

As for many leftwing jurists of his generation, it was a series of political disputes in the early 1960s over the abuse of executive power, not only the question of emergency laws, that led Simon to train his full attention on the character of the West German *Rechtsstaat*. A landmark decision by the Federal Constitutional Court in February 1961 struck down Adenauer's attempt to establish a second national television network that would provide favorable coverage of the government, citing constitutional principles of federalism and press freedom.⁸⁰ More shocking was the so-called "Spiegel affair" that convulsed German politics during the final months of 1962. On October 10, 1962, the weekly newsmagazine published a cover story reporting on a recent military simulation conducted by NATO forces over West Germany. Revealing that the exercise portended nuclear disaster for West Germany, the editors criticized the CDU government's policy of relying on nuclear instead of conventional armaments. Two weeks later, the West German Defense Ministry, led by the CSU anti-Communist stalwart Franz Joseph Strauss, arranged for the arrest of the *Spiegel* editor-in-chief Rudolf Augstein and military affairs editor Conrad Ahlers, while police carried out a nighttime raid on the magazine's offices.⁸¹ Within a month, five FDP cabinet members resigned in protest, while Strauss resigned from his post as Defense Minister at the behest of the SPD leadership—all while Augstein and Ahlers remained in prison.

⁷⁹ Ibid., 361.

⁸⁰ Collings, *Democracy's Guardians*, 68-72.

⁸¹ Ibid., 80-83; see also Frank Bosch, "Später Protest: Die Intellektuelle und die Pressefreiheit in der frühen Bundesrepublik," in *Streit um den Staat*, eds. Geppert and Hacke, 91-112.

While many of Simon's *Bruderschaften* colleagues responded to the *Spiegel* affair with yet further comparisons between the Nazi and West German states, predicting an imminent collapse of democracy, Simon understood the crisis as an opportunity to seek the fuller realization of values immanent in the constitution itself. Reflecting his orientation toward guidelines for practical action, in an early 1963 essay and subsequent radio lecture Simon posed a question to his Protestant colleagues: "Is there a place for the *Rechtsstaat* in theological ethics?" The question, as Simon pointed out, broached a significant gap in Protestant political thought, too often "ignorant of law [*rechtsfremd*]." While Protestants had long contributed at a practical level to the development of constitutional law in postwar West Germany, both as practitioners and activists, the theological basis for this engagement had been insufficiently theorized. Indeed, this question was not merely abstract, since its answer determined whether Protestants merely participated in West German politics as responsible citizens, or were bound to defend constitutional democracy as a (quasi) religious obligation. To be sure, Simon noted, the *Rechtsstaat* could only be a provisional good, the "relatively better, for which Christians decide both according to the measure of human insight and human capability, as well as on the basis of their convictions of belief." Certainly, a state that lacked the qualities of a *Rechtsstaat* did not necessarily cease to hold authority over Christians under Romans 13.⁸² Nevertheless, core features of the West German *Rechtsstaat* harmonized with Protestant ethics: its binding of power through law; its protection of "human dignity" as the foundation for all other basic rights; and "respect for personal freedom as the foundation of community." Moreover, citizens living in

⁸² Helmut Simon, "Ist in der theologischen Ethik Platz für den Rechtsstaat? Die Spiegel-Affäre als Lehre und Aufgabe," in Heinrich Albertz et al., *via viatorum: für Karl Kupisch* (Berlin: Kätche-Vogt Verlag, 1963), 62-76, quoted 68-69.

states with greater political freedom were called upon to exercise greater responsibility for the preservation of those freedoms.⁸³

Simon's defense of the *Rechtsstaat* as a state form that not only provided religious freedom, but itself bore affinities with Protestant ethical tenets, allowed for a rapprochement with the school of constitutional law around Rudolf Smend. In the early 1960s, representatives of this school found themselves in a debate over the *Rechtsstaat* with followers of the still-influential Carl Schmitt, who argued that the core of the *Rechtsstaat* was being hollowed out by a bloated administrative state and a reliance on vague conceptions of the "value order."⁸⁴ By contrast, building on the recent *Lüth* decision, Smend's followers such as Ulrich Scheuner and the younger Protestant jurist Konrad Hesse emphasized that the merely formal, positivist doctrine of the *Rechtsstaat* dominant in the early twentieth century had been supplanted by a new idea of the "substantive [*materielle*] *Rechtsstaat*." The state now received its legitimacy through adherence to not merely formal procedure, but foundational principles—separation of powers, equal treatment of citizens, and the value system of the fundamental rights. The basic rights were guarantees not only of individual freedom from the state, but also of a social minimum necessary for full participation in the polity; hence, the principle of the *Sozialstaat*, much maligned by the Schmitt school, was anchored in Article 20 of the Basic Law. Certainly, Simon departed from the economic conservatism shared by Scheuner and Hesse, both of whom emphasized that insofar as the constitution regarded individual freedoms as pre-political foundations of public life, the state

⁸³ Helmut Simon, "Der Rechtsstaat: Fragen des Juristen an die Theologie," Deutschlandfunk, 22. Mai 1963, AEKR, Handakten Theodor Immer, 6HA017/3.

⁸⁴ For an extensive analysis of this debate and the various participants in the "Schmitt school" and "Smend school," see Günther, *Denken vom Staat her*, 112-191 and See also Specter, *Habermas*, 44-57, in particular on the role of Schmitt's student Werner Weber.

could not guarantee social equality.⁸⁵ Nevertheless, Simon shared with the Smend school the conviction that the values at the core of the Basic Law reflected Christian ethical precepts.

As a theorist of the *Rechtsstaat*, Simon sought to chart a path between "militant democracy" on the one hand and equivocation between the West and East German political systems on the other. He endorsed the idea of a "value order," while seeking out a more open definition of the concept than Adolf Arndt. Thus, at a meeting in February 1963 organized by the Committee on Social Ethics of the Protestant Church in the Rhineland, Simon firmly opposed the emergency laws alongside the leftwing jurist Helmut Ridder.⁸⁶ At the same time, he threatened to resign his position in the *Arbeitskreis kirchlicher Bruderschaften* over the organization's stance toward East Germany and insufficient commitment to constitutional democracy.⁸⁷

Bridging the *Bruderschaften* and the mainstream of West German jurisprudence, however, Simon was able to serve as a mediating figure in Protestant intellectual circles. In the summer of 1963, Simon took an active role in spearheading the next meeting of the executive committee at the Hessian town of Friedrichsdorf around the theme of "The Theological Problem of the *Rechtsstaat*." The theme marked a significant departure from that of the previous year, "The Limits of Obedience." Now, rather than inquiring into the boundary conditions of Christian political ethics, the commission would focus on the political order that Christians should strive to uphold. The list of contacts arranged by Simon and his colleagues suggests an effort to establish

⁸⁵ Konrad Hesse, "Der Rechtsstaat im Verfassungssystem des Grundgesetzes," in *Staatsverfassung und Kirchenordnung: Festgabe für Rudolf Smend zum 80. Geburtstag am 15. Januar 1962*, eds. Konrad Hesse, Siegfried Reicke, and Ulrich Scheuner (Tübingen: Mohr, 1962), 71-95; Ulrich Scheuner, "Die neuere Entwicklung des Rechtsstaats in Deutschland," in *Hundert Jahre deutsches Rechtsleben: Festschrift zum hundert jährigen Bestehen des Deutschen Juristentages, 1860-1960*, eds. Ernst von Caemmerer, Ernst Friesenhahn, and Richard Lange (Karlsruhe: C. F. Müller, 1960), 229-262.

⁸⁶ Horst Dahlhaus, ed., *Notstandsrecht und Demokratie: Notwendigkeit oder Gefahr?* (Stuttgart: Kreuz Verlag, 1963), 10-26.

⁸⁷ "Kirchliche Bruderschaft im Rheinland: Rundbrief Nr. 2/1963, Juni 1963," AEKR 6HA016/10.

a good-faith discussion that would bring together divergent viewpoints. In addition to the keynote speakers Ulrich Scheuner and Ernst Wolf, the organizers invited pastors and lay intellectuals representing a wide spectrum of political views, from Gustav Heinemann, by now an establishment SPD parliamentarian, to the more radical pastor and DFU leader Herbert Mochalski to the Barthian theologian active in ongoing discussions about the Oder-Neisse line, Wolfgang Schweitzer.⁸⁸

As the pastors who organized the event noted, the January 1964 meeting on "The *Rechtsstaat* as a Choice and Task" represented the first time the *Rechtsstaat* was "theologically recognized [*theologisch würdigte*]" by Protestants, despite longstanding discussions of political ethics within the Protestant milieu.⁸⁹ The question of the *Rechtsstaat* stood behind ongoing disputes over "practical questions of emergency laws, press freedom, and state security."⁹⁰ Ulrich Scheuner's opening lecture rehashed the Smend school's conception of the *Rechtsstaat*, making more explicit its Protestant theological background. Touting the "substantive *Rechtsstaat*" of the Bonn constitution as an alternative to both the positivist and authoritarian models of the German past, Scheuner insisted that Carl Schmitt and his students missed the *political* principle that made the *Rechtsstaat* more than simply a set of procedural mechanisms—its protection of individual freedom.⁹¹ Wolf's lecture, which drew affirmatively on Scheuner, marked a deeper transformation. Not only was Wolf a Social Democrat, but the "Christological" theology of law

⁸⁸ Linke to members of the Arbeitskreis kirchlicher Bruderschaften, June 16, 1963 and Linke to Bruderschaften, October 6, 1963, EZA 613/16; Linke to Scheuner, August 1, 1963 and Linke to Heinemann, September 24, 1963, AEKR 6HA017/3.

⁸⁹ Karl Linke and Theo Immer, "Vorwort," in *Rechtsstaat: Angebot und Aufgabe*, ed. Wolf, 7.

⁹⁰ Karl Linke, "Der Rechtsstaat – Verfassung, Ideologie, Wirklichkeit: Zur Jahrestagung der Kirchlichen Bruderschaft," *Stimme der Gemeinde*, March 1, 1964.

⁹¹ Ulrich Scheuner, "Die Rechtsstaatliche Ordnung des Grundgesetzes," in *Rechtsstaat: Angebot und Aufgabe*, ed. Wolf, 19.

he had long espoused seemed to preclude any theological valuation of a particular state form. Wolf recognized that previous statements of the Confessing Church and the *Arbeitskreis kirchlicher Bruderschaften*, going back to the Barmen Declaration, had refused to endorse a particular "idea of the state." Following Karl Barth's Nazi-era writings, Confessing Church successor organizations had restricted their purview to admonishing the state of its proper role in upholding God's order.⁹² Yet Wolf now rejected the question of the "theological foundations" of the state altogether. Rather than treating the state as a "metaphysical concept" Protestants should understand the state as a human institution for which individual conscience is responsible. In this light, Christians should prefer to live in a constitutional democracy, not because the *Rechtsstaat* manifested unchanging principles of natural law, let alone a divine sanction, but because it bestowed on its citizens the freedom to assume responsibility for the conditions of political life.⁹³

Like Scheuner, Wolf affirmed the notion of a "substantive *Rechtsstaat*" that went beyond the formalistic constitutional state of the nineteenth century, to draw on deeper sources of legitimacy. On the one hand, the state respected the human being's divinely-endowed "dignity" as a human right. On the other hand, the *Rechtsstaat* integrated the citizenry around a set of common values: the "integration function of the state [was] a determinate legal form for a pluralist society." In short, the constitution not only set limits on state power, as in a classical liberal state, but in so doing guarded the very values that bound the polity together. The "substantive *Rechtsstaat*" balanced the rights of individuals with common adherence to the values defined by those rights.⁹⁴ While Wolf did not acknowledge the point expressly, the

⁹² Ernst Wolf, "Die rechtsstaatliche Ordnung als theologisches Problem," in *Rechtsstaat: Angebot und Aufgabe*, ed. Wolf, 40-41.

⁹³ *Ibid.*, 42-43.

⁹⁴ *Ibid.*, 35-36, 47.

leaders of the *Bruderschaften* held the development of constitutional jurisprudence since the early 1950s to signify the incorporation of Protestant values into the legal foundations of the West German state. The "material *Rechtsstaat*" of the *Grundgesetz* to which Wolf gave his theologian's assent reflected the interventions of the legal milieu around Rudolf Smend, as well as Protestant church commissions themselves, making the newfound link between Protestantism and West German constitutional democracy a two-sided rapprochement.

Affirming these conclusions, a report by Helmut Simon appended to the published volume of the conference charted the development of the doctrine of the *Rechtsstaat* in West German constitutional jurisprudence. Simon tracked a linear progression from the SRP and KPD bans through the 1958 *Lüth* decision and the 1961 television case, praising the Federal Constitutional Court for realizing the *Rechtsstaat* principle immanent in the constitution. Of particular importance for Simon was the Court's decision December 1960 decision expanding the right of conscientious objection to military service. The Court's protection of "free individual conscience," he argued, established the West German state as "a community of free people."⁹⁵ Simon recognized the prominent role of Protestant jurists in motivating the conscientious objection ruling, and thus implicitly advanced a narrative whereby the Court had recognized the concept of conscience championed by Protestant intellectuals as a pillar of its own jurisprudence.⁹⁶

⁹⁵ "Der Rechtsstaatsgeanke in der Rechtsprechung: zusammengestellt von Helmut Simon," in *Rechtsstaat: Angebot und Aufgabe*, ed. Wolf, 64-101.

⁹⁶ Helmut Simon, "Das Recht zur Kriegsdienstverweigerung in Gesetzgebung und Rechtsprechung der Bundesrepublik," in *Kriegsdienstverweigerung als christliche Entscheidung*, eds. Joachim Beckmann and Martin Schröter (München: Kaiser, 1965), 32-58, especially 33-36. Simon himself had engaged in the earlier debate with the promulgation of conscription legislation in 1956, favoring an expanded right of conscientious objection: Simon, "Artikel 4, Absatz 3 des Grundgesetzes, sein Inhalt und seine Auslegung," in *Evangelische Stimmen zur Frage des Wehrdienstes*, eds. Karrenberg and Bismarck, 43-57.

An imagined Protestant lineage of the West German *Rechtsstaat* gained wide currency well beyond the immediate milieu of the *Arbeitskreis kirchlicher Bruderschaften* in the aftermath of the January 1964 meeting. In particular, this thesis harmonized with the legal theory of the SPD's Godesberg Program, facilitating a reintegration of the Protestant Left following the concatenating divisions of the preceding years. In a March 1965 address before the SPD Jurists Congress on the theme of "The *Rechtsstaat* as a Theological Problem," Gustav Heinemann invoked the lectures by Wolf, Scheuner, and Simon at the *Bruderschaften* meeting of the prior year, a move that would have been unthinkable at a conference of Social Democrats a decade earlier. Heinemann's lecture exemplified the elision between conceptions of Protestantism, Christian culture, and West German democratic citizenship that came to form the centerpiece of the Protestant critique of the CDU by the mid-1960s. Promising his Social Democratic audience that he did not advocate for the imposition of Christian privileges in law, Heinemann instead invoked a Protestant genealogy of West German democracy. Citing the 1934 Barmen Declaration as a transformative moment at which Protestants abandoned their old ethics of "throne and altar," Heinemann offered a narrative of redemption through Protestants' postwar embrace of civic responsibility. Heinemann acknowledged that Protestants and Catholics disagreed on fundamental questions of theology. Citing Helmut Simon's tract on the "Catholicization of Law," Heinemann suggested that the very term "natural law" remained marred by interconfessional debates. Protestants did not believe that "God could be grasped in timeless norms of order or determinations of essences," but rather that "True obedience happens in the always novel dare to answer correctly the question of what God wants from us in the present situation." Heinemann nevertheless called for recognition of the Christian background of the constitutional order: "Our democratic *Rechtsstaat*...can be interpreted in a Christian manner

not only in the fundamental rights, but also as a whole as the effort to achieve a good relationship between law and power, that is the mitigation of power through law and through civic responsibility for the benefit of the dignity of humanity." For Heinemann, a Protestant vision of the responsible citizen provided the mediating link between the *Rechtsstaat* and democracy, infusing the "mere formal system of legal technicalities" with the investment and participation of the people, and with a moral basis rooted in a shared Christian culture.⁹⁷

The Protestant discussion of the *Rechtsstaat* in 1964-65 therefore aided the development of a middle ground on the West German Left, between the SPD and the DFU. Wolf, Heinemann, Simon, Heinz Kloppenburg, and other figures connected to the *Arbeitskreis kirchlicher Bruderschaften* defended the Federal Republic not merely as a *fait accompli* or predecessor to a reunited Germany, but as a state rooted in a distinctive value system and mission.⁹⁸ Without indulging in polemical anti-Communism, they laid out a case for protecting the *Rechtsstaat* from both internal and external threats. Smend's concept of the constitution as a document of "integration" in political life allowed for a Protestant valuation of the *Rechtsstaat* that united this segment of the Left with more conservative Protestants such as Ulrich Scheuner and Smend himself. Moreover, figures ranging from the establishment Social Democrat Heinemann to the more critical Simon affirmed the West German *Rechtsstaat* by linking both its underlying ideals and historical development to a specifically Protestant lineage. While Protestant jurists celebrated to the state's guarantee of pluralism and religious freedom, their polemics against

⁹⁷ Gustav W. Heinemann, "Der demokratische Rechtsstaat als theologisches Problem," in Adolf Arndt, Gustav W. Heinemann, and Gerhard Jahn, *Der Bürger und das Recht: Drei Vorträge gehalten auf dem rechtspolitischen Kongreß der SPD "Der Bürger und das Recht" am 26. und 27. März in Heidelberg* (Bonn: Vorstand der SPD, 1965), 23-33.

⁹⁸ For Kloppenburg's review of the volume produced as a result of the meeting, see Heinz Kloppenburg, "Die Bundesrepublik – unsere politische Verantwortung," undated review, Landeskirchliches Archiv der Evangelischen Kirche von Westfalen (LAEKW), Bielefeld, Nachlass Ernst Wilm, Bestand 0.1/51.

"Catholic" jurisprudence alongside their paeans to Germany's Christian culture made plain their association of the *Rechtsstaat* with ostensibly Protestant virtues.

Emergency Laws and the Return of the Resistance Debate

The Protestant defense of the *Rechtsstaat* that took shape at the *Bruderschaften* conference of 1964 directly informed the renewed round of opposition to emergency laws that flared in mid-1965. Already at the January 1964 meeting, Ernst Wolf and Helmut Simon charged that the proposed constitutional amendments violated the essence of the *Rechtsstaat*.⁹⁹ Grumblings of opposition in 1962 had remained restricted to the unions, the *Kirchliche Bruderschaften*, and leftwing attorneys such as Heinrich Hannover and Helmut Ridder, themselves often affiliated with Protestant groups. By the mid-1960s, with the rise of movements for university reform across West German campuses, opposition to emergency laws came to encompass growing numbers of students and professors. Protestant networks and periodicals continued to serve as an organizational and intellectual hub of this movement, and the wider oppositional milieu increasingly echoed a rhetoric of "resistance" gaining ground among Protestants. In the aftermath of the *Bruderschaften* meetings on the theology of the *Rechtsstaat*, Protestant detractors of emergency laws had at their disposal a rich vocabulary of opposition that positioned them not as seditious radicals but as stalwarts of the very values on which the constitution rested. They increasingly eschewed a disjuncture between resistance and the *Rechtsstaat*, instead affirming civil disobedience as a legitimate act in defense of an endangered constitutional order.

⁹⁹ Wolf and Simon in *Rechtsstaat: Angebot und Aufgabe*, ed. Wolf, 60-61, 71. Heinz Kloppenburg also noted this point in his review (see note 98).

Public debate about emergency laws reemerged in response to the approval of a new draft of the amendments by the Bundestag legal committee on March 17, 1965, following two and a half years of public silence.¹⁰⁰ Ostensibly, the new draft addressed the criticisms that had led Social Democrats to reject the previous version. Yet the SPD remained divided on the issue, and ongoing pressure from the DGB, still a key Social Democratic constituency, pushed the majority of SPD delegates to reject the bill.¹⁰¹ Nevertheless, the Bundestag was able to pass seven so-called "simple emergency laws," primarily involving civil defense, which did not involve amending the Basic Law and therefore required only a simple majority.¹⁰² At the same time, SPD leaders such as Carlo Schmid made clear that they would be open to a future compromise on the constitutional amendments, and more ambitiously, to entry into government in a "Grand Coalition."¹⁰³

The "simple emergency laws" were sufficient to rekindle a discourse of resistance among the government's Protestant opponents. Outlining conditions for the requisitioning of vehicles, rationing of food, and government takeover of private industry, the "simple emergency laws" appeared to some to herald the coming of the "total emergency state."¹⁰⁴ In the aftermath of the *Rechtsstaat* conference of January 1964, Protestant intellectuals anchored their criticisms of emergency laws in an explicit defense of constitutional democracy. Emerging at the same time as the *Ostdenkschrift*, this revived Protestant Left abandoned calls for reunification—now an relic of the 1950s anti-rearmament movement—in favor of a form of constitutional democracy

¹⁰⁰ Herbert Mochalski, "Zur 2. Lesung der Notstands-gesetze," *Stimme der Gemeinde*, June 15, 1965.

¹⁰¹ Braunthal, "Emergency Legislation," 80-81.

¹⁰² *Ibid.*, 76-77.

¹⁰³ Hanshew, *Terror and Democracy*, 63.

¹⁰⁴ Heinrich Hannover, "Der totale Notstandsstaat," *Stimme der Gemeinde*, November 1, 1964.

anchored in Christian values of freedom and human dignity. After the September 1965 elections resulted in a victory for the CDU-FDP coalition and left Erhard as Chancellor, 450 university professors signed a petition asking the DGB to "maintain" its resistance, subsequently endorsed by 650 Protestant pastors. The petition called for "resistance" against the proposed emergency laws, which it framed as only one piece of the Erhard government's program for undermining the "democratic-pluralist order of the Federal Republic."¹⁰⁵ Heinrich Hannover simultaneously filed a petition against the "simple emergency laws " with the Federal Constitutional Court on March 16, 1966, alleging that these laws contravened the "free democratic essence of the state."¹⁰⁶ A open letter signed by 672 pastors and 250 additional church employees was delivered to all members of the Bundestag after the East German government revealed plans by the West German cabinet for an emergency civil service law, formulated even after the Bundestag had rejected the proposal the previous year.¹⁰⁷

Following this series of statements and petitions, Protestant pastors and lay intellectuals became centrally involved in the formation of the first national-level attempt to coordinate opposition against the emergency laws, which culminated in the eight-thousand member "Congress on the Emergency of Democracy" at the University of Frankfurt on October 30, 1966.¹⁰⁸ Organized during the summer of 1966, the Congress was timed to take place before the

¹⁰⁵ Helmut Schauer, ed., *Notstand der Demokratie: Referate, Diskussionsbeiträge und Materialien vom Kongreß am 30. Oktober 1966 in Frankfurt am Main* (Frankfurt: Europäische Verlagsanstalt, 1967), 7. For the petition, see "Neuer Professoren-Appell," *Stimme der Gemeinde*, April 15, 1966.

¹⁰⁶ Heinrich Hannover, "Normenkontrollklage gegen sechs Notstandsgesetze," *Stimme der Gemeinde*, March 15, 1966.

¹⁰⁷ Werner letter to signatories, October 6, 1966, EZA 613/186. On the so-called *Schubladengesetze*, see Schauer, *Notstand der Demokratie*, 8.

¹⁰⁸ Thomas, *Protest Movements*, 91 estimates that between eight and nine thousand people attended the Congress.

first parliamentary reading of yet another set of proposed amendments in November.¹⁰⁹ Its chairs were the jurists Heinz Maus and Helmut Ridder, the latter of whom maintained close connections with the *Arbeitskreis kirchlicher Bruderschaften*.¹¹⁰ Maus and Ridder recognized the role of the Protestant milieu in organizing early opposition and recruited numerous Protestant leaders to the advisory board of the Congress, including Helmut Gollwitzer, Heinz Kloppenburg, Martin Niemöller, Ernst Wolf, and the Confessing Church pastor Horst Symanowski. These Protestant pastors and theologians served alongside West Germany's most prominent leftwing intellectuals, many of whom had themselves published in Protestant periodicals—including the jurist Wolfgang Abendroth, Marxist philosopher Ernst Bloch, political scientist Karl Dietrich Bracher, and psychoanalyst Alexander Mitscherlich.¹¹¹ The very logic championed by Maus and Ridder mirrored arguments long advanced by Protestant jurists. They counterposed the written law against the higher values underwriting the constitution, the emergency laws against the "pluralist and open character our democratic constitutional order."¹¹²

At the Congress itself, a session on "Freedom of Conscience and the Right of Resistance" brought concerns of the Protestant opposition movement to the fore.¹¹³ The speaker Ekkehart Stein, a jurist at Kiel and former student of Helmut Ridder, echoed longstanding Protestant

¹⁰⁹ Maus and Ridder to Kloppenburg, July 15, 1966, EZA 613/186.

¹¹⁰ Ridder participated alongside Helmut Simon in the 1963 discussion on the emergency laws organized by the Rhineland Protestant church: Dahlhaus, ed., *Notstandsrecht und Demokratie*. Maus and Ridder also co-authored, alongside Eugen Kogon, the petition of March 10, 1966 that was reprinted in *Stimme der Gemeinde*: "Neue Professoren-Appell" (see note 105).

¹¹¹ "Notstand der Demokratie – Zentrales Treffen zum Schutze der Verfassung am 30. Oktober 1966 in Frankfurt (Main) : Zusagen für eine Unterstützung und für die Bereitschaft, dem Kuratorium beizutreten," August 15, 1966, EZA 613/186. See also Schauer to Kloppenburg, June 29, 1966 and Maus and Ridder to Kloppenburg, July 15, 1966, EZA 613/186. On Symanowski's biography, see Sarah Jäger, "Symanowski, Horst," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Symanowski,+Horst> (accessed April 15, 2018).

¹¹² Maus and Ridder to Kloppenburg, July 15, 1966, EZA 613/186.

¹¹³ Schauer to Kloppenburg, July 9, 1966, EZA 613/186.

tropes when he confessed that no hard and fast principle regulated the relationship between conscience and the dictates of law, or the extent of "freedom of conscience" under the Basic Law. Nevertheless, "resistance" became a legitimate possibility in defense of the core values of the constitution, and might become necessary against an "abuse of emergency powers." A union representative noted that unions would always support a "right of political strike in defense of a rule-of-law democracy." Another participant proposed "civil disobedience" as an underutilized political strategy in West Germany.¹¹⁴

The Congress' concluding resolution called for "general resistance against the emergency laws" in the "coming weeks and months," noting the "rising forces of resistance from the intelligentsia, the unions, and in particular the young generation irrespective of other differences of political opinion." Resistance against the emergency laws would prevent "the hollowing out of the second German democracy" and "the devaluation of democracy into a luxury constitution of an affluent society."¹¹⁵ A final rally attended by twenty-four thousand sought to manifest this principle in practice.¹¹⁶ The following day, 250 Protestant pastors staged a silent march in Bonn opposing the emergency laws as well as the West German government's support for the American war in Vietnam, under the banner, "The church takes responsibility for democracy."¹¹⁷ Resistance rhetoric thus found a home at the Frankfurt Congress, but Protestant intellectual leaders and members of the broader protest movement consistently linked legitimate resistance to

¹¹⁴ Ekkehart Stein, "Notstandsgesetze und Gewissensfreiheit," in *Notstand der Demokratie*, ed. Schauer, 163-181. On Stein, see Götz Frank and Heiki Stintzing, "Ekkehart Stein," *JuristenZeitung* 64 (2009): 252-254.

¹¹⁵ "Schlußerklärung des Kuratoriums 'Notstand der Demokratie' zum Kongreß," in *Notstand der Demokratie*, ed. Schauer, 209-211.

¹¹⁶ Thomas, *Protest Movements*, 91.

¹¹⁷ On the group's founding, see "Arbeitsgemeinschaft Kirche und Demokratie, Köln-Klettenberg – Presseinformation," September 9, 1966, EZA 613/186. See also Werner to signatories of the open letter, October 6, 1966, EZA 613/186.

the preservation of democratic norms and constitutional principles. Doubts that West German Protestants should adopt a principled stance in favor of constitutional democracy and against Communism were seldom voiced.

Contesting the "Theology of Revolution"

The final step toward the passage of the emergency laws was taken with the inauguration of West Germany's Grand Coalition government on December 1, 1966, the step feared by the Extra-Parliamentary Opposition since the SPD Godesberg congress. With the breakdown of the Ludwig Erhard's CDU-FDP coalition over budget negotiations, the Social Democrats entered government under a Christian Democratic-led coalition headed by Kurt Georg Kiesinger, a former Nazi Party member and high-ranking official in the Goebbels Propaganda Ministry. The Free Democrats, whose electoral returns had sunk below ten percent in the elections of September 1965, now formed the sole parliamentary party outside of government, fueling claims by the New Left that the true opposition lay outside parliament. From the outset of the Grand Coalition, SPD parliamentarians worked with their CDU counterparts to conclude a revised draft of the emergency laws, announced by the government on March 10, 1967. As the historian Karrin Hanshew has argued, compromise on the emergency laws was the "price" the SPD paid for entry into government. The Christian Democrats, however, also made substantial concessions to ensure the passage of the amendments.¹¹⁸ The new draft restored the right of unions to strike during a declared emergency, long a bone of contention between the parties, and maintained a wider range of civil liberties. An "internal emergency" could not be declared to quell a labor dispute. The militarized border police could only be deployed against an external threat. Most

¹¹⁸ Hanshew, *Terror and Democracy*, 65.

significantly, the joint parliamentary emergency committee now possessed full authority to declare both the onset and end of an emergency.¹¹⁹

The period preceding the passage of the amendments saw the unfolding of the events that have come to define the generational upheavals of the West German "Sixties." On June 2, 1967, the student Benno Ohnesorg was fatally shot by a police officer during a protest over the Iranian Shah's visit to West Berlin, fueling the student protest movement with new radicalism. The following months were marked by sit-ins, marches, and demonstrations in every major West German city, as the objects of student protest grew from initial concerns with university overcrowding to the Vietnam War, NATO support for Third World dictatorships, the presence of former Nazis (not least Kiesinger) in government, as well as emergency laws.¹²⁰

While *Bruderschaften* members remained staunch opponents of emergency laws, the years leading to their final passage in May 1968 were marked by tensions with the student movement that signified the older generation's deepening commitment to constitutional democracy. The student protest movement, spearheaded by the SDS, adopted an increasingly radical stance against the laws and institutions of the Federal Republic over the course of the 1960s. The movement's "anti-authoritarian" wing around the Free University in West Berlin, led by Rudi Dutschke, carried out provocative demonstrations against the Vietnam War even before the Ohnesorg shooting, including likening South Vietnam to the Nazi state and collecting funds for the purchase of weapons by the Viet Cong. For many students, the proposed emergency laws served as a case in point that the Federal Republic itself was on a path back toward Nazism; the Campaign for Disarmament [*Kampf für Abrüstung*], the anti-nuclear movement that had taken an

¹¹⁹ Ibid., 66; Braunthal, "Emergency Laws," 82-83. For an inventory of the changes under the new draft, see also "Der 'neue' Entwurf der Notstandsverfassung," *Stimme der Gemeinde*, April 15, 1967.

¹²⁰ These events have been the subject of a large literature; for an overview, see Thomas, *Protest Movements*, 107-197.

increasingly radical stance against the West German government's support for the Vietnam War, declared in a flyer, "We see that old Nazis are always still involved and that young Nazis are joining them. We see that democratic rights and freedom of opinion could be fully removed."¹²¹

Several leftwing Protestant professors, especially those who had participated in the emergency law debate since the early 1960s, engaged as interlocutors of the students. Dutschke, who came from a devout Lutheran family and adopted a Christian socialism that perplexed his fellow student radicals, was among Helmut Gollwitzer's mentees at the Free University's Institute for Protestant Theology. On Christmas eve 1967, Dutschke along with a group of SDS members staged a demonstration against the Vietnam War at the Berlin *Gedächtniskirche*, taking the pulpit to excoriate the assembled churchgoers for "speak[ing] of peace" amidst the West German-backed war. While the protest drew denunciations from the West German press, Gollwitzer defended the demonstrators.¹²² Moreover, the oppositional newsletter *Informationsdienst zur Notstandsgesetzgebung*, edited by a group of pastors affiliated with the *Arbeitskreis kirchlicher Bruderschaften*, warned that the shooting of Benno Ohnesorg prefigured the permanent state of exception that the emergency laws threatened to bring about.¹²³

Despite these points of convergence, Protestant intellectuals of the Confessing Church generation remained committed to the institutions of the Federal Republic, rather than engaging in the brinkmanship characteristic of more radical students. Doubtless this distinction in part reflected generational disparities. But equally important were the links the *Bruderschaften* had

¹²¹ Ibid., 69-85, quoted 83.

¹²² Ibid., 154-155.

¹²³ "Praktizierung von Notstandsgesetzen in Berlin?" *Informationsdienst zur Notstandsgesetzgebung: für Pfarrer und kirchliche Mitarbeiter*, no. 3 (April-June 1967), LAEKW, Nachlass Ernst Wilm, Bestand 0.1/51. Editors affiliated with the *Arbeitskreis kirchlicher Bruderschaften* included the pastors Dieter Schellong and Heinrich Treblin. See, for instance, "Protokoll der Leiterkonferenz der Bruderschaften am 24./25. Mai 1961 in Frankfurt/Main," EZA 613/15 and the report on the meeting of the Leitungsausschuss der Kirchlichen Bruderschaften in Dortmund, 1. November 1961, EZA 613/16.

drawn between a "Christological" theology of law and a defense of constitutional democracy. By the outset of the Grand Coalition, West German democracy represented for many Protestant intellectuals not an abstract political form but a state to whose political foundations they had decisively contributed. In particular, the period of student protests saw efforts by Protestant theologians and jurists to work out the implications of their theology of law on an international scale, with significant consequences for their valuation of the legitimacy of resistance in West Germany.

West German engagement with the international ecumenical movement was hardly novel to the mid-1960s. A substantial German delegation participated in the founding conference of the World Council of Churches in 1948. By 1959, West Germany's regional Protestant churches had mounted an international relief and development initiative, *Brot für die Welt*, and Ulrich Scheuner, Heinz Kloppenburg, and the Hannoverian bishop Hans Lilje served as standing West German representatives to the WCC's Commission of the Churches for International Affairs.¹²⁴ But only at the "World Conference on Church and Society" at Geneva in July 1966, the first ecumenical conference to deal intensively with the theme of law, did West Germans serve as an important intellectual influence. The conference took place at a turning point for the ecumenical movement, as pastors from postcolonial and decolonizing countries, home to the world's fastest-growing Christian populations, assumed an increasingly dominant role. In particular, the Geneva conference marked the arrival of new currents of liberation theology, inspired by Latin American theologians such as Gustavo Gutiérrez, to the center of the movement's agenda.¹²⁵ A widely

¹²⁴ Claudia Lepp, *Tabu der Einheit? Die Ost-West-Gemeinschaft der evangelischen Christen und die deutsche Teilung (1945-1969)* (Göttingen: Vandenhoeck & Ruprecht, 2005), 466.

¹²⁵ More generally, see Annegreth Schilling, "Demokratischer Sozialismus, Humanisierung und Befreiung. Der Beitrag Lateinamerikas zur Globalisierung der Ökumene," in *Globalisierung der Kirchen: Globale Transformation und ökumenische Erneuerung des Ökumenischen Rates der Kirchen in den 1960er- und 1970er-Jahren*, eds. Katharina Kunter and Annegreth Schilling (Göttingen: Vandenhoeck & Ruprecht, 2014), 217-236.

circulated address by the American theologian Richard Shaull, a professor at the Princeton Theological Seminary, upbraided the political conservatism of Western churches and called for a new theology oriented toward the rapid social transformations and rising demands for social justice in the Third World. Most provocatively, Shaull refused to rule out violence as a strategy of the "revolution necessary for the humanization of modern society": "There can really be some situations where only the threat or use of violence can introduce a change. Important is not whether violence is proscribed, but whether its use, when it is absolutely necessary, fits a strategy of a permanent struggle for finite transformations in society."¹²⁶

Calls for a theology of revolution brought questions of law, legitimacy, and resistance, longstanding issues of contention in German Protestant discourse and central in ongoing controversy over the emergency laws, to the heart of the ecumenical agenda. Drawing on a now established defense of constitutional democracy, Protestant jurists in West Germany called for a more sober perspective on the themes raised by Shaull. West German participants at the Geneva conference comprised a broad cross section of the Protestant intelligentsia, including Simon, Helmut Gollwitzer, Ludwig Raiser, Eberhard Müller, Hansjürg Ranke, and Heinz-Dietrich Wendland, who had assumed a chair in Christian social ethics at Münster following his return from postwar imprisonment. The theologian Trutz Rendtorff and jurist Rolf-Peter Calliess, a participant in the FEST "Institution Commission" who had written a dissertation on the theological foundations of property law, represented a younger generation.¹²⁷ At a preparatory

¹²⁶ Richard Shaull, "Die revolutionäre Herausforderung an Kirche und Theologie," in *Appell an die Kirchen der Welt: Dokumente der Weltkonferenz für Kirche und Gesellschaft*, ed. Ökumenischer Rat der Kirchen (Stuttgart: Kreuz-Verlag, 1967), 91-99, quoted 95. On the reception of Shaull's lecture in West Germany, see Alexander Christian Widmann, *Wandel mit der Gewalt: Der deutsche Protestantismus und die politisch motivierte Gewaltanwendung in den 1960er und 1970er Jahren* (Göttingen: Vandenhoeck & Ruprecht, 2013), 94-103.

¹²⁷ Wilkens to Krüger, January 30, 1967, EZA 6/5950. On Wendland's postwar trajectory, see Karl-Wilhelm Dahm and Wolfgang Marhold, "Theologie der Gesellschaft. Der Beitrag Heinz-Dietrich Wendlands zur Neukonstruktion der Sozialethik," *Zeitschrift für evangelische Ethik* 34 (1990): 174-191. For Calliess' biography, see Tim Schedel,

meeting for West German attendees of the July 1966 Geneva conference, Helmut Simon, along with Hansjürg Ranke, the EKD administrator Cornelius von Heyl, and Calliess prepared a document on "The Relationship of the Christian to State and Law."¹²⁸ At the conference itself, Simon served as the section rapporteur for a working group on "The Function of the State in a Revolutionary Age."¹²⁹

As Helmut Simon would subsequently recall, Ernst Wolf's theology of the "Kingdom of Christ" formed the basis for much of the Geneva conference's discussion of law.¹³⁰ Wolf's longstanding critique of the conservative instrumentalization of natural law found a receptive audience among Third World participants, who challenged invocations of "natural law" in the service of preserving existing social orders, in particular property relations.¹³¹ The final report of Simon's working group on law and the state sought to expand the social efficacy of both law and theology beyond their traditionally conservative role. The report noted that law possessed not only a "protective" but also an "educative" and "productive" function, such that law could both reflect and guide processes of social transformation. For Simon and his colleagues, the Christian's proper political role involved not simply challenging or even overthrowing unjust

"Calliess, Rolf-Peter," *Protestantismus in den ethischen Debatten*, <https://wiki.de.dariah.eu/display/F1P/Calliess%2C+Rolf-Peter> (accessed April 15, 2018). His dissertation was Calliess, *Eigentum als Institution: Eine Untersuchung zur theologisch-anthropologischen Begründung des Rechts* (München: Kaiser, 1962).

¹²⁸ Von Heyl to Teilhomer der Weltkirchenkonferenz für Kirche und Gesellschaft, April 7, 1966, EZA 6/5949. For the report, see "Das Verhältnis des Christen zu Staat und Recht," *Zeitschrift für evangelische Ethik* 12 (1968): 116-119.

¹²⁹ "World Conference on Church and Society, July, 1966. Section II," May 25, 1966, WCC Archives, Conference on Church and Society, Geneva 1966, 243.7.2.

¹³⁰ Helmut Simon, "'Wer wenig im Leben hat, soll viel im Recht haben': Beiträge zu einer ökumenischen Rechtstheologie," *Ökumenische Rundschau* 16 (1967): 338-357, at 340, 356 n8.

¹³¹ World Conference on Church and Society, Conference Section II, Sub-section 3, "Law in a Revolutionary Situation," WCC Archives, 243.7.11. See also "Das Recht in einem revolutionären Zeitalter," in *Appell an die Kirchen*, ed. Ökumenischer Rat der Kirche, 157-161.

structures but infusing law with Christian ideals. Informed by a theological anthropology of the human being as a divine creation, the law could serve as a medium for advancing justice. The report in turn regarded violence with far greater ambivalence than did Richard Shaull. Without condemning a "theology of revolution" outright, it warned that revolutionary violence could hardly be contained once unleashed. Instead, Christians should "encourage the development of an international machinery" for the "protection" of "human rights," and "press in their own societies for effective implementation of internationally accepted standards of human rights through constitutional provisions, laws, and administration."¹³²

In the aftermath of the Geneva conference, committees of German representatives, including Simon, Ulrich Scheuner, Hans Dombois, Hansjürg Ranke, Ernst Wolf, and Rolf-Peter Calliess held a series of meetings addressing questions of law and revolution in preparation for the WCC plenary conference, scheduled to take place in Uppsala, Sweden in July 1968.¹³³ Engaging with international calls for a "theology of revolution," Protestant intellectuals in West Germany pointed toward a Christian path between the violent overthrow of, and blind adherence to existing, unjust political orders. They thereby applied a model of politics developed within a West German context on a global scale.

The core theoretical product of the Geneva conference and the West German planning meetings for Uppsala was a *dialectical* theory of law, one that recognized the co-evolution and co-constitution of law and society. Discussions revived longstanding tropes, such as the dual

¹³² World Conference on Church and Society, "The Nature and Function of the State in a Revolutionary Age," WCC Archives, 243.8.14.

¹³³ Ranke to Deutscher Ökumenischer Studienausschuß, October 11, 1967, BArch Koblenz, N 1367/290; "Protokoll zur Weiterarbeit an den Ergebnissen der Weltkonferenz 'Kirche und Gesellschaft' vom 16.-17. Oktober in der Evangelischen Akademie Arnoldshain/Taunus, veranstaltet vom Kirchlichen Aussenamt der EKD," EZA 6/5953. The largest preparatory meeting for the Uppsala conference brought together eighty-three church leaders and lay intellectuals at the *Evangelische Akademie* in Arnoldshain in October 1967.

critique of natural and law and legal positivism, as well as the "Christological" theology of law that located the foundation for human law in Christ's ongoing sovereignty over the political world. Now, these tropes were recast to respond to calls for rectifying international inequalities. As Rolf-Peter Calliess wrote in a report prepared for consideration by the Uppsala conference, law could not be derived solely from the immediate demands of a "revolutionary context" or from "higher norms." Rather, "The task of the Christian is to decide in concrete situations, in making decisions to take up, support, and engage with certain contexts, and to ignore others." Echoing the FEST institution commission, in which he had participated during the early 1960s, Calliess described law as a "dialectical relationship between process [*Bewegung*] and status [*Zustand*]," which maintained both a "revolutionary (productive) and at the same time conservative (protective) function."¹³⁴

In a 1967 article for West Germany's leading ecumenical organ reflecting on the Geneva conference, Helmut Simon similarly sought to elucidate the dialectical relation between law and society, drawing on the "Christological" theology of law developed in *Bruderschaften* circles to suggest that law should be responsive to the demands of the concrete moment rather than the bedrock of an unchanging order. A theological understanding of law would empower Christians to build worldly institutions that "most truly correspond to the insights of biblical anthropology and most effectively realize love of one's neighbor," while challenging "established structures" and uncovering the "actions of unseen power in unjust social systems." "The worldly legal order," Simon continued, could function as "a privileged locus of solidarity, in which Christians

¹³⁴ "Thesen zum christlichen Verständnis des Rechts im gegenwärtigen Zeitalter," *Zeitschrift für evangelische Ethik* 12 (1968): 110-116. Calliess' composition of the theses in July 1967 is documented in EZA 686/8693. Calliess also introduced the published collection of the commission's meetings: Calliess, "Institution und Recht," in *Recht und Institution*, 2. Folge, ed. Dombois, 11-60.

face the concrete tasks of their situation."¹³⁵ Law should be responsive to changing social relations, technological advances, and the requirements of justice, but at the same time, law itself could shape processes of social change in conformity with a Christian ethic of neighborly love.

Stated in these terms, the legal theory developed by Protestant ecumenical commissions appears highly abstract. But this theory can be understood as a refraction of the transformations of Protestant legal praxis since 1945. Neither uniformly conservative nor progressive, the theology of law developed by Confessing Church veterans and their heirs insisted that human life be rooted in strong institutional foundations, while also demanding the freedom to transform those institutions in light of considerations of justice. Protestant jurists and theologians thereby rejected an absolute disjuncture between freedom in the spiritual sphere and obedience in the political. Moreover, as critics of revolutionary violence, Protestant intellectuals in West Germany proposed the model of the Basic Law as a means to achieve social justice while stemming the threat of violence worldwide. They thereby aligned the Protestant constitutionalism developed in postwar West Germany with a universal model of democratic citizenship.

Human Rights or Revolution? Protestant Intellectuals and "1968"

If Protestant intellectuals sought to universalize the West German constitutional model as participants in the ecumenical movement, newfound Protestant conceptions of the link between resistance and democracy would shape the final stage of debate about the emergency laws within the Federal Republic. Even as Protestant leaders of the Extra-Parliamentary Opposition clashed with the SPD establishment, the Social Democrats won an important concession that addressed the concerns of the Protestant Left: the incorporation of a constitutional right of resistance

¹³⁵ Helmut Simon, "Wer wenig im Leben hat," 338-357, quoted 351-352.

against breaches of democracy. Introduced in the parliamentary *Rechtsausschuss* in early April 1968 and accepted by the full parliament on May 15, the new clause appended to Article 20 of the Basic Law read, "All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available."¹³⁶ Contemporary critics argued that the legal codification of a right of resistance was inherently contradictory, since resistance could become necessary only at the moment when the constitutional order broke and legality became irrelevant.¹³⁷ However, the right of resistance garnered support from both major parties, though CDU and SPD representatives tended to view the likely significance of resistance through different lenses—for the former, against threats "from below," for the latter, against threats "from above."¹³⁸ By rendering resistance as a constitutional right of all citizens, the Bundestag definitively broke with the elitist conception that dominated the July 20 commemorations to reconceptualize resistance as a legitimate measure, in extreme circumstances, of preserving the integrity of the constitution.

The origins and particular formulation of the right of resistance, moreover, reflected the Protestant tradition of constitutional thought extending back to Rudolf Smend, which emphasized the basis of constitutional interpretation in fundamental "values." Its placement in Article 20, one of the two articles, alongside the Article 1 guarantee of human dignity, whose "principles" could not be amended, made the right of resistance a pillar of the "democratic and

¹³⁶ "Basic Law," Art. 20, Para. 4.

¹³⁷ David Clay Large, "Normifying the Unnormifiable: The Right of Resistance in West German Constitutional History," in *The Cornerstone of Democracy: The West German Grundgesetz, 1949-1989*, ed. Detlef Junker (Washington, D.C.: German Historical Institute, 1995), 83-95.

¹³⁸ For an overview, see Christoph Böckenförde, "Die Kodifizierung des Widerstandsrechts im Grundgesetz," *JuristenZeitung* 25 (1969): 168-172, at 170-171. For more on the debate about the codification of the right of resistance, see Johst, *Begrenzung des Rechtsgehorsams*, 213-226.

social federal state."¹³⁹ The right signified that in extreme cases, citizens could defend the values of the constitutional order even against the written law. As the SPD parliamentarian Wolfgang Stammberger announced in the Bundestag's second reading of the emergency laws on May 15, 1968, the right of resistance "is in the first instance symbolic. It shows that the meaning of the emergency laws should be: not the restriction of liberal rights, but the defense of liberal rights even to the final extreme, that each person themselves must be prepared to defend them when all other means break down."¹⁴⁰ Against opponents who argued that a codified right of resistance entailed a contradiction in terms, Stammberger cited Adolf Arndt's conception of constitutional law as "the art of completeness."¹⁴¹ The political community could not rest on unwritten rules, too easily manipulable for political interests. Against proponents of a right of resistance solely as a matter of natural law, Arndt and his SPD colleagues suggested that basic values had to be made manifest in the constitution itself. Arndt, moreover, formulated the final version of the amendment.¹⁴²

The introduction of a right of resistance into the proposal for emergency laws hardly quelled the criticism of the amendments from the extraparliamentary Left, but it did harmonize with the now frequently invoked link between resistance and democracy. On May 8, 1968, five hundred pastors and other church employees staged a demonstration in Bonn under the slogan "Christians for Democracy – Against Emergency Laws," holding posters emblazoned with "1933 Enabling Act – 1968 NS-Constitution" (a pun on National Socialist and emergency, or *Notstand*)

¹³⁹ Article 79, Paragraph 3 of the Basic Law establishes that "Amendments to this Basic Law affecting...the principles laid down in Articles 1 and 20 shall be inadmissible." The identity of the Federal Republic as a "democratic and social federal state" is established in Article 20, Paragraph 1.

¹⁴⁰ VDBT, Deutscher Bundestag, 5. Wahlperiode, 174. Sitzung, 15. Mai 1968, 9364.

¹⁴¹ VDBT, Deutscher Bundestag, 5. Wahlperiode, 174. Sitzung, 16. Mai 1968, 9450.

¹⁴² Böckenförde, "Kodifizierung des Widerstandsrechts," 171.

and "Never Again – Throne and Altar."¹⁴³ Thirty percent of West Germany's Protestant pastors signed an open letter to all members of the Bundestag protesting the emergency laws.¹⁴⁴ The culminating event of the campaign against emergency laws was a march in Bonn on May 11, drawing at least sixty thousand participants.¹⁴⁵ Protests continued at every major West German university during the ensuing weeks, with demonstrations in Frankfurt and Munich during the final week of May drawing especially large groups of students proclaiming, "Never again 1933."¹⁴⁶ Helmut Gollwitzer read out a "funeral oration for the Basic Law" on Hessian radio on May 28, arguing that the emergency laws would replace the existing Basic Law with a new "emergency constitution." Framing his critique as a defense of the integrity of the constitution, Gollwitzer expressed the social vision that guided the wider Protestant discussion of the *Rechtsstaat* in the mid-1960s. The Church had finally overcome its "all too long authoritarian tradition" to defend of a "society of free, mature citizens, who are guided by the form of their institutions and are put in the position to become the designers of their common life."¹⁴⁷ Gollwitzer's vision of democracy emphasized less its social benefits than its preservation of individual autonomy and dignity, precisely the values to be threatened by investing the federal government with emergency powers.

In the event, no such destruction of West Germany's constitutional order occurred. The Bundestag passed the emergency laws, alongside the constitutional right of resistance, on May

¹⁴³ Wolfgang Kraushaar, "Furcht vor einem 'neuen 33': Protest gegen die Notstandsgesetzgebung," in *Streit um den Staat*, eds. Geppert and Hacke, 139.

¹⁴⁴ Kubbig, *Kirche und Kriegsdienstverweigerung*, 13.

¹⁴⁵ Kraushaar, "Furcht vor einem 'neuen 33,'" 140 reports an attendance of "more than sixty thousand." Thomas, *Protest Movements*, 194 estimates an attendance of between sixty and eighty thousand.

¹⁴⁶ Kraushaar, "Furch vor einem 'neuen 33,'" 141-142; Thomas, *Protest Movements*, 195.

¹⁴⁷ Helmut Gollwitzer, "Leichenrede auf das Grundgesetz," *Stimme der Gemeinde*, July 1, 1968.

30, with only the FDP remaining in opposition. The amendments have never been invoked in the five decades since, remaining a relic of Cold War fears of Soviet invasion and nuclear attack. But the movement against the emergency laws, including its Protestant wing, was not entirely without impact. The concessions that the SPD demanded for its eventual support for the amendments, in particular the preservation of the right to strike, were the product of activism by West Germany's unions and their supporters in the extraparliamentary opposition. Moreover, the debate about the emergency laws engendered a rethinking of civil disobedience and resistance. For members of the extraparliamentary Left, the category of "resistance" took on meaning beyond the narratives of elite opposition to National Socialism dominant during the early years of the Federal Republic. Protestant theologians such as Helmut Gollwitzer and Heinz Kloppenburg, as well as their lay allies such as Wolfgang Abendroth, Helmut Ridder, and Jürgen Seifert, mediated between the more radical student activists and the mainstream SPD by framing such a concept of "resistance" not in terms of the overthrow but the buttressing of constitutional democracy. Moreover, SPD parliamentarians adopted a similar understanding. By supporting the incorporation of a right of resistance into of the Basic Law, the SPD expanded the political discourse about resistance, from an action legitimated solely against an unconstitutional regime to the boundary condition for the preservation of constitutional democracy.

The October 1968 Protestant synod in West Berlin, an epilogue to the heady events of the previous May, demonstrates how a commitment to constitutional democracy came to form a common denominator for Protestant intellectuals of the Confessing Church generation across West Germany. Certainly, although the student protests in West Germany never reached the levels of violence of their French counterparts or endangered the stability of government, divisions over the movement's legacy remained palpable within Protestant circles. The "theology

of revolution," a centerpiece of the July ecumenical conference in Uppsala, revived old questions about the connections between politics and the Gospel.¹⁴⁸ In the aftermath of the ecumenical conference, a new generation of radical theologians formed a "conference on critical theology" in Celle and organized "political night prayers" on themes of social justice in Cologne.¹⁴⁹ The movement "no other Gospel [*kein anderes Evangelium*]," founded in Dortmund in March 1966 with the involvement of the indefatigable Walter Künneth, represented a conservative backlash.¹⁵⁰

Helmut Gollwitzer maintained perhaps stronger ties to the student movement than any other synod member, and he emerged as a leading exponent of the "theology of revolution" for a West German audience.¹⁵¹ Yet Gollwitzer's lecture at the October 1968 synod in many ways summarized themes that had gained wide currency within the postwar Protestant milieu. Gollwitzer bound a narrative of Confessing Church resistance against Nazism to a fundamental critique of the two kingdoms doctrine on which Lutheran understandings of politics had long rested. Invoking Dietrich Bonhoeffer's "political activities in close relationship to God," Gollwitzer insisted that the very distinction between political and Christian convictions would have made no sense for Bonhoeffer. For Gollwitzer, the Gospel was necessarily political, and critics of the "politicization of the church" merely advanced their own political ideology. At the same time, in breaking down the dichotomies of gospel and law, love and justice, and implicitly, between the *Unrechtsstaat* of the Nazi period and the *Rechtsstaat* of postwar West Germany,

¹⁴⁸ On the Uppsala conference, see Annegreth Schilling, "1968 und die Ökumene. Die Vollversammlung des ÖRK in Uppsala als Beginn einer neuen Ära?" in *Globalisierung der Kirchen*, eds. Kunter and Schilling, 89-120.

¹⁴⁹ Widmann, *Wandel mit der Gewalt*, 278-282.

¹⁵⁰ *Ibid.*, 65-66.

¹⁵¹ See the documents collected in "Vorlesung 'Die Revolution des Reiches Gottes und die Gesellschaft' im SS an der Freien Universität Berlin, 1968," EZA 686/9207-9208.

Gollwitzer emphatically did not believe that revolutionary violence against the West German state could be justified in the manner demanded by the contemporary SDS. All legal means of social change had to be exhausted before violence could be permissible.¹⁵² Despite his ties to the student movement, Gollwitzer's political theology thus harmonized with the concept of the *Rechtsstaat* proposed by Protestant thinkers over the course of the 1960s. By expanding the concept of the *Rechtsstaat* beyond procedural mechanisms, to encompass a "value order" based on ideas of dignity, pluralism, tolerance, and freedom of conscience, these theorists believed that the possibility of violence and revolution could be averted.

If discussions at the first EKD synod of 1949 foundered on the uncertain theological basis for the church's interventions in law, nearly two decades later, foundational questions appeared less central against the experience of the Church's practical political engagement. Theological debate had provided resources for broad agreement that the churches served not as the designers of all social institutions but as a source of values that united the polity across political and confessional divides. The synod's concluding injunction reached beyond internecine conflict and toward a broad affirmation of the church's worldly obligations, exemplifying the transformation of Protestant political theology in Germany since the outset of the Third Reich:

The theological confrontations over these contentious questions should help the church reach a correct Christian Word in political-social matters, but they must not prevent the church from issuing this Word. That is, the political-social witness of the church, that its Lord demands of it today (about this, there is consensus!), must not be delayed until we have found clarity on all of these questions and have reached unity...Here also Zwingli's word is valid for the church: 'Do on behalf of God (and therefore also on behalf of humanity) something courageous!'¹⁵³

¹⁵² Helmut Gollwitzer, "Die Weltverantwortung der Kirche in einem revolutionären Zeitalter," in Gollwitzer, *Forderungen der Umkehr: Beiträge zur Theologie der Gesellschaft* (München: Kaiser, 1976), 44-69. On the latter point, see also Claudia Lepp, "Helmut Gollwitzer als Dialogspartner der sozialen Bewegungen," in *Umbrüche*, eds. Hermle, Lepp, and Oelke, 234.

¹⁵³ Kirchenkanzlei der Evangelischen Kirche in Deutschland, ed., *Berlin-Spandau 1968: Bericht über die regionale Tagung der Synode der EKD vom 6. bis 11. Oktober 1968* (Hannover: Verlag des Amtsblattes der EKD, 1969), 339.

Epilogue: Reinventing Protestant Germany

This dissertation has analyzed the intersections of Protestant theological and legal debate in Germany during a transformative period: the years of National Socialism and the two decades immediately following. I have argued that a generation of theologians and lay intellectuals born between approximately 1890 and 1910, who came of age as members of the Nazi-era Confessing Church and its postwar successor organizations, pioneered a theological transformation with significant consequences for Protestant political engagement in the postwar West German Federal Republic. Whereas authoritarianism and conservative nationalism dominated Protestant attitudes toward the Weimar Republic, Protestant intellectuals challenged the theological underpinnings of older traditions during and after the Second World War. Confessing Church veterans called into question a strict separation of Christians' outward political obligations from their inward spiritual freedom. They introduced new arguments for infusing law and politics with Christian values. While reflecting an ongoing processes of theological renewal, the transformation of the Protestant churches in West Germany was also the product of retrospective efforts to devise a narrative of Protestant resistance against National Socialism.

Certainly, both Protestant and Catholic churches in West Germany, and across Western Europe, undertook concerted efforts to shape politics and society after the Second World War, during what Samuel Moyn has described as Christianity's last "golden age" on the European continent.¹ Yet as this dissertation has argued, the political strategy of Protestant intellectuals in West Germany was the product of a specific political theology developed during and after National Socialism, which drew inspiration both from theological innovations pioneered by Karl Barth as well as from patterns of postwar confessional conflict. At the core of this political

¹ Moyn, *Christian Human Rights*, 99, 169.

theology stood a leap from a rejection of "natural theologies" that claimed to perceive a divine will in nature and history to a critique of the instrumentalization of "natural law" claims toward conservative ends. Contesting the monopoly of the Catholic Church and the Christian Democratic Union on conceptions of "Christian" politics, Confessing Church veterans contended that Catholic politicians described a merely contingent ordering of politics and society as the product of a divine will.

At one level, Protestant polemics again natural law resonated with parallel critiques on the secular Left, helping to bring about a convergence of Confessing Church veterans with the West German New Left by the mid-1960s.² However, Protestant theologians and lay intellectuals also reshaped oppositional politics in West Germany by seeking out a novel means for relating theology and law. EKD commissions and Confessing Church successor organizations positioned the churches as guardians less of immutable institutional structures than of values that underpinned a shared democratic life. According to this vision, law should and would change to reflect the characteristics of particular societies and historical epochs. The Protestant churches were charged on the one hand to remind politicians of the historicity and fallibility of human law in light of the ultimate claims of divine justice, and on the other hand to work toward the moral improvement of politics and society by advocating for the adoption in public life of values rooted in Christian traditions. The Protestant defenses of tolerance, conscience, reconciliation, and resistance traced in this study were framed less as legal principles than as traits of the ethical subject who could constitute democracy.

Such assertions were, of course, paradoxical. Confessing Church veterans criticized efforts by the Catholic Church, and by more conservative Lutherans, to instantiate a vision of

² For critiques of natural law among secular Social Democrats, see Morris, "Write and Resist."

immutable "natural orders" in law, instead calling for the acknowledgement of West Germany's religious pluralism. At the same time, they engaged in an equally pronounced confessional rhetoric that positioned the Protestant churches as the truer guardians of the West German constitutional order. By the mid-1960s, as a consequence of a series of Protestant victories before West Germany's Federal Constitutional Court, Protestant intellectuals could celebrate the alignment of Protestant ethics with the values undergirding West Germany's "substantive *Rechtsstaat*." Objecting to the demonization of Communism, the preservation of patriarchal family laws, the creation of confessional schools, and the refusal to recognize the Oder-Neisse border, the Protestant networks traced in this study contested the dominant rhetoric of "Christian" politics in postwar West Germany. Confessing Church veterans thereby contributed toward the secularization of the West German state, while opening a path toward new conceptions of Christian political identity that outlasted the decline of the dominant religious conservatism of the early postwar years.

What has been the legacy of the Protestant political theory I have traced for ensuing generations of West, and then reunified German politics? Many scholars of religion in postwar Western Germany argue that Christian churches exercised wide influence on politics during the 1950s, but soon experienced a reversal of fortune. The decades since the 1960s, this argument runs, have witnessed a rapid secularization of West German society, demonstrated by falling rates of church attendance and, since the early 1970s, a wave of departures from the established churches that shocked and unsettled church leaders.³ "Individualization" and "pluralization" have

³ For statistics, see Karl Gabriel, "Von der 'vordergründigen' zur 'hintergründigen' Religiosität: Zur Entwicklung von Religion und Kirche in der Geschichte der Bundesrepublik," in *Die Bundesrepublik: Eine historische Bilanz*, ed. Robert Hettlage (München: Beck, 1990), 275-279. Gabriel demonstrates a spike in departures from both major churches, but especially from the EKD, beginning in the early 1970s.

served as the key categories for historians seeking to make sense of these changes.⁴ While the disintegration of traditional social milieus did not necessitate a collapse of "religion" in any straightforward sense, social transformations since the 1960s have meant that individuals increasingly create religious meaning for themselves, drawing eclectically on a widening range of available options from "New Age" practices to homeopathy to Eastern religions.⁵ Rather than understanding themselves as the ultimate arbiters of society's values, as they had during the early postwar period, the churches had to reinvent themselves as merely one voice, still significant but by no means all-encompassing, within a pluralist society.⁶

Reunification in 1990 posed further challenges for the German churches, which have had to cope with the incorporation of the most secular region of the European continent into a unified German state. The Eastern, predominately Protestant regions of Germany registered lower rates of church attendance than the West even before 1933. As a result of largely successful pressures by the East German regime—alongside an erosion of religious affiliation also underway in West German Protestantism—rates of church attendance and membership in the German Democratic Republic had fallen precipitously by the time of the state's collapse in 1989. The East German civil rights movement of the 1980s organized in large part around the Protestant churches.

⁴ Detlef Pollack and Gert Pickel, "Religions Individualization or Secularization: An Attempt to Evaluate the Thesis of Religious Individualization in Eastern and Western Germany," in *The Role of Religion in Modern Societies*, eds. Detlef Pollack and Daniel V.A. Olson (New York: Routledge, 2008), 191-220.

⁵ Pascal Eitler, "Der 'Neue Mann' des 'New Age'. Emotion und Religion in der Bundesrepublik Deutschland 1970-1990," in *Die Präsenz der Gefühle: Männlichkeit und Emotion in der Moderne*, eds. Manuel Borutta and Nina Verheyen (Bielefeld: Transcript, 2010), 279-304.

⁶ Großbölting, *Losing Heaven*, 196-199. On the fragmentation of the Catholic milieu in West Germany by the mid-1960s, see Ruff, *Wayward Flock*. In this understanding of secularization, historians of (West) Germany have followed historians of Britain who have understood the 1960s to constitute a watershed moment: Callum Brown, *The Death of Christian Britain: Understanding Secularisation, 1800-2000*, 2nd ed. (London: Routledge, 2009); Hugh McLeod, *The Religious Crisis of the 1960s* (Oxford: Oxford University Press, 2008). For a comparative perspective, see Nancy Christie, Michael Gauvreau, and Stephen J. Heathorn, eds., *The Sixties and Beyond: Dechristianization in the United States and Western Europe, 1945-2000* (Toronto: University of Toronto Press, 2013).

Beginning in 1982, the Leipzig *Nikolaikirche* served as the site of famous Monday night vigils demanding the right of exit, which in the fall of 1989 grew into the protests that would help bring about the fall of the GDR.⁷ The eventual success of the protest movement did not translate into a renewal of Christianity in post-Communist Eastern Germany as many Protestant leaders had hoped, however. In retrospect, the use of Protestant facilities by the East German civil rights movement appears to have been largely opportunistic, and the erosion of church life under Communism more permanent. Whether or not these transformations should be subsumed under the label of "secularization" seems immaterial to their significance for reshaping the place of the churches in German society.

While the major churches have undoubtedly experience a loss of overt political influence since the 1950s, the trajectory of postwar Protestant politics traced in this study provides a point of departure from dominant narratives of secularization, "individualization," and religious decline. I do not mean to equate the rise of New Age practices with a process of "resacralization" or "the return of religion." As the historian Mark Ruff has pointed out, this argument both overestimates the extent of alternative spiritual practices and presumes a definition of religion so expansive as to render it meaningless.⁸ Rather, since the 1960s, the institutional Protestant churches have adopted a strategy for relating confessional and pluralist discourses with roots in the postwar years. A tension between claims to respect Germany's religious pluralism and to serve as a bedrock of values for German society, which characterized the pronouncements of Confessing Church veterans after 1945, has become a template for Protestant politics in contemporary Germany.

⁷ Charles S. Maier, *Dissolution: The Crisis of Communism and the End of East Germany* (Princeton: Princeton University Press, 1997), 135-146.

⁸ Mark Edward Ruff, "The Postmodern Challenge to the Secularization Thesis: A Critical Assessment," *Schweizerische Zeitschrift für Religion und Kulturgeschichte* 99 (2005): 385-401.

Protestant networks continued to shape constitutional law into the second and third postwar generations of German jurisprudence. Helmut Simon went on to be appointed by the SPD to a seat on the First Senate of the Federal Constitutional Court in 1970, which he would hold until his retirement in 1987. Simon's tenure was marked by important dissents in cases where the Court overturned legislation requiring universities to offer equal representation to students and professors on matters of university governance (1972) and legalizing abortion in the first twelve weeks of pregnancy (1975).⁹ Simon's most influential decision concerned the right of free assembly under Article 8 of the Basic Law, in a case involving the protest movement against the construction of a nuclear power plant in the Schleswig-Holstein town of Brokdorf. Over the course of 1980, anti-nuclear activists planned a demonstration at the construction site for February 28, 1981 without, however, registering the protest with the district authorities. The protest went on despite the ban upheld by the regional administrative court, and four years later, the Federal Constitutional Court ruled in favor of an appeal filed by the protesters. With major contributions from Simon and two other justices with strong connections to lay Protestantism—Roman Herzog (later Federal President from 1994-99) and Konrad Hesse—the First Senate affirmed the right of assembly as a crucial avenue of democratic engagement. Peaceful demonstrations, the Court ruled, remained legitimate even if a minority of demonstrators adopted violent tactics; only an entirely violent demonstration could be banned, and even then authorities should prioritize citizens' fundamental rights. By expanding the purview of legitimate protest, thereby widening the range of dissenting opinions accommodated within West Germany's

⁹ Collings, *Democracy's Guardians*, 130-133, 154-155.

Rechtsstaat, the Brokdorf decision addressed a demand advanced by Protestant jurists since 1950s debates about conscientious objection.¹⁰

Of even greater significance for the development of constitutional law was the jurist Ernst-Wolfgang Böckenförde, postwar Germany's most influential judge and legal scholar, who served on the Federal Constitutional Court from 1983 to 1996. Although a Catholic, Böckenförde's constitutional thought was strongly influenced by Adolf Arndt, whom he first met in 1959. An early critic of the Catholic Church's postwar silence about its role in the rise of the Nazi regime, Böckenförde concurred with Arndt's argument for the uncoupling of churches from party politics, his critique of the "clericalization" of the CDU, and his aspiration to overcome traditional animosities between Christians and the SPD.¹¹ Böckenförde, who joined the SPD in the mid-1960s, is known for his oft-cited 1967 "dictum" that has proven foundational to subsequent German debates about the place of Christianity in political life: "The liberal [*freiheitlich*], secularized state lives by prerequisites which it cannot guarantee itself."¹² Böckenförde's statement should not be understood to advocate for the instantiation of Christian doctrines in law. Six years later, Böckenförde issued a clarion call *against* the interpretation of "natural law" dominant in postwar Catholic thought, arguing that natural law discourses could scarcely guide political judgments in concrete circumstances and often reflected little more than

¹⁰ Ibid., 208-210; see also Oliver Lepsius and Anselm Doering-Manteuffel, "Die Richterpersönlichkeiten und ihre protestantische Sozialisation," in *Der Brokdorf-Beschluss des Bundesverfassungsgerichts 1985: eine Veröffentlichung aus dem Arbeitskreis für Rechtswissenschaft und Zeitgeschichte an der Akademie der Wissenschaft und der Literatur, Mainz*, eds. Anselm Doering-Manteuffel, Bernd Greiner, and Oliver Lepsius (Tübingen: Mohr Siebeck, 2015), 167-224. For Simon's earlier discussion of this issue, see Helmut Simon, *Freiheitliche Verfassung und Demonstrationsrecht: Vortrag gehalten am 31. Januar 1969* (Berlin: Lettner-Verlag, 1969).

¹¹ Ruff, *Battle*, 100-102.

¹² See also Peter E. Gordon, "Between Christian Democracy and Critical Theory: Jürgen Habermas, Ernst-Wolfgang Böckenförde, and the Dialectics of Secularization in Postwar Germany," *Social Research* 80 (2013): 173-202.

the political interests of their proponents.¹³ Rather, Böckenförde's "dictum" should be read in light of Adolf Arndt's conviction that constitutional democracy rested on a bedrock of pre-political values, which, in a German context, would invariably draw from Christian sources. Böckenförde's own political engagements exemplify the ambiguity of this idea. While Böckenförde played a pioneering role in calling on the Catholic Church to account for its actions during the Nazi years, more recently he has defended Christian vision of Europe, arguing that Europe's "cultural ground [*kulturellen Boden*]" in the "Christian religion" requires the exclusion of Turkey from admission to the European Union.¹⁴

The EKD leadership itself attempted to formalize a Protestant doctrine of political engagement in a 1970 memorandum "The Tasks and Boundaries of Church Statements on Social Questions." Adopted in the midst of declining membership and at a time of generational and cultural transformation, the memorandum might be seen to mark a turning point at which the Protestant Church acknowledged its diminished role in shaping policy. The memorandum advised that the EKD's political interventions should remain indirect, and should respect West Germany's religiously and ideologically pluralist society: "It must be recognized that we do not strive for a so-called Christian social order at the expense of those who believe otherwise [*Andersdenkende*]...The charge of clericalism would be accurate if the church sought to achieve a maximum of institutional security and political influence, and at the same time attempted to shield its statements from public critique." Rather, the "advice" of the church should represent "a

¹³ Ernst-Wolfgang Böckenförde, "Kirchliches Naturrecht und politisches Handeln," in *Naturrecht in der Kritik*, eds. Franz Böckle and Ernst-Wolfgang Böckenförde (Mainz: Matthias-Grünwald-Verlag, 1973), 96-125.

¹⁴ Ernst Wolfgang Böckenförde, "Nein zum Beitritt der Türkei," *Frankfurter Allgemeine*, December 9, 2004, <http://www.faz.net/aktuell/feuilleton/europaeische-union-nein-zum-beitritt-der-tuerkei-1193219.html> (accessed April 15, 2018).

dialogical contribution in the process of decision-making."¹⁵ These statements, however, were continuous with the self-representation of Confessing Church veterans during the early postwar decades, who expressly equated "clericalism" with the machinations of the CDU and the Catholic Church. Such a critique gave rise to an alternative conception of Christian politics. Indeed, the EKD's expressions of self-restraint only fueled the conviction of Protestant intellectuals that the Church's commitment to dialogue made it exemplary of, and even a source of, wider political virtues. Commenting on the 1970 memorandum, Helmut Simon thus argued:

By contrast to the Weimar period, Protestantism now shows readiness for a constitutional patriotism, and regards as a Christian obligation the need to take up the legal and social democracy of the Basic Law as an opportunity and a task, and to assume civic co-responsibility as a vocation. I see a particular gain for our common political culture in that the astute part of Protestantism tends toward neither uncritical adaptation nor complacent idealization of our constitutional order. *It practices its constitutional patriotism as a critical solidarity with an order that is improvable and deserving of improvement*; it grasps the gap between constitutional norm and constitutional reality, and the necessity of alterative reforms.¹⁶

Simon's remarks suggest a further contribution of the Protestant intellectual milieu toward German political identities since the 1960s—the notion of "constitutional patriotism," which gained wide resonance in 1980s debates about anti-nuclear protests and civil disobedience. Originally formulated by the Heidelberg political scientist Dolf Sternberger in 1979, on the thirtieth anniversary of the Basic Law, "constitutional patriotism" signifies the idea that common allegiance to the principles of the constitutional state, rather than cultural or religious loyalties, should form the basis of national identity.¹⁷ The term's most famous exponent is the philosopher Jürgen Habermas, who deployed it during the mid-1980s in confrontation with

¹⁵ Rat der Evangelischen Kirche in Deutschland, ed., *Aufgaben und Grenzen kirchlicher Äußerungen zu gesellschaftlichen Fragen: Eine Denkschrift der Kammer für soziale Ordnung der Evangelischen Kirche in Deutschland* (Gütersloh: Gütersloher Verlagshaus, 1970), 24-25; also cited in Röse and Röse, *Simon*, 321.

¹⁶ Cited in Röse and Röse, *Simon*, 318, emphasis added.

¹⁷ Jan-Werner Müller, *Constitutional Patriotism* (Princeton: Princeton University Press, 2009), 21.

both a resurgent German nationalism on the Right, as well as what he perceived as an anti-modern communitarianism on the Left.¹⁸ For Sternberger, Habermas, and a wide array of left-liberal intellectuals who have followed them, constitutional patriotism represents the only appropriate form of collective political identity for a post-nationalist Germany.

While Sternberger and Habermas are often regarded as paragons of liberal secularism, the foregoing discussion should make clear the strong resonances of "constitutional patriotism" with the legal theories advanced by Protestant jurists and theologians in West Germany since the 1950s. The political theorist Jan-Werner Müller rightly understands Sternberg's constitutional patriotism as a further development of Rudolf Smend's theory of the Basic Law as a source of "integration" in political life. Sternberg's valuation of the constitution as a source of political identity only became possible as a result of the strong powers of judicial review and interpretation assumed by the postwar Federal Constitutional Court, inspired in large part by Smend's constitutional theory.¹⁹ Habermas' connections to the postwar Protestant milieu are yet more direct. Habermas participated in the Marxism commission of the Heidelberg *Forschungsstätte der evangelischen Studiengemeinschaft* in the early 1960s, served on the board of the Congress on the Emergency of Democracy alongside Protestant leaders in the mid-1960s, and engaged with theologians including Dorothee Sölle, Jürgen Moltmann, and the Catholic Johannes Baptist Metz during the ensuing decades.²⁰ Moreover, Habermas developed the concept of constitutional patriotism to defend civil disobedience against the renewed NATO

¹⁸ Ibid., 26; Specter, *Habermas*, 147-151.

¹⁹ Müller, *Constitutional Patriotism*, 19-21.

²⁰ These issues are the subject of a paper I am currently writing: "Political Theology After Auschwitz: Jürgen Habermas' Postsecularism in Postwar German Perspective." On Habermas' participation in the FEST Marxism commission, see chapter 5. On his involvement in the leadership committee of the *Kongress Notstand der Demokratie*, see Schauer, *Notstand der Demokratie*, 13.

deployment of nuclear weapons in West Germany during the early 1980s, a protest movement in which the Protestant churches were heavily represented. According to Habermas, the West German state's ability to tolerate civil disobedience that remained loyal to the underlying principles of the constitution signified the arrival of a mature democracy.²¹ In a 1985 *Kirchentag* address on "Protestantism and Protest," Helmut Simon similarly cited tolerance of "dissenting minorities, through youth rebellion and civil disobedience" as the hallmarks of West German constitutional identity.²²

An ideal of constitutional patriotism found its formal adoption into the platform of the EKD with the 1985 memorandum of Commission on Public Responsibility, "The Protestant Church and Liberal Democracy [*freiheitliche Demokratie*]," the so-called *Demokratie-Denkschrift*. Critics argued that such a memorandum came too late, and that to affirm West German democracy in the mid-1980s hardly represented a bold act. But this point misses the wider import of the memorandum. It is not only the case, as Helmut Simon pointed out, that the *Bruderschaften* had already declared the West German *Rechtsstaat* to be exemplary of Christian moral principles during the mid-1960s, or that the EKD Council remained reserved in its political statements out of efforts to maintain relations with the Protestant churches of East Germany.²³ Rather, the *Demokratie-Denkschrift* formalized what had long come to be an accepted understanding of the relationship between Protestantism and democracy. The memorandum renounced any demand for "special rights [*Sonderrechte*] for Christians," and insisted that the Protestant Church could not "declare its own political program." Rather,

²¹ Specter, *Habermas*, 151-165. On Protestant engagement in anti-nuclear politics during the 1980s, see Greschat, *Protestantismus in der Bundesrepublik*, 170-179 and Michael Schüring, "West German Protestants and the Campaign against Nuclear Technology," *Central European History* 45 (2012): 744-762.

²² Cited in Röse and Röse, *Simon*, 318.

²³ Röse and Röse, *Simon*, 282-283.

Protestants were called to "special responsibility" for political life. "Citizens' initiatives" in the domain of "environmental protection" served as evidence for the importance of civic engagement outside political parties, suggesting the Council's tacit approval of the anti-nuclear movement with its appeal to values of life and health in opposition to government policy.²⁴ The memorandum portrayed the churches less as direct lawmakers than as institutional bedrocks of democratic values, which would necessarily accept the limitations on their roles required by a pluralist society. Yet by encouraging the Protestant laity to engage in politics on the basis of Christian convictions, the EKD commission also elevated Protestant Christians to a privileged status as arbiters of the bounds between religious and civil identities.

The political impact of Protestant discourses of constitutional patriotism is evident in one of the most contentious issues facing West German politics in recent decades, at the intersection of constitutional law, political identity, and social practice—the rapid rise in religious diversity. The West German state commenced its "guest worker" program in 1955 to fill the labor needs of the postwar economic boom, signing labor recruitment agreements with Italy in 1955, Spain and Greece in 1960, and Turkey in 1961. Turks quickly became the largest group of migrant workers in the Federal Republic. However, as the historian Rita Chin has pointed out, not until the late 1970s did the term "foreigner" become predominately associated with Turks, or did West German commentators begin to describe the challenges of Turkish migration in terms of religious conflict.²⁵ This shift coincided with the 1973 oil shock and the subsequent recession, which led the Federal Republic to terminate its guest worker program and the families of migrant

²⁴ Rat der Evangelischen Kirche in Deutschland, *Evangelische Kirche und freiheitliche Demokratie: Der Staat des Grundgesetzes als Angebot und Aufgabe* (Frankfurt: Evangelischer Pressedienst, 1985), 22-23, 33; also cited in Andreas Busch, "Die Demokratieverständnis der Denkschrift aus politikwissenschaftlicher Sicht," in *Aneignung des Gegebenen: Entstehung und Wirkung der Demokratie-Denkschrift der EKD*, ed. Hans Michael Heinig (Tübingen: Mohr Siebeck, 2017), 88-90.

²⁵ Chin, *Guest Worker Question*, 144-157.

workers to seek large-scale entry into West Germany for fear of an imminent closing of borders. As West German politicians, academics, and social reformers began to confront the emergence of a permanent nonwhite, non-Christian minority, Protestant church leaders played an important role in articulating the terms of the ensuing debates on religious diversity.

As early as 1975, the Protestant and Catholic churches organized the first annual "Day of the Foreign Co-Citizen [*Tag des ausländischen Mitbürgers*]" that aimed to educate (Christian) Germans about the cultural traditions of Turks living in the Federal Republic, followed by programming in the early 1980s at the *Evangelische Akademie* in Arnoldshain. By replacing the more common "guest worker [*Gastarbeiter*]" with *ausländischer Mitbürger*, the churches challenged the ephemeral status assigned to Turkish immigrants in dominant political discourses. Nevertheless, as Chin has argued, Protestant leaders reinscribed the conventional bounds of (white, Christian) German citizenship just as they purported to expand them. A *Mitbürger* was not a *Bürger*, and the programming of the Protestant Academies treated Turkish residents more as objects of exoticized fascination than as equal—and for West Germany's postwar economic growth, indeed crucial—participants in German society.²⁶ The Protestant churches thus formed part of a bloc that also included the elements of the SPD, progressive social workers, pedagogy reformers, citizens' initiatives, as well as the Catholic Church. These groups challenged the overt racism of politicians who called for the immediate departure of Turkish immigrants and championed a new policy of "integration," but without acknowledging how citizenship laws based on *jus sanguinis* entrenched discrimination and inequality.²⁷

²⁶ Ibid., 105, 202-205. The date of 1975 is reported in Ökumenischer Vorbereitungsausschuss zur Interkulturelle Woche, "Die Geschichte: Vom Tag des ausländischen Mitbürgers zur Interkulturellen Woche," *Interkulturelle Woche*, <http://www.interkulturellewoche.de/die-geschichte> (accessed April 15, 2018).

²⁷ Chin, *Guest Worker Question*, 99-105, 139-140.

Such elisions in Protestant discussions of Muslim migration to the Federal Republic had significant consequences for government policy. By identifying Christian values with the principles underlying the constitutional order, not only the Protestant churches themselves, but also the political institutions whose rhetoric and self-conception had been influenced by postwar Protestantism, increasingly defined Islam as outside of and problematic to that order. In response to the growing presence of Islam in the public sphere, the Protestant churches frequently contrasted their own secularity and rapprochement with the constitutional state against Muslim irrationalism and backwardness.²⁸ Courts and state officials in turn decried the illegibility of Muslim communities to the model of church-state relations established under the Basic Law, given the lack of formalized entry requirements and parish memberships in Islamic traditions. Not until 2005 did Germany's Federal Administrative Court grant Muslim umbrella associations the status of "corporations of public law" that formed the basis for the legal privileges of the major churches.²⁹ Moreover, where the practices of Muslim communities most forcefully collided with the Basic Law, the Federal Constitutional Court drew on a tradition of religious freedom jurisprudence deeply marked by the Protestant influences of the early postwar decades.

Legal debates about the status of Islam in Germany culminated in the case of Fereshta Ludin, "an Afghani-born German citizen who had recently completed her teacher training certification," and in 1997 was denied a position as a public school teacher in Baden-Württemberg due to her decision to wear a headscarf in school. Ludin's appeal to the *Volksgerichtshof* in Mannheim was denied, on the grounds that the Baden-Württemberg state constitution contained a provision stating "Children will be raised on the basis of Christian and

²⁸ Großbölting, *Losing Heaven*, 243-244.

²⁹ *Ibid.*, 237-239.

Western educational and cultural values." Surely, a teacher wearing an Islamic headscarf could not represent Christian values as an employee and agent of the state. Media accounts of the case reported that the headscarf symbolized female subjugation at odds with Germany's constitutional guarantee of gender equality, a ubiquitous argument in contemporaneous "headscarf" controversies throughout Western Europe.³⁰ Ludin appealed her case to the Federal Constitutional Court, which ruled in September 2003 that no law in Baden-Württemberg prohibited the wearing of a headscarf by a public school teacher. However, the Court's decision stated equally that "The social change connected with rising religious pluralism can be cause for a new determination of the permissible extent of religious coverings in the school."³¹ The Court effectively granted state legislators license to ban Muslim teachers from wearing the headscarf. Several months later, the state parliaments of both Baden-Württemberg and Hesse passed such legislation, while allowing teachers to display "Judeo-Christian symbols and clothing," including explicitly (in the case of Baden-Württemberg) head coverings for nuns.³²

Most significant about the Constitutional Court decision is how the judges figured the relationship between Christian and secular constitutional norms. Unlike the Baden-Württemberg state constitution, the Basic Law explicitly forbids the establishment of a state religion, and the terms "Christian" and "Christianity" are nowhere mentioned. Instead, the 2003 headscarf decision relied on an equally controversial decision of 1995, when the Federal Constitutional Court ruled in favor of a father who requested that crucifixes be removed from the classrooms of

³⁰ Beverly Weber, "Cloth on her Head, Constitution in Hand: Germany's Headscarf Debates and the Cultural Politics of Difference," *German Politics and Society* 72 (2004): 33-64; see also Chin, *Crisis of Multiculturalism*, 217-220. For a comparative perspective, see Scott, *Politics of the Veil*. For the Mannheim *Volksgerichtshof* decision, see "Religiös motiviertes Tragen eines Kopftuchs als Eignungskriterium für Lehramtsbewerberin," *Neue Juristische Wochenschrift* 54 (2001): 2899-2905.

³¹ "Lehrerin mit Kopftuch," *Neue Juristische Wochenschrift* 56 (2003): 3111-3122.

³² Weber, "Cloth on her Head," 44.

his daughter's public elementary school in Bavaria. In the earlier case, the Court determined that the presence of the crucifix in the classroom infringed on the (anthroposophist) family's negative freedom from religious influence; moreover, in this context the crucifix could be considered not merely a cultural but a religious symbol.³³ The crucifix decision hardly offered a paean to liberal ideas of religious freedom, however, but relied on a tradition of jurisprudence extending back to the *Reichskonkordat* decision of 1957, which sought to balance individual liberties with the value system underpinning the constitution. Intervening decisions by the Constitutional Court, including rulings that permitted Christian interdenominational schools (1975) and Christian prayer in nondenominational public schools (1979), similarly relied on the *Reichskonkordat* precedent. The rulings of the 1970s clarified that parents and states shared equal responsibility for children's education, and that the states maintained wide latitude to determine the value orientation of public schools. While parents' rights could not be cited to demand state-supported confessional schools, the Constitutional Court found, these rights did not override the prerogative of states to imbue schools with a Christian character.³⁴ Thus, the 2003 ruling on Ludin's case determined that a state could prohibit teachers from wearing headscarves in schools not only to uphold students' negative religious freedom, but in light of the state's freedom to establish the "ideological-religious character [*ideologische-religiöse Ausprägung*] of the public school."³⁵

³³ "Anbringen von Kreuzfixen in staatlichen Pflichtschulen als Verstoß gegen Artikel 4 Absatz I GG," *Neue Juristische Wochenschrift* 48 (1995): 2477-2483. For more on this case, see Leora Auslander, "Bavarian Crucifixes and French Headscarves: Religious Signs and the Postmodern European State," *Cultural Dynamics* 12 (2000): 283-309 and Peter C. Caldwell, "The Crucifix and German Constitutional Culture," *Cultural Anthropology* 11 (1996): 259-273.

³⁴ "Verfassungsmäßigkeit der christlichen Gemeinschaftsschule," *Neue Juristische Wochenschrift* 29 (1976): 947-950; "Verfassungsmäßigkeit des Schulgebets an bekenntnisfreien Gemeinschaftsschulen außerhalb des Religionsunterrichts," *Neue Juristische Wochenschrift* 33 (1980): 575-579.

³⁵ "Lehrerin mit Kopftuch," 3113.

Disentangling the strands of the Constitutional Court's religious freedom jurisprudence requires understanding its roots in the confessional conflicts of the 1950s. Protestant jurists such as Rudolf Smend and Adolf Arndt challenged Catholic demands for confessional schools and the *Reichskonkordat* while also seeking to restore the "Christian" foundations of civil society in the aftermath of Nazism. As a result of Protestant influence during the 1950s, the argument that a non-confessional Christian culture should form the basis for public schools gained ground in legal debate, and has exercised an enduring legacy on German jurisprudence.

The EKD's response to the headscarf decision was delivered by Bishop Wolfgang Huber, the leader of the Protestant church in Berlin-Brandenburg who had been recently inaugurated as the chair of the EKD Council. Concurring with the Constitutional Court's ruling and the legislation subsequently passed in Baden-Württemberg, Huber claimed in a 2003 interview with the Berlin *Tageszeitung* that the headscarf "symbolizes an attitude in gender relations that is incompatible with our constitution."³⁶ While Huber might be simplistically dismissed as a conservative defender of Christian hegemony, his background sheds light on the more complex intersections of Protestant and secular politics in postwar Germany. Born in 1942 as the son of the Nazi jurist Ernst Rudolf Huber, a student of Carl Schmitt and author of the principal textbook on state law of the Nazi era, Wolfgang Huber is a successor to postwar legal-theological exchanges tracked in this study.³⁷ Although he pursued a career as a theologian and church administrator rather than following his father's path toward law, Huber has devoted his writings to anchoring concepts of justice, rights, and constitutional democracy in Protestant theology. As the associate director of the Heidelberg FEST during the 1970s, Huber co-authored the first text

³⁶ Cited in Philipp Gessler, *Wolfgang Huber: Ein Leben für Protestantismus und Politik* (Freiburg: Kreuz, 2012), 222.

³⁷ On Ernst Rudolf Huber, see Gessler, *Huber*, 16-26. Huber's *Verfassungsrecht des Großdeutschen Reiches* (1939) is discussed in Stolleis, *History of Public Law*, 370-372.

to take up human rights as a major theme of Protestant theology. His work on legal ethics has been praised by Jürgen Habermas as a major advance toward the democratization of Protestant thought.³⁸ Moreover, as president of the *Kirchentag* during the mid-1980s, Huber was active in the anti-nuclear movement, going as far as to invoke the church's right of resistance against breaches of democracy anchored in Article 20 of the Basic Law.³⁹ Huber was a principal contributor to the EKD's *Demokratie-Denkschrift* of 1985; he would later celebrate the memorandum as indicative of the contributions of Protestant intellectuals, especially those of the 1968 generation, to the vitality of West German democracy.⁴⁰ Thus, Huber's more recent statements on Islam should be seen less as a product of conservative Islamophobia than as the apogee of a tradition that identified the *progressive* values of the German constitution as the product of (Protestant) Christian teachings.⁴¹

Such a position motivated the EKD Council's most recent formal statement on the presence of Islam in Germany, a 2006 "guidebook" entitled "Clarity and Good Neighborliness: Christians and Muslims in Germany," on which Huber served as a major influence. The report appeared amidst ongoing controversies about the presence of Islam in Western Europe and North American in the aftermath of the attacks of September 11, 2001 and the July 2005 train bombings in London. Ostensibly an invitation to dialogue, the report expressed skepticism about

³⁸ Gessler, *Huber*, 109-110. Huber's major works on theology and law include Huber and Heinz Eduard Tödt, *Menschenrechte: Perspektiven einer menschlichen Welt* (Stuttgart: Kreuz Verlag, 1977) and Huber, *Gerechtigkeit und Recht: Grundlinien christlicher Rechtsethik* (Gütersloh: Kaiser, 1996).

³⁹ Gessler, *Huber*, 112-121. For Habermas' critique of Huber on the latter point, see Specter, *Habermas*, 157-158.

⁴⁰ Wolfgang Huber, "Demokratie wagen. Der Protestantismus im politischen Wandel 1965-1985," in *Umbrüche*, eds. Hermle, Lepp, and Oelke, 383-399. On Huber's participation in the composition of the *Demokratie-Denkschrift*, see Hans-Michael Heinig, "Die Entstehung der Demokratiedenkschrift - Einsichten aus der Archivarbeit," in *Aneignung des Gegebenen*, ed. Heinig, 51-60.

⁴¹ Other commentators, such as the theologian Friedrich Wilhelm Graf, have instead perceived a rightwing turn in Huber's thought: see Gessler, *Huber*, 106.

the preparedness of Muslims for democracy. At the core of the report's conceptual framework stood an elision between Christian and secular political identities:

Muslim identity is rooted in a cultural world that has not completed the transformation of religion under the conditions of the scientific-technical age and a secular state, as has the West. Religious and ideological diversity, values and life forms without religious moorings, as well as atheistic convictions, show Muslims that life in a Christian-influenced [*christlich geprägt*] and still secular and pluralist society can lead to the loss of religious connections.⁴²

Such distinctions in democratic preparedness, the report continued, were rooted in theology itself. Protestants' practice of religious tolerance emerged from their recognition that God himself allowed non-Christians "space and time to recognize [Jesus Christ's] love." Protestants' respect for the dignity of the individual human being followed from the teaching of humanity's creation in God's image, a tenet absent from the Islamic tradition.⁴³ Islam's failure to recognize the basic values of dignity and tolerance was manifest not only in its regressive views about gender, but in Mohammad's injunctions to murder apostates; the unequal rights accorded believers and non-believers under Sharia law were still practiced under the legal systems of majority-Muslim countries.⁴⁴ In short, according to Huber and the EKD Council, Protestant values blended seamlessly into the legitimating foundations of constitutional democracy, whereas Islam constituted a problem for democracy and therefore an object of state intervention.

As if to counter the objection that their Church's own (recent) history had hardly been marked by pluralism and tolerance, the authors of the EKD report framed the Christian embrace of the "value order" of German democracy as the result of a historical process, one, however,

⁴² Kirchenamt der Evangelischen Kirche in Deutschland, ed., *Klarheit und gute Nachbarschaft: Christen und Muslime in Deutschland: Eine Handreichung des Rates der EKD*, November 2006, https://www.ekd.de/download/ekd_texte_86.pdf (accessed April 15, 2018), 22.

⁴³ *Ibid.*, 17-21.

⁴⁴ *Ibid.*, 36-42.

rooted in the very tenets of Protestant Christianity itself. Through a "long historical path," the Protestant Church had "learned" to "critically engage with elements of its own tradition"—certainly an understatement of the conflicts that pervaded the Protestant churches after 1945, but also a misapprehension of those conflicts, which frequently centered on competing resistance narratives rather than acknowledgement of past misdeeds.⁴⁵ Moreover, the report argued, Protestants contributed fundamental values of human dignity, tolerance, and "likeness to God [*Ebenbildlichkeit*]" that had proven foundational to German democracy. In contrast to the Muslim veil, a "mere piece of clothing" that was hardly a "religious symbol" but rather a sign of gender inequality, the "identifying symbols of the Jewish-Christian tradition do not represent beliefs that come into tension with the value decisions underlying the German constitutional order. Rather, the Jewish-Christian tradition has contributed decisively to the cultural and spiritual foundations of liberal [*freiheitlich*] democracy."⁴⁶ Thus, the EKD Council demanded that Muslims living in Germany undertake a process of self-critique that would mirror the postwar path of Germany's Protestant churches. The Muslim rapprochement with democracy would necessarily entail greater deviation from tradition, however, insofar as principles of democracy remained inherent, if sometimes historically unrealized, in Protestant thought.

Since 2015, Huber, now retired from his position as both bishop and EKD Council chair, has been among the Protestant leaders who has vocally defended Angela Merkel's policies on the entry of refugees from the Syrian Civil War. The basis on which Huber has supported the Chancellor's policies, moreover, indicates the persistence of a Protestant rhetoric of citizenship in contemporary German politics. Insisting in a January 2016 article for the *Tagesspiegel* that "It is

⁴⁵ Ibid., 21.

⁴⁶ Ibid., 64-65.

not about a Clash of Civilizations," Huber criticized conservative rhetoric that aimed to curtail migration. For Huber, the acceptance of non-Christian migrants would serve less to fundamentally reshape the meanings of German citizenship than to affirm the virtues of Germany's Christian society. Huber reminded his readers that Christian traditions taught "the equal dignity of those who are different, and love for all people," praising Christian associations and local parishes for aiding in the "integration" of refugees into German society. Huber also warned that Muslims would have to transform themselves into democratic citizens, on the model of the historical trajectory undertaken by the Christian majority: "Whoever as a Muslim does not doubt Islam, does not really love it."⁴⁷

The trajectory traced in this dissertation casts doubt on the assertions of the inherent democratic propensity of Germany's Protestant churches proffered by Huber as well as contemporary Protestant politicians. But it also eschews an equally simplistic narrative that would reduce the political role of the postwar Protestant churches to one of exclusion, evasion, and the narrow pursuit of institutional privileges. Confessing Church veterans perpetuated an exaggerated narrative of Christian resistance under Nazism that imbued public deliberations on issues of conscientious objection and the right of resistance, while covertly engaging to stymie the prosecution of Nazi perpetrators. At the same time, these figures facilitated an expansion of postwar constitutional rights, including the liberalization of family law and the right of conscientious objection, as well as the moderation of the West German state's early territorial demands. The writings and practical engagement of postwar Protestant intellectuals helped to legitimate the EKD's claim to serve as a moral arbiter of postwar society, but also challenged the

⁴⁷ Wolfgang Huber, "Zwischen Terror und Integration," *Der Tagesspiegel*, January 17, 2016, <https://www.tagesspiegel.de/politik/fluechtlinge-zwischen-terror-und-integration/12838986.html> (accessed April 15, 2018).

instrumentalization of Christian discourses toward more conservative ends and served to expand the bounds of public discourse about the Nazi past. This ambiguous legacy can still be felt in German politics. If Christian churches in Germany are unlikely to again serve as institutional pillars of social life or arbiters of the moral values of a wide laity, the Protestant churches, and especially the embedded legacies of their postwar interventions, continue to exercise a subterranean impact on political discourse and constitutional law. Making these legacies explicit is perhaps an important step toward confronting ongoing challenges of diversity and democracy.

Glossary of Names¹

Wolfgang Abendroth (1906-1985): Social Democratic jurist and political scientist; 1950-72 professor at Marburg; 1961 expelled from the SPD following the Godesberg program; 1966 member of the board of the *Kongress Notstand der Demokratie*; habilitation adviser to Jürgen Habermas.

Adolf Arndt (1904-1974): Social Democratic politician and jurist; study at Marburg and Berlin; 1933-43 attorney in Berlin; 1943-45 forced labor and imprisonment; 1946 entry into SPD; 1949-69 member of the Bundestag and "crown jurist" of the SPD.

Karl-Heinz Becker (1900-1968): Confessing Church theologian and jurist; trained in theology and law at Munich, Erlangen, Berlin, and Marburg; 1935-40 pastor at Ezelheim (Franconia) and writer for *Evangelische Theologie*; 1940-44 Wehrmacht chaplain and author of works on theology and law; 1946-65 pastor in Franconia.

Karl Barth (1886-1968): Swiss Reformed theologian; 1911-21 pastor in Safenwil, Switzerland; 1918 and 1921 publication of commentary on *Epistle to the Romans*; 1921-35 professor at Göttingen, Münster, Bonn; 1934 principal author of the Barmen Declaration; 1935-62 professor at Basel and author of multivolume *Church Dogmatics*.

Dietrich Bonhoeffer (1906-1945): Lutheran theologian and resistance member; 1933 participant in the formation of the Pastors' Emergency League; 1941-43 member of the military intelligence service (Abwehr) and contact of the underground resistance; 1943-45 imprisonment; 1945 execution at Flossenbürg concentration camp.

Rolf-Peter Calliess (b. 1935): jurist and scholar of criminal law; trained in law and theology at Berlin and Bielefeld; member of the FEST "institution commission" and preparatory commissions for the 1968 ecumenical conference in Uppsala; 1974-2000 professor of criminal law at Hannover.

Otto Dibelius (1880-1967): Lutheran theologian and bishop; 1915-25 pastor in Berlin-Schöneberg; 1925-33 superintendent of church province of Kurmark, Brandenburg; 1934 member of Confessing Church *Bruderrat* in Brandenburg; 1937 imprisonment; 1945-66 Bishop of the Protestant Church of Berlin-Brandenburg; 1949-61 chair of the EKD Council.

Constantin von Dietze (1891-1973): economist; 1914-18 soldier in the First World War and POW in Siberia; 1925-37 professor at Rostock, Jena, and Berlin; 1937 preparatory commission for Oxford ecumenical conference; 1937-61 professor at Freiburg; 1938-44 member of the Freiburg Council and wartime Freiburg Circle; 1944-45 imprisonment at Ravensbrück and Berlin; 1955-61 president of the EKD synod.

¹ Information in this glossary comes primarily from the encyclopedia DFG-Forschergruppe 1765, *Der Protestantismus in den ethischen Debatten der Bundesrepublik Deutschland 1949-1989*, <https://wiki.de.dariah.eu/display/F1P/Startseite> (accessed April 15, 2018) and from Hannelore Braun and Gertraud Grünzinger, eds., *Personenlexikon zum deutschen Protestantismus 1919-1949* (Göttingen: Vandenhoeck & Ruprecht, 2006). Further references are found in the body of the dissertation.

Hans Dombois (1907-1997): jurist; 1933-39 prosecutor in Potsdam and Berlin; 1937 NSDAP member; 1939-47 military service and imprisonment; 1950 doctorate at Göttingen with Rudolf Smend; 1952 legal scholar at the *Christophorus-Stift* in Hemer, member of EKD marriage law commission; 1958 permanent staff of the Heidelberg FEST, member of institution and Marxism commissions.

Hermann Ehlers (1904-1954): jurist and politician; 1934 member of the Confessing Church; 1936 participant at Bad Oeynhausen synod; 1941-45 military service; 1945-50 member of the *Evangelisches Hilfswerk*; 1946 member of the CDU; 1949-54 CDU parliamentarian; 1950-54 president of the Bundestag.

Martin Fischer (1911-1982): Confessing Church theologian; study at Greifswald, Berlin, Halle; 1937-45 leader of the student organization of the Confessing Church; 1945-72 docent and professor at the *Kirchliche Hochschule*, West Berlin.

Helmut Gollwitzer (1908-1991): Confessing Church pastor and theologian; 1937 doctorate under Karl Barth; 1938-40 pastor at Martin Niemöller's church in Berlin-Dahlem; 1940-49 military service and imprisonment in the Soviet Union; 1950-57 professor at Bonn; 1957-1975 professor at the Free University in West Berlin and adviser to Rudi Dutschke; 1968 participant at World Council of Churches ecumenical conference in Uppsala.

Konrad Hesse (1919-2005): jurist; 1950, 1955 doctorate and habilitation with Rudolf Smend in Göttingen; 1952-56 assistant at the Institute for Ecclesiastical Law at Göttingen; 1956-87 professor at Freiburg; 1975-87 judge on Federal Constitutional Court.

Gustav Heinemann (1899-1976): jurist and politician; study of law and political economy; 1922, 1929 doctorate and habilitation at Marburg and Münster; 1934 member of Confessing Church Barmen Synod; 1934-38 member of the Confessing Church *Bruderrat* in the Rhineland; 1936-49 board member of the *Rheinische Stahlwerke* in Essen; 1946-49 mayor of Essen; 1949-50 Federal Interior Minister; 1952-57 founding member of the *Gesamtdeutsche Volkspartei*; 1957 joined SPD; 1957-69 SPD Bundestag delegate; 1966-69 Federal Justice Minister; 1969-74 Federal President.

Wolfgang Huber (b. 1942): theologian, church leader, and son of the jurist Ernst Rudolf Huber (1903-1990); studied theology at Heidelberg, Göttingen, and Tübingen; 1968-80 associate director of the Heidelberg FEST; 1973-94 member of the EKD Commission on Public Responsibility; 1980-94 professor at Marburg and Heidelberg; 1994-2009 Bishop of Berlin-Brandenburg; 2004-09 Chair of the EKD Council.

Heinrich (Heinz) Kloppenburg (1903-1986): Confessing Church theologian; study under Karl Barth at Bonn; 1934 participant at the Barmen Synod; 1934-45 Confessing Church member in Oldenburg; 1947-50 secretary of the refugee department at the World Council of Churches; 1953-78 editor of *Junge Kirche*; 1959-71 chair of the *Zentralstelle für Recht und Schutz der Kriegsdienstverweigerer aus Gewissensgründen*; 1971-86 president of the *Zentralstelle*.

Walter Künneth (1901-1997): Lutheran theologian; study at Erlangen and Tübingen under Adolf Schlatter and Friedrich Brunstäd; 1933 member of the Young Reformation movement in the Confessing Church; 1937 ban from public speaking on political grounds; 1946-1969 honorary then ordinary professor at Erlangen.

Gerhard Leibholz (1901-1982): jurist and constitutional scholar; 1929-35 professor at Greifswald and Göttingen; 1935 prohibited from teaching due to Jewish ancestry; 1938 emigration to Britain with his wife, Sabine Bonhoeffer (twin sister of Dietrich Bonhoeffer); 1947 return to professorship at Göttingen; 1951-71 judge on Federal Constitutional Court.

Martin Niemöller (1892-1980): pastor and church administrator; 1915-18 submarine commander; 1919-23 theological study in Münster; 1931 pastor in Berlin-Dahlem; 1933 co-founder of Pastors Emergency League; 1934, 1936 participant in Confessing Church synods at Barmen and Bad Oeynhausen; 1937-45 imprisonment at Sachsenhausen and Dachau; 1945-56 president of the EKD Foreign Office; 1947-64 President of the Protestant Church of Hesse-Nassau.

Diether Posser (1922-2010): jurist, politician, and law partner of Gustav Heinemann in Essen; 1941-47 military service and imprisonment; 1952-57 member of the *Gesamtdeutsche Volkspartei*; 1957 entry into SPD; 1972-88 justice minister and finance minister in North Rhine Westphalia.

Gustav Radbruch (1878-1949): jurist and politician; 1921-22, 1923: SPD minister of justice; 1933-45 prohibited from teaching; 1946 publication of "Statutory Injustice and Supra-Statutory Justice".

Ludwig Raiser (1904-1980): jurist; 1937-43 member of the Magdeburg reinsurance commission; 1945-69 professor at Göttingen and Tübingen; 1948-51 rector at Göttingen; 1957 chair of the academic advisory commission of the Heidelberg FEST; 1961-70 chair of the EKD Commission on Public Responsibility; 1970-73 president of the EKD synod.

Hansjürg Ranke (1904-1987): 1933 employee of the chancellery of the *Deutsche Evangelische Kirche*; 1939-46 military service and imprisonment; 1946 administrator in the EKD chancellery for "postwar questions" (responsible for coordinating EKD opposition to denazification and war crimes trials); 1950 *Oberkirchenrat* in the EKD responsible for social questions.

Renate Riemeck (1920-2003): historian, peace activist, and politician; 1941 NSDAP member; 1943 doctorate in history at Jena; 1949 adopted Wienke and Ulrike Meinhof following death of Ingeborg Meinhof; 1950 professor in the Pedagogy Faculty at Oldenburg; 1960 co-founder and party chair of the *Deutsche Friedensunion*.

Gerhard Ritter (1888-1967): Lutheran historian; 1925-56 professor at Freiburg; 1938-44 member of the Freiburg Council and the Protestant Freiburg Circle, principal author of the Freiburg Memorandum; 1944-45 imprisonment; 1945 signatory of the Stuttgart Declaration and member of the EKD Council; 1949 retirement from membership in EKD commissions.

Ulrich Scheuner (1903-1981): 1933-44: professor at Jena, Göttingen and Strasbourg; 1937 NSDAP member; 1944-45 military service; 1947-48 member of the *Evangelisches Hilfswerk*; 1950-72 professor at Bonn; 1955 member on the EKD commission on conscientious objection.

Friedrich Karl Schumann (1886-1960): Lutheran theologian; 1932-45 professor at Halle; 1946 denazification; 1947 director of the *Christophorus-Stift* in Hemer and member of the family law and institution commissions; 1947-55 honorary then ordinary professor at Münster.

Elisabeth Schwarzhaupt (1901-1986): jurist and politician; 1919-33 member of liberal German People's Party; 1930-35 jurist in Frankfurt and Dortmund; 1948 legal adviser in the EKD Foreign Office and member of the *Evangelische Frauenarbeit*; 1953-69 CDU parliamentarian; 1961-66 Federal Minister of Health; 1970-72 first chair of German Women's Council.

Wolfgang Schweitzer (1916-2009): theologian and ecumenical leader; 1943 doctorate at Tübingen despite classification as a "half Jew"; 1945-52 Secretary in the Study Department of the World Council of Churches; 1955 professor at the *Kirchliche Hochschule* in Bethel; 1957-75 editor of *Zeitschrift für evangelische Ethik*; 1963 author of the "Bielefeld theses" of the *Arbeitskreis kirchlicher Bruderschaften* that preceded the *Ostdenkschrift*.

Helmut Simon (1922-2013): jurist and judge; 1941-45 military service; 1946-47 study in Basel with Karl Barth; 1952 doctorate at Bonn with Ulrich Scheuner; 1958 member of the *Arbeitskreis kirchlicher Bruderschaften*; 1958 apprenticeship with Hermann Weinkauff at the *Bundesgerichtshof*; 1960-65 judge at the Düsseldorf *Oberlandesgericht*; 1965-70 judge at the *Bundesgerichtshof*; 1970-87 judge at the Federal Constitutional Court.

Rudolf Smend (1882-1975): constitutional scholar; 1909-22 professor at Greifswald, Tübingen, Bonn; 1922-35 professor at Berlin; 1927 publication of *Verfassung und Verfassungsrecht*; 1935 compulsory move to Göttingen; 1945 founder of EKD *Institut für evangelisches Kirchenrecht*; 1951 co-founded *Zeitschrift für evangelisches Kirchenrecht*, publication of "State and Church under the Basic Law."

Erik Wolf (1902-1977): jurist; 1930-67 professor at Freiburg; 1936 member of Confessing Church; 1938-44 member of Freiburg Council and wartime Freiburg Circle; 1948 delegate to the World Council of Churches conference in Amsterdam.

Ernst Wolf (1902-1971): Confessing Church theologian; 1934 member of the Barmen Synod; 1934-38, 1946-71 editor of *Evangelische Theologie*; 1942-45 military service and imprisonment; 1945-70 professor at Göttingen; 1958 co-founder of the *Arbeitskreis kirchlicher Bruderschaften*; 1966 member of the board of the *Kuratorium Notstand der Demokratie*.

Theophil Wurm (1868-1953): pastor and church administrator; 1929 church president of the Württemberg regional Protestant church; 1933 Protestant Bishop of Württemberg; 1934 participant at the Barmen synod of the Confessing Church; 1945-49 Chair of the EKD Council.

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